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Mental Capacity Assessments and Litigation Friends

Member Guidance

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1. Introduction

1.1 It is vital to ensure that all prisoners are able to participate effectively in their parole review to ensure a fair hearing. In order to achieve this, it is necessary for panels to be alert to the possibility of cases where a prisoner may lack the mental capacity to make decisions and participate.

1.2 Issues of mental capacity are specific to the person and the decision being made at a point in time. In this case, the relevant area of decision-making is the mental capacity of the prisoner to understand and make decisions in the parole process, in effect "*to conduct the parole proceedings*".

1.3 The Common Law Test for Capacity to Litigate[1] is relevant:

"whether the party to the legal proceedings is capable of understanding, with the assistance of proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings… the threshold for capacity to provide instructions is not high, and people severely affected by a mental disorder may still be able to provide instructions if you explain matters simply and clearly."

1.4 This includes capacity to give instructions to anyone the prisoner appoints to represent them in the parole process, who may or may not be legally qualified[2].

1.5 Panels will need to be able to identify cases where capacity is in doubt and take appropriate steps to ensure that these prisoners are adequately assisted and/or represented. Where a prisoner is found to lack mental capacity, the Board, working with the Public Protection Casework Section (PPCS), has in place a process whereby a litigation friend can be appointed to make decisions and enable effective participation, either directly or by instructing a legal representative. This is supported by the Parole Board Rules.

1.6 This guidance sets out information and advice on the following:

- Brief overview of the Mental Capacity Act 2005 and key concepts;
- Determining a prisoner's mental capacity to appoint a legal representative or otherwise conduct, understand, and participate meaningfully in their parole review;
- Sourcing a litigation friend;
- Appointing a litigation friend and (in turn) a legal representative where a prisoner is assessed as lacking mental capacity.

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[1] *Masterman-Lister v Brutton & Co [2003] 1WLR 1511*

[2] *YA v CNWL [2015] UKUT 37 (AAC). See also 'Representation Before Mental Health Tribunals', Law Society Practice Note, 12.12.2019, para. 4.2*

2. The Mental Capacity Act 2005

2.1 The Mental Capacity Act 2005 (MCA2005) came into force in England and Wales in 2007. The MCA2005 aims to empower and protect people who may not be able to make decisions for themselves.

2.2 The MCA2005 also enables people to plan ahead in circumstances where they are unable to make important decisions for themselves in the future. For example, there may be someone already appointed to manage their affairs, which may include matters relating to parole. Panels will need to check whether the appointment of such a person also enables that person to make decisions about Parole Board proceedings[3].

2.3 The MCA2005 applies to all people aged 16 or over in England and Wales. The Deprivation of Liberty Safeguards (DoLS)[4] applies to those aged 18 or over in England and Wales. For those aged 16 and 17, any deprivation of liberty must be authorised by a court. See Section Sixteen for more information about DoLS.

2.4 The MCA2005 protects people with mental disorders as well as people with conditions such as dementia, learning disabilities, or stroke or brain injuries. These people may find it difficult to make decisions some, or all of the time.

2.5 The MCA2005 applies to situations where people may be unable to make a particular decision at a material time. For someone with a mental disorder, this will depend on how they are feeling or the impact of their condition on them at that time. In some cases, they may be able to make the decision at a later time or date.

2.6 The law works on the principle that all adults are assumed to have capacity to make decisions for themselves, particularly if they are given enough information, support, and time. It protects the rights of the person to make their own decisions and to be involved in any decision that affects them. Even if their decision appears unwise or eccentric, the MCA2005 makes clear that they should not be treated as lacking capacity for that reason. **The MCA2005 sets out in law what happens when people are unable to make a particular decision**.

2.7 The legal framework provided by the MCA2005 is supported by a Code of Practice. The Code of Practice provides guidance to anyone who is working with and/or caring for adults who may lack capacity to make particular decisions. It describes their responsibilities when acting or making decisions on behalf of persons who lack the capacity to act or make these decisions for themselves. In particular, the Code of Practice focuses on those who have a duty of care to someone who lacks the capacity to agree to the care that is being provided.

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[3] Please seek bespoke advice from the Legal & Practice team if you are not sure about the scope of any appointment.

[4] Pursuant to Schedule 1A Mental Capacity Act 2005

2.8 It may be useful for panels to be aware of the distinctions between the Mental Capacity Act 2005 and the Mental Health Act 1983.

- The Mental Health Act 1983 (MHA) applies if a person has a mental disorder, as defined in s.1 of the MHA, and sets out their rights if they are subject to this Act.

- The Mental Capacity Act 2005 (MCA2005) applies if a person lacks mental capacity to make a decision as a result of an impairment of, or disturbance in the functioning of the mind or brain. This may or may not be because they have a mental disorder which would mean that they might be detained under the MHA.

Below are some of the key differences between the MHA and the MCA2005.

