

Criminal Law News



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Swarms of military drones



A swarm of drones

Working as a team, the core component of modern military policy, is being considered with regard to military unmanned vehicles. The unmanned aerial vehicle (UAV) is a single reconnaissance drone tracking terrorists or enemy military forces and can pass through enemy defences to perform a hit-and-run attack. US military are researching the design of swarms of semi-expendable reconnaissance and electronic warfare drones which can fall quickly on an unsuspecting enemy to overwhelm them and suppress their missile defences; disrupting their communications systems; terrifying their internal security; and disabling enemy data networks.

Swarms of drones would be launched on the enemy from military planes at safe distances away. Such an idea would be comparatively inexpensive to today's manned military attacks. Although still yet a pipe-dream, it would need much work to iron out the many technical problems envisaged, such as creating effective wireless networks that would enable drones to communicate and work together in teams.



Heated academic debates

Exciting as this news is technically, there will be heated debate by legal academics. In May 2009, the Director of the United States Central Intelligence Agency (CIA), Leon Panetta, responded directly to the growing criticism of America's use of unmanned aerial vehicles, better known as 'drones'.

The United States began using 'weaponised' drones since 2001, but the criticism became heated when the United States (US) increasingly used drones to attack in the border area between Afghanistan and Pakistan.¹ These attacks resulted in the deaths of hundreds of unintended victims, including children.² At the time, counter-terrorism experts wrote an article in *The New York Times* in March 2009, stating that drones are

¹ Bronnitt, S. (ed) (2009) *Shooting to kill: the law governing lethal force in context*, Oxford: Hart Publishing.

² Jane Mayer, 'The Predator War, What are the Risks of the C.I.A.'s covert drone program?' *The New Yorker*, 26 October, 2009.

anything but precise and that the numbers of civilian casualties have not been limited.³ The 2009 article stated that the Pentagon has made two major changes in its strategy to defeat the Taliban, Al Qaeda and their affiliates in Afghanistan and Pakistan, one of which was that the military was giving Pakistan more information on its drone attacks on future control over drone routes, targets and decisions to fire weapons. From September 2008 to March 2009 the Central Intelligence Agency (CIA) operatives had launched more than three dozen strikes. The New York Times explained that drone attacks create a sense of insecurity among militants and constrain their interactions with suspected informers. Because drones kill remotely, drone strikes avoid American casualties. But on balance, the costs outweigh these benefits for three reasons, it was argued. The drone war had created a siege mentality among Pakistani civilians, as it did in Somalia in 2005 and 2006, when similar drone strikes were employed against the forces of the Union of Islamic Courts. This 2009 article stated that over the three years from 2006 to 2009 drone strikes killed 14 terrorist leaders but also killed some 700 civilians and therefore US military claims of drone precision are not true. This is not admitted in the government figures of drone use in PAKISTAN from 2003 to 2014, but it is known that the technology is improving, although it is still difficult to be certain about targets

However, the Obama government released official United States statistics about their drone strikes to the year 2014 as follows:

Below is a summary of CIA drone strikes and casualty estimates for all years between 2009 and 2014, and the US government claims these are 'best estimate' numbers.

(Source: Jack Searle, 'Get the data: Drone wars. Obama 2015 Pakistan drone strikes', *The Bureau of Investigative Journalism*, 5 January 2015, at

³ David Kilcullen and Andrew McDonald, 'Death from above, outrage down below', New York Times, 17 March, 2009. See http://www.nytimes.com/2009/05/17/opinion/17exum.html?_r=0, accessed 25.9.2015.

<https://www.thebureauinvestigates.com/2015/01/05/obama-2015-pakistan-drone-strikes/>, accessed on 25.9.2015.)

United States drones with missile launch capability began to be used in early October

2001 in Afghanistan, apparently at first with the permission of Uzbekistan which

hosted a US airbase where the drones were kept.

| CIA strikes – Obama 2014 | |
|---------------------------------|----------------|
| Total CIA drone strikes | 25 |
| Total reported killed: | 115-186 |
| Civilians reported killed: | 0-2 |
| Children reported killed: | 0-2 |
| Total reported injured: | 53-76 |

| CIA strikes – Obama 2013 | |
|---------------------------------|----------------|
| Total CIA drone strikes | 27 |
| Total reported killed: | 109-195 |
| Civilians reported killed: | 0-4 |
| Children reported killed: | 0-1 |
| Total reported injured: | 43-89 |

| CIA strikes – Obama 2012 | |
|---------------------------------|----------------|
| Total CIA drone strikes | 50 |
| Total reported killed: | 199-410 |
| Civilians reported killed: | 13-63 |
| Children reported killed: | 1-2 |
| Total reported injured: | 100-212 |

