

Specialist Research Ethics Guidance Paper

RESEARCH INVOLVING ADULT PARTICIPANTS WHO LACK THE CAPACITY TO CONSENT

This note covers all research undertaken at the University that involves the recruitment of adult participants, i.e. over the age of 16, who lack the capacity to consent (LCC) to take part in the research, or who it is believed will lose the capacity to withdraw consent during the course of the research.

Part 1 Introduction to the governance frameworks

The recruitment of adult participants LCC into a piece of research is subject to statutory regulation. As such, there is a set of complex legal procedures that must be adhered to in the consent process before a Research Ethics Committee (REC) will grant approval for the research to proceed. In addition, please note that the University's Research Governance Procedure will apply to these studies (more details can be found here: <https://www.sheffield.ac.uk/rs/ethicsandintegrity/governance>).

CTIMP or non-CTIMP?

There are two governance routes for researchers to follow, depending on whether the research being proposed is a clinical trial of an investigational medicinal product (CTIMP), or not. Whilst the requirements for both CTIMP and non-CTIMP research are similar, the legal foundations, process and terminology are quite different. The Medicines and Healthcare Products Regulatory Agency (MHRA) have an algorithm that can assist in determining whether the research is a CTIMP.¹

Non-CTIMP research involving adults LCC is regulated by the Mental Capacity Act 2005 (MCA). These regulations apply to all research conducted in England and Wales. Research conducted in Scotland is regulated by s.51 of the Adults with Incapacity (Scotland) Act 2000. Research conducted in Northern Ireland is regulated by the common law. Multi-sited UK or international research that involves the recruitment of adults LCC will, therefore, be covered by different legal jurisdictions. This will have implications for the governance requirements that will need to be met.

CTIMP research involving adults LCC is regulated by the Medicines for Human Use (Clinical Trials) Regulations 2004. These regulations are derived from a 2001 EU Directive that outlines how clinical trials carried out in the EU should be conducted, and the regulations apply to research conducted across the UK. Schedule 1, Part 5 of the regulations outlines the special requirements that apply for CTIMPs involving adults LCC.

Process for seeking approval

All research that involves adult participants LCC must be approved by an 'appropriate body'. This means approval from a 'flagged' REC operating within the Health Research Authority's (HRA's) Research Ethics Service (RES)². University RECs are NOT 'appropriate bodies' for approving research that involves adults LCC. A list of 'flagged' RECs can be found on the RES 'search RECs' webpage³.

¹<https://www.gov.uk/guidance/clinical-trials-for-medicines-apply-for-authorisation-in-the-uk#when-a-clinical-trial-authorisation-cta-is-needed>

² <https://www.hra.nhs.uk/about-us/committees-and-services/res-and-recs/research-ethics-service/>

³ <https://www.hra.nhs.uk/about-us/committees-and-services/res-and-recs/search-research-ethics-committees/>

Part 2 Non-CTIMP Research – The Mental Capacity Act 2005

The MCA is built upon 5 core principles (s.1):

1. A person must be assumed to have capacity unless established otherwise.
2. Individuals should be helped to make their own decisions as far as practicable.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
4. Decisions made must be in the best interests of the person lacking capacity.
5. All decisions must be the least restrictive of the person's rights and freedom of action.

Principles 4 and 5 are modified and extended in the research provisions of the MCA (s.30-34) to offer adults LCC specific protections.

What counts as research?

The MCA applies to all 'intrusive research': research that would otherwise require consent in order to be lawful. Research projects seeking to involve adults LCC will extend across social contexts, and will certainly not be limited to health research. If the study is designed solely for the purposes of service evaluation and development, it falls outside the remit of the MCA. The only exception is in social care, where a broader definition of research is preferred. Service audits may be classed as a piece of research, and can be reviewed by the relevant REC.

How is capacity to consent defined?

