



### A: Introduction

1. This purpose of this document is to provide for social workers and those working in front-line settings an overview of the interaction between mental capacity and housing law, in particular in relation to tenancies and licences.
2. This document cannot take the place of legal advice. In any case of doubt as to the principles or procedures to apply, it is always necessary to consult your legal department.
3. The guide, which is focused upon England, covers the following areas:
  - a. Part 7 applications
  - b. Possession claims
  - c. Tenancy agreements vs licence agreements
  - d. Applications for judicial authorisation of deprivation of liberty

### B: Mental capacity and applications for assistance as a homeless person under part 7 Housing Act 1996

4. Under s.23 Care Act 2014, a local authority may not:

*meet needs under sections 18 to 20 by doing anything which it or another local authority is required to do under—*  
*(a) the Housing Act 1996, or*  
*(b) any other enactment specified in regulations.*

### Editors

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(Hon)  
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**Disclaimer:** This document is based upon the law as it stands as at May 2022; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

The picture at the top, "Colourful," is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

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5. A person whose sole need is for accommodation cannot have this provided under the Care Act 2014: see *R(AR) v LB Hammersmith and Fulham*.<sup>2</sup> However, there are persons who have both a housing need and eligible needs for the purposes of the Care Act, which can include matters relating to housing, for example, maintaining a habitable home environment. So in what circumstances can a person with care and support needs be accommodated by the local housing authority under its homelessness duties (Part 7 of the Housing Act 1996)?

Capacity to be an applicant for social housing

6. In the joined cases of *R v Oldham BC ex parte Garlick* and *R v LB Tower Hamlets ex parte Ferdous Begum* [1993] AC 509 it was held by the House of Lords that neither a child or a person lacking mental capacity to make an application could be an applicant for homelessness assistance: the Act was primarily concerned with the provision of housing, and not with care and attention for the disabled (then provided for under the National Assistance Act 1948). No purpose would be served in making an offer of accommodation to a disabled person who was unable to comprehend or evaluate the offer: see page 520:

*But I can see no purpose in making an offer of accommodation to a person so disabled that he is unable to comprehend or evaluate the offer. In my view it is implicit in the provisions of the Act that the duty to make an offer is only owed to those who have the capacity to understand and respond to such an offer **and if they accept it to undertake the responsibilities that will be involved**. If a person is so disabled that he cannot do this he is not left destitute but is protected by the National Assistance Act 1948 ... (emphasis added)*

7. In subsequent cases, these "old" authorities have been held to continue to have binding effect - see *R (MT) v Oxford CC* [2015] EWHC 795 in which HHJ Sycamore, sitting as a Deputy High Court Judge, held that:

*21 The ratio in Garlick (Lord Griffiths at 520) is (1) there is no purpose in making an offer of accommodation to a person who does not have the ability to understand the offer; (2) similarly, there is no purpose in such an offer to a person who cannot understand the responsibilities that would be involved; (3) in any event, Parliament has provided alternative provision under the 1948 Act. 23. That is a logical distinction and in my judgment, it cannot be said to be discriminatory to provide two different systems for provision of accommodation. 24. In the circumstances, I dismiss this claim for judicial review. Garlick remains binding ...*

8. In *WB v W District Council* [2018] EWCA Civ 928 Arden LJ stated that:

*39. I accept that a person may have capacity to decide where to live but lack capacity to enter a tenancy. Indeed, the Court of Protection has issued guidance for cases where it is desired to enter into a tenancy agreement on behalf of a person who has capacity, for example, to apply for social security payments but not to enter into a tenancy agreement: see Applications for the Court of Protection in relation to tenancy agreements (updated February 2012).*

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<sup>2</sup> [2018] EWHC 3453 (Admin) at paragraph 18.

40. However, I do not propose to express a view as to how the HA 1996 would apply in those circumstances as they do not arise in this case.

At paragraph 68, Lewison LJ held that:

*A deputy may make decisions on behalf of the person without capacity to the extent that his or her appointment allows. As Lady Justice Arden points out those powers may include a power to decide where a person is to live (section 17 (1) (a)) and a power to acquire property on his or her behalf (section 18 (1)). If authorised to do so by his or her appointment a deputy could make the application, decide whether to accept offered accommodation, and enter into a tenancy on behalf of the person without capacity. However, the mere fact that the Court of Protection authorised a council official to sign a tenancy agreement is not, in my judgment, enough. That is no more than an administrative act; and does not amount to decision making. There is, therefore, no one in this case who has the power to make such decisions on WB's behalf.*

