



Mental Capacity and Sexual Relations Explainer

10 June 2021

This Explainer looks at the role of human rights law when decisions are being made about a person's mental capacity relate to having sex. Please note that this Explainer explains the current law and position at the time of writing. This area has developed in the last year and may change again, especially as some of the cases mentioned are waiting to be appealed.

What is mental capacity?

The ability to make everyday decisions is called mental capacity. The legal starting point is always the presumption that all people have capacity to make decisions for themselves. If there are concerns that a person make lack capacity to make a specific decision, then this must be established by an assessment. There are laws which tell staff in public services what to do if someone needs help to make decisions, or if someone does not have capacity to make a decision.

The [Mental Capacity Act \(MCA\)](#) is designed to protect and empower people who may lack the mental capacity to make their own decision about specific issues in their lives. It applies to people aged 16 and over. Legally there is no such thing as generally lacking capacity because each decision needs to be looked at on a case-by-case basis. A person's mental capacity may be affected for a number of reasons. For example, they may have mental health issues, a learning disability, live with dementia, a brain injury, they may have had a stroke, be unconsciousness caused by an anaesthetic or sudden accident, or they may be intoxicated. A person's ability to make decisions can also fluctuate.

To establish whether someone has capacity to make a certain decision, the MCA says that a person will lack capacity to make that decision if, at the material time, they are "**unable to make a decision for himself**" (section 2(1) MCA). A person is unable to make a decision for themselves if they are unable:

- (a) to understand the information relevant to the decision,
- (b) to retain that information,
- (c) to use or weigh that information as part of the process of making the decision, or
- (d) to communicate his decision (whether by talking, using sign language or any other means).

If a person is unable to do any one of these four things, it must be established that they are unable to do so "**because of an impairment of, or a disturbance in the functioning of, the mind or brain**" (section 2(1) MCA). This is known as the 'causative nexus'.

When this happens, staff in health or care services can follow the MCA to make a best interests decision for the person.

What does mental capacity mean for sexual relations?

Under the Mental Capacity Act, people can be assessed to see whether they have capacity to engage in sexual relations. Being able to have autonomy over your sexual life and have relationships is part of the right to private life, which is protected by the Human Rights Act. We look at this right later in this Explainer.

Whether someone has capacity to engage in sexual relations has been looked at in cases before the Court of Protection and the Court of Appeal. In June 2020, a judge in [the case of JB](#) stated that the test of capacity in respect of sexual relations is whether the person has capacity to "decide to engage in sexual relations". As explained earlier, whether someone has capacity to make a decision means they must be able to understand, retain and weigh up information that is relevant to that decision. In JB, the judge said that the information relevant to a decision about engaging in sexual relations may include the following:

- (1) the sexual nature and character of the act of sexual intercourse, including the mechanics of the act;
- (2) the fact that the other person must have the capacity to consent to the sexual activity and must in fact consent before and throughout the sexual activity;
- (3) the fact that P can say yes or no to having sexual relations and is able to decide whether to give or withhold consent;
- (4) that a reasonably foreseeable consequence of sexual intercourse between a man and woman is that the woman will become pregnant;
- (5) that there are health risks involved, particularly the acquisition of sexually transmitted and transmissible infections, and that the risk of sexually transmitted infection can be reduced by the taking of precautions such as the use of a condom.

What happens if someone is assessed as lacking capacity to make decisions about sex?

Section 27 of the MCA is clear that if a person lacks capacity to make a decision about having sex, then staff cannot make a best interest's decision on the person's behalf to enable them to have sex. For example, in February 2021 the Court of Protection applied the tests in the JB case to the situation of HD, a 29 year old woman with what was described as a mildly severe learning disability ([find this case here](#)). The Court found that while HD understood the need for a sexual partner to consent to engage in sexual relations, the evidence showed that she could not, at that point, understand the need for a sexual partner to have capacity to consent to sexual relations. However, the Court did note that "there is

nothing to be lost, and possibly much to be gained, by providing HD with a package of further education to see if she can so learn.” (Paragraph 29).

What happens if someone has fluctuating capacity to make decisions about sex and those supporting them?

Capacity is ‘task-specific’. This means the focus is on the specific decision that needs to be made at the time. If you lack capacity to make one decision, it does not mean that you lack capacity to make other decisions. Legally there is no such thing as generally lacking capacity as each decision needs to be looked at on a case-by-case basis. Steps must be taken to support people to make a decision, and everyone has the right to make unwise decisions (part of our right to autonomy in Article 8 of the HRA). A person’s decision-making ability can change so it is important that there is a process of review, and that people are re-assessed to enable them to make decisions about their own lives as much as possible.

In the [recent case of DY](#), the Court of Protection looked whether an 18-year-old woman, DY, had capacity to engage in sexual activity. DY has a diagnosis of two chromosomal duplicities, foetal alcohol syndrome disorder, and a moderate learning disability. DY had already been assessed to lack capacity to conduct court proceedings, and to make decisions about her care, contact with others, social media use and her finances. When assessed by child and adolescent mental health services in July 2020, DY was considered to be at medium-high risk of child sexual exploitation. The Local Authority responsible for DY’s care thought that she had capacity to engage in sexual activity most of the time when she was stable, but that she would not have capacity when she was “upset” or “distressed” – that she had ‘fluctuating’ capacity. The Local Authority was concerned that when she was upset or distressed, DY might not be able to weigh up the risks as well as she might when she was calm and stable. The judge described, “the real tension in this case” as being between the “desire to protect DY and a decision to permit her freedom to engage in sexual relationships which might place her at some risk.”

The judge looking at this case started by confirming that “it is well established that the test for determining the capacity to engage in sexual relations is transaction-specific or act-specific and not person-specific.” (Paragraph 16) – meaning that the capacity to decide to have sex relates to each decision a person makes to have sex and is not tied to a particular sexual partner.

The people involved in assessing DY’s capacity, including a doctor and DY’s social worker, agreed that at the time she was assessed, DY “understood and was able to weigh all relevant information and had the capacity to decide to engage in sexual relations on a general non-specific basis”. This means she was assessed as having capacity to make the decision to have sex. The judge said that the evidence about how DY might respond in other circumstances (for example, if she was upset or was deciding to have sex with someone other than her current partner) was uncertain and speculative. The doctor who assessed DY’s capacity was clear that, if DY were provided with support, she did not think her capacity on this issue would fluctuate. The judge was really clear in his decision that DY:

“should not be assessed as lacking capacity unless all practicable steps have been taken to support her to make the decision without success, that included putting in place a package of support to limit and/or mitigate the effect of any periods of distress or unsettledness. The local authority's concerns about the risk of abuse and exploitation could be addressed through an appropriate package of care and contact arrangements, decided in DY's best interests.”

This case illustrates the importance of the first principle of the MCA: that capacity must be assumed unless it has been established that the person cannot make the decision. Although there may be instances where a person needs more support to make a decision, or they are unable to make it at a particular time, there needs to be clear evidence showing that this is the case. For DY, evidence of her ‘fluctuating’ capacity was insufficient, and the judge could not state that she lacked capacity to engage in sexual activity.

What happens if someone is assessed as having capacity to make decisions about sex, but they have support needs?

A person may be assessed for capacity to make a range of decisions and found to have capacity for some decision-making and not others. For example, a person may be assessed as having capacity to engage in sexual relations, but as lacking capacity to decide who they have contact with, as was the case in DY summarised in the previous section. Care staff and social workers will often support people who lack capacity to make certain decisions in their daily lives. A recent case looked at how far this support goes in relation to sexual relations.

Section 27 of the MCA is clear that if a person lacks capacity to make a decision about having sex, then staff cannot make a best interests decision on the person's behalf to enable them to have sex.

However, the issue becomes more complex when a person does have mental capacity to have sex, but they rely on care and support for various daily activities. In this situation there is a question about how far care workers should go in supporting someone to have sex. In particular section 39 of the Sexual Offences Act 2003 (SOA) specifically criminalises care workers who intentionally cause or incite someone they care for with a mental health or capacity issue to engage in sexual activity.

In April 2021, the Court of Protection looked at whether care workers who support someone in their care to engage in sexual relations would be committing an offence under s39 SOA. This case, [about C](#), involves a 27-year-old man who receives care and support due to Klinefelter syndrome (XXY syndrome). This is a genetic disorder which means C has developmental delay and other social communication difficulties. C has also been diagnosed with autistic spectrum disorder. Between 2014 and 2017 he has been detained under the Mental Health Act due to deteriorating mental health and threats of a sexual nature. C participated in a range of therapies and was discharged to a shared home with support. C needs significant assistance with independent living, and this is likely to

continue. C has a package of support which requires the deprivation of his liberty which has been authorised by the Court since 2017. In 2018, C asked his support team if he could have contact with a woman sex worker - we use this term as it was the term used by the Court, meaning a person paid to have sex, also referred to as a prostitute in the law.

C's mental capacity had been assessed under the MCA. He was found to not have capacity for some decisions but was found to have the capacity both to engage in sexual relations and to decide to have contact with a sex worker. He would however need support to be able to do this. The care staff who supported him with his daily life wanted to know whether supporting him to do this would mean they were committing the crime under s39 SOA.