The research provisions in the MCA apply to all adults over the age of 16, and who lack the capacity to give or withhold their consent to participate in a study. Research involving minors is regulated by the common law. The definition of 'lacking the capacity to consent' is provided in s.2 and s.3 of the MCA, and can be viewed as a 'two-stage test':

1. Is there an impairment of, or disturbance in, the functioning of mind or brain?
2. Is the impairment or disturbance such that the person is unable to make the specific decision to take part in the research project?

Under s.3, an adult is unable to make a decision if s/he is unable to:

- understand the information relevant to the decision,
- retain that information,
- use, and weigh up, that information in the process of coming to a decision, **or**
- communicate the decision (by any means).

Adults LCC will, therefore, include those with dementia, significant learning disabilities, or physical conditions causing confusion or a loss of consciousness. Capacity cannot be presumed in any person. However, sometimes a lack of capacity to consent will be clear (e.g. if the proposed participant is in a coma). In other cases, a person's incapacity will:

- be temporary (e.g. in a person who has had an accident),
- be borderline (e.g. in a person who has a moderate learning disability),
- fluctuate (e.g. in a person with a drug dependency), or
- be a future consideration (e.g. in longitudinal research involving people with dementia).

In all cases, the MCA requires that every attempt must be made to enable adults LCC to participate in research with consent.

Researchers should seek to employ a range of practices when seeking to make 'every attempt' to enable participation. Examples include:

- Use of simple language
- Taking one decision at a time
- Finding the time and the setting that is most likely to help the person feel safe and comfortable
- Ensuring that communication uses language/other means familiar to the person and considers cultural factors
- Considering use of non-verbal language such as pictures, prompts, gestures
- If the person is agreeable, involving others who know best how the person prefers to communicate
- Making sure the person has any support aids they require (hearing aids, glasses etc.)
- Building rapport and embedding consent within relationships between researcher and participant where possible.

Good Practice Example: Consent Support Tool^{4,5}

The Consent Support Tool seeks to assist professionals, who wish to involve people with communication disorders in their research, to identify the types of support most likely to help each individual understand the information provided to them as fully as possible. For people with more severe communication disorders, the tool can be used to identify those individuals who are unlikely to be supported to understand adapted information sufficiently to make their own independent decision.

The tool achieves this in three ways:

1. A screening test helps the professional to identify the profile of communication abilities and difficulties of the individual
2. Ideas on how to communicate best with the individual given his/her communication profile are suggested
3. Styles of information most consistent with the individual's communication profile are identified to help the professional prepare and provide information in the most useful way to support that individual to understand the information necessary to make an informed decision.

A number of copies of the Consent Support Tool are available in the Royal Hallamshire Hospital Health Sciences Library, in the Main Sequence, reference: WL 340.2 (P)

⁴ Palmer R & Jayes M (2016) *Consent Support Tool: including people with communication disorders in health research studies*. Macclesfield: Napier Hill Press

⁵ Jayes, M. and Palmer, R., 2014. Initial evaluation of the Consent Support Tool: a structured procedure to facilitate the inclusion and engagement of people with aphasia in the informed consent process. *International journal of speech-language pathology*, 16(2), pp.159-168.

Consent should be viewed as the result of an ongoing supportive approach by researchers. As such an overarching set of inclusive practices should be considered in the lead up to consent, and following the participant's involvement. The Scottish Dementia Working Group has developed a set of core principles as a guide for researchers in the field: <http://dementiavoices.org.uk/wp-content/uploads/2014/06/Involving-people-with-dementia-in-research1.pdf>.

These principles stress the significance of the involvement of people with dementia throughout the research process, including the development of consent materials and inclusive practices in the participation of people with dementia. See also Murphy et al⁶ who outline a similar strategy.

Consistent with an overarching strategy there is a growing literature focusing on the ways in which people who may lack capacity are approached to take part in research, utilising inclusive consent practices. In the field of dementia Dewing⁷ proposes 'process consent' as a means of allowing the person with dementia to revisit the decision to be involved. Dewing outlines five stages:

1. Background and preparation: making a 'person-centred' approach
2. Establishing the basis for capacity: using multiple strategies
3. Initial consent: reflecting on the moment, ensuring that the researcher is satisfied
4. Ongoing consent monitoring: assessing ongoing consent as consistent with initial consent
5. Feedback and support: supporting transition from the research environment

Good Practice Example: Use of visual materials in the process of consent

A number of researchers are seeking to use visual means of communication within information sheets and consent forms. The 'Being Warm, Being Happy' project (<https://beingwarmbeinghappy.org/>) is focused on the issue of fuel poverty within the population of adults with learning disabilities.

The project team used a range of visual materials including, photographs of the research team, scenarios relevant to the research question, symbols and illustrations. The study found that using such materials assisted the team and participants in gaining confidence in the process.

These materials are included in the appendix to this guidance paper.

NB. The information sheet used as part of this project is provided as an example of good practice. It is not intended that this format be used for every study involving adults who may lack the capacity to provide informed consent; in developing informed consent materials, the specifics of each study need to be considered carefully. In addition, it should be noted that the materials for this particular study were developed before changes to data

⁶ Murphy K, Jordan F, Hunter A, Cooney A, and Casey D. (2015). Articulating the strategies for maximising the inclusion of people with dementia in qualitative research studies. *Dementia: The International Journal of Social Research and Practice*. 14(6), 800-824.

⁷ Dewing, J. (2008). Process consent and research with older persons living with dementia. *Research Ethics Review*. 4(2), 59 -64.

protection legislation in May 2018, and hence there may be additional information which would now need to be included to meet current data protection requirements.

Training Tools

The HRA has prepared a short online training resource aimed at supporting researchers seeking to involve participants lacking capacity (Internet Explorer only): <http://elearning.hra.nhs.uk/>

What does the MCA require?

Gaining research approval under the MCA requires researchers to fulfil a number of requirements under three sections of the Act:

- Section 31: General requirements
- Section 32: Consultation requirements
- Section 33: Supplementary requirements

What is required under Section 31?

- The research must be connected to the condition that means the adult lacks the capacity to consent, or to the care/treatment of that condition. There must be reasonable grounds for believing that research of comparable effectiveness could not be carried out if the sample was confined to adults with capacity (this is designed to prevent convenience sampling).
- The research must be judged to have the potential to, either, i) benefit participants without imposing a disproportionate burden, or, ii) benefit future people with the same/similar impairing condition, if the risk to the participant is negligible, and the research will not be unduly invasive or interfere significantly with participants' freedom of action or privacy.

What is required under Section 32?

The researcher must identify a 'personal consultee' (PC), who is:

- not connected to the research project, and
- engaged in caring for the participant (but not in a professional or paid capacity), interested in his/her welfare, has been previously named by the adult LCC, or has been appointed by a Lasting Power of Attorney⁸, and
- is willing to be consulted.

The researcher must provide the PC with information about the project, and ensure that the PC can give advice about what the adult LCC's wishes, feelings and values would be in relation to being involved as a participant in the project. The PC should be provided with the opportunity to advise that the adult LCC be recruited as a participant in the research.

The researcher must also provide the PC with information about the role and responsibilities of a PC. See useful template outlining this with example wording in *Adults not able to consent for themselves* on the HRA website: <http://www.hra-decisiontools.org.uk/consent/examples.html>. There is also a template for the consultee declaration form.

⁸ According to the MCA, the Lasting Power of Attorney must relate to the participant's personal welfare or specified matters concerning their personal welfare, and/or the participant's property and affairs or specified matters concerning their property and affairs.

When a PC cannot be identified, or when the PC identified is not willing to fulfil the role, a 'nominated consultee' (NC) should be identified. The NC must be:

- a person who cares for the adult LCC, or is interested in his/her welfare, in a professional or paid capacity (e.g. a participant's key worker, or a GP), and
- not connected to the research project

The NC is expected to fulfil the same role as the PC.

