# Mental Capacity Act Policy and Procedure



## Policy Statement

Zenith Care Recruitment complies with the principles of the Mental Capacity Act 2005 by first treating all of our service users and prospective service users on the basis that they are able to take their own decisions and give valid consent to their care and treatment. Consistent with the legislation, Zenith Care Recruitment is prepared to take a decision for a person in their best interests if there is evidence that they cannot take the decision (at the time it needs to be made) because of mental incapacity.

## Background

The Mental Capacity Act, or MCA as it is often known, was introduced into England in April 2007 to provide a statutory framework to protect those who lack the mental capacity to make their own decisions, such as those with severe dementia or any other significant brain dysfunction, and those who are dying and no longer capable of making decisions for themselves.

The Act applies to people aged 16 years and over and sets out:

* who can take decisions for people who lack capacity
* in which situations this can be done
* how they should go about this.

Certain groups of people are legally required to have regard to the Act and its associated Code of Practice when making decisions on behalf of people who lack mental capacity. This includes doctors, nurses, health and social care managers and staff.

## Definition of Capacity

The “capacity” referred to in the MCA refers to the mental capacity to make a decision. Where a person is described as “lacking capacity” this means that the person is judged as being unable to make a decision for him or herself because of an impairment of (or a disturbance in the functioning of the mind or brain, whether temporary or permanent.

Importantly, capacity can change and may relate to different decisions differently. Therefore, a lack of capacity should never be assumed or presumed.

**Two-stage test of capacity**

The MCA sets out a 2-stage test of capacity:

(1) Does the person have an impairment of their mind or brain, whether as a result of an illness, or external factors such as alcohol or drug use. It does not matter whether the impairment or disturbance is temporary or permanent.

( 2) Does the impairment mean the person is unable to make a specific decision when they need to.

There is a causal connection between the two stages. It must be shown that the lack of decision-making ability results from the impairment.

**Points to determine**

When assessing a person’s capacity to take simple or complex decisions it is important to determine the following.

Can the person:

* take in and understand the information needed to take the decision?
* retain that information so that they can make use of it in their decision-making?
* weigh up the information, including asking for more information?
* communicate their decision?

## Compliance with Registration Standards and Regulations

In England, the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014 contain the following with respect to mental capacity.

* Regulation 9: Person-centred Care requires Zenith Care Recruitment to ensure that the care and treatment of service users must be appropriate, must meet their needs, and must reflect their preferences and wishes. The regulation specifically requires Zenith Care Recruitment to act in accordance with the Mental Capacity Act 2005 with regard to people who may lack capacity.
* Regulation 11: Need for Consent requires that care and treatment is only provided with the consent of the relevant person.

The Regulated Services (Service Providers and Responsible Individuals) Regulations 2017, formed under the Regulation and Inspection of Social Care Act 2016 (in force from April 2018), address mental capacity issues explicitly or implicitly in Regulations 13: Suitability of the Service, Regulation 14: Personal Plan, Regulation 15: Review of Personal Plan, Regulation 20: Standards of Care and Support — Overarching Requirements, and Regulation 29: Control and Restraint, which includes issues relating to deprivation of liberty.

our DoLS policy also comply with the provisions of the Human Rights Act 1998, the Mental Capacity Act 2005, the Care Act 2014, and the requirements of the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

Deprivation of liberty safeguarding applies Zenith Care Recruitment and staff who are involved in the care treatment and support of people over the age of 18 and above who is unable to make all or some decisions for themselves. The Policy and Procedure is in conjunction with the Zenith Care Recruitment Policy and Procedure on the Mental Capacity Act 2005.

Staff are reminded that they have a formal duty of care to the Mental Capacity Act and The Deprivation of Liberty Code of Practice and will need to take active responsibility for equipping themselves to practice within the law. Staff should be able to explain how they have regard to the Act and the Code when acting or making decisions on behalf of people who lack capacity to make decisions for themselves. However, for a detailed wider commentary on the practice implications of the new law staff will need to consult the Deprivation of Liberty Code of Practice, as well as case law commentary as it emerges.

As a care service provider, Zenith Care Recruitment is therefore aware that there are circumstances in which it might become involved in the care of people who are subject to or could require deprivation of liberty safeguarding. It will then exercise its duty of care to raise the matter with the relevant statutory bodies such as the local authority and/or an NHS body and express any safeguarding concerns to the local safeguarding adults’ authority.

**Policy:**

To ensure staff at Zenith Care Recruitment know, and work within the Act's underpinning principles:

**Principle 1:** A presumption of capacity

**Principle 2:** Individuals being supported to make their own decisions

**Principle 3:** Unwise decisions

**Principle 4:** Best interests

**Principle 5:** Less restrictive option

* 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

To ensure that staff at Zenith Care Recruitment 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 users 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.

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:

• Presuming someone has capacity

• The starting assumption must always be that a person has the capacity to make a decision, unless it can be established that they lack capacity. Understanding what is meant by capacity and lack of capacity

• A person’s capacity must be assessed specifically in terms of their capacity to make a particular decision at the time it needs to be made. Treating everyone equally

• A person’s capacity must not be judged simply on the basis of their age, appearance, condition or an aspect of their behaviour. Supporting the person to make the decision for themselves

• It is important to take all possible steps to try to help people make a decision for themselves

Staff know how the Mental Capacity Act defines restraint. They know that that restraint is when someone uses force (or threatens to) to make someone do something they are resisting, and when someone's freedom of movement is restricted, whether or not they are resisting restrain someone who lacks mental capacity in the person's best interests, when the person lacks the 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

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.

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. Staff will be trained in restraint and authorisations added to the Service Users care plan.

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.

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 Safeguards Policy and Procedure at Zenith Care Recruitment

**Procedures**

1. Staff at Zenith Care Recruitment 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.
2. All staff of Zenith Care Recruitment are given training in the Mental Capacity Act. References to training resources can be found in the Underpinning Knowledge/References section of this policy.
3. Zenith Care Recruitment makes available to staff, documents and resources about the Act, including training resources, which are available under 'Useful Documents' in our policy folder.
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. Some people lack mental capacity over a long period of time for many kinds of decisions, 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.
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.
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 interest decisions to be recorded on Homecare Direct approved documentation.
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.
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.
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.
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.
12. If there is a dispute about best interests, firstly ensure that you have followed the mandatory best interests 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

1. 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. 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

1. 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
* PAs, 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

## Staff Involvement

Zenith Care Recruitment expects its care (and nursing) staff to implement the agreements and decisions that are identified on an individual’s care or personal plan.

Zenith Care Recruitment also expects its staff to involve service users in all day-to-day decisions that need to be taken by seeking their consent and checking that the actions to be taken are consistent with their care or personal plan if the individual service user lacks capacity at the time.

Where the service user needs to take a decision that lies outside of their ability at the time, staff must do everything to help the service user to decide for him or herself.

Zenith Care Recruitment expects its staff to avoid taking decisