

POL28 – Mental Capacity Act (MCA) 2005 Policy and Procedure

Serendipity Healthcare Ltd
Unit 4 Millennium Way, Dunston, Chesterfield, Derbyshire
S41 8ND



1. Purpose

- 1.1 To meet the provisions of the Mental Capacity Act 2005 (occasionally referred to as 'The Act' in this policy):
- 1.2 To support Serendipity Healthcare Ltd in meeting the following Key Lines of Enquiry:

CARING	C2: How does the service support people to express their views and be actively involved in making decisions about their care, support and treatment as far as possible?
CARING	C3: How are people's privacy, dignity and independence respected and promoted?
EFFECTIVE	E7: Is consent to care and treatment always sought in line with legislation and guidance?

- 1.3 To meet the legal requirements of the regulated activities that Serendipity Healthcare Ltd is registered to provide:

- The Care Act 2014
- The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014
- Human Rights Act 1998
- Mental Capacity Act 2005
- Mental Capacity Act Code of Practice

2. Scope

- 2.1 The following roles may be affected by this policy:
 - Registered Manager
 - Other management
 - All workers delivering support or care
- 2.2 The following Service Users may be affected by this policy:
All adult (16+) Service Users who might lack mental capacity as defined under the Act in England and Wales
- 2.3 The following stakeholders may be affected by this policy:
The family and friends of Service Users who might lack mental capacity as defined under the Act in England and Wales

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3. Objectives

- 3.1 To ensure adherence to the statutory framework of the MCA, including the five principles, to empower and protect vulnerable people who may lack capacity always to make their own decisions; to support them to plan ahead, if they wish, for a time when they may lose capacity.
- 3.2 To ensure that those working with an adult who lacks capacity will make specific decisions that are in the person's best interests as explained in the MCA and its code of practice, and the least restrictive of their rights that can be identified as meeting their needs.
- 3.3 To build confidence among staff regarding how and when to assess someone's mental capacity, and how to make best interests decisions, when necessary, whilst also ensuring that staff are aware of their responsibilities and are legally protected through following the principles of the MCA.

4. Policy

- 4.1 To ensure staff at Serendipity Healthcare Ltd know, and work within the Act's underpinning principles:
 - The presumption of capacity – every adult has the right to make his or her own decisions and must be assumed to have the capacity to do so unless it is proved otherwise
 - Individuals must be supported to make their own decisions – people must be given all appropriate help before anyone concludes that they cannot make their own decisions
 - Individuals must be able to make what might be seen as eccentric or unwise decisions, without this being used as the sole reason to say they lack capacity
 - Best interests – anything done for, or on behalf of people who lack capacity must be in their best interests
 - Least restrictive option - before any act is done or a decision is made, staff must consider if they have found the option that, while meeting the need, is the least restrictive possible of the person's basic rights and freedoms
- 4.2 To ensure that staff at Serendipity Healthcare Ltd understand the importance of helping people to make their own decisions:
 - Staff know how to present the right information in the right way, including using easy-read or pictures where suitable, and being clear about all the available options
 - Staff actively look for the best ways to communicate with an individual, by checking that their vision and hearing are as good as they can be, or querying if an interpreter might be needed
 - Staff put the Service User at ease, whether by choosing the right time of day to explain about a decision to the person, or asking whether they would like a relative or friend present
 - Staff allow time for the Service User to ponder on the decision, or go away and discuss it with trusted relatives or friends

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- 4.3 When a person lacks the mental capacity to make a particular decision, everything that is done for, or on behalf of that person is in the person's best interests and restricts their rights as little as possible. In working out what is in someone's best interests, staff apply the mandatory checklist of factors laid out in the Mental Capacity Act.
- 4.4 Staff know how the Mental Capacity Act defines restraint. They know that it is lawful to restrain someone who lacks mental capacity in the person's best interests, when the person lacks the mental capacity to consent to what staff want to do, but only if they reasonably believe, not only that the person does lack capacity and what is proposed is in their best interests, but also that the restraint is both:
- Necessary to prevent harm to the person, and also
 - That it is a proportionate response to the likelihood and seriousness of that harm
- 4.5 They know that any necessary and proportionate restraint must be used for the shortest possible time. They seek to learn from incidents of restraint to find ways to avoid or minimise its use in the future.
- 4.6 Staff know that if restraint of a person lacking capacity to consent amounts to a deprivation of liberty, it must be specially authorised, in order to protect the human rights of the Service User by allowing them to challenge the restrictions in the Court of Protection.
- 4.7 Staff know that the Mental Capacity Act does not allow a person to be deprived of their liberty in community settings such as domiciliary care, supported living, extra-care housing or shared lives, unless this receives direct authorisation from the Court of Protection.
- 4.6 Staff in a community setting know that, if a Service User is deprived of their liberty, the provider must ask the Commissioner or Local Authority to apply directly to the Court of Protection for authorisation. The authorisation process is described in the Deprivation of Liberty in Community Settings Policy and Procedure at Serendipity Healthcare Ltd.

5. Procedure

- 5.1 Staff at Serendipity Healthcare Ltd know and work within the Mental Capacity Act principles and codes of practice, including how to recognise the deprivation of liberty of someone lacking mental capacity, and how then to proceed.
- 5.2 All staff of Serendipity Healthcare Ltd are given training in the Mental Capacity Act. References to training resources can be found in the Underpinning Knowledge/References section of this policy.
- 5.3 Serendipity Healthcare Ltd makes available to staff, documents, and resources about the Act, including training resources, which are available under 'Useful Documents' in your QCS system.
- 5.4 Any assessment of a Service User's mental capacity is decision specific and time specific to decide whether they can make a particular decision at the time it needs to be made. There must never be a generalised statement that someone lacks mental capacity. It is never enough to say that the Service User lacks mental capacity because of a diagnosis (such as dementia), or because of their age, or because of their appearance.
- 5.5 Some people lack mental capacity over a long period of time for many kinds of decisions,

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and it is not necessary to carry out repeated formal capacity assessments. However, capacity must always be reviewed whenever a Service User's Care Plan is being developed or reviewed, or there appears to be some change in their capacity to make decisions, or when they lack capacity for a major decision that needs to be made, for example, about where to live, or whether to have serious medical treatment

- 5.6 There is no requirement in the Mental Capacity Act 2005 to complete any specific documentation regarding assessments of capacity and subsequent decisions made on their basis. However, paid staff only receive protection from liability when they can prove that they have come to 'reasonable' decisions about capacity and best interests, and some form of documentation is essential evidence of that process.
- 5.7 For day-to-day decisions, Care Workers always work to a Care Plan which is clearly based on assessments of capacity and best interests. For more important decisions, it is certainly good practice for capacity assessments and best interests' decisions to be recorded. This can be done by completing the forms accompanying this policy with the Service User.
- 5.8 Remember that, when assessing a Service User's capacity, the person does not have to prove to you that they have capacity to make a certain decision. It is up to the person who will make decisions on behalf of the Service User to prove that, on the balance of probabilities, the Service User lacks the mental capacity to make this decision.
- 5.9 Do not set out to 'fail' someone; give Service Users all the help you can to enable them to make their own decisions. Take your time: a good capacity assessment is a conversation and must not be rushed. For some people, having a Care Worker or a family member to sit with them during the assessment process may be reassuring and help them relax and feel comfortable.
- 5.10 Make sure that the record of the assessment is completed fully, that it is signed by the assessor and that it is dated. This form must be kept with the Care Plan so it is readily available and can be revisited in the future when reviewing aspects of the Service User's care.
- 5.11 If it is determined that the Service User does not have the mental capacity to make a particular decision at the time it needs to be made, any action taken, or any decision made must be in his or her best interests.
- 5.12 If there is a dispute about best interests, firstly ensure that you have followed the mandatory best interest's checklist, and tried, in particular, to make a decision that is in alignment with what the Service User wants. The following must be considered:
 - Family and friends will not always agree about what is in the best interests of an individual. However, they usually have greater knowledge than Care Workers of what this Service User would have wanted, and sometimes of what the Service User now wants
 - If you are the decision-maker, you will need to clearly demonstrate in your record keeping that you have made a decision based on all available evidence and taken into account all conflicting views. You will take particular care to look for the option that is the least restrictive of the Service User's rights

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- 5.13 If there is a dispute, the following things might assist you in determining what is in the Service User's best interests:
- Involve an advocate who can represent the Service User who lacks mental capacity for this decision, to help their wishes and feelings to be central to the decision-making
 - In some situations, a best interests meeting is a good idea, to identify all the possible options and explore the pros and cons of each
 - Go to mediation
 - An application could be made to the Court of Protection for a ruling. This would normally be undertaken by the relevant Local Authority or NHS Trust when a complex and serious decision is to be made. If relatives/friends are not permitted to see or speak to the Service User alone, or sometimes even not allowed to visit, it is essential to resolve the dispute with relatives or friends, or ask the Local Authority urgently to request the Court to make a best interests decision for this person
 - You must ensure that all documents you complete are both signed and dated
- 5.14 In making a decision in someone's best interests, the following must be taken into account (except in an emergency, when there is no time). The following checklist is a mandatory requirement under the Mental Capacity Act of matters to consider by a decision-maker:
- Is the person likely to regain the mental capacity to make this decision and, if so, can this decision wait until then?
 - Do everything possible to encourage the person to take part in the making of the decision, even though they lack the capacity to make the decision
 - Give great weight to the person's past and present wishes and feelings (in particular if they have been written down)
 - Identify any beliefs and values (e.g., religious, cultural, or moral) that would be likely to influence the decision in question
 - Include any other factors that would be relevant and important to this person if they were able to make their own decision
 - Be sure that you are not making assumptions about this person's best interests simply based upon the person's age, appearance, condition, or behaviour
 - As far as possible, the decision-maker must consult other people who might have views on the person's best interests and what they would have wanted when they had mental capacity, especially the following people:
 - Anyone previously named by the person lacking capacity as someone to be consulted
 - Carers, close relatives, friends, or anyone else interested in the person's welfare
 - Any attorney appointed under a Lasting Power of Attorney
 - Any deputy appointed by the Court of Protection to make decisions for the person

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6. Definitions

6.1 Mental Capacity Act

- The Mental Capacity Act 2005, covering England and Wales, lays out a legal framework for people who lack capacity to make decisions for themselves, or who have capacity and want to make preparations for a time when they might lack capacity in the future
- It sets out who can take decisions, in what situations, and how they should go about this
- Most of the MCA applies to people from the age of 16 upwards
- Certain parts, such as the right to make an advance decision to refuse treatment or appoint attorneys under a Lasting Power of Attorney, only relate to people aged 18 and over

6.2 Test for Capacity

- The Act sets out a two-stage test for assessing whether a person lacks capacity to take a particular decision at the time it needs to be made. It is a 'decision-specific and time-specific' test, and must be recorded in a way that explains why you have reached the conclusions to answer these questions:
 - Firstly, is this person facing a decision that they are unable to make, even with all help that can be given?
 - Secondly, is this inability BECAUSE OF some impairment or disturbance in their mind or brain, whether short-term or permanent?
- The person has capacity for this decision if they can do all of the following:
 - Understand appropriately presented information about the decision to be made
 - Retain that information for long enough to use or weigh that information as part of the decision-making process
 - Use or weigh that information as part of the decision-making process
 - Communicate their decision (by talking, sign language or any other means)

6.3 Best Interests

Everything that is done to, or on behalf of a person who lacks capacity must be in that person's best interests. The Mental Capacity Act does not define best interests but lays out how best interests' decisions must be made. The Act provides a checklist of factors that decision-makers must work through, except in an emergency, in deciding what is in a person's best interests. A person can put his/her wishes and feelings into a written statement if they so wish, which the person making the decision must consider

6.4 Lasting Power of Attorney (LPA)

The Act allows a person aged 18 and over, who has capacity to make this decision, to appoint attorneys to act on their behalf if they should lose capacity in the future. There are two types of LPA, one to make health and welfare decisions, and the other to make finance and property decisions. The provision replaces the previous role of Enduring Power of Attorney (EPA)

Staff should be aware of any LPA in place for Service Users in their care; they should know which individuals have been given powers to make which specific types of decisions

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6.5 Court Appointed Deputies

The Act provides for a system of court appointed deputies to replace the previous system of receivership in the Court of Protection. Deputies are able to take decisions on welfare, healthcare and financial matters as authorised by the Court but are not able to refuse consent to life-sustaining treatment

They are only appointed if the Court cannot make a one-off decision to resolve the issues, and if the person has already lost capacity to make these decisions. Staff should be aware of any Court appointed deputies in place for Service Users in their care, and of what decisions any deputy is authorised to make

6.6 Court of Protection

The Court of Protection has jurisdiction relating to the whole Act and is the final arbiter for capacity matters. It has its own procedures and nominates judges

6.7 Advance Decision to Refuse Treatment (ADRT)

- The Act creates ways for people aged 18 and over to make a decision in advance to refuse medical treatment if they should lose capacity in the future. This is called an advance decision to refuse treatment.
An advance decision to refuse treatment that is not life-sustaining does not need to be in writing, but the person must ensure that professionals know what treatment(s) the person is refusing

A person who is refusing in advance, life-sustaining treatment, must make sure that their advance decision meets certain requirements. These are that the decision must be in writing, signed and witnessed, with a clear statement of which treatment or treatments the person is refusing. In addition, there must be an express statement that the person understands that this may put their life at risk but that the decision stands even if it does so

- A person can only refuse specified medical treatments; they cannot insist on any particular treatment
- Carers must be clear

Whether an advance decision to refuse treatment exists, what is in it, and, where it is to be found

Any doctor or paramedic needs to know if treatment they might suggest would be lawful or whether the person has refused it in advance.

6.8 Independent Mental Capacity Advocate (IMCA)

An IMCA is a specific kind of 'non-instructed' advocate, who can only be appointed by a Local Authority or NHS body, in certain circumstances, to support a person who lacks capacity but has no one except paid carers interested in their welfare

The IMCA makes representations about the person's wishes, feelings, beliefs, and values, whilst bringing to the attention of the decision-maker all factors that are relevant to the decision. The decision-maker must consider the views of the IMCA but is not bound by them Carers need to know if an IMCA is going to visit the person, to receive them as a colleague after checking their identity; the IMCA has the right to speak with the Service User alone if they wish, and the right to see notes relevant to the decision that is to be made

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6.9 Restraint

The Mental Capacity Act defines restraint of a person lacking mental capacity to consent to the action for which restraint is needed as:

The use, or threat of use, of force to make someone do something they are resisting, or
The restriction of a person's freedom of movement, whether they are resisting this or not

6.10 Protection from Liability

The Mental Capacity Act allows carers, healthcare, and social care staff to carry out certain tasks for, or on behalf of people whom they reasonably believe to lack capacity to consent to these actions, without fear of liability

For actions to receive protection from liability, the worker must:

- Reasonably believe the person lacks capacity to consent to or refuse the proposed actions
- Reasonably believe the actions they propose are in the person's best interests, and
- Reasonably believe they have found the least restrictive option to meet the identified need Note that two extra conditions apply for the use of restraint. Any action intended to restrain a person who lacks capacity will not attract protection from liability unless the following two conditions are also met:

•
The person taking action must reasonably believe that restraint is necessary to prevent harm to the person, and

The amount or type of restraint must be a proportionate response to the likelihood and seriousness of that harm

6.11 Deprivation of Liberty

A person who lacks capacity to consent to or refuse the Care Plan that keeps them safe is deprived of their liberty if this Care Plan shows that they are:

Under complete and effective supervision and control by staff (this may not always be 'line of sight' supervision know at all times pretty well what they are doing) and they are:

- Not free to leave the place where they are being cared for (in the sense of leaving to go and live somewhere else if they choose, or go away on a trip without permission from others), but staff prevent the person from acting in a way that would cause them harm, and know at all times pretty well what they are doing) and they are
- Not free to leave the place where they are being cared for (in the sense of leaving to go and live somewhere else if they choose, or go away on a trip without permission from others)

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6.12 Authorisation of Deprivation of Liberty

In community settings such as when receiving care in their own home, supported living, extra-care housing or shared lives schemes, a person aged 16 or older who is deprived of their liberty to give them necessary care or treatment must have their rights protected by having the situation authorised by the Court of Protection. This is arranged by the commissioner of the service or, for self-funders, the Local Authority. If Serendipity Healthcare Ltd suspects that a Service User is deprived of their liberty, they must notify the Commissioner or Local Authority

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