Note: under the MCA, no person can give consent or assent on behalf of an adult LCC in relation to any decision. The consultee is simply providing advice based on his/her knowledge of the person.

What is required under Section 33?

Section 33 outlines a number of supplementary requirements, most of which apply when the adult LCC has been recruited as a participant:

- Nothing can be done in the research that the adult LCC appears to object to
- The adult LCC must be withdrawn from the research immediately if the PC or NC indicates that the person should be withdrawn
- Any 'advanced refusal' or 'advanced statement of wishes' made by the LCC, prior to losing capacity, in relation to participating (or not) in research must be taken into account alongside the advice sought from the PC or NC. It is advisable to ask someone to check the person's notes, or to ask the PC or NC whether they are aware of any such advanced statement having been made.

Managing special situations

Circumstances can arise in a piece of research that must be managed carefully in order for the research to be conducted lawfully. One such circumstance is when a participant loses capacity to consent, or withdraw consent, during the course of the research. If a participant loses capacity, the researcher no longer has valid consent. However, the researcher can continue to involve the participant in the research if they have received advanced approval by an REC under the requirements of the MCA outlined above. If not, the participant must be withdrawn from the research.

Another special situation is 'emergency' research. For example, it will be impractical to identify and seek advice from a consultee beforehand if research is taking place alongside the provision of emergency treatment to an unconscious patient. Section 32(9) of the MCA allows the research to include the adult LCC as a participant with the agreement of an independent doctor, or in accordance with a procedure approved by a REC. The advice of a consultee on whether the adult LCC should continue as a participant in the study (if required) must be sought as soon as possible after the emergency treatment has been provided.

If there is the potential that participants may lose capacity during a research study, then it would be seen as good practice to address this possibility in the research protocol and in the patient information sheets in the initial REC application. This provides the participants with the opportunity to make some decisions about what they would want to happen if they lose capacity at a future point in time and who they might want to nominate as a personal consultee. Clearly this issue should be handled with sensitivity.

If the initial REC application did not address the potential loss of capacity, and participants do lose capacity, then a substantial amendment will need to be submitted. Part B of the REC

application will need to be completed and consultee information sheets and declaration forms will need to be submitted.

What is the REC looking for?

The REC wants to see that researchers have put reasonable arrangements in place to meet the requirements under s.31-33 of the MCA. For example, do researchers have:

- the relevant skills and experience to assess capacity, or procedures in place to ensure that those with the skills and experience will assess capacity?
- good reasons for including adults LCC in their research?
- a clear plan in their protocol for approaching, providing information to, and seeking advice from, PCs and NCs for individual participants?

These requirements are incorporated into a number of questions in the HRA's 'IRAS' form.

Part 3 CTIMP research: The Medicines for Human Use (Clinical Trials) Regulations 2004

Four principles

The regulations for involving adults LCC in CTIMP research place a higher threshold for authorisation than those in the MCA for non-CTIMP research. Four principles govern the requirements that are placed upon researchers:

1. The 'legal representative' (LR) of an adult LCC must give written consent that the person can be recruited as a participant into the CTIMP. A 'personal LR' is suitable by virtue of their relationship with the adult LCC. If no such person is available, or willing to fulfil the role, a 'nominated LR' should be approached. This is the doctor primarily responsible for the treatment of the adult LCC. Note the inconsistency here with respect to the permissibility of proxy consent, between the position of the MCA and the position in English common law.
2. The trial must have been designed to minimise pain, discomfort, fear and any risk relating to the disease and cognitive abilities of the adult LCC
3. The risk threshold and the degree of distress have to be specially designed and carefully monitored.
4. The interests of the adult LCC always prevail over those of science and society.

How should Principle 1 be met?

