



# Mental Capacity Policy

Reviewed	Date of Next Review	Responsibility
October 2023	October 2024	Registered Manager

## Our Mission:

**'To enable young people to live and work without barriers'**

## Our Values:

- **Teamwork** – we hold ourselves and each other to account and are better when we work together
- **Compassion** – we act with trust, honesty and kindness in everything we do
- **Inclusion** – we treat each other fairly and with respect
- **Innovation** – we encourage thoughtful, creative and aspirational ideas
- **Pride** – we encourage each other to be proud of who we are and what we do

## **Policy Statement**

The Mental Capacity Act 2005 and the accompanying Code of Practice is a vital piece of legislation which aims to make a real difference to people's lives. It should empower people to make independent decisions, enable people to take positive risks and respect that people can & will make unwise decisions, and protects those who lack capacity by providing a flexible framework that places individuals at the very heart of the decision-making process.

Everyone working with, living with or caring for someone who may lack capacity must follow the Mental Capacity Act 2005, which came into force in 2007 (MCA) and the code of practice.

## **Care Act 2014**

Throughout this Act, capacity or lack of it determines how adults will be supported and cared for by ensuring that person centered care is core to how services are delivered. Those services must reflect the needs, preferences and wellbeing of the person requiring care and support and where they lack capacity the code of practice must be followed. The Care and Support Statutory Guidance was updated on the 1<sup>st</sup> of June 2023 and issued under the Care Act 2014 - Chapter 6.

## **The Policy**

FT, will act in accordance with the five statutory principles outlined within the Mental Capacity Act 2005, unless guided otherwise by our responsible body (Local Authority) or statutory multi-agency partner.

The five statutory principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help them 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/she makes an unwise decision.
4. An act done, or decision made, under this Act, for or on behalf of a person who lacks capacity, must be done, or made, in their best interests.
5. Anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedom.

Throughout the Code of Practice, a person's capacity (or lack of capacity) refers specifically to their capacity to make a particular decision at the time it needs to be made.

These basic principles must be understood, respected, and incorporated into the FT practice, at every level, by all members of staff. Anyone who claims that an individual lacks capacity should be able to provide proof. They need to show, that, on the balance of probabilities, the individual lacks capacity to make a particular decision, at the time it needs to be made. This means being able to show that it is more likely than not that the person lacks capacity to make the decision in question.

All staff must familiarise themselves with the provisions set out in the Mental Capacity Act 2005 and should always remember that the spirit of MCA and DOLS should encourage a person-centered view. The emphasis should be on empowerment and enablement.

## **Roles, bodies and powers supporting the MCA**

**Attorneys appointed under Lasting Powers of Attorney (LPAs)** – the Act has introduced a new form of Power of Attorney which allows people over the age of 18 to formally appoint one or more people to look after their health, welfare and/or financial decisions, if at some time in the future they lack capacity to make those decisions for themselves.

**Court of Protection and Deputies** – the MCA created a new court and a new public official to protect people who lack capacity and to supervise those making decisions on their behalf. The Court can appoint a Deputy, for example, because a person has an ongoing lack of capacity. The Court will tailor the powers of the deputy according to the circumstances of the individual.

**The Public Guardian** – the role of the Public Guardian is to protect people who lack capacity from abuse. The Public Guardian is supported by the Office of the Public Guardian (OPG). The OPG maintains a register of LPAs and EPAs. It also maintains a register of the Court-appointed Deputies and is responsible for supervising them.

Approved Mental Capacity Professional (AMCP) is a new role created by the Mental Capacity (Amendment) Act 2019 to provide 'enhanced oversight'.

AMCPs play a key role in the protection of people who are, or who need to be, deprived of their liberty to enable their care or treatment and who lack the mental capacity to consent to their arrangements.

**Independent mental capacity advocate (IMCA)** – IMCAs are a statutory safeguard for people who lack capacity to make some important decisions. This includes decisions about where the person lives and serious medical treatment when the person does not have family or friends who can represent them. IMCAs can also represent individuals who are the focus of adult protection proceedings. The Deprivation of Liberty Safeguards introduced further roles for IMCAs.

**Advance decisions to refuse treatment** – the Act creates statutory rules with clear safeguards so that people may decide, in advance, to refuse treatment if they should lack capacity in the future.

**A criminal offence** – Under Section 44 of the Mental Capacity Act, ill-treatment and willful neglect is a criminal offence for anyone, who has care of a person who lacks capacity. It is an offence under the Criminal Justice and Courts Act 2015 for a person who has the care of another person by virtue of being a care worker to ill-treat or willfully to neglect said person who lacks capacity.

## **Summary**

- The Mental Capacity Act 2005 came into force in 2005.
- There is a Code of Practice which provides guidance and information as to how the Act works.
- The Mental Capacity Act (MCA) 2005 applies to everyone involved in the care, treatment and support of people aged 16 and over living in England and Wales, who or are unable to make all or some decisions for themselves.
- All professionals have a duty to comply with the code of practice. It also provides guidance and support to less formal Carers.
- The Mental Capacity Act 2005 was designed to protect and restore power to vulnerable people who lack capacity.
- The Mental Capacity Act 2005 also supports those who have capacity and choose to plan for their future - this applies to everyone in the general population who is over the age of 18.

- The Act's five statutory principles are the benchmark and must underpin all acts carried out and decisions taken in relation to the Act.
- Understanding and using the MCA supports practice – for example, application of the Deprivation of Liberty Safeguards (DoLS) Within the Act, a distinction is made between day to day and more complex decisions.
- In July 2018, the government published a Mental Capacity (Amendment) Bill, which passed into law in May 2019. It replaces the Deprivation of Liberty Safeguards (DoLS) with a scheme known as the Liberty Protection Safeguards. The target date for implementation is spring 2020.
- Consent forms an essential part of the MCA, and at FT it is fundamental to the care, treatment, support and education given to the young people. The application, assessment, care plan and learner agreement require consent by the young person and if appropriate, a relevant and responsible adult.

### **What is the test of capacity?**

To help determine if a person lacks capacity to make particular decision, the Act sets out a two stage test of capacity, which must be undertaken using the appropriate forms. A Mental Capacity Assessment form can be found at the end of this policy and on our internal system 'People HR'.

#### Stage 1:

- Does the person have an impairment of, or a disturbance in the functioning of their mind or brain? If the person does not have such an impairment or disturbance, they will not lack capacity under the Act.
- Examples of impairment or disturbance include:
  - Conditions associated with some forms of mental illness.
  - Dementia
  - Significant learning disabilities.
  - The long-term effects of brain damage.
  - Physical or mental conditions that cause confusion, drowsiness or loss of consciousness
  - Delirium

Concussion following a head injury, and the symptoms of alcohol or drug use

#### Stage 2:

- Does the impairment or disturbance mean that the person is unable to make a specific decision when they need to?
- For a person to lack capacity to decide, the Act says their impairment or disturbance must affect their ability to make the specific decision when they need to. But first people must be given all practical and appropriate support to help them make the decision for themselves. (Principle 2)
- Stage 2 can only apply if all practical and appropriate support to help the person make the decision has failed.
- "Inability to make a decision"
- A person is unable to make a decision if they cannot:
  - Understand information about the decision to be made (the Act calls this "relevant information").
  - Retain that information in their mind.
  - Use or weigh that information as part of the decision-making process, or
  - Communicate their decision (by talking, sign language or any other means).

## **Assessing ability to make a decision**

- Does the person have a general understanding of what decision they need to make and why they need to make it.
- Does the person have a general understanding of the likely consequence of making or not making the decision?
- Is the person able to understand, retain and use and weigh up information relevant to this decision?
- Can the person communicate their decision (by talking, using sign language or any other means)? Would the services of a professional (such as speech and language therapist) be helpful?

The member of staff who carries out the initial assessment will be trained and competent to do so. All care or support staff will be trained and competent in MCA 2005 as different people will be involved in assessing someone's capacity to make different decisions at different times on a day to day basis. Any assessor will have the skills and ability to communicate effectively with the person, where necessary they should get professional help to communicate with the person.

When assessing capacity the following points are considered:

- Start by assuming the person has capacity to make the specific decision. Is there anything to prove otherwise?
- Does the person have previous diagnosis or disability or mental disorder? Does the condition now affect their capacity to make this decision? If there have been no previous diagnoses, it may be best to get a medical opinion
- Make every effort to communicate with the person to explain what is happening.
- Make every effort to try to help the person make the decision in question.
- See if there is a way to explain or present information about the decision in a way that makes it easier to understand. If the person has a choice, do they have information about all the options?
- Can the decision be delayed to take time to help the person make the decision, or to give the person time to regain the capacity to make the decision for themselves?
- Does the person understand what decision they need to make and why they need to make it?
- Can they understand information about the decision? Can they retain it, use it and weigh it to make the decision?

It is important to remember that a person agreeing with you or assents to what is proposed does not necessarily mean that they have capacity to make the decision.

Anyone accessing someone's capacity will not assume that a person lacks capacity simply because they have a particular diagnosis or condition. There must be proof. The following questions will be asked:

- Does the person have a general understanding of what they need to make and when they need to make it?
- Do they understand the likely consequences of making or not making the decision?
- Can they understand and process the information about the decision? Can they use it to help them decide?

## **Complex decisions**

When assessing someone's capacity in making a complex decision, we will obtain a professional opinion when necessary. This may be the G.P, a specialist, speech and language therapist, and in some cases a multi-disciplinary team.

## **Challenging a " finding of lack of capacity"**

- When a situation arises that a young person's responsible person challenges the result of the assessment of capacity, the first step is to raise the matter with the person who carried out the assessment. If the young person has been assessed to lack capacity they should have support from family, friends or an advocate.
- The assessor must give the reason why they believe the person lacks capacity to make the decision and provide objective evidence to support their belief.
- The assessor must show they have applied the principles of the Mental Capacity Act.
- If possible, a second opinion from an independent professional or expert in assessing competence should be sought.
- If the disagreement cannot be resolved the person who is challenging the assessment may be able to apply to the Court of Protection.

## **Professional records**

When professionals carry out an assessment of a person's capacity to consent or make a particular decision, the relevant records are kept in the young person's personal file

## **Best interest decision**

One of the key principles of the MCA 2005 is that any decision made on behalf of a person who lacks capacity must be done or made, in that person's best interests.

FT follows these rules:

- Where a decision involves the provision of medical treatment, the G.P or other health care staff will decide, based on the individual's best interests. All decisions are recorded within the Young Persons care plan.
- If a Lasting Power of Attorney has been made or a deputy has been appointed under a Court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority
- Whenever possible, the person who lacks capacity will be involved in the decision - making process. For major decision based on best interests of a person who lacks capacity the responsible person will liaise with the local authority, families and will record findings.

Factors which may indicate that a person may regain capacity in the future:

- The lack of capacity is likely to decrease in time (for example, where it is caused by the effect of medication or alcohol, drugs, or following a sudden shock)
- If a person is temporarily incapacitated, for example under the influence of alcohol, drugs or at crisis, responsible person would decide based in their best interest at that time. This may include positive behavior support
- A person with learning disabilities may learn new skills or be subject to new experience which increase their understanding and ability to make certain decisions
- A person previously unable to communicate may learn a new form of communication

## **Advocacy**

FT will advise the young person or responsible person to use an advocate should:

- The person who lacks capacity has no close family or friends to take an interest in their welfare (ie: Health & Welfare/ Property & Financial)
- Family members disagree about the person's best interests
- Family members and professionals disagree about the person's best interests
- There is a conflict of interest for people who have been consulted in the best interest's assessment (for example, there is a conflict in decision where there is a breakdown in family relations)
- There is a concern about the protection of a vulnerable adult

### **This policy should be read in conjunction with:**

- Statement of Purpose
- Employee handbook
- Deprivation of Liberty Policy
- Dignity & Respect & Intimate Care Policy
- Medication Policy
- Positive & Proactive Working Policy
- Safeguarding & Child Protection Policy
- Staff Training & Development Policy
- Student Support Policy
- Prevent Policy

### **This policy is supported by the following legislation and is not exhaustive:**

- Children Act 1989
- Data Protection Act 2018
- Equality Act 2010
- Equality Act 2010: Chapter 1 (protected characteristics) Chapter 2 (prohibited conduct) and Chapter 3 (services and public functions)
- The Health and Social Care Act 2008 (Regulated Activities) (Amendment) Regulations 2015
- Health and Safety at Work etc. Act 1974
- Human Rights Act 1998
- The Local Authority Social Services and National Health Service complaints (England) regulations 2009
- Mental Capacity Act 2005
- Safeguarding Vulnerable Groups Act 2006

If completed, the forms following this page should be attached to the young person's care plan.

BY ORDER OF THE BOARD

**Registered Manager**

October 2023

## Capacity Assessment and Best Interest Decision

### The Mental Capacity Act

The Mental Capacity Act 2005 is a law that protects vulnerable people over the age of 16 around decision-making. It says that:

- Every adult, whatever their disability, has the right to make their own decisions wherever possible.
- People should always support a person to make their own decisions if they can. This might mean giving them information in a format that they can understand (for example this might be easy read information for a person with a learning disability) or explaining something in a different way.
- If a decision is too big or complicated for a person to make, even with appropriate information and support, then people supporting them must make a 'best interests' decision for them.

<b>Individual's Details</b>	
Person's Name:	
Date of Birth:	
What is the decision to be made?	
<b>Capacity Information</b>	
Does this person have a learning disability?	Yes/No
Details:	
<b>Stage 1 of the 4 stages of Capacity</b>	
What information has been provided so that the person has <u>all</u> the relevant information they need to make this decision?	
Has the person been given <u>all</u> the information on alternatives?	Yes/No
How have you communicated to the person to give them the best chance of understanding?	
Please list the alternatives:	
Does the person understand the information about the decision?	Yes/No
<b>Stage 2 of the 4 stages of Capacity</b>	
Does the person retain the information about the decision?	Yes/No
What support have you provided to give the person the best chance possible of retaining this information?	



**Stage 3 of the 4 stages of Capacity**

Can the person weigh up the 'pros and cons' of making this decision?	Yes/No
What support have you provided to give the person the best chance possible of retaining this information?	

**Stage 4 of the 4 stages of Capacity**

Can the person communicate their decision?	Yes/No
What communication aids were used to support the person to share their decision?	

**If the answers to any of the above questions is a NO, the person is deemed to lack capacity. Please move onto Capacity Decision Table below.**

**Capacity Decision**

How was the assessment completed?	
Where did it happen?	
Who was involved?	
If more than one person was involved, did you all agree on the outcomes?	Yes/No
Is the person going to regain capacity?	Yes/No
Can the decision wait until they are able to decide?	Yes/No or NA
On the balance of probability, do you feel that there is enough evidence to indicate that the person lacks capacity to make this particular decision at this particular time?	Delete as appropriate: Yes – this person lacks capacity No – this person has capacity More information is needed.
Your Name:	
Relationship to the person:	

**If the decision is made that the person lacks capacity to make this decision, please move onto the best interest process.**

<b>Best Interest Risk Assessment</b>	
What are the options being considered?	
Is there a least restrictive option?	
What are the potential benefits?	
How likely are these to be achieved?	
What is the impact if no decision is made and no change takes place?	
What could go wrong?	
Is there a possibility that anyone may be harmed?	
Who are the people that need to be consulted?	
<b>Please move onto consultation details.</b>	
<b>Best Interest Risk Consultation</b>	
Consultation (Person):	
Are there any past or present wishes that relate to this decision?	Yes/No If so, what are they?
Are there any other circumstances which should be taken into account in some way?	Yes/No If so, what are they?
Consultation (all relevant parties):	
<b>What do you consider to be in the person's best interests on the matter in question?</b>	
<b>Name (1):</b>	
Relationship to Person:	
Views:	
How have these views been obtained?	
When were these views obtained?	
<b>Name (2):</b>	
Relationship to Person:	
Views:	

How have these views been obtained?	
When were these views obtained?	
<b>Name (3):</b>	
Relationship to Person:	
Views:	
How have these views been obtained?	
When were these views obtained?	
<b>Name (4):</b>	
Relationship to Person:	
Views:	
How have these views been obtained?	
When were these views obtained?	
<b>Name (5):</b>	
Relationship to Person:	
Views:	
How have these views been obtained?	
When were these views obtained?	
<b>Name (6):</b>	
Relationship to Person:	
Views:	
How have these views been obtained?	
When were these views obtained?	

**Best Interest Action Plan**

How will this be communicated to the person?	
How will this be communicated to next of kin (NOK)?	
How will this be communicated to professionals?	

Action	By Who	By When	Comments

**FT Polices are reviewed annually, more frequently, or as necessary.**