The judge decided that supporting someone in this situation, where they had capacity to engage in sexual activity and expressly wanted to do, could **not** fall within the meaning of section 39 SOA. **Therefore, in this case it would not be a crime for a care worker to support C to have contact with a sex worker.**

It is important to note that the legal issue in this case was not the extent to which laws on prostitution do or do not uphold the human rights of people involved in prostitution. It is currently not unlawful to pay for sex; the SOA criminalises various arrangements involved in prostitution. The case of C was focused on the extent to which criminal offences apply to care workers supporting a disabled person with capacity to engage in sex. The case is also based on very specific facts. Section 53A of the SOA does make it a crime to pay for the sexual services of a prostitute where they are subjected to force, threats, coercion or deception.




The judge decided that the exploitation covered by section 53A did not apply to C's situation, noting evidence from an academic and Chair of a charity for people with disabilities focused on education and support for the provision of 'sexual and intimate services'. The judge was considering the balance to be struck between the need to criminalise care workers who abuse their position of trust and the need to protect people against such abuse with the need to respect the autonomy of people with reduced capacity and support needs. The judge noted the importance of a carefully assessed care plan being drawn up for the individual involved in this situation, taking into account their individual needs and rights and how best to support them.

This case has lots of references about how human rights are involved in situations like this, which we look at below.

Which human rights are involved?

When thinking about sexual relations, we can think about how our legally protected human rights are engaged.




Our human rights are protected by the Human Rights Act, and public bodies have a legal duty to:

	<p>To respect people's human rights.</p> <p>This means public officials (including the government) should not interfere with your human rights unless it is necessary, and they can show that this is the case.</p>
	<p>To protect people's human rights.</p> <p>This means that the government and people working in public bodies should take 'reasonable and appropriate' measures to promote our human rights.</p>
	<p>To fulfil people's human rights.</p> <p>When things go wrong regarding our human rights, there should be an investigation and steps should be taken to try and stop the same thing happening again.</p>

The right to respect for private and family life and home and correspondence (Article 8 of the HRA)

The right to respect for private and family life is protected by Article 8 of the Human Rights Act. It covers people's right to be involved in decisions about themselves, maintaining relationships with others and protecting well-being. Whenever a decision about someone's capacity is made, their right to private life is very important as this is all about our autonomy to make decisions. This right includes our ability to choose to engage in sexual relations or build relationships. In the case of C, explained above, the judge said that he "had little difficulty in concluding that Article 8 does extend to a person's sexual life and that in circumstances where, as here, access to a sex worker is lawful (save for the restrictions I have identified above e.g., Section 53A SOA 2003) this too is within the scope of the right" (at paragraph 73). So, when thinking about someone's capacity to have sex or build relationships and, if they have support needs what this means for assisting them, the right to private life must be considered.

The right to private and family life is a **non-absolute** right, meaning it can be restricted by public officials in some situations. Any restriction on someone's right to private life, (including a restriction on their decision to engage in sexual relations), must meet the three tests of lawful, legitimate, proportionate, outlined below. There may be situations where all three tests are met, or as in the case of C, where not all of the tests were met, e.g., in the circumstances of C's case, preventing care worker support would not be proportionate. Each situation will need to be looked at on a case-by-case basis.

	<p>Lawful</p> <p>There must be a law which allows public officials to take that action or decision, such as the Mental Capacity Act.</p>
	<p>Legitimate</p> <p>The restriction has to be for a reason set out in the law. Restrictions could be imposed on this right in the interests of public safety or to protect the rights of others.</p>
	<p>Proportionate</p> <p>The government or public body must have thought about other things they could do, but there is no other way to protect you or other people. In other words, it must be the least restrictive option. Blanket restrictions that apply regardless of individual circumstances cannot be proportionate.</p>

The [right to non-discrimination](#) (Article 14 of the HRA)

The right to non-discrimination is protected by Article 14 of the Human This right must be used with another right in the HRA. At BIHR we call it a 'piggy-back' right. The right means that people receiving care and support should not be discriminated against when accessing this support and when decisions about their care are made. This means that when deciding if someone has, first and foremost, the capacity to decide whether to have sex, they must also not be discriminated against for any reason, for example because they have a learning disability. It also means that when decisions are made about how to support someone with capacity to build relationships or have sex (as part of their right to private life), they should not be discriminated against, e.g., because they have a learning disability.

What happens now?

As already mentioned, this Explainer explains the current position on capacity and human rights as discussed in the courts recently. The law explained here may well change, especially as the case of C (about care workers supporting someone to contact a sex worker) is [being appealed by the Government](#). It is also important to note that the JB case, which sets out the legal considerations for making a capacity assessment on sexual relations decisions is also being appealed. The Supreme Court is due to hear this case on the 15 July 2021 ([You can find out more here](#)).

Where can I find more information?

- BIHR resource, [Mental Health, Mental Capacity: My human rights](#)



- BIHR resource, [Mental Health, Mental Capacity: My human rights accessible version](#)
- BIHR blog from 2019, [Let's talk about sex \(and capacity and human rights\)](#)