The following six steps must be followed:

- The researcher must have an interview with the LR, outlining objectives, risks and inconveniences of the trial.
- A contact point must be provided to the LR.
- The LR must be informed about the right to withdraw the adult LCC at any time. The LR has a role in continually reviewing participation.
- The adult LCC must receive information, regardless of the fact that he/she might lack the ability to understand this information.
- The explicit wish of an adult LCC who is capable of forming an opinion and assessing the information, to refuse participation or withdraw from the trial, must be considered at all times. Dissent is legally relevant.
- No financial incentives must be given to the adult LCC, or to the LR. Expenses incurred can be reimbursed

How should Principles 2–4 be met?

The following three conditions must be fulfilled:

- There must either be grounds for expecting that administering the medicinal product will produce a benefit for the adult LCC that outweigh the risks, or being a participant in the trial should produce no risk at all.
- The trial must relate directly to a life-threatening or debilitating clinical condition from which the adult LCC suffers. The CTIMP must offer potential direct benefit to the adult LCC who is participating. Potential benefits for future patients do not justify inclusion.
- The trial must be essential to validate data obtained in other clinical trials involving participants able to give consent, or data obtained using other research methods.

Managing special situations

In contrast to the MCA, under the Medicines for Human Use (Clinical Trials) Regulations the original consent of a participant remains valid even when that participant loses the capacity to consent, or withdraws consent. Consent from a LR would only be required when a substantial amendment was made to the trial design, such that fresh consent would be required from all participants. It is, however, important to take the expressed wishes of the adult LCC into account with regard to their continued participation.

For 'emergency' research, a separate set of regulations apply: The Medicines for Human Use (Clinical Trials) Amendment No.2 Regulations 2006. These regulations apply when the clinical trial relates to urgent treatment, and when it is not reasonably practicable to seek consent from a LR. The research can go ahead in emergency situations if the research takes place in accordance with procedures approved by a REC. Consent from the participant (if able to give consent), or from a LR, must be sought as soon as practicable following the emergency treatment.

Practical considerations

Both the MCA and the Clinical Trials Regulations view research that involves adults LCC as a 'special case'. The general position, endorsed in law, is that adults LCC should be excluded from participating in research whenever possible. Researchers must, therefore, be prepared to justify why their research should be permitted to proceed, and to provide a considered and detailed defence of their study.

Recruiting adults LCC into a piece of research is a time-consuming process, and requires an extensive amount of work to be devoted to the consent process. The ethics review process, capacity assessment, recruitment, and consultation procedures can take months to complete. Extra information sheets and consultee declaration forms will need to be prepared for review by the REC. The feasibility of including adults LCC in student projects should be given careful thought.

Members of MCA- or CTIMP-flagged RECs have received specific training about the relevant legal requirements. However, recent empirical research analysing RECs' decision letters has drawn attention to inconsistencies in the knowledge and interpretation of the requirements of the MCA by RECs. Researchers should, therefore, consider the appropriateness of an appeal if they feel they have designed a protocol that is consistent with the requirements of the MCA, but that has been given an unfavourable opinion on these grounds.

Appendix to the Specialist Research Ethics Guidance Paper:

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Good Practice Example: Use of visual materials in the process of consent

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The project team used a range of visual materials including, photographs of the research team, scenarios relevant to the research question, symbols and illustrations. The study found that using such materials assisted the team and participants in gaining confidence in the process.

The following materials from this study are provided in the following pages:

- Participant Information Sheet for interviews
- Participant Consent Form for workshops

IMPORTANT NOTE:

This information sheet and consent form are provided as examples of good practice. It is not intended that this format of these documents be used for every study involving adults who may lack the capacity to provide informed consent. In developing informed consent materials, the specifics of each study need to be considered carefully.

In addition, it should be noted that the materials for this particular study were developed before changes to data protection legislation in May 2018, and hence there may be additional information which would now need to be included to meet current data protection requirements.

