



# BEYOND LIMITS

Beyond the limits of conventional support

## **Capacity and Decision-Making Policy**

This policy sets out the commitments of Beyond Limits in ensuring that we work with the people we support and promote their right to make decisions about matters that affect them.



## INTRODUCTION

The Mental Capacity Act 2005 is a piece of legislation enacted in 2007. Its purpose is to empower and protect the rights of individuals who may not have the ability to make a specific decision. The act is applicable to those aged 16 years or older residing in England or Wales. The legislation provides staff with a statutory framework to support the people we support with decision making or to plan ahead if loss of capacity is anticipated. The overarching aims of the Act are to promote autonomy and protect vulnerable people from harm.

Beyond Limits embraces this piece of legislation will work within its boundaries to promote decision-making and protect (but not limit) the decision's made on behalf of people who lack the capacity to make decisions for themselves in certain areas of their lives.

The purpose of this policy is to support staff in the understanding and application of the Mental Capacity Act (2005). This will ensure the rights of the people we support are upheld and that staff



**act in their best interests at all times. This policy identifies who can make decisions, in which circumstances and what actions must be taken that allow a person to lawfully provide care and treatment to someone who lacks capacity. This policy also sets out the actions to be taken if someone who we support presents with a valid Lasting Power of Attorney (LPA) or an advance decision document. An advance decision document may also be known as an advance directive, or a living will.**

## **DEFINITIONS**

- **ADVANCED DECISION TO REFUSE MEDICAL TREATMENT (ADRT)**  
A written advanced decision made by a person we support prior to loss of capacity. The document is valid and legally binding if it complies with the prerequisite of the Mental Capacity Act (2005). Most ADRT relate to decisions around life sustaining treatment.
- **ADVOCATE**  
An independent person to help and support someone to understand issues and express their own views, feelings and ideas. An independent advocate will be appointed under the Care Act (2014) where a person has substantial difficulty engaging with an assessment process and has no one suitable to represent them other than paid carers.
- **BEST INTEREST**  
Is not actually defined in the Mental Capacity Act (2005), but when working out what is in the best interests of the person who lacks capacity to make a decision or act for themselves, decision makers must take into account all relevant factors that would be reasonable to consider, not just those that they think are important. They must not act or make a decision based on what they would want to do themselves if they were the person who lacked capacity ([Section 4 Mental Capacity Act 2005](#))
- **COURT OF PROTECTION**  
A specialist court for all concern relating to individuals who lack mental capacity to make specific decisions.

- **DECISION MAKER**  
The person who is responsible for deciding what is in the best interests of an individual who lacks capacity. Who this is depends on the decision that needs to be made and sometimes it will be a professional and at other times a family member, carer or close friend.
- **DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS)**  
The process of independent assessment to safeguard people whose care involves restrictions and, or restraint in their best interests, to which they cannot validly consent.
- **ENDURING POWER OF ATTORNEY (EPA)**  
A form of Power of Attorney role created under the Power of Attorney Act 1985. EPA pertains to finance and property of an individual.
- **INDEPENDENT MENTAL CAPACITY ADVOCATE**  
Someone independently appointed to provide support and representation for a person who lacks capacity to make specific decisions, where the person has no one else to support them.
- **LASTING POWER OF ATTORNEY (LPA)**  
The Mental Capacity Act allows a person (donor) to appoint an attorney to act on their behalf for health and welfare and, or financial decisions should they lose capacity in the future. Any decision by the attorney must be made in the donor's best interests and they must be registered with the Office of the Public Guardian.
- **MENTAL CAPACITY ACT (2005)**  
A piece of legislation that is designed to protect and empower people who may lack capacity to make their own decisions relating to care and treatment.
- **MENTAL CAPACITY ASSESSMENT**  
An assessment of a person's ability to make an informed choice regarding a specific decision.
- **MENTAL DISORDER**  
A disturbance of the mind or brain that results in a cognitive impairment for instance dementia or a learning disability.
- **OFFICE OF PUBLIC GUARDIAN (OPG)**  
A Government office that helps individuals in England and Wales to remain in control around decisions relating to finances and health and welfare including LPA and EPA.

## **POLICY DETAIL**

### **MENTAL CAPACITY ACT (2005)**

**Having mental capacity means that a person is able to make their own decisions or give informed consent. The act states a person should receive support to help them make their own decisions before it is concluded they lack capacity to do so themselves. The act is specifically designed to cover situations where someone is unable to make a decision because their mind or brain is affected by illness or a disability. The Mental Capacity Act (2005) applies to situations where a person may be unable to make a particular decision at a particular time, but this does not mean that a person lacks all capacity to make any decisions. This policy applies to all employees, volunteers, apprentices and any students who may be employed by Beyond Limits or who are completing placements in accordance with their university requirements.**

### **THE FIVE PRINCIPLES OF THE MENTAL CAPACITY ACT (2005)**

**All employees must follow the MCA five key principles, which are:**

**1. A PERSON MUST BE ASSUMED TO HAVE MENTAL CAPACITY UNLESS IT IS PROVED OTHERWISE**

**All people (aged 16 and over) must be assumed to have mental capacity to make their own decisions. The assumption of capacity means that staff should act on the basis that the person is able to consent or make a relevant decision. If staff doubt a person's mental capacity, they should speak with their line manager or service leader as it may be that a mental capacity assessment is required by someone who has expertise in this area.**

**2. UNTIL ALL PRACTICAL STEPS HAVE BEEN TAKEN TO HELP SOMEONE MAKE A DECISION WITHOUT SUCCESS THEY CANNOT BE TREATED AS LACKING MENTAL CAPACITY.**

**People must be supported as much as possible to make their own decisions before anyone concludes that they cannot make their own decisions. For clarity, this means that people must be assumed to have capacity and must be helped to have capacity until it has been assessed that the person does not have capacity.**

**3. A PERSON IS NOT TREATED AS UNABLE TO MAKE A DECISION THEMSELVES BECAUSE THEY ARE MAKING AN UNWISE DECISION.**

**A person can make a decision that may appear unwise and even unsafe. It is important to consider whether the person has the mental capacity to make that decision including an understanding and acceptance of the consequences of that decision. For clarity, at times**



**people will make decisions that appear risky or unwise. This in itself is not a reason to assume the person lacks capacity.**

**4. ANY ACT OR DECISION TAKEN ON BEHALF OF SOMEONE LACKING MENTAL CAPACITY MUST BE IN THE PERSON'S BEST INTEREST.**

**If the person has been assessed as lacking capacity to make a decision then the act states that any decisions made on behalf of the person, must be made in the person's best interests.**

**5. ANY ACT OR DECISION TAKEN ON BEHALF OF SOMEONE LACKING MENTAL CAPACITY SHOULD AIM TO BE THE LESS RESTRICTIVE OPTION IN TERMS OF THE PERSONS RIGHTS AND FREEDOMS.**

**There is a statutory obligation on those making best interest decisions to consider the least restrictive options and ensure any interventions are proportionate and necessary.**

**All employees at Beyond Limits are required to adhere to these principles and will receive training and support to enable them to feel confident in supporting decision-making and identifying when someone lacks capacity and requires the involvement of others to make decisions or act on their behalf.**

## **HOW TO WORK WITH THE ACT AND INDIVIDUAL RESPONSIBILITIES**

**This is what Beyond Limits will do to ensure the Mental Capacity Act (2005) underpins all that we do.**

**Initially when Beyond Limits carries out a Service Design Day and/or completes a Working Policy with a person we are going to support, the question of capacity in all areas of their lives will be discussed and recorded. The issue of capacity should be explicitly recorded in the person's working policy as this will provide clarity about any legal representatives who have the jurisdiction to make decisions on their behalf.**

**When completing and reviewing the working policy, we will work with all other professionals involved in the person's life and contribute to decision making around the person's capacity. We will**

**work within the spirit of the act and consider all decisions taken and ensure our views are heard that all decisions should be made in the person's best interests.**

**It is important to remember that each of us has a responsibility to work within the guidance of the act and uphold the five principles outlined above. Importantly we should:**

- **Be careful we do not make assumptions about someone's best interests based on their age, appearance or behaviour**
- **Encourage, wherever possible the person to take part in the decision-making process or improve their ability to**
- **Ensure there is no discrimination influencing the way you work with the person.**
- **Work with the person to increase their decision-making powers**
- **Support the person to have control over their life and teach people skills which increase their confidence**
- **Support someone to make informed choices, from what they wear, when they want to get up in a morning and what they will spend their money on**
- **Always work from the position of assumed capacity until you have seen evidence that suggest otherwise**

## WORKING WITH RESTRICTIONS

**The act is clear that when people lack capacity and restrictions have to be imposed, the least restrictive option must always be considered.**

**If you are working with someone who requires the use of physical intervention and/or escape techniques, this must be recorded in the working policy, and you must work within the [CALM framework and guidelines](#).**

**Importantly:**

- **A full CALM assessment must be completed to determine the extent and nature of any physical intervention required.**

- **It must have been assessed that physical intervention is absolutely necessary to prevent the person coming to harm.**
- **You must ensure that the physical intervention used is reasonable and in proportion to the potential harm. Beyond Limits is a member of the Restraint Reduction Network and as such is committed to reducing the use of physical intervention across the organisation, where appropriate. For more information, please see [Restraint Reduction Network](#).**

## DEPRIVATION OF LIBERTY SAFEGUARDS

Deprivation of Liberty Safeguards (DoLS) is an amendment to the Mental Capacity Act (2005). It also introduces Liberty Protection Safeguards (LPS), the Law Commission's proposed replacement for DoLS.

DoLS ensures people who cannot consent to their care arrangements are protected if those arrangements deprive them of their liberty. Arrangements are assessed to check they are necessary and, in the person's best interests.

As Beyond Limits provide support to people in their own home, an application to the Court of Protection in the person's best interest must be used to restrict or restrain any person we support in any way. This would be completed with a multidisciplinary team, ensuring a best interest meeting is held for the person. The outcome of such a meeting must be recorded in the working policy and any restrictions imposed must be explicitly recorded and highlighted to all staff responsible for working with the person.

Please refer to the Capacity Process flow chart in Appendix A for details of when an assessment of capacity should be made.

## CAPACITY ASSESSMENTS

A capacity assessment will be made (if needed) by external professionals with the appropriate authority. However, there may be times when we are asked (as part of multi-disciplinary working) to contribute to these assessments. As such, it is important to be aware of the process that takes place when a capacity assessment is needed.

The Mental Capacity Act (2005) is a two-stage test of capacity which should be used to see whether an assessment of capacity is required.

1. Is there an 'impairment of or disturbance in the functioning of a person's mind or brain' affecting their ability to make a decision?

A person's capacity to make decisions can be affected by lots of things (confusion, a learning disability, poor mental health) but having a mental health problem or a learning disability does not necessarily mean that the person lacks the capacity to make *all* decisions. This is where the second step comes in.

2. Is that 'impairment or disturbance in the functioning of a person's mind or brain' sufficient that the person lacks capacity to make that particular decision at that particular time?

If the decision in question is a complex one there will need to be consultation with other people and a best interest meeting (at which you may be involved) may be required. These other people might be the care manager, other support workers and external professionals.

**A complex decision should never be made by one individual.**

## EXAMPLES OF COMPLEX DECISIONS

- Where there is disagreement with the person, their family or others about their capacity to make a decision.
- Where the person's capacity may be challenged by someone
- Decision over life sustaining and other serious medical treatment
- Where other people might be put at risk
- Whether a person should move to new or a different type of accommodation
- Whether the person should receive care or support at home
- Where the decision has legal complications or consequences such as liability
- Where there are significant financial or property issues

## **DECISION MAKING STEPS**

**There are 5 steps to assessing whether a person lacks the capacity at the time that the decision is required. The person must be able to complete all 5 steps, or they are likely to lack capacity:**

- 1. Can the person understand the information relevant to the decision – generally what the decision is and why they need to make it?**

**This is where it is really important we make information as accessible as possible for the person and really understand how they communicate. These are some of the ways to help a person understand information:**

- Use pictures, photos, Makaton, or any other communication tool**
- Give information with someone present who knows the person well**
- Find somewhere the person feels comfortable and able to concentrate**
- Give time for them to absorb, discuss and reflect on the information**
- Give information at a time of day they are most alert, i.e. not after medication**
- Give information in manageable chunks**
- Give information separately on each different topic**
- Ask a person in the same situation, or who had had to make the same decision to explain it to the person**

- 2. Can the person remember the relevant information for as long as it takes to make the decision?**

**The person only has to understand the information for as long as it takes to make the decision. However, you must be aware if you begin to consider the person lacks the capacity to make the same decision at a future date then the process must be followed again.**

- 3. Can the person consider the information and weigh up the importance of it and pros and cons?**

**Can they grasp the basics of what the outcome of the decision might be?**

- 4. Can the person communicate their decision?**

**This does not need to be through talking, it can be through gesture, signing or however the person communicates usually.**

**Decisions that can never be taken on someone's behalf:**

- **Marriage**
- **Civil partnership**
- **Divorce**
- **Sexual relationships**
- **Adoption**
- **Voting**
- **Consent to fertility treatment**
  
- **If an assessment is carried out because there is doubt about a person's capacity to make a decision and that decision is then made on behalf of that person by others, these people become known as the 'decision-makers'.**
  
- **Best interest decisions are usually made by a group of people of which a Beyond Limits employee may be a member. Others may include the care manager, a court of protection deputy, family, health employee, other professionals, and people from the person's circle of support.**
  
- **The decision-makers should follow a best interest checklist when reaching a best interest decision.**

**Guidelines include**

- **Do not make assumptions about someone's best interests based on their age, appearance or behaviour**
- **Take all relevant circumstances into consideration**
- **Make sure you have everything you need to encourage the person to take part in the decision-making process, or improve their ability to**
- **Consider any past or present beliefs and values (e.g. religious, cultural or moral) that would be likely to influence the decision in question and any other relevant factors**
- **Consider the views of other relevant people in particular, anyone the person asks you to consult, those involved in supporting the person (Beyond Limits employee) anyone else interested in their welfare, court appointed deputies etc.**
- **Consider if it is likely that the lack of capacity is a temporary one. If so the decision should be deterred until they are able to make the decision**
- **If the decision is life sustaining medical treatment, it must not be motivated by a wish to hasten the person's death**
- **Decisions must not be motivated by any type of discrimination**

## **ADVANCED DECISIONS**

**Some decisions that need to be made are difficult and require sensitive support, but in an age where people are living longer because of medical advances, you may support people who have capacity which becomes impaired over time due to illness or old age.**

**If a person you support has capacity and wants to plan for the future when their capacity may become impaired there are two ways they can do this.**

- 1. Lasting Power of Attorney (LPA) Where a person over 18 with capacity can appoint another person to take decisions about health, welfare and property if, in the future they lose the ability to do so themselves. LPA's have to be registered with the Office of the Public Guardian and must always act in the person's best interests.**
- 2. Advance decisions where a person over 18 with capacity makes an advance decision about receiving medical treatment should they later lose capacity. This is a useful tool for someone with an enduring mental health need that requires treatment at a time the person may not have the capacity to make a decision about a particular medical treatment. E.g. if they don't want certain psychotropic drugs used. Advance decisions can include refusal or lifesaving treatment. They must be respected and are legally binding.**

**It is important that Beyond Limits is aware of any LPA or advance decisions in place as people involved or decisions made must be included in support planning and details must be recorded in a person's working policy.**

## **INDEPENDENT MENTAL CAPACITY ADVOCATE (IMCA)**

**An independent mental capacity advocate (IMCA) safeguards the interests of people who lack capacity to make important decisions and have no one except paid employees to advise and support them.**

**IMCA's are paid for by the local council. All referrals to an IMCA service must be made by the relevant council and so the care manager must be contacted.**

**If the decision is required quickly there should be no delay in one being appointed. If there is a delay, contact the appropriate service leader who will take the matter further. IMCA's have the right to see all relevant support records. They must be given a written copy of the assessment decision, and the reasons for it.**

## **COURT OF PROTECTION AND DEPUTIES**

### **Court of Protection**

The court rules on any matter covered by the MCA for example, whether someone has capacity and what is in their best interests.

### **COURT OF PROTECTION DEPUTY**

A Deputy is a person appointed by the Court of Protection who is given rights and responsibilities to make decisions about a person deemed to lack capacity. The appointed person is responsible for looking after finances (benefits and savings) and/or welfare when the person is assessed to lack that particular capacity. This means they have legal rights to access the person's financial records and a legal responsibility that makes them accountable for these decisions. A Deputy can be checked on by the Court of Protection at any time and therefore they require evidence to support decisions and financial spending if necessary.

For those people Beyond Limits supports who have a Court of Protection Deputy, we must ensure that evidence of financial transactions we have been involved in on their behalf are given to them on a regular basis, as the Deputy will be monitored by the Court of Protection and this evidence will be required. Doing this also ensures Beyond Limits are checking for any financial irregularities in money they handle that belongs to the people we support.

Each service undergoes a financial audit every quarter and any issues are escalated to a Senior/Service Leader.

For the people we support who have a Deputy (this will usually be a family member or someone from the local authority) we may be asked to support the person to spend money that is held by the Deputy. In which case we must keep evidence that we are doing so and that we are doing so in ways that safeguard the person's finances.

As we are involved in handling a person's money we must therefore follow Beyond Limits policies around handling money and we must also ensure we have agreement with the Deputy and provide evidence for the deputy that the way we are supporting the person to spend their money, safeguards their finances.

## **THIS IS THE PROCESS TO FOLLOW**

- **The working policy developed MUST RECORD who the Deputy is**
- **When developing the working policy, we must agree with the Deputy appropriate financial standards including a budget (weekly or monthly) what we are going to support the person to do (e.g. withdraw money from a cash point, reconcile money, count the petty cash or pay at the checkout). The budget should include what items money can be spent on and an amount (e.g. £30 a week for food, £40 a month on clothes), what level of spending above which the Deputy wants to be notified and give the agreement for (this is usually around £50) and anything else the Deputy wants to be consulted about.**
- **The Service Leader must also agree with the Deputy whether they wish receipts to be kept at the person's home or be sent to them on a monthly basis (this must be recorded as part of the financial section in the person's working policy)**
- **Every month the Service Leader should be given the receipts by the Team Leader for the month and reconcile the figures on a summary sheet. Photocopies of receipts should be made for our own records (if original receipts are going to be sent to the Deputy)**
- **The Service Leader must alert the Director of Operations, and the Finance Director should they find any discrepancies whilst reconciling the expenditure**
- **A copy of the monthly reconciled figures should be sent to the Deputy (with receipts additionally if requested)**
- **A copy of the monthly summary sheets must be kept in the appropriate file for the person in the central office**

## **OFFICE OF THE PUBLIC GUARDIAN (OPG)**

**The OPG keeps a register of holders of LPA'S and Deputies and monitors what they do. The OPG has 'visitors' that can be called on to investigate concerns about the conduct of holders of LPA's and Deputies.**

**Deputies and LPA holders have to keep records of the decisions made on behalf of a person and if they look after their finances accounts to show how financial decisions have been made, and how money has been spent. They could be asked by an OPG visitor to present this information.**

## **WHEN THE MENTAL HEALTH ACT 1983 (MHA) SHOULD BE USED RATHER THAN THE MENTAL CAPACITY ACT 2005 (MCA)**

Before an application can be made under the Mental Health Act, decision-makers (not employees) should consider whether they could achieve their aims safely and more effectively by using the MCA. A member of staff may be included in discussions about the best interests of a decision to use the MHA and should bring any information on how support is/ or can be provided to keep the person safe in their chosen environment.

The Mental Health Act should be used when:

- The required treatment cannot be given without detention under the Act
- The required treatment cannot be given under the Mental Capacity Act (for example where the person made a valid advance decision to refuse treatment that they now require)
- The person requires physical intervention in a way not allowed under the MCA
- The person is expected to regain capacity and may then refuse treatment or part of the treatment they require
- There is some other reason the person might not get treatment and they or someone else may suffer as a result

## **CONSENT TO TAKING PART IN RESEARCH**

If a person we support is approached to take part in research and they lack capacity to make that decision then:

- A family member, friend or other independent person must be consulted and agree to the involvement
- If the person shows any signs of not being happy to take part then the involvement must end
- A research ethics committee must have checked and approved the research
- The committee must also have agreed to what the researcher will do if the person loses capacity whilst the research is underway
- All other normal decision-making guidelines and other code of practice principles apply

## **MENTAL CAPACITY AND HOUSING/TENANCIES**

- No one, whatever level of capacity should be precluded from having their own home; as a tenant or homeowner. There are steps to take in both situations. However, if a person lacks mental capacity to sign a tenancy agreement or terminate it then the tenancy can only be signed by someone authorised to do so by the Court of Protection because a tenancy

- **agreement** is a legal document covered by property and affairs.
- Sometimes the landlord of the property may not require a signature on the agreement. However, this practice is discouraged by the Court of Protection as it could make the tenancy agreement unenforceable and put the person's living arrangements at risk.
- When working with a person to understand their tenancy we should follow the principles of the Mental Capacity Act which are that:
  - We must begin by assuming the person has capacity unless it is established that they lack capacity to make the decision in question at that time (because of their behaviour, previous capacity issues similar to this decision or information available from others suggest they lack capacity to make the decision).
  - People must be helped to make decisions by taking all 'practicable steps' to help them and only deem them unable if they still cannot make the decision in question (by using simple language, photos etc.)
  - Only after we have tried whatever ways we feel will help them understand the 'essentials of the deal' as detailed below, should we consider taking further steps
- The Department of Health information agency DH Care Networks Housing LIN Factsheet 20 says that for someone to understand their tenancy, they need to '*understand the essentials of the deal*' so we need to evidence that:
  - The person has basic concept of money
  - Understands the concept of owning it and exchanging it in return for something
  - Basic concept of promises and rules which need to be abided by (even if they require help to manage to keep what they promise)
  - If after every effort we feel the person lacks capacity to understand and agree to their tenancy then the following steps should be taken with the full involvement of the person's family and/or care manager
- If the person only requires their tenancy signing/terminating then an application can be made for an order specifically dealing with this, however if the person lacks the capacity to manage other aspects of their property, affairs and welfare and have other assets and income other than social security benefits then it will usually be necessary to appoint a deputy to deal with it all (local authority, family or solicitor usually).
- It will assist the Court of Protection if you contact them by email or phone before making an application so that you do not make mistakes that may mean the application is rejected or sent back.

## GLOSSARY of TERMS

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**Advance decision to refuse treatment (ADRT) - allows an adult with capacity to set out a refusal of specified medical treatment in advance of the time when they might lack the capacity to refuse it if it is proposed. If life-sustaining treatment is being refused, the advanced decision has to be in writing, signed and witnessed and has to include a statement saying that it applies even if life is at risk**

**Best interests – the duty of decision makers to have regard to a wide range of factors when reaching a decision or carrying out an act on behalf of a person who lacks capacity**

**Capacity – The ability to make a decision**

**Court of Protection – where there is a dispute or challenge to a decision under the Mental Capacity Act 2005, this Court decides on such matters as whether a person has capacity in relation to a particular decision, whether a proposed act would be lawful and the meaning and effect of a Lasting Power of Attorney or Enduring Power of Attorney.**

**DOLS – Deprivation of Liberty Safeguards.**

**Independent Mental Capacity Advocate (IMCA) – An advocate who has to be instructed when a person who lacks capacity to make specific decisions has no-one else who can speak for them. They do not make decisions for people who lack capacity, but support and represent them and ensure that major decisions regarding people who lack capacity are made appropriately and in accordance with the MCA.**

**Lasting Power of Attorney – A power under the MCA that allows an individual to appoint another person to act on their behalf in relation to certain decisions regarding their financial, welfare and healthcare matters.**

**Office of the Public Guardian – this official body registers Lasting Powers of Attorney and court appointed deputies and investigates complaints about how an attorney or a deputy is exercising their powers.**



## Independent Mental Capacity Advocate Service

Does the person need an IMCA?

- Does the person have a condition which is affecting their ability to make decisions?
- Is the person facing a decision about serious medical treatment or a change of accommodation?

Or are there

- Decisions relating to Adult Protection proceedings

Or

- A care/accommodation review where it is felt that the person would benefit from an IMCA
- Is the person 16 years or older?
- Does the person lack capacity to make the particular decision?
- Is there nobody (other than paid workers) whom the decision-maker considers are willing and able to be consulted about the decision?

(This does not apply for Adult Protection proceedings – people can have family and still be eligible)

If you would like to discuss whether a person is eligible for the IMCA service, please contact your local IMCA service.

[IMCA - Plymouth Highbury Trust](#)

[Independent Mental Capacity Advocacy \(IMCA\) - Advocacy for All](#)

[1.6 Mental capacity | PLYMOUTH.GOV.UK](#)