| CIA strike – Obama 2011 | |
|--------------------------------|----------------|
| Total CIA drone strikes | 75 |
| Total reported killed: | 363-666 |
| Civilians reported killed: | 52-152 |
| Children reported killed: | 6-11 |
| Total reported injured: | 158-236 |

| CIA strikes – Obama 2010 | |
|---------------------------------|------------------|
| Total CIA drone strikes | 128 |
| Total reported killed: | 755-1,108 |
| Civilians reported killed: | 89-197 |
| Children reported killed: | 23 |

| | |
|-------------------------|----------------|
| Total reported injured: | 351-428 |
|-------------------------|----------------|

| CIA strikes – Obama 2009 | |
|---------------------------------|----------------|
| Total CIA drone strikes | 52 |
| Total reported killed: | 465-744 |
| Civilians reported killed: | 100-210 |
| Children reported killed: | 36-39 |
| Total reported injured: | 262-397 |

On November 3, 2002, the US used a drone outside a combat area to fire laser-guided Hellfire missiles at a passenger vehicle travelling in a thinly populated region of Yemen. The drone was operated by CIA agents based in Djibouti. The U.S. Air Force, at that time, operated the US's drones, but the Air Force was concerned about legal issues raised by the Yemen operation, so the CIA carried out the strike. All six passengers in the vehicle were killed.

US drone costs and usefulness

Drones cost less than manned military aircraft. In 2009, a Predator cost about \$4.5 million, 30 times less than a fighter jet. Further, drones can be used for any battlefield operation: surveillance, reconnaissance, precision attacks, targeted killings, etc. As any other robot, a drone can be used to carry out dull, dirty or dangerous battlefield operations.

Drone firing decisions made by computer

The weather plays a role, as does the attitude of the pilot. There is a tendency to trust the computer in distinction to the pilot's own judgment. If the computer registers that a target has a gun that was recently fired, pilots have a tendency to defer to the computer. This tendency is encouraged by the multiple decisions pilots must make every day in split seconds.

It is likely to increase as pilots oversee multiple drones.

So while the computer is not technically autonomous in deciding to strike, that is becoming the reality.⁴ ENDS+



Spyware- Malwarebytes

Spyware can infect a computer without anyone knowing. It can monitor web surfing habits; change computer configurations; and/or steal personal information such as passwords and banking information. Unprotected computers can place personal privacy and identity at risk. Therefore computer manufacturers advise customers in after-sales that the use of

⁴ Peter W. Singer, 'In the Loop? Armed Robots and the Future of War', Brookings, 28 February 2009, at <http://www.brookings.edu/>.

effective antispyware will result in comprehensive detection, complete removal and 24/7 prevention of spyware threats. In past years, *Malwarebytes Anti-Malware* has detected only ‘*Potentially Unwanted Programs* (PUPs) that was mostly harmful and deceptive’. The manufacturer of the software named ‘*Malwarebytes Anti-Malware*’ indicated that ‘*most of their users have no knowledge that these PUPs were installed and would like them removed. Several thousand forum posts and support tickets confirm this standpoint*’. Microsoft stated that they would (in light of the problems that users face with *Malwarebytes AntiMalware*) like to see all software manufacturers have a policy, not only against malware but also against ‘annoying and misleading software, in a collective effort to stop malware.

MalwareBytes has not bothered to verify that it indeed does not do anything harmful. The puzzles do not download themselves since visitors must click on a link, and then confirm they want to download and run the puzzle. *MalwareBytes*, therefore, by ignoring these issues and classifying them as PUPs without reasonable cause, can harm business. **ENDS+**

U.S. Air Force - safeguard communications nuclear weapons detonations



Officials of the Air Force Research Laboratory Information Directorate in Rome, N.Y., issued a request for information (RFI-RIK-15-04) this week for the Nuclear Communications for Aerial Systems and Technologies (NCAST) project. NCAST involves communications technologies that can survive and operate through nuclear explosions using frequencies that offer less competition for spectrum, high capacity, and resilience in nuclear environments. The project also involves modelling, simulation, and emulation (MS&E) systems that can characterize the effects of existing and new airborne communications systems operating in atmospheric environments with electromagnetic pulse (EMP) and nuclear scintillation present. Researchers are looking for information to help them better understand existing

company offerings and the status of research and development of airborne communications technologies designed to operate effectively in nuclear environments. Airborne communications in the higher frequency bands are expected to offer increased levels of radio communications survivability, endurance, and resilience in nuclear atmospheric environments. Radio transmissions in certain wideband frequencies not only allow for relatively high data rates and anti-jam features but also offer high levels of resiliency in the presence of nuclear scintillation and high-altitude EMP. Researchers are looking for wideband radio transceivers that provide efficient spectrum use, anti-jam features; low-probability of intercept; secure transmissions and overall robust operation in nuclear environments. In the military embedded environment, design engineers looking to maximize advancements in commercial electronic processors face multiple SWaP (size, weight and power) limitations. Deployed systems need to be placed within small physical areas, be as light as possible, use limited power, and withstand harsh environments including heat, cold, sand and seawater. Researchers also are interested in optical transceivers that can operate reliably amid nuclear radiation, blast, and EMP effects. Optical communications offer anti-scintillation capabilities and high data rates but are limited by their inability to operate reliably in rain, clouds, smoke, and other atmospheric obscurants. Researchers also want cyber security to safeguard communications systems from jamming, eavesdropping, or cyber attacks in nuclear environments and Radiation-hardened RF antennas that not only can operate in nuclear atmospheric effects.



Identifying the human trafficking crime

Human trafficking is not always easy to detect because trafficking can masquerade as a variety of other offences. But modern-day slavery can be identified; it is an assault on fundamental human dignity. Local law enforcement officers are the first responders in the communities where such crimes occur and are therefore the key players in identifying and exposing these serious crimes.



Convicted human traffickers to receive long sentences

Often, local police who arrest persons involved in vice or domestic violence offences spend many hours processing these incidents only to see these offenders on the street again. But trafficking crimes, when, discovered, charged, tried and convicted, bring long prison sentences to offenders.



Trafficking in the US

In the United States (US) Congress amended the Trafficking Victims' Protection Act to make the most egregious trafficking violations punishable by death. Thus, trafficking crimes are punished with the utmost severity in the US when compared with other applicable crimes covering the same conduct in the US.



People Trafficking, Drugs and Arms trafficking linked

Recent studies demonstrate a link between trafficking in people and trafficking in drugs and arms. Organised crime syndicates may be involved in all three illegal activities, or use established trade routes already established to facilitate their criminal

enterprise. Organised crime groups associated with human trafficking schemes operate across borders. The intelligence required to dismantle such groups often draws upon the resources and assistance of numerous agencies: local, national and international. Recognising the links between organised crime syndicates and human traffickers, has forced many countries to draft human trafficking laws predicate offences. For example, in the US, human trafficking can now come under the laws of the Racketeer Influenced and Corrupt Organizations Act (RICO). Thus, organised crime that may be difficult to dismantle under individual criminal liability theories are made easier to reach through the powerful evidentiary tools available under federal organised crime laws.



No neighbourhood is immune to human trafficking

Human trafficking is not confined to areas with large immigrant populations. People trafficking victimises British girls as well as American and European women and men, especially runaway teenagers who are particularly at risk of being targeted by pimps and other sex traffickers.



Human trafficking victims in the UK to receive specialised assistance

The UK Modern Slavery Act 2015, treats victims of trafficking as victims of a violent crime and provides them with assistance and benefits not normally available to victims and witnesses in other types of cases. Furthermore, in those cases where victims themselves face possible criminal liability on account of their participation in illicit activity, such as prostitution or immigration fraud, the new law mandates that law enforcement protect rather than prosecute such victims. Given their special victim status, trafficking victims may be eligible to receive benefits such as temporary legal immigration status, employment authorisation, English language classes, housing and other assistance, medical treatment and psychological counselling.

In identifying a trafficking situation, it is important to remember that the victim need not be chained or restrained or even beaten. Modern-day slavery means that the defendants use force or threats of harm to coerce work from the victim. In essence, if the defendants make the victim feel that serious harm will result if she leaves, then the case should be investigated as a trafficking matter. Defendants in trafficking cases argue often that a victim consented to her work conditions because she signed an

employment contract or otherwise demonstrated consent. Such arguments do not undermine trafficking charges, where, for example, the consenting victim is defrauded about her working conditions and is thereafter prevented from leaving. In such a case, a victim's initial agreement to work is no bar to a trafficking prosecution.



Detecting and Investigating Trafficking Cases

Know where to look. Although trafficking can occur at any worksite and in any industry, authorities have noticed patterns. Strip clubs, massage parlours, brothels, sweatshops where garments are manufactured, agricultural sites employing migrant labour, restaurants employing workers to serve at tables and to wash dishes, and homes employing domestic help exploit a disproportionate number of trafficking victims. Seemingly benign businesses such as nail shops and massage parlours may also offer commercial sex. Know what to look for. Trafficking victims work long hours, receive very little (or no) pay, are scared of their employers, are restricted in their movement, and may be guarded by other employees or family members of the defendant.

Be aware of fatigue, bruises, or other evidence of injury

Look for withdrawn workers who are afraid of unsanctioned contact with outsiders, or whose statements are censored by overseers. When passing parks or other

recreational areas where nannies or babysitters may take their charges, note the appearance of these workers: are they old or weak in appearance? Are they afraid to talk (either because of fear of contact with outsiders or because their immigration documents are invalid or have expired)?

In vice operations, police take note of particularly young-looking prostitutes.

Know what questions to ask. Examples of appropriate questions include the following: How did you arrive in the United Kingdom?

How did you come to work for X?

Describe your work hours and work conditions. Were you paid?

Were you free to come and go as you pleased?

Could you talk to anyone you wanted to talk to?

Did anyone take your passport or other papers?

Be very careful in selecting your interpreter. In cases involving foreign languages, the available pool of interpreters is small, and the most trustworthy interpreter possible must be used.

Ensure that the interpreter has no biases, in favour of either the perpetrators or the victims.

Ask questions creatively.

Concepts of time differ between cultures.

Some victims may not know how old they are, since they may originate from countries where birth records are not maintained.

Victims may be illiterate or uneducated.

A victim's age is a crucial item of proof in certain types of trafficking cases.

If 'How old are you?' fails to yield an answer, attempt to ask the question creatively.

Try referring to the ages of the victim's family members. Ask:

‘Do you have brothers and sisters?’

‘Do you remember the day your youngest sister was born?’

‘Could you walk and talk then?’

If the victim or witness has children, another effective technique is to use the ages of the child or children as a reference point for determining when key events in the trafficking transaction occurred.

Know when to stop asking questions

Never ask the ultimate question: ‘Were you a slave?’

Some cultures have no equivalent word for ‘slave’ or ‘slavery’.

For certain victims, questions of slavery may cause such embarrassment that a denial is elicited, even though the reality may be otherwise.

Instead, focus on specific instances where the victim's freedom may have been restricted:- freedom to come and go; observe regular work hours; take time off; receive letters; or speak freely to friends and family.

Take pictures of potential targets, witnesses, and victims. Use these photographs when questioning victims and witnesses. In many trafficking cases, key players have a variety of aliases and the witnesses may not know the players by the same names known to the police. More information on potential subjects and witnesses can be obtained by using photographs than by using names.

In suspected trafficking situations, contact people who can help.

Ensure the trafficker is not contacting the victim. Victims and traffickers often remain in contact, even after a victim is safely in the custody of law enforcement. Be wary of traffickers' attempts to contact the victim in order to influence her statements.

Expect that potential trafficking victims will not trust the police immediately- they may trust their traffickers more than they trust police. Some trafficking victims may have been led to believe that police will put them in jail or deport them to their native countries

Sometimes victims may even consider themselves ‘married’ to their traffickers, and exhibit considerable loyalty to them. So officers should adopt a reassuring manner and tone with the victim. Enlist the assistance of nongovernmental public interest groups to find appropriate housing, medical and mental health assistance, and other services for the victim. Demonstrate the police's commitment to the victim's well being to engender the trust necessary to ascertain the truth with time.

Conclusion and Appendix

Investigating and prosecuting trafficking cases are rewarding, both professionally and personally. Successful investigations not only finally imprison the worst kind of criminals for a long time but also transform the lives of victims, many of whom are destitute and defenceless when first liberated, yet may go on to lead productive lives after the case is over. The Appendix below may serve as a useful point in obtaining independent legal representation for trafficked persons. It is an excerpt of a recent Practice Note issued by the Law Society of England and Wales.



APPENDIX 1 (including warning comments on final page)
Relevant excerpts from the 2015 Law Society of England and Wales: Practice Note ‘Meeting the needs of vulnerable clients’ – deemed suitable in finding legal representation for trafficked persons

What is the issue?

Some clients have difficulty accessing and using legal services. Research has concluded that solicitors need to adapt their practices to identify and meet the needs of vulnerable clients. **Who are vulnerable clients?**

The terms vulnerable and vulnerability are used here as a shorthand to address a range of situations which could affect *any client who is at a disadvantage because of factors that affect their access to, and use of, legal services.*

The possibility of vulnerability should be considered whenever you are consulted or instructed by a client in any matter. This Law Society practice note focuses on three broad categories of vulnerable clients. The issues are:

- (1) Clients who have capacity to make decisions and provide you with instructions, but by reason of a range of mental and/or physical disabilities require enhanced support to engage your services and give you instructions.
- (2) Clients who lack mental capacity to make decisions and provide you with instructions, for whom a range of statutory and other safeguards must be followed.
- (3) Clients who are vulnerable to undue influence or duress and who may or may not have mental capacity to make decisions and provide you with instructions.

1.4 Compliance with regulatory and legislative obligations

Section 5 of this note discusses independent third party support for vulnerable clients which can often be crucial in assisting you in obtaining the best possible legal outcome for them.

1.4.1 There are ten mandatory principles which apply to all those the Solicitors Regulation Authority (SRA) regulates and to all aspects of practice. The principles can be found in the SRA Handbook. You should always bear these principles in mind and use them as your starting point. Failure to meet your professional duties within the SRA Handbook may result in SRA sanctions or a referral to the Solicitors' Disciplinary Tribunal.

1.4.2 In addition, if you fail to meet the needs of a vulnerable client you could be at risk of:

A discrimination claim or a claim for a failure to make reasonable adjustments under the Equality Act 2010, which could result in sanctions including damages. A claim for damages or compensation against you or your firm if you act on the instructions of a client lacking capacity to make relevant decisions, having failed to satisfy yourself as to the client's capacity to instruct you or failing to document your assessment of the client's capacity, leaving the validity of the transaction open to challenge. A complaint against you to the Legal Ombudsman, which could result in your name being published and/or you having to pay financial compensation. The ombudsman will refer complaints about discrimination to the SRA. Reputational risk - your practice's reputation is inextricably linked to the way in which you treat your clients.

Conversely, a practice with an inclusive ethos will not only attract a wider group of clients but also a more diverse workforce bringing benefits to the business. Liability to other parties for breach of warrant of authority.¹

1.4.3 This practice note will help you to recognise and meet your duties under the Mental Capacity Act 2005 and the Equality Act 2010.

2. Identifying the vulnerable client

2.1 Vulnerability indicators

Risk factors may be short or long-term, and can fluctuate over time depending on the circumstances. The following are offered as examples of **risk factors** and are not an exhaustive list:-

Children and young people; ill-health; cognitive impairment; mental health problems; learning disabilities; acquired brain injury caused for example by a head injury; difficulty in accessing and/or understanding complex information, for example, because of psychological or emotional factors such as stress; communication difficulties, including as English a foreign language, limited ability to read or write and illiteracy; experience of domestic violence or sexual abuse; or exposure to financial abuse.

Some people may be affected by more than one risk factor - Any one or more of these risk factors may mean that your client is vulnerable and may require your assistance to express their wishes, understand relevant advice and provide you with instructions, or that they may lack capacity to make relevant decisions and to give your instructions.

2.2 Signs of vulnerability: what to look out for

It may not always be easy to identify vulnerability. Some signs may be obvious while others are only just perceptible or hidden. You should not assume that your client will tell you of any difficulties. **Simple observation will identify many mobility problems, physical or sensory disabilities or more severe impairment of mental capacity.** It is important not to feel inhibited about asking for more information for fear of being intrusive - many clients will be open about any disability they have or specific assistance they require, or will be if asked, and will be glad to discuss how you can best meet their needs.

The Law Society practice note on financial abuse provides further guidance on the identification of adults at risk of financial abuse.

2. 3. Identifying the needs of your client

Once you are aware that there are risk factors present, you can help your client to access your services and overcome any disadvantage caused by these risk factors.

You should tactfully try to identify the needs of your client to find out:

- *Whether they have any requirements or preferences for communicating with you have any requirements to access your services, eg how services are provided, such as documents written in clear and simple language or information given orally;
- *whether they understand and can act on the information and advice provided, or
- *whether they may need support to do this, eg from an advocacy service or interpreter.

Carers or family members may also be able to provide helpful information *but in the first instance you should always seek to discuss these matters with the client alone, **unless** the client lacks capacity give you instructions.*

3. Enabling vulnerable clients to access your services

3.1 Areas to think about

Ensuring that your practice provides an accessible service to vulnerable clients will mean considering many different aspects of your practice including:

Marketing/making use of local links: advertising the services that you offer and the ways in which you can assist vulnerable clients and their families and carers. Many vulnerable potential clients will not have access to the internet.

Website accessibility: conversely, for many clients, your website will be an important source of information about your practice and the services that it offers. If your website is not easy to read or navigate or if its content is difficult to understand, you may put off potential clients².

Do you have meeting rooms large enough to accommodate clients who may bring other family members, carers or advocates with them? (The Centre for Accessible Environments can provide you with information about registered access audits ensuring compliance with your statutory obligations to make reasonable adjustments and avoidance of disability discrimination in charging for **reasonable adjustments**.)

Training for staff who may have contact with clients –to:

- * recognise vulnerability;
- * conflicts between clients and carers; and
- * Safeguarding, and financial abuse.

Willingness to visit clients at home: may put them at ease and aid communication.

Accessibility of written communications, eg client care letters; letters of advice, costs information, *written clearly and free from 'legal jargon'*.

The use of support professionals or independent advocates: to assist throughout the legal process, including at the initial advice stage. The '**reasonable adjustments**' duty under the Equality Act 2010 is anticipatory: you must anticipate the needs of people with particular types of disability as well as making tailored **reasonable adjustments** for individuals. This means you need to be prepared. **Types of adjustments that could aid communication with your clients include:** allowing extra time for meetings with clients who may need longer to understand what you are explaining, or who are communicating through a third party; or explaining issues without using legal jargon; or enlisting the help of an appropriate third party.

3.3 Assisting vulnerable clients in the course of court proceedings

3.3.1 Criminal cases

Special considerations and measures apply to vulnerable defendants and witnesses in criminal and family cases. These are especially relevant if you are carrying out any advocacy on behalf of a vulnerable client or instructing counsel to do so. The Advocacy Training Council has developed specialist toolkits under the Advocates Gateway programme which provide valuable advice on supporting vulnerable clients throughout the trial or hearing process. The toolkits can be accessed from the Law Society website. A range of '*special measures*' apply to vulnerable and intimidated witnesses (**but not defendants**) in criminal cases pursuant to **sections 16 to 33 of the Youth Justice and Criminal Evidence Act 1999**, including screens to shield the witness from the defendant, use of a live link, exclusion of the public from the courtroom, and the removal of wigs and gowns in the Crown Court. The court may appoint an intermediary to assist a vulnerable witness to give their evidence at court and facilitate communication; the intermediary may explain questions or answers so far as is necessary to enable them to be understood by the witness or the questioner, without changing the substance of the evidence.

The Coroners and Justice Act 2009 extended intermediaries to the evidence of defendants, **but this provision is not yet in force**. However, the courts have a common law duty to appoint an intermediary to ensure that a **vulnerable child defendant** can have a fair trial (see *R(C) v Sevenoaks Youth Court*[2009] EWHC 465 (Admin); and *R (OP) v SS Justice, Cheltenham MC, and CPS (Just for Kids Law intervening)* [2014] EWHC 1944 (Admin)).

4. Clients who may lack mental capacity

4.1 What is capacity?

Mental capacity is the ability to make a decision - both day-to-day decisions and more significant decisions that may have legal consequences, such as buying property, entering into a contract, making a will, bringing or defending legal proceedings or seeking a divorce. Capacity is decision-specific, so a client may have capacity to make a simple decision but does not have capacity to make a complex decision or a decision that has significant consequences or carries significant risk.

If you reasonably entertain a doubt about your client's capacity to give proper instructions, it is your professional duty to satisfy yourself that the client either has or does not have the capacity to give instructions.⁵ The statutory test of capacity to make a decision is contained in **section 2(1) MCA 2005** which is set out at paragraph 4.3 below. There continues to be judicial debate as to the relationship between the statutory capacity test and common law tests of capacity although the High Court has clarified the position on the test for capacity to make a will and to make a lifetime gift (both of which are addressed at paragraphs 4.5.1 and 4.5.2 respectively). The test of capacity to conduct proceedings is set out in 4.5.3. below.

4.2 Mental Capacity Act 2005 - the statutory principles

Section 1 MCA 2005 contains the first three principles that are the starting point for assessing capacity:

1. A person must be assumed to have capacity unless it is established that he lacks capacity.
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.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

The starting point is the presumption that an adult client has full legal capacity to make their own decisions. Where there is doubt as to a person's capacity, the burden of proof is on the person seeking to establish a lack of capacity, on the balance of probabilities.

A person must be given all appropriate help and support to enable them to make their own decisions or, in the event that they are assessed as lacking capacity to make the decision in question, to maximise their participation in any decision making process.

An unwise decision should not, by itself be sufficient to indicate lack of capacity.

However, doubt may be raised as to the person's capacity if, for example, their decision is out of character.

4.3 Mental Capacity Act 2005- the legal test for “*capacity to make decisions*”

You should be aware that a lack of capacity cannot be established merely because of a person's age or appearance or their condition or an aspect of their behaviour. Section 2(1) of the MCA 2005 states that:

*'... 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.'*⁶

Capacity is therefore both decision specific and time specific and the inability to make the decision in question must be because of *'an impairment of, or a disturbance in the functioning of the mind or brain'*.

Although there is one test of capacity, the statutory Code of Practice which supports the MCA 2005 identifies two elements: the 'diagnostic' and the 'functional' elements. Does the person have an impairment or disturbance that affects the way their mind or brain works? Does the impairment or disturbance mean that they are unable to make a specific decision at the time it needs to be made for one or more of the reasons set out in section 3 MCA 2005? It is important to understand that a person is only considered to lack capacity for the purposes of the MCA 2005 *if their inability to make a decision is because of impairment or a disturbance in, the functioning of, the mind or brain*. MCA 2005 section 3 defines what it means to be unable to make a decision. In deciding whether the person is unable to make a decision the following four factors must be considered: Does the person understand the information relevant to the decision? Can the person retain the information? Can the person use or weigh up the information as part of the process of making the decision? Can the person communicate their decision (whether by talking, sign language, or any other means)? Information relevant to a decision will include the particular nature of the decision in question, the purpose for which it is needed, the effect(s) of the decision and the likely consequences of deciding one way or another or of making no decision at all (MCA 2005 s.3(4)). You must provide an explanation of the relevant information in ways that are appropriate to the person's circumstances, using the most appropriate form of communication to help the person understand. Retaining information for even a short time may be sufficient in the context of some decisions. It depends on what is necessary for the decision in question. You can find further guidance about the MCA 2005 test of capacity in chapter 4 of the MCA 2005 Code of Practice. (Section 6 of this practice note addresses the position where a client has capacity to make the material decisions but is vulnerable to the influence of those around them).

4.4 Capacity to instruct a solicitor to carry out specific instructions

You must be satisfied that your client has capacity to give you instructions on the matter in question. If you have any doubt as to whether a client has capacity to provide an instruction or instructions, you must undertake a capacity assessment before any instructions are acted upon. To do otherwise may place you at risk of the sanctions set out at paragraph 1.4.2 above.

Different levels of capacity are required for different transactions.

For example, different considerations apply to making a gift than in conducting litigation. You must assess the client's understanding in the context of the transaction upon which you are instructed, applying the relevant legal test of capacity (see paragraph 4.5 below) and then consider whether the client is able to provide you with instructions on what they wish to do. Even if you are satisfied that your client has the necessary mental capacity to make a specific decision, you may still need to be alert to the possibility of the client being subject to undue influence (see section 6).

If your client lacks capacity instruct you your role, your obligations and responsibilities are different from when you are acting for a client with capacity.

4.6 Assessing capacity

It is for you to decide whether a client has capacity to instruct you and whether you can accept and act on the client's instructions. Although the MCA 2005 guiding principle is the presumption of capacity you would not be acting in your client's best interests when you knew or should have known that there were grounds to doubt their capacity without first satisfying yourself that the client does indeed have the requisite capacity - see paragraph 1.4.2 above. You must apply the relevant legal test in respect of each particular transaction at the time the decision needs to be made. The assessment should be conducted whenever possible with the client alone. You should not assume that anyone accompanying the client (including a family member) has their genuine interests at heart. It may be useful if you also observe how any relative or friend who has accompanied the client behaves towards the client and vice versa as that may identify whether there is the risk of undue influence or pressure.

If you are concerned about a client's capacity, especially in relation to a decision with serious consequences either for them or other people, it is advisable to seek the opinion of an appropriately qualified professional.

Where possible, you should choose a professional who knows your client and has expertise relevant to your client's condition. You should explain to the professional the legal test of capacity and ask for an opinion as to how the client's medical condition may affect their ability to make the decision in question.

5.5 Appropriate Adults in criminal matters

Under the Police and Criminal Evidence Act 1984 (PACE) Codes of Practice, police custody sergeants must secure an Appropriate Adult (AA) to safeguard the rights and welfare of vulnerable people (children aged 10-17 and mentally vulnerable adults) who are detained and questioned by the police. The role includes:

- *to support, advise and assist the detained person, particularly while they are being questioned to observe whether the police are acting properly, fairly and with respect for the rights of the detained person, and
- *to tell them if they are not, and
- *to assist with communication between the detained person and the police; and
- *to ensure that the detained person understands their rights and that the AA has a role in protecting those rights.

An AA should be someone who is completely independent of the police and, where possible the vulnerable person (although parents often do act as AA for a child or young person). It is desirable that they should have a sound understanding of, and experience or training in, dealing with the needs of juveniles, vulnerable adults or mentally disordered people. An AA cannot, merely because of their position, give instructions to a solicitor on behalf of the individuals they are to assist.

6. Influence and undue influence

There are a significant class of people who are unable to take their own decisions but whose inability to do so stems from the influence exercised over them by others (for example family members), rather than from an impairment of, or disturbance in, their mind or brain.

The law treats such vulnerable individuals differently to those lacking capacity for the purposes of the MCA 2005: because the person has capacity to make their own decision, no other person may take decisions on their behalf.

In these circumstances it is possible for any person or body concerned as to whether the individual is under duress to seek the assistance of the High Court to provide its protection under its inherent jurisdiction.¹⁴ The High Court has the power to grant injunctive or other relief with the aim of putting in place a framework to enable the individual to make their own decisions.

In your first meeting with a vulnerable client, information may come from an intermediary, such as a family member, carer or concerned neighbour. In the majority of cases their assistance is well intentioned and they will be communicating on behalf of, and with the consent of, the client.

However, you should be aware of the possibility of conflicts of interest or, in some cases, undue influence. Your overriding duty is to your client and you must ensure that your instructions are from your client, free of undue influence of others. So, if your client has capacity to do so, you should confirm your instructions directly with the client by seeing them on their own, especially if detailed information has been provided by someone else.

Clients may seek legal advice (for example to make a will, an LPA or a significant gift) because they have been influenced or told by someone, such as a family member, that they ought to do so. Such 'influence' may be well-intentioned and sensible. However, if you suspect that a client's instructions are the result of coercion or pressure ('undue influence'), you need to exercise your professional judgment as to whether you can proceed or continue to act on the client's behalf.

Your duties in relation to assessing the possibility of undue influence bearing upon your client are underpinned by the indicative behaviours in chapter 1 of the SRA Code. In particular IB 1.6 and IB 1.28 directly address the issue of undue influence:

IB (1.6) 'in taking instructions and during the course of the retainer, [have] proper regard to your client's mental capacity or other vulnerability, such as incapacity or duress.'

IB (1.28) 'acting for a client when there are reasonable grounds for believing that the instructions are affected by duress or undue influence without satisfying yourself that they represent the client's wishes'.... would demonstrate that you have failed to comply with the Code.'

D. WORKING WITH CLIENTS WITH LEARNING DISABILITY

John and Mary Smith need advice about possible care proceedings being taken in respect of their two year-old child. They have received a pre-proceedings letter from the local authority which urges them to take legal advice and which gives your firm's name (among others) as appropriate specialists. An appointment has been made, by telephone, by an independent advocate Mrs Jones, who said she was calling on behalf of the Smiths as they both have learning disabilities and find formal telephone conversations and correspondence problematic. She has left her contact number.

Although you are a very experienced care proceedings lawyer, you have not worked with clients with learning disabilities before, or with an independent advocate. Colleagues tell you that, in general terms, independent advocates help the people they work with to participate in decisions that affect their lives, to understand what they are being told and enable them to make their views, opinions and decisions known.

Your colleagues say that, similarly to working with intermediaries in court, having the assistance of an independent advocate is essential for ensuring that you can communicate effectively with your clients and that they can communicate effectively with you.

Points for consideration:

Recent case law involving parents with learning difficulties (for example *A Father v SBC & Others* [2014] EWFC 6) emphasises the need to ensure that the processes by which decisions about the children are made are fair and that the parents are sufficiently involved in that process. The Human Rights Act 1998 and the Equality Act 2010 are therefore likely to be particularly relevant for your clients.

All aspects of this case, including the Smiths' contact with you and the local authority, how meetings and correspondence are managed, what services are offered, how decisions are reached, what adjustments have been made, will be pertinent when considering whether there has been compliance with the legislation.

8.3.2 Mental Capacity Act practice and procedure

MCA 2005 Code of Practice

Social Care Institute for Excellence - MCA Directory

Court of Protection Handbook Guidance

British Medical Association MCA Toolkit

39 Essex Chambers - Mental Capacity Newsletter

ENDNOTES TO APPENDIX

1. *Blankley v Central Manchester & Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18
2. The World Wide Web Consortium produces recommendations for website accessibility.
3. *Norah Fry Centre Research*, 'What happens when people with learning disabilities access legal services?'
4. The Law Society practice note on providing services to deaf/hard of hearing people provides more guidance.
5. *RP v Nottingham City Council and Official Solicitor* [2008] EWCA Civ 4
6. *PC & Another v City of York Council* [2013] EWCA Civ 478
7. *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 confirmed in *Dunhill v Burgin* [2014] UKSC.
8. *Sheffield City Council v E and another* [2005] Fam 326 per Munby J at para 38
9. Part 21 Civil Procedure Rules 1998, Part 15 Family Procedure Rules 2010, Part 17 Court of Protection Rules 2007.
10. *Kenward v Adams* [1975] CLY 3591; *The Times*, 29 November, 1975.
11. *Baker Tilly v Makar* [2013] EWHC 759 (QB).
12. *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18.
13. If a suitable panel is established, it may in due course be possible for solicitors to be appointed directly to represent the subject of proceedings before the Court of Protection as 'accredited legal representatives'.
14. *Re L (vulnerable Adults with Capacity: Court's Jurisdiction)* [2012] EWC CIV 253.
15. *A Local Authority v DL & Ors* [2011] EWHC 1022 (Fam)



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