Some additional comments from the UREC on these documents, which may be of interest in developing your own informed consent documents, are as follows:

- It is really good practice to include photographs of the researchers in informed consent documents; this can help to reduce anxieties and it is also good for people with face blindness.
- Where the documents refer to the work being confidential, it might be worth pointing out that it is not confidential for the participant, so they know they are free to discuss their involvement. This could reduce anxieties but could also help from a safeguarding point of view, ensuring there is no concern over secrets etc. for vulnerable people.
- Where there is reference to participants being provided with a copy of the report, it might be sensible to ask here if they would like a copy, rather than the participant having to ask for a copy at a later stage.

UREC
January 2019



Participant Information Sheet: individual interview

Title of project: Being Warm – Being Happy:
Understanding what helps adults with learning
disabilities keep warm at home.

Names of researchers: *(names and
photographs of researchers have been
removed for confidentiality reasons)*

Contact number: ****

What do we want to do?



We are doing research to find out if people with learning disabilities are warm at home.



We would like to measure the temperature in your home.



We would like to talk to people about how they keep warm in their homes.



You can say **yes** or **no** to taking part. The **red** form says more about this.

Who can take part?



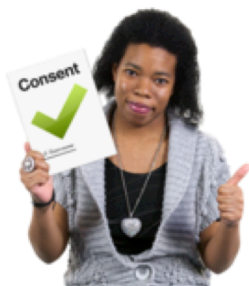
We would like to talk to people who are over 18 years old.



We would like to talk to people who live on their own or with family members.



We would like to talk to people who understand what the research is about and what taking part will mean.



We would like to talk to people who agree to take part.

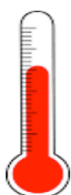
What will happen if you take part?



One researcher from the university and one researcher from Speak Up will meet with you.



We will meet at your home



We will leave a small temperature monitor in your living room and your bedroom.



We will leave these for two weeks.



When we visit to remove the temperature monitors we will ask you what you think



We will talk about how you keep warm in your home.



We will talk about what makes you feel cold in your home.



We will talk about how much gas and electricity you use in your home.



We will talk about who you can ask for help if you need it.

What will happen to the information you give us?



We will record what you say using a voice recorder.



We will listen to the recording and write down what you said.



We will keep all information in a safe place.



What we talk about is confidential. This means we will keep it private.

What will happen to the information you give us?



If we are worried that somebody might get hurt, we will need to tell someone. We will tell you if we have to do this.



We will write about the what we talk about in a report.



We will make an easy to read report too.

You can have a copy of this.



What we learn from the interview will help to make research with people with learning disabilities better.



Taking part will not change the support you receive.



If you are unhappy with anything about the project you can complain.
You can tell us your complaint



Or you can tell **(name)** who works at Speak Up Self Advocacy

(email address)



(phone number)



Or you can tell **(name)** who works at Sheffield University.

(email address)



(phone number)



Please take time to decide if you want to take part.

You can ask us if you have any questions.

Contact details for (*name of researcher*)



(*email address*)



(*phone number*)



Participant Consent Form: workshop

Title of project: Being Warm – Being Happy:
Understanding what helps adults with learning
disabilities keep warm at home.

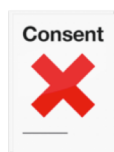
Names of researchers: *(names and
photographs of researchers removed for
confidentiality reasons)*

Contact number: ****

Before taking part in this project you decide if you agree with this form. This is called 'giving consent'



I have read and understand the information sheet.

☐

I understand that I can say **yes** or **no**.

☐

I understand that I can stop at any time.

☐

I agree to the workshop being recorded.

☐



Please tick the box if you **agree**



I agree that what I say can
be used in future
research.

☐

I understand that my
name will be kept private.

☐



Please tick **one** of the boxes below.

I **do** want to take part.

☐

I **do not** want to take part.

☐

Name

Signature

Date

To be filled in by the researcher:

I confirm that I have explained the research study to the person whose name is printed above.

Name of researcher:

Date:

Signature: