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Pearl, A.L. orcid.org/0000-0002-1243-0636 Briefing Note on Support with Decision-Making, for Matt Robinson, Chair of the UK Finance, Third Party Access and Mental Capacity Working Group. Report. (Unpublished)

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Briefing Note on Support with Decision-Making for Matt Robinson, Chair of the UK Finance, Third Party Access and Mental Capacity Working Group

Prepared by Dr Alex Louise Pearl

Getting support to make legally significant decisions is a fundamental human right under the United Nations Convention on the Rights of Persons with Disabilities (2008). It is also a (frequently overlooked) core principle of the Mental Capacity Act 2005, (s.1(3)). Support with decision-making has close links to the duty to make anticipatory reasonable adjustments for disabled people under the Equality Act 2010. However, the principle of support with decision-making is being widely overlooked in practice (Paradigm, 2023). The ‘Support Principle’ in the Mental Capacity Act 2005 (MCA) outlines that a person cannot be treated as unable to make a decision “unless all practical steps” to help her do so have been taken without success. This requires the provision of support for decision-making.

What is Support with Decision-Making?

Support with decision-making occurs when a person, or a group of people, support a disabled individual to make a decision for themselves. That decision should be based on the ‘rights, will and preferences’ of the individual and should assist them, as far as possible, to make their own choices. It is a paradigm shift away from other people making decisions ‘for’ or ‘on behalf’ of a disabled person. It requires:

- Asking the person how they want to be supported and who they want to support them.
- Using, creating, or obtaining accessible information about the decision and the available options.
- Using appropriate communication methods to talk through the decision in plain language and helping the person to understand and weigh up the pros and cons of all their available options, as well as the potential consequences of making one decision or another.
- Supporting the person to identify any risks present in their available options and thinking about how to address them, and
- Supporting the person to express their wishes and feelings about their available options and helping them to communicate their choice.

‘Support’ covers a broad range of measures which can include:

- Considering if anyone else can help with communication, for example a family member, a support worker, another trusted person, an interpreter, or an advocate.
- Making the person feel at ease, perhaps seeing them in person, or at a time of day when their understanding might be the strongest.
- Crucially, it includes asking whether anyone else can help or support the person to make choices or to express and communicate their views.
- The support given should be individualised and tailored to the needs of the person.
- The provision of support often includes providing relevant information in an accessible format which the person can understand. It may include using simple language and/or alternative forms of communication such as EasyRead resources, Makaton picture cards, infographics, or even non-verbal forms of communication to help a person express their will and preferences.

[NB: It is important to note that there are broader obligations to provide accessible information and services which meet the needs of disabled people more generally under the Equality Act 2010. More accessible services would assist not only people with learning disabilities, but also those with



sensory and other impairments, who do not require support with the decision-making process itself, but who require information in an accessible format and communication assistance to use services.]

If a person is assessed as having the capacity to make a particular decision, support can involve helping them to implement that decision, facilitating communication of that decision to others, and ensuring that the person's decision is respected. Fundamentally, it is about putting the person at the heart of the decision-making process and enabling them to control the decisions which affect their life, to the greatest extent possible.

Under the MCA framework, the 'cut off' for support with decision-making occurs where a person is still thought to 'lack mental capacity' for a particular decision, even when all practicable and appropriate steps to help her make the decision, have been taken without success (MCA Code of Practice, 2007, chapter 3; and Paradigm, 2023). When this happens, we can use the phrase 'facilitated decision making' in which the people supporting the individual apply a 'best interpretation' of the person's will and preferences. This means determining what the individual would likely want, or what we think they would choose, if they could tell us their preferences. This assessment should be based on what we know about them as a person and considering their life history.

Under the MCA, where a person is deemed to lack capacity for a particular decision, the decision must be made based upon their 'best interests'. This involves considering a list of factors including the person's 'wishes and feelings', their 'values and beliefs' over time, and the factors they would consider to be important if they were making the decision. Importantly, the person making the decision must, 'so far as is reasonably practicable, permit and encourage the person to participate, or improve h[er] ability to participate, as fully as possible in any act done for [her] and any decision affecting [her]'. In determining a person's best interests, the decision-maker must consider the views of anyone who the person says should be consulted, anyone engaged in caring for them, or any donees of a Lasting Power of Attorney or appointed Deputies. The MCA does permit 'best interest' decisions to be made based on factors other than the person's will and preferences. However, the courts are increasingly clear that contravening a person's wishes, even when they 'lack mental capacity' for a particular decision, has profound emotional consequences for the person, and requires strong justifications, such as the need to protect that person from harm or abuse. If a person lacks capacity for a particular decision (such as opening a bank account), and they do not already have a Lasting Power of Attorney in place (or the requisite level of capacity to make one), the people who support them must apply to the Court of Protection to obtain an order, or appoint a Deputy, who is then authorised to make decisions on the person's behalf.

What happens in reality:

Contrary to the Support Principle in the MCA, and the duty to provide reasonable adjustments in the Equality Act, people with learning disabilities (and other types of impairments), are not often being given adequate support to enable them to make, or be involved in making, financial decisions. My research and other evidence suggest that banks and other service providers often require disabled people and their supporters to adopt formal Lasting Powers of Attorney (LPAs) or Deputyships (at significant personal cost and delay), before allowing people to use third party access or dual access banking measures. Frontline banking staff felt they could offer people with learning disabilities more support and access to third party access measures, only if formal LPAs or Deputyships were already in place. The operational norm seems to be that these measures are required *before* banks offer people access to extra support and more accessible facilities (in the form of third-party access or delegated banking measures), which could help them manage their money assisted by a trusted person.



Information about this document:

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Further Useful Resources:

Relevant Domestic Legislation:

Mental Capacity Act 2005 <<https://www.legislation.gov.uk/ukpga/2005/9/contents>>

Equality Act 2010 <<https://www.legislation.gov.uk/ukpga/2010/15/contents>>

United Nations Documents:

United Nations Convention on the Rights of Persons with Disabilities (CRPD), (adopted 13 December 2006, entered into force 3 May 2008) GA Res. 61/106, (24 January 2007), 2515 UNTS 3. <<https://social.desa.un.org/issues/disability/crpd/convention-on-the-rights-of-persons-with-disabilities-crpd>>

Secondary Sources:

Sally Warren and Jo Giles, Paradigm and Partners, ‘A Practical Guide to Supported Decision-Making’ (Paradigm, 2023), particularly pages 7 and 9. <https://paradigm-uk.org/wp-content/uploads/2023/01/Print-copy-2023-MASTER-Supported-Decisions-Making-booklet-27-September-A5_Wiro_Bound_SEB.pdf>

Department for Constitutional Affairs, ‘Mental Capacity Act 2005: Code of Practice’ (The Stationary Office, 2007), Chapter 3, <<https://assets.publishing.service.gov.uk/media/5f6cc6138fa8f541f6763295/Mental-capacity-act-code-of-practice.pdf>>. In 2022 the previous Government produced an updated draft of the Mental Capacity Act Code of Practice, but this has not been enacted to date. The draft is available here: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1080137/draft-mental-capacity-act-code-of-practice.pdf>

For Easy Read information about Supported Decision-Making, see WA Individualised Services (Western Australia), ‘Supported Decision-Making Guide: Information to help you, Easy Read version’ (2019) and other resources available from their website, <<https://waindividualisedservices.org.au/group/easy-read/?rel=image>>