#### Capacity to enter into a tenancy & capacity to be an applicant for Part 7 purposes

9. As stated in *Garlick*, and cited with approval in *MT* (though of course binding in any event) part of having capacity to be an applicant for Part 7 purposes is being able to understand what the responsibilities of a tenant involve. Ultimately, the aim of applying for social housing is to obtain a tenancy (though this could be of private sector accommodation), so a person who is unable to enter into a tenancy, is unable to participate in the final element of being an applicant, i.e. becoming a tenant.
10. However there is more to the application process than being offered, and accepting, a tenancy, and the “relevant information” in relation to a Part 7 Housing Act 1996 application may include the series of criteria a person must satisfy in order to qualify for assistance (a person must be homeless,<sup>3</sup> eligible (in immigration terms),<sup>4</sup> in priority need<sup>5</sup> and not intentionally homeless<sup>6</sup>). There is a process of statutory review,<sup>7</sup> and consequences if a offer of accommodation considered to be suitable by the local authority is rejected.<sup>8</sup> An applicant may be rejected if he does not have a “local connection” with the authority to which he has applied, but does have such a connection to another local housing authority.<sup>9</sup>
11. Part 6 of the Housing Act 1996 (allocations) also carries hurdles an applicant must navigate, though these will depend on the local housing authority’s allocations policy, and such policies vary, but can include criteria such as residence requirements and processes of “bidding” “bands” and “points” (the latter two relating to priority for an allocation over other applicants).

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<sup>3</sup> S.175 Housing Act 1996

<sup>4</sup> S. 185

<sup>5</sup> S. 189

<sup>6</sup> S. 191

<sup>7</sup> S. 202

<sup>8</sup> S.193

<sup>9</sup> S.198 & 199

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## C: Possession claims

12. Formal possession proceedings will not be necessary in all cases. However, it is important that the correct legal procedures are followed. It is necessary therefore to understand the nature of any tenancy and whether the proper procedure has been followed. For instance, a common issue is non-compliance with the notification requirements of s. 21 Housing Act 1988 in the case of assured shorthold tenancies. Specialist housing law advice may be required on these issues.
13. Possession proceedings may be brought against individuals by both private and social landlords. The test the courts apply to such claims is a test of reasonableness, not best interests: an order may lawfully be made against a person who lacks capacity to make decisions about their residence, or indeed who lacks capacity to defend the possession proceedings.
14. There are however a number of matters which should be taken into account when bringing or defending possession proceedings in such a case.

### *Pre-action protocol for possession claims by social landlords*

15. There is a specific pre-action which should be followed by any 'social landlord' (e.g. a local authority or housing association) prior to commencing possession proceedings. This provides that if the landlord is aware that the tenant has difficulty reading or understanding information, they should take reasonable steps to communicate the information appropriately and to ensure that the tenant understands the information given.
16. In the case of particularly vulnerable tenants, the landlord should consider:
  - whether there may be issues with the tenant's capacity to defend proceedings and whether a litigation friend is required (in accordance with CPR Part 21). The test for capacity in this context is that set out in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, i.e. whether the individual is capable of understanding, with the assistance of explanation from legal advisers and experts, the issues on which his consent or decision was likely to be necessary in the course of the proceedings.
  - whether there are any issues arising from the Equality Act 2010 (see below).
  - (for local authorities) if a Care Act assessment should be carried out.
17. Part 2 of the pre-action protocol sets out a procedure which should be followed if tenants have fallen into rent arrears. If applicable, landlords should apply to the DWP for arrears to be paid by deductions from benefits and should assist tenants to apply for benefits for which they are eligible. It also advises that the landlord should bear in mind that arrears may be part of a general debt problem and signpost tenants to sources of free advice such as CABx. In this context, it may be pertinent for local authority landlords to give further consideration to whether there are any issues around the tenant's capacity to manage their finances.
18. Part 3 applies to claims where, if the landlord succeeds, mandatory grounds for possession will be made out and s. 89(1) Housing Act 1980 applies to restrict the giving up of possession to be

deferred (other than in cases of exceptional hardship). In such cases the landlord should write to the occupiers to seek any representations they wish to make and consider any such representations with a view to reviewing if they wish to bring a claim. If they do they should file a schedule with any claim setting out whether they have gone through such a process and brief reasons for bringing the claim.

*Mental health and anti-social behaviour*

19. Although the pre-action protocol applies only to social landlords, much of the guidance there given reflects good practice and is likely to be worth consideration in other cases.
20. It may be important in cases where it is proposed to rely on anti-social behaviour grounds to ensure there has been proper communication with the tenant. If the behaviour is in fact a consequence of mental health issues, this may provide for an opportunity for the underlying issue to be identified and appropriate support provided (in the case of local authorities).
21. The government has produced a guide for private landlords which addresses how to deal with tenants engaging in anti-social behaviour ([here](#)). This recommends talking to tenants in the first instance, before giving a final warning, and reminds private landlords that 'the police, local authorities and other local agencies have a range of flexible tools that they can use to respond quickly and effectively to anti-social behaviour'. Although the guidance focuses on powers to restrain such behaviour, it is also true that local authorities and other agencies may be able to assist if there are concerns about a tenant's health.
22. Ensuring that consideration is given to whether anti-social behaviour is in fact arising as a consequence of mental health should also help to avoid discrimination on the grounds of disability.

*Disability discrimination*

23. The Equality Act 2010 provides that it is unlawful to treat a disabled person less favourably than you would a non-disabled person because of their disability (direct discrimination). For instance, evicting somebody because they have a mental health condition is very likely to give rise to direct discrimination.
24. It is not possible to justify direct discrimination. It is unlawful in all circumstances to evict someone *because* they are disabled.
25. The Equality Act 2010 also recognizes that there are other forms of unlawful discrimination. Indirect discrimination (applying a measure which affects both people with a protected characteristic and those without it, but which puts people with the protected characteristic at a particular disadvantage) may also arise. This may be the case if a landlord imposes a requirement on all tenants, but which disabled tenants would generally struggle to meet, so putting them at greater risk of breaching their tenancy agreement.
26. Particularly relevant further provisions in possession proceedings are s. 15 (which prohibits discrimination arising from disability – so seeking to evict somebody for something which arises only as a consequence of their discrimination, for instance antisocial behaviour which is caused by

a mental health problem or the amount of noise made by a tenant who is deaf). S. 35 of the Equality Act 2010 also specifically provides that a person who manages premises must not discriminate against a person who occupies the premises by evicting them or taking steps to secure their eviction.

27. In such cases it is necessary for the court to consider whether eviction is a proportionate means of achieving a legitimate aim, which requires the court to adopt a structured approach to proportionality (*Akerman-Livingstone v Aster Communities Ltd* [2015] UKSC 15). In applying this approach, it will be necessary for the courts to consider whether there are any steps less drastic than eviction which might be tried in order to address the problem and whether the effect on the individual is outweighed by the benefits to others (*Aster Communities* at [34]).
28. Circumstances may therefore arise where consideration needs to be given to alternatives (can tenants be helped to minimize the effects of any anti-social behaviour? Should additional support be provided to them?) in order to satisfy the court that making an order for possession is proportionate.

#### D: Tenancy agreements vs licence agreements

29. The first step is to consider whether a person has capacity to make decisions in respect of residence before a statutory body takes steps to move the individual from one residential setting to other accommodation, requiring a different form of legal agreement. Section 2(1) of the Mental Capacity Act 2005 sets out the test for capacity:<sup>10</sup>

*a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."*

30. To apply the test, it can best be broken down into three questions:
- Is the person able to make a decision? If they cannot:
  - Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:
  - Is the person's inability to make the decision because of the identified impairment or disturbance?
31. A person is unable to make a decision if he is unable:
- To understand the information relevant to the decision; or
  - To retain that information; or
  - To use or weigh that information as part of the process of making the decision; or
  - To communicate his decision.

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<sup>10</sup> More guidance about capacity assessments can be found in our [guidance note](#).

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32. The information relevant to an assessment as to a person's capacity to make a decision regarding residence is:<sup>11</sup>

- **The two (or more) options for living.** This must include the type and nature of the living option, such as whether it amounts to supported living or not, and if so, in what way the protected person will be supported. The person being assessed must also understand what sort of property it is, and the facilities that would be available to them there;
- **Broad information about the area.** This would cover the notional 'sort' of area in which the property is located, and any known specific risks of living in that area beyond the usual risks faced by people living in any other given area;
- **The difference between living somewhere and just visiting it.** Pictorial methods of conducting this assessment may be useful. The courts have approved of a social worker's methodology of asking a person to describe what they understood to be the meaning of living, the meaning of visiting, and to draw the difference between the two, which happened to be a picture of a bed and which held the meaning of overnight stays. This could also include a discussion of what it means to sleep somewhere, and an understanding of the days of the week;
- **The activities that the person being assessed would be able to do if he lived in each place;**
- **Whether and how the person being assessed would be able to see friends and family if he lived in each place;**
- **The payment of rent and bills.** This is not required to be understood in any detail beyond the fact that there will have to be a payment made on their behalf, as for most cases concerning protected persons, the payments will be made by an appointee;
- **Any rules of compliance and/or the general obligations of a tenancy.** Again, the rules are not required to be known in any great detail by the person under assessment but a basic understanding of the fact that there are restrictions, and the areas in which they would operate, will be necessary.
- **Who they would be living with at each placement;**
- **The sort of care they would receive in each placement;**
- **The risk that a family member or other contact may not wish to see the person being assessed should they choose a particular placement against their family's wishes.**<sup>12</sup>

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<sup>11</sup> This is from the judgment of Theis J in *Theis J in LBX v K, L and M* [2013] EWHC 3230 (Fam). For further information in respect of information relevant to different decision, see our [guidance note](#).

<sup>12</sup> This is subject to the caveat below that this should not be presented as a long term and permanent risk with severe consequences on the longer term relationship between the person and the contact involved. To do so would veer towards both emotional manipulation and predicting the future. However, it is perfectly appropriate to warn the protected person of the risk that they may not get many, or any, visits from their contacts where this is born of impracticality, especially if there are long distances or restricted visiting hours involved with any particular residence.

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### *Difference between a tenancy agreement and a licence agreement*

33. Consideration then needs to be given to whether the proposed accommodation requires a tenancy agreement or a licence agreement, given that capacity is decision-specific.<sup>13</sup> A tenancy is a legal interest in land for a period of time; whereas, a licence is personal permission for someone to occupy accommodation. A tenancy agreement is a contract between the adult and the landlord, which creates certain legal rights – some of which are created by the contract itself and others are implied to the contract by statute. The key features of a tenancy agreement, as compared to a licence agreement, are:<sup>14</sup>

- The grant of exclusive possession of premises;
- For a period of time;
- At a rent.

34. The exclusive possession is the right of the tenant to stop others, including the landlord, from entering without permission.

35. There are also a number of safeguards from eviction in respect of a tenancy agreement (see, for example, the Protection from Eviction Act 1977). In contrast, if an individual stays as temporary accommodation pursuant to a licence agreement, the Protection from Eviction Act 1977 does not apply.<sup>15</sup>

### *Relevant information*

36. The information that is relevant to the decision being assessed might require tailoring to the specific circumstances, particularly when considering the reasonably foreseeable consequences of decision one way or another, or failing to make a decision.<sup>16</sup> Although not a binding decision, District Judge Batten's judgment in *London Borough of Islington v QR* [2014] EWCOP 26 provides helpful guidance as to the relevant information for these decisions.

37. In respect of the decision to enter into a tenancy, the following information is likely to be relevant:<sup>17</sup>

- The obligations as tenant to pay rent, occupy and maintain the flat;
- The landlord's obligations to the individual under the contract;
- The risk of eviction if the person does not comply with their obligations;
- The purpose of and terms of the tenancy (for example, on the facts, in *QR*, the purpose was to provide her with 24 hour support so that she takes her medication and can maintain her mental health);

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<sup>13</sup> *A Local Authority v JB* [2021] UKSC 52.

<sup>14</sup> *Street v Mountford* (1985) 17 HLR 402, HL

<sup>15</sup> *R (on the application of N v Lewisham LBC)* [2015] AC 1259

<sup>16</sup> Mental Capacity Act 2005, s 3(1)

<sup>17</sup> *London Borough of Islington v QR* [2014] EWCOP 26, para 101



- The landlord/support staff's right to enter the flat without permission in an emergency if there is serious physical danger or risk to the person.

38. In terms of a decision to surrender a tenancy, the following information is likely to be relevant:<sup>18</sup>

- By surrendering a tenancy the person loses the right to live or return there;
- A person is no longer under the obligation to pay rent and maintain the flat;
- A person might, however, owe outstanding rent to the landlord;
- The landlord no longer has obligations to the person.

39. A decision to enter into a licence has not been the subject of judicial consideration, but the relevant information is likely to include:

- The person is permitted to live at the premises;
- Anyone can enter the premises;
- They can be required to leave.

40. Practicable steps that may assist a person in making a decision could include an easy read tenancy agreement, simple language and visual aids.<sup>19</sup>

41. Importantly, an individual can have the mental capacity to enter a tenancy agreement, but does not have to be able to physically sign the agreement. Instead, they can authorise someone to sign it on their behalf.

#### Obligations in a tenancy agreement

42. If a person lacks capacity to enter into a tenancy agreement, it is important to consider whether all the obligations pursuant to that tenancy agreement are in the person's best interests. For example, it might be that the tenancy agreement requires the individual to behave in a certain way or not harass anyone. If the individual cannot understand the legal consequences to them if they breach that obligation, then it is unlikely that the landlord would be able to enforce against them.<sup>20</sup> Similarly, if an individual tends to cause damage to property, it is unlikely that an obligation requiring them to pay for that damage is likely to be in that person's best interests.

#### Applications to the Court of Protection

43. An application to the Court of Protection ("COP") will be required whenever authority is sought to (i) enter into/sign a tenancy or licence agreement; or (ii) surrender and/or terminate such an agreement. Indeed, it is important that such an application is made because section 5 of the Mental Capacity Act 2005 does not provide authority to enter into a contract (or quasi-contract) on P's

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<sup>18</sup>*ibid*, para 99

<sup>19</sup> Mental Capacity Act 2005, s 1(3); 3(2)

<sup>20</sup> *Wookey v Wookey* [1991] Fam 121.

behalf. If authorisation from the COP is not obtained, then problems might arise in relation to enforcement of any such agreement, surrendering the agreement, or proving that P has a valid interest in the property for the purposes of, for example, housing benefit.

44. If there is a deputy or lasting power of attorney (“LPA”) in respect of property and financial affairs, careful consideration will need to be given as to whether the deputyship order or LPA gives the necessary authority and whether an application is therefore required.
45. An application to the COP will need to be accompanied by a mental capacity assessment addressing the specific decision in the usual way. The court will also need to be provided with the relevant contract.

### E: Applications for judicial authorisation of deprivation of liberty in the community

46. In any application for judicial authorisation of deprivation of liberty in the community, the following questions are asked on the COP DOL11 form:<sup>21</sup>
- Does P or will P occupy the accommodation under a tenancy agreement?
  - Who has the authority to sign a tenancy agreement on P’s behalf?
  - Do you need authority from the court to sign the tenancy agreement?
47. In our experience, it is (all too often) only when either the local authority or the CCG responsible for making the application for authorisation of a community deprivation of liberty comes to look at the form for purposes of making that application that the question of the basis upon which the person occupies the accommodation arises. The COP DOL11 form, helpfully, via the prompt in the last question set out above allows the applicant then to ask for one-off authority to be given to someone to sign the tenancy agreement. In other words, it is not necessary to make the application required otherwise for a deputy to be appointed to sign the tenancy agreement (which would incur a separate application fee).
48. The COP DOL 11 form does not address the situation where P occupies the accommodation under a licence. If this is the situation, then an explanation of the position should be given in the COP24 witness statement that accompanies the application and, if necessary, any relevant authority to regularise the position be set out within the draft order that has to be attached to the form.<sup>22</sup>
49. More guidance about making applications for judicial authorisation of deprivation of liberty in the community can be found in our [guidance note](#).

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<sup>21</sup> Available at: [Form COPDOL11: Application to authorise a deprivation of liberty \(Sections 4A\(3\) and 16\(2\)\(a\) of the Mental Capacity Act 2005\) - GOV.UK \(www.gov.uk\)](#)

<sup>22</sup> A model draft order (not including reference to either tenancy or licence arrangements) can be found on the Court of Protection Handbook website: [Legislation, Forms and Practice Directions – Court of Protection Handbook](#) (under ‘Re X process’).

## F: Useful resources

50. Useful free websites include:

- [www.39essex.com/resources-and-training/mental-capacity-law](http://www.39essex.com/resources-and-training/mental-capacity-law) – database of guidance notes (including as to capacity assessment) case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing [marketing@39essex.com](mailto:marketing@39essex.com).
- [www.mclap.org.uk](http://www.mclap.org.uk) – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to ‘do’ the MCA 2005 better.
- [www.lpslaw.co.uk](http://www.lpslaw.co.uk) – website set up by Neil with resources relating to the Liberty Protection Safeguards and many other aspects of the MCA 2005.
- [www.mentalhealthlawonline.co.uk](http://www.mentalhealthlawonline.co.uk) – extensive site containing legislation, case transcripts and other useful material relating to both the Mental Capacity Act 2005 and Mental Health Act 1983. It has transcripts for more Court of Protection cases than any other site (including subscription-only sites), as well as an extremely useful discussion list.
- [www.scie.org.uk/mca-directory/](http://www.scie.org.uk/mca-directory/) - the Social Care Institute of Excellence database of materials relating to the MCA.

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