Mental Health Act 1983

- Applies if a person has a mental disorder; mental disorder means any disorder or disability of the mind, and mentally disordered shall be interpreted accordingly (there are some exclusions, for example being intoxicated or suffering from withdrawal from substances is not defined as a mental disorder in its own right);
- If a person has a mental disorder which is of a nature or degree to justify treatment in a hospital for their own health or safety, or for the safety of others, and where appropriate medical treatment is available, they can be admitted to hospital, under the MHA;
- If a person is detained under the MHA, the health professionals must follow the provisions of the MHA at all times. They should also follow the Code of Practice, which has been produced alongside the MHA;
- Applies to treatment a person is given for their mental disorder, such as antipsychotic medication. This means they can be given the treatment for the first three months from when treatment commenced without their consent. After that time, they can consent if they have capacity; if not consenting or lacking capacity, a second opinion must be sought from a Second Opinion Approved Doctor, employed by the Care Quality Commission.

Mental Capacity Act 2005

- Applies if a person does not have the mental capacity to make a specific decision, for example about healthcare, residential care, general care, or their welfare;
- Any decisions made about a person must follow the best-interests checklist, which has been produced alongside the MCA2005 (as set out in Section 4 of the MCA2005);
- If a person cannot be detained under the MHA, and they lack capacity to make decisions about their care and treatment, they can still be detained and stopped from leaving a care home or hospital using the Deprivation of Liberty Safeguards (DoLS)[5] procedure under the

[5] *See separate guidance for more information about DoLS*

MCA2005 or by a Court Order. For example, enabling care staff to prevent a person with dementia leaving a care home;
- Can be used to give a person treatment for physical health problems (even if they are detained under the MHA) that have nothing to do with their mental disorder if they do not have capacity to decide whether to have the treatment. An example might be regular insulin injections for a diabetic person with a learning disability. If the person is not detained under the MHA, treatment for their mental disorder could also be given, if they are in hospital or a care setting and do not object or have not refused in the past or via an advance decision, attorney or deputy.

More information about prisoners detained under the MHA and the impact on their parole review is contained in the guidance on *Restricted Patients and the Mental Health Act.*

3. Key concepts

3.1 A person who has 'mental capacity' is able to make a particular decision for themselves. Mental capacity is *not* about a person's capacity to make decisions in general. It is "decision specific". The legal definition says that a person who lacks mental capacity cannot, due to an illness or disability such as a mental disorder, dementia, or a learning disability, do one or more of the following:

- understand information given to them to make a particular decision;
- retain that information long enough to be able to make the decision;
- use or weigh up the information to make the decision;
- communicate their decision.

The first three should be applied together. If a person cannot do any of these three things, they will be treated as unable to make the decision. The fourth only applies in situations where people cannot communicate their decision in any way.

3.2 The test[6] for establishing if a person lacks capacity is defined as follows:

- whether the person can understand/retain/use/weigh information and communicate their decision
- if they cannot, do they have an impairment/disturbance in the functioning of their mind or brain
- if they do, is their inability to make the decision because of the impairment/disturbance.

The question of whether a person lacks capacity must be decided on the balance of probabilities, taking into account all relevant evidence.

[6] *As established by the Court of Appeal in PC & NC v City of York Council [2013] WLR (D) 176*

3.3 When determining whether a prisoner is able to participate effectively in the parole process, panels will need to consider the prisoner's capacity[7] in respect of:

- the issues on which the prisoner's consent or decision is likely to be necessary in the course of the proceedings;
- understanding the advice of their representative; and
- giving instructions relevant to their case.

3.4 In doing so, panels should consider how the legal definitions set out above apply to the particular case being reviewed:

- whether the prisoner is able to understand relevant information, including the reasonably foreseeable consequences of deciding a matter one way or another or failing to make a decision;
- retain that information (even if only for the period necessary to make a decision);
- use or weigh that information in order to give instructions;
- communicate their instructions (whether by talking, using sign language or any other means or support).

3.5 Panels should explore whether presenting information in another way will support the effective participation of the prisoner, in line with Principle 2 in Section Four below. Information might be able to be adapted so that it becomes more accessible to the prisoner. Communication specialists, such as a language therapist, an intermediary, or an interpreter may be able to advise on how this might be achieved. Even where a prisoner has been assessed as lacking mental capacity they may still benefit from adapted communication, as some form of explanation about what is happening will still be required in an accessible manner.

3.6 If a person lacks mental capacity to make a decision, then decisions will need to be made in their best interests. The term "best interests" is not defined in the MCA2005. However, Part 1, Section 4 of the MCA2005 does explain how to work out the best interests of a person who lacks mental capacity to make a decision at the time it needs to be made. Section 4 sets out a non-exhaustive checklist of common factors that must always be considered by anyone who needs to decide what is in the best interests of a person who lacks mental capacity in any particular situation. The common factors on the checklist are summarised below:

- *Working out what is in someone's best interests cannot be based simply on someone's age, appearance, condition, or behaviour;*
- *All relevant circumstances must be considered when working out someone's best interests;*
- *Every effort should be made to encourage and enable the person who lacks capacity to take part in making the decision;*
- *If there is a chance that the person will regain the capacity to make a particular decision, then it may be possible to put off the decision until later if it is not urgent;*

[7] *As set out in Masterman-Lister v Jewell [2002] EWHC 417 (QB)*

- *The person's past and present wishes and feelings, beliefs and values should be taken into account;*
- *The views of other people who are close to the person who lacks capacity should be considered, as well as the views of an attorney or deputy.*

3.7 This checklist is only the starting point. In many cases, all relevant circumstances must be considered.

3.8 When working out what is in the best interests of the person who lacks capacity to make a decision or act for themselves, decision-makers must take into account all relevant circumstances that it would be reasonable to consider, not just those that they think are important. They must not act or make a decision based on what they would want to do if they were the person who lacked capacity.

3.9 Best interests decision-making is confined to a choice between available options. If an option would not be available even if the person had capacity to ask for it, then it does not become available through the best interests decision-making process. This is quite an important point to be mindful of.

3.10 The full text of Section 4 of the MCA2005 Best Interests Checklist can be read **here**.

4. Statutory Principles

4.1 When considering matters of capacity, which should be addressed as soon as possible, and kept under review, panels will need to be mindful of the five statutory principles, as defined by the **Mental Capacity Act 2005 – Code of Practice**:

Principle 1: *A person must be assumed to have capacity unless it is established that they lack capacity.*

Panels will require evidence in order to make a determination, particularly as to the diagnostic criteria of impairment or disturbance in the functioning of the mind or brain.

Principle 2: *A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.*

Panels should take whatever steps are practicable in order to facilitate and maximise a prisoner's participation. This might involve using simple language, visual aids, or any other means. If, using these adaptations, it is possible to enable the prisoner to make their own decisions, then that prisoner can be regarded as having capacity to make decisions.

Principle 3: *A person is not to be treated as unable to make a decision merely because he makes what others consider to be an unwise decision.*

Prisoners have a right to make a decision that others do not agree with. That includes decisions that may go against their own interests, for example refusing to participate in parole proceedings. If panels are concerned a prisoner is acting in a way that is not consistent with previous behaviour, have concerns about the motivation/s for their behaviour, or they are making decisions that may put them at risk of harm, then this may indicate possible lack of capacity giving rise to the need to request a mental capacity assessment.

Principles 4 and 5 are set out below. They may not be directly relevant to the assessment of capacity, but it is helpful for panels to be aware of them because they may apply to the panel's decision making.

Principle 4: *An act done, or decision made for or on behalf of a person who lacks capacity, must be done for, or made in, the person's best interests.*

Principle 5: *Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.*

5. Identifying prisoners who may lack mental capacity

5.1 Individuals working with the prisoner should be alive to signs or indications that suggest the prisoner may lack capacity to make decisions about their parole review, and this should be addressed as soon as possible. Examples of individuals who *may* raise these concerns include:

- the prisoner's representative or potential representative (if one is involved informally at this stage, perhaps through previous representation);
- staff within the prison or probation working with the prisoner;
- staff from any charity or support organisation working with the prisoner;
- staff from any local authority or care provider who has interacted with the prisoner, for example to assess the prisoner or prepare for their release;
- a medical professional treating the prisoner;
- a spouse/partner, family member, or friend;
- anyone else having contact with the prisoner.

5.2 If the prisoner is held in a hospital following a First Tier Tribunal (Mental Health) England or a Mental Health Review Tribunal (Wales) issuing a direction that a conditional discharge would be appropriate (s47/49 or s45A cases) there may be a clear indication in the Tribunal's decision. Where a prisoner (who will be a restricted patient) lacks mental capacity, the Tribunal can appoint a representative under R11(7)(b). PPCS should

be able to check with the Mental Health Casework Section (MHCS) to confirm if there has been such an appointment made which may highlight a mental capacity concern.

5.3 It is important that appropriate support and adaptations are explored and put in place to enable the prisoner's effective participation alongside any determination as to whether or not they lack mental capacity. Panels, staff within the prison, any representatives of the prisoner, and all others involved in the parole review, should take appropriate steps to enable the prisoner's effective participation in the parole proceedings.

5.4 If those working with the prisoner continue to have concerns about a prisoner whose parole review has commenced, they should consider whether a formal mental capacity assessment should be carried out. PPCS has established a process for this purpose. Once PPCS is aware of a potential mental capacity concern, they will convene a case meeting to bring together the relevant individuals to decide next steps. This will include taking a view on whether a mental capacity assessment should be commissioned. The process, together with a map is at Annex A.

5.5 Where the prisoner is assessed as lacking mental capacity for the purposes of conducting their parole review, the steps set out in the PPCS process map will be followed, which briefly will be:

- Mental capacity assessment confirms prisoner lacks capacity;
- PPCS will add a flag on PPUD;
- PPCS will look to identify a litigation friend;
- PPCS will submit a request to the Board (via an SHRF) to appoint a nominated person to act as the prisoner's litigation friend or advise that no suitable person can be found.

5.6 Where the prisoner is not deemed to lack capacity, they will be sifted out of the process. A note should be provided on the dossier setting out the steps taken. Whilst the prisoner will be sifted out of this process, other support arrangements may still be identified and put in place.

5.7 Where the above steps do not appear to have taken place, but there may be indicators in the dossier that mental capacity may be a consideration, panels should direct that PPCS confirm the position.

5.8 Panels may want to seek further clarification from PPCS if they are not wholly satisfied about the prisoner's mental capacity to participate effectively or not. There may be signs indicating a mental capacity issue such as a learning disability, dementia, brain injury, substance misuse etc.

5.9 Other indicators may be through the prisoner's general attitude towards their parole hearing, the structure and tone of their representations, reports within the parole dossier, knowledge of a relevant medical condition, or the prisoner's conduct at the oral hearing, including their demeanour, response to questions, engagement, or attention to proceedings.

5.10 If a prisoner is declining to engage with the parole process, this might also be a warning sign that there may be an issue as to that prisoner's mental capacity, which calls for greater enquiry as to the prisoner's mental capacity.

5.11 HOWEVER, panels will need to be mindful that such behaviour may not necessarily be due to a prisoner's lack of mental capacity, but for other reasons. Other reasons may include, for example, problems with communication or reading/understanding the documentation so that the prisoner may need specialist communication support, access to an interpreter, or even something as simple as a hearing aid device not working properly.

5.12 Declining to engage, or otherwise behaving in a manner others may consider deeply unwise, is not in itself proof of a lack of mental capacity, although it may be a possible indicator. Prisoners who have mental capacity can still decide to act in a way which others consider deeply unwise, for a variety of reasons.

5.13 Some of the measures that can be taken to enable the prisoner's effective participation in parole hearings are set out in Section Thirteen below.

5.14 **It is important to explore the circumstances behind a prisoner failing to participate in their parole review, as making some adaptations to the approach or communication style may be all that is needed. Where there are still concerns, then steps, as set out above, should be taken to ascertain if there is a concern about their mental capacity.**

6. Assessing mental capacity

6.1 In theory, anyone can assess the probable mental capacity of another person. For everyday decisions, a relative or carer is the person most likely to need to assess whether a person is able to make a particular decision.

6.2 Professionals will need to formally assess mental capacity when decisions are more complex, for example when liberty is at stake, as in the case of parole. If the decision is about treatment, a doctor may assess capacity; if it is a legal decision, a solicitor may be able to assess capacity (although they may need assistance from a relevant professional to do so).

6.3 Where there is a concern that a prisoner may lack mental capacity to participate effectively, then as a general rule, and because of the consequences of any conclusion that they lack such capacity, panels will need to be assured that the issue has been determined by a professional with appropriate expertise.

6.4 In order to support this, PPCS will make a decision on whether to commission a mental capacity assessment as outlined in Section Five.

6.5 Panels will need to ensure they have the evidence required to come to a satisfactory conclusion about a mental capacity determination. Such evidence may already be available in the dossier, where a mental capacity assessment has already been undertaken. As a general rule, these reports will need to be fairly recent i.e. written within the last 12 months (but noting mental capacity can change at any time so the more recent the better). However, an older report may also be helpful if the prisoner's condition is chronic or degenerative.

6.6 The report must also specifically address the question of participation in parole proceedings, as mental capacity is decision-specific. If there is no such report already in existence, panels will need to direct that such a report be prepared. The following are examples of professionals who *may* have the relevant expertise to provide an assessment report, but it will be for HMPPS agencies to determine who that may be:

- a relevant qualified professional working within the prison, or commissioned by the prison;
- a member of prison healthcare staff;
- a professional commissioned by a local authority;
- An NHS body or Trust participating in the parole proceedings, or who a panel may call upon to be involved in the parole proceedings for this purpose.

6.7 Panels may be aware that someone working for the local authority is acting as an Independent Mental Health Advocate (IMHA), or someone from an NHS Body or Trust is acting as an Independent Mental Capacity Advocate (IMCA) for the prisoner in some way. Neither an IMHA nor an IMCA will have the remit to act as a litigation friend for the purposes of parole reviews. However, on the rare occasion where this may be proposed, and they agree, it would be independent of their role as an IMHA or IMCA.

6.8 The panel will need to consider the assessment report, along with any other evidence available, when establishing whether the prisoner has the mental capacity or not to engage in their parole review.

6.9 In clear cases, where there is no doubt or dispute that the prisoner lacks mental capacity, it may be appropriate for the panel, with the assistance of a Parole Board member with expertise in mental health, to determine a case without a capacity assessment. Such cases will be rare, and advice from the Legal Adviser should be sought where this arises.

7. Sourcing a litigation friend

7.1 There is no limit on the categories of people who may act in the role of litigation friend, provided they meet the criteria for the role.

7.2 For someone to act as a litigation friend, the following criteria, as set out in common law[8], will need to be met:

- be sufficiently capable to act in that role;
- be willing to act;
- be acting in the prisoner's best interests, and
- have no conflict of interests, between the prisoner's interests and any personal or other interest of the litigation friend, and be able to make decisions about the case in a fair and competent way. (This is a similar approach as that set out in rule **17.1 of the Court of Protection Rules 2017** and other rules in other jurisdictions.)

7.3 A wide variety of people can be appointed to act as litigation friend for a prisoner in parole proceedings. These include:

- a parent or guardian;
- a spouse/partner, family member, or friend;
- a solicitor who is not also instructed as the prisoner's legal representative;
- a professional advocate, such as an advocate working with an advocacy service;
- someone who has a lasting or enduring power of attorney;
- The Official Solicitor (as a last resort).

7.4 Whilst there is no bar on another serving prisoner acting as a litigation friend (unlike representing a prisoner, which is not permitted), care should be taken if this is requested.

7.5 Whilst an individual (including the Official Solicitor) can be invited to act as a litigation friend, they cannot be required to do so.

7.6 In cases where PPCS has established that the prisoner lacks mental capacity steps will be taken to identify a litigation friend.

7.7 A spouse/partner, family member or friend may be the first option and they may volunteer to act as the litigation friend, particularly where the prisoner is young or elderly.

7.8 However, where such a person is not available, or there are conflicts of interest or other reasons to not appoint such a person, then the situation is likely to be more difficult.

7.9 Where a legal representative is already involved, possibly from a previous review or other action, and becomes aware that the prisoner lacks or may lack mental capacity, they may be able to offer advice to PPCS on who may be best suited to act as a litigation friend. It should be noted that if the prisoner does lack mental capacity, they will be unable to appoint or instruct a legal representative and so any involvement at this stage is likely to be informal.

[8] *Litigation friends: Who can be a litigation friend - GOV.UK (www.gov.uk)*

7.10 PPCS may also contact authorities responsible for the prisoner's welfare to enquire into sources of potential litigation friends, and their availability and willingness to act. The prison holding the prisoner, and the local authority responsible for the prisoner's social care and safeguarding, should also take steps to support PPCS to enquire into sources of potential litigation friends for the prisoner.

7.11 Any of these groups (PPCS, a legal representative involved, the establishment holding the prisoner, and the local authority responsible for the prisoner's social care and safeguarding) can contact the Parole Board for assistance or advice with identifying a suitable person to recommend.

7.12 If none of the above appears to have taken place, panels may need to issue directions to initiate such enquiries.

7.13 **The Board does not make decisions itself on who should be approached to act as a litigation friend. However, it can assist with sources of information and contact information for organisations who may be able to assist.**

7.14 If all avenues to source a suitable litigation friend have been exhausted, PPCS will notify the Board (via an SHRF) setting out the steps that have been taken. If the panel is satisfied that exhaustive efforts have been made and that such enquiries have been unsuccessful, the panel should ask the Secretariat to approach the Official Solicitor with an invitation to act as litigation friend of last resort.

7.15 The Official Solicitor helps people who are vulnerable, because of their lack of mental capacity or young age, to take advantage of the services offered by the justice system. This helps to prevent them from being socially excluded. For the purposes of this guidance, the principal role of the Official Solicitor is to consider stepping in to act as a last resort litigation friend, for children (other than those who are the subject of child welfare proceedings) and for adults who lack mental capacity.

7.16 In order for the Official Solicitor to consider acting as the litigation friend of last resort, a referral form will need to be completed – this can be found at Annex B. The Official Solicitor will need to be satisfied that:

- the prisoner concerned lacks capacity to conduct the proceedings;
- the Official Solicitor is litigation friend of last resort;
- there is security for the Official Solicitor's costs in terms of retaining solicitors from the prisoner.

7.17 Where there is any doubt with any of the above, the Official Solicitor is unlikely to be able to make a decision and further information will be required.

7.18 In such cases, please seek advice from the Legal Adviser.

7.19 It may also be useful to note that the MCA2005 created legal safeguards, which are unlikely to come into play with parole reviews, unless there may be a need to access private funds, and are primarily to stop fraud and abuse:

- The Court of Protection will be able to make final decisions about whether someone lacks capacity, it can make important decisions on their behalf and it can appoint deputies to make decisions on someone's behalf;
- The Office of the Public Guardian oversees Lasting Power of Attorneys and Enduring Power of Attorneys, supervises deputies appointed by the Court of Protection, and gives guidance on the MCA2005 to the general public;
- The ill treatment or wilful neglect of a person who lacks capacity is a criminal offence;
- There are procedures and safeguards for involving people in research when they lack the capacity to consent.

8. Parole Board Rules 2019

8.1 Rule 10(6) empowers panels to appoint a litigation friend for a prisoner who lacks capacity to effectively make decisions about and participate in parole proceedings. It does so by empowering the Parole Board to appoint a *"representative"* for the prisoner.

The full text of Rule 10 is at Annex C.

8.2 The judgment handed down in the case of *R (EG) v Parole Board* [2020] EWHC 1457 in June 2020 helpfully set out the following relevant points. The full judgment can be read at Annex D.

8.3 ***Whether a solicitor can act in a dual capacity in parole reviews, as they do in the Mental Health Tribunals.***

A legal representative acting for a prisoner in their parole matters should not undertake the dual role of prison lawyer AND litigation friend.

8.4 ***Whether the 2019 Rules, properly construed, permit the appointment of a litigation friend.***

The Court found that the Parole Board Rules 2019 do allow for the appointment of a litigation friend.

8.5 ***The role of the Official Solicitor as litigation friend of "last resort" for prisoners in their parole review*.**

The Court found that the Official Solicitor could act as a litigation friend of last resort in parole matters. However, it did not comment on how such an arrangement should be put in place.

9. Appointing a litigation friend

9.1 If the prisoner has been found to lack mental capacity to make decisions about and participate meaningfully in parole proceedings, it will be in their best interests to have a litigation friend. Whether it is in their best interests for a specific person to be appointed as their litigation friend will depend on the panel's assessment of the suitability of the person to take up the role of litigation friend.

9.2 It is for the panel to appoint the person as the litigation friend.

9.3 Where a person has been identified as a litigation friend for a prisoner, the panel will be contacted and informed in writing via an SHRF from PPCS. Sufficient information should be provided so that the panel can decide whether it is in the prisoner's best interests for that particular person to be appointed as litigation friend. An example of such a letter is at Annex E.

9.4 In considering suitability to act as litigation friend, the panel will need to satisfy itself that the person being proposed has the understanding to undertake the role, has no interest adverse to the prisoner, and there is no likelihood of a conflict of interest. This may be particularly pertinent where a spouse/partner or family member is being recommended to the panel. Panels will need to bear in mind the circumstances of the prisoner's family dynamics, and the potential for conflicts of interest.

9.5 In some cases, the panel will be able to immediately satisfy itself of these matters, for example through the panel's experience of the person applying, or the organisation to which that person belongs. The panel could also seek advice from a specialist Parole Board member if it is unsure.

9.6 In most cases, the panel may be able to make a decision to appoint the person as the litigation friend on the basis of the paper application. Where this is the case, the panel should issue a direction formally appointing the named person as a litigation friend for the purposes of the parole proceedings and reference the Parole Board Rule.

9.7 However, in some cases the panel may wish to make further enquiries, or perhaps convene a Directions Hearing to satisfy itself of the appropriateness of appointing a particular person as litigation friend.

9.8 Where the panel declines to appoint the named person, a direction should be issued to this effect, and PPCS should be asked to seek alternatives.

9.9 Any objection to the appointment of a litigation friend by either party should be submitted to the panel in the same way as an objection to any other direction issued, via a Stakeholder Response Form.

10. Conflicts of interest

10.1 Legal representatives and litigation friends (including the Official Solicitor) are required to avoid acting in circumstances in which they have a conflict of interest. A conflict of interest could arise, for example, if the individual putting themselves forward to act as litigation friend may also be acting in the capacity of a legal representative for a co-defendant to the offence for which the prisoner was imprisoned (especially if sentenced through joint enterprise); possibly being put forward by an estranged member of the prisoner's family; or having previously been involved with the prisoner in providing therapeutic or other treatment.

10.2 The obligations on legal representatives and litigation friends have different sources, but the principles are similar.

10.3 For legal representatives, the rules are contained in the Solicitors' Regulatory Authority's Code of Conduct for Solicitors, Rules 6.1-6.2: Conflict of interests.

10.4 Litigation friends are required to avoid conflicts between the interests of the prisoner they are representing and any other interest they may have.

10.5 If panels have concerns about any conflict of interest matters, they should seek advice from the Legal Adviser.

11. Funding

11.1 Funding may be required to cover the costs of providing a litigation friend. There is currently no provision within legal aid to fund a litigation friend. **The Parole Board does not cover such costs. A source of funding will need to be found**.

11.2 However, where a family member or friend is acting as the litigation friend there may be access to small Parole Board funds to cover travel and subsistence costs. This would not extend to professional fees or lost earnings. Please contact the Legal Adviser if this arises.

11.3 The Official Solicitor would not seek to cover inhouse costs, where acting as the litigation friend of last resort. However, costs associated with retaining solicitors for the prisoner will need to be covered.

11.4 It will be important to ascertain the financial circumstances of the prisoner in order for legal aid to be considered and applied for. A litigation friend may need advice and support on the process for appointing a legal representative and will need to provide information about the prisoner's access to any private means.

11.5 It is acknowledged that ascertaining such information may prove challenging with prisoners who lack mental capacity and there is no appointed person managing their financial affairs.

11.6 The relevant provision for solicitors applying for legal aid is contained in paragraph 3.6(c) of the Legal Aid Specification to the Standard Crime Contract 2017:

> *3.5 Where Financial Eligibility Tests apply to the provision of Advice and Assistance or Advocacy Assistance in this Specification, satisfactory evidence as described in the Contract Guide must be provided to you by the Client before you assess their financial eligibility, subject to Paragraph 3.6. The evidence (or a copy of it) must be retained on the file.*
>
> *3.6 You may assess the prospective Client's means without the accompanying evidence only where:*
>
> *(a) it is not practicable to obtain it before commencing the Contract Work;*
> *(b) pre-signature telephone advice is given; or*
> *(c)* ***exceptionally, the personal circumstances of the Client make it impracticable for the evidence to be supplied at any point during the Matter or Case.***

11.7 Further guidance on this provision as it relate to Prison Law cases is provided at Section 13 of the Criminal Bills Assessment Manual:

[Paragraph] 3.6, of the SCC Specification details that, in some circumstances, a case can be claimed where the client's Financial Eligibility cannot be obtained. An example of this may be if there are difficulties with the prison providing the information requested. All such communication must be provided with the application forms if the file is claimed.

11.8 Each application would need to be assessed on a case-by-case basis by the person or agency undertaking the financial eligibility assessment. Co-operation between the parties may be required in order to obtain this evidence. In the absence of an appointed legal representative, this may fall to PPCS. The existing rules do give some flexibility where it is impracticable to obtain evidence of means which should be helpful, particularly where the Official Solicitor may be approached.

12. The Role of the litigation friend

12.1 Once appointed, a litigation friend must conduct the proceedings on behalf of the prisoner. This means that they will:

- make decisions for the prisoner and decide what course of action is in the prisoner's best interests;
- find out their wishes and feelings and take these into account when deciding what course of action to argue for in the prisoner's best interests. The prisoner's wishes and feelings are relevant, but not determinative of what is in his or her best interests;

- do everything he or she can to tell the prisoner what is happening in the case;
- where a legal representative is instructed, talk to them about what is happening, get advice from them and give instructions to them in the prisoner's best interests.

12.2 It is for the litigation friend to decide whether it is in the prisoner's best interests to appoint a legal representative to act in the parole proceedings. Funding from the Legal Aid Agency will usually be available for such legal representation (see Section Eleven for more detail about this). The Board's view is that it will always be in the prisoner's best interests to appoint a legal representative to act in matters relating to parole.

12.3 Other decisions that a litigation friend may need to make on behalf of the prisoner during parole proceedings include, for example, making the final decision on which witnesses to request, deciding whether to make an application for release or a progressive move (if eligible), deciding whether to apply to adjourn or defer a hearing, and deciding whether to instruct experts to assess a prisoner's risk. When making such decisions a litigation friend will usually be guided by the advice of a legal representative experienced in parole proceedings.

12.4 A role specification document has been drawn up which sets out in detail the role of the litigation friend, and, importantly, the role of a legal representative. This can be found at Annex F. Panels should direct that the appointed litigation friend be provided with a copy of this document.

13. Arrangements for the hearing

13.1 Panels have a broad discretion to make directions for arrangements to enable participation in parole hearings. This is particularly important where a prisoner has cognitive difficulties, learning difficulties, a mental disorder or for any other reason may be lacking mental capacity to make decisions and participate effectively in their parole review.

13.2 Where the case involves a litigation friend, a variety of steps to assist prisoners with participation in such hearings should be taken, including the following:

- The composition of the panel should be considered, and it is recommended that a specialist member (ideally a psychiatrist) is appointed as a co-panellist;
- Additional time should be allocated to such oral hearings;
- The Board should support and facilitate engagement between the legal representative, the litigation friend, and the prisoner, issuing directions as required.

13.3 Other adaptations[9] should be carefully considered, which may include:

- Tailoring questions to the prisoner's needs and abilities. Clear and simple language is often vital. Avoid questions which carry a high risk of being misunderstood or producing unreliable answers, such as leading, or tag questions. Panels should consider breaking down questions into smaller sections, preparing the prisoner for each stage of the communication. Panels should take care to not rush prisoners facing such difficulties. Such prisoners may need longer to process the questions and think about their answers;
- Discussing whether a communication specialist, such as a Speech & Language Therapist, or intermediary is required to facilitate communication both prior to and during any oral hearing;
- Adjusting the setting and conditions to facilitate participation for vulnerable prisoners, such as the way the room is set out;
- Adjusting the hearing procedure to facilitate participation. For example, the prisoner may be given regular breaks in their hearing if it is known that they have a short attention span, or listing only one case for that day, to ensure the panel has sufficient time available if needed;
- Directing a person to carry out assessments which may be needed for the panel to understand how to facilitate participation in the hearing. A person directed to make such an assessment could be a professionally qualified mental health specialist, either working within or retained by the prison estate, or from or on behalf of the social services department of the relevant local authority. An appropriately qualified member of the Board may be able to assist a panel to form a view on whether an assessment is needed;
- Directing that adaptations be made to facilitate participation, such as by provision of an easy read version of documents or information. An appropriately qualified member of the Board may be able to assist a panel to form a view on what adaptations are needed;
- Directing witnesses from local authority social services departments to attend to assist in explaining matters to and supporting the prisoner, and to explain how they will provide care to the prisoner as part of the risk management plan for release. Where there are difficulties in deciding on the relevant local authority, they can direct that senior managers from the different relevant authorities attend in person to resolve the issue.

Assistance on composing questions for vulnerable prisoners can be found on the Advocate's Gateway website and/or specialist advice sought from a Speech and Language Therapist or intermediary (if available). https://www.theadvocatesgateway.org/

13.4 If there is any concern expressed as to whether a prisoner has mental capacity to participate effectively in their parole review, then an oral hearing should ideally be held, if release on the papers cannot be made.

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[9] *Some of these may require external funding which will need to be identified and secured. The Parole Board is unable to fund such adaptations.*

In such cases careful consideration should be given to how the oral hearing should be convened[10], i.e. whether it should be face to face or whether remote arrangements could be suitable.

14. Capacity and Disclosure of Information

14.1 There may be occasions where the disclosure of information that may pertain to risk is affected by the capacity of the prisoner to understand it and make relevant decisions, either at the time of the offence or since conviction. Panels may need to consider this when looking at current risk.

14.2 Similarly, non-disclosure of information about victims[11] may be linked to the mental capacity of the prisoner, either at the time of the offence, or at another time, or during the parole review, which contribute to their inability to disclose the information. Panels will need to explore whether capacity has, at any time, been an influencing factor on the failure to disclose information about victims.

14.3 In particular, where a prisoner has not disclosed the whereabouts of the remains of a victim; or if the prisoner has not identified a child subject in indecent photographs they were convicted of possessing, there is a legal duty[12] for the Parole Board to take this into account for initial release cases.

14.4 More detail about this can be found in the member guidance on Disclosure of Information about Victims.

15. Prisoners under 18

15.1 The MCA2005 applies to adults who lack capacity.

15.2 For clarity, the following definitions widely apply:

- An "Adult" is a person aged 18 years or over.
- A "Young Person" is a person aged 16 or 17 years old.
- A "Child" is a person under the age of 16 years old.

15.3 This differs from the Children Act 1989 and the law more generally where the term "child" is used to refer to people aged under 18.

15.4 In most situations, the care and welfare of children will be dealt with under the Children Act 1989. There are, however, two parts of the MCA2005 that apply to children under 16:

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[10] Guidance has been published which may assist when considering how to progress cases where the prisoner is deemed vulnerable

[11] *See RM v St Andrew's Healthcare [2010] UKUT 119 (AAC) and M v ABM University Health Board [2018] UKUT 120 (AAC)*

[12] As set out in the Prisoners (Disclosure of Information about Victims) Act 2020

- The Court of Protection can make decisions about a child's property or finances, (or can appoint a deputy to make these decisions), if the child lacks capacity to make such decisions within Section 2(1) of the MCA2005 and is likely to still lack capacity to make financial decisions when they reach the age of 18.
- The criminal offence of ill treatment or wilful neglect of a person who lacks capacity applies to children under 16 as no lower age limit is specified for the person harmed/victim.

15.5 Parental Responsibility (PR) will be relevant and refers to "all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property", (Section 3(1) Children Act 1989). The Children Act 1989 explains who has PR for a child and how PR is acquired.

15.6 PR lasts until the child/young person is 18.

15.7 People with PR may make decisions on behalf of that young person where those decisions are in scope of parental responsibility.

15.8 The decisions that a person with PR can make are those decisions that are seen to sit within the zone of parental control. The zone of parental control is a legal concept describing which decisions a parent should be able to take concerning their child's welfare:

- Is the decision one that a parent would be expected to make?
- Are there any indications that the parent might not act in the child or young person's best interests?

Also to be considered:

- Is the young person resisting?
- The nature of what is proposed.

15.9 The moment that a young person wakes up on the morning of their sixteenth birthday, the presumption of capacity applies to them. The common law also recognises a child may have capacity to make some of their own decisions before they reach 18.

15.10 All those involved in supporting a young person are obliged to have regard to the MCA2005 in all that they do in relation to that young person.

15.11 However, young people aged 16-17 years cannot make a Lasting Power of Attorney, a will, or certain advanced decisions.

15.12 Whilst the principles set out in this guidance can be applied to cases of prisoners under 18, panels should contact the Legal Adviser for further advice on such cases.

16. Deprivation of Liberty Safeguards (DoLS)

16.1 The Deprivation of Liberty Safeguards (DoLS) are an amendment to the MCA2005. They apply in England and Wales only.

16.2 The MCA2005 allows restraint and restrictions to be used – but only if they are in a person's best interests.

16.3 Extra safeguards are needed if the restrictions and restraint used will deprive a person of their liberty. These are called the Deprivation of Liberty Safeguards.

16.4 Article 5 of the European Convention on Human Rights (ECHR) states that "*everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law*".

Deprivation of liberty within the meaning of Article 5 of the ECHR will arise if the person:

- is not free to leave their home or place of residence;
- is subject to continuous supervision and control;
- is offered conditions amounting to a deprivation of liberty as an alternative to detention;
- either cannot or does not consent[13] to restrictive conditions placed upon them.

16.5 A deprivation of liberty is unlawful and will breach Article 5 if it is not authorised in accordance with a procedure prescribed by law.

16.6 DoLS is the procedure prescribed in law when it is necessary to deprive of their liberty a resident or patient aged 18 or over in a hospital or care home who lacks capacity to consent to their care and treatment in order to keep them safe from harm.

16.7 DoLS ensures a person who cannot consent to their care arrangements in a care home or hospital (other than a prison) is protected if those arrangements deprive them of their liberty. Arrangements are assessed to check they are necessary and in the person's best interests. Representation and the right to challenge a deprivation of liberty are other safeguards that are part of DoLS.

16.8 Whilst it is avoided wherever possible, sometimes there is no alternative but to deprive a person of their liberty because it is in their best interests.

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[13] There is Supreme Court authority that some legislation does not empower the setting of conditions that amount to a deprivation of liberty, even if they are consented to: MM [2018] UKSC 60. If consent is an issue in your case, please seek bespoke advice from the Legal & Practice Queries team

16.9 It should be noted that the Mental Capacity (Amendment) Act 2019 introduced the Liberty Protection Safeguards (LPS) which will replace the DoLS system. The target date for the LPS to come into force is on 1 April 2022.[14]

16.10 DoLS will not come into play when assessing a prisoner's mental capacity or making arrangements for an oral hearing.

16.11 Panels will come across DoLS in some cases when considering and setting licence conditions. Separate guidance[15] has been produced to assist members with this.

17. Complaints

17.1 If a prisoner or person assisting them has concerns or is unhappy about any aspect of matters associated with their representation in parole proceedings, then they may wish to make a complaint. Where that complaint is directed to depends on who or what they are complaining about.

17.2 The Board can only investigate complaints about the handling of the parole process in terms of proceedings and conduct of panel members or staff. Anyone wishing to make a complaint should be sign-posted to the Parole Board's complaints policy.

17.3 Complaints about any other issue should be addressed to the relevant agency or organisation providing the service, for example the Prison or Probation Service, the law firm which a legal representative works for, the Official Solicitor, or an organisation providing a litigation friend.

[14] *Further information on Liberty Protection Safeguards can be found at:* *Liberty Protection Safeguards factsheets - GOV.UK (www.gov.uk)*
[15] *currently being drafted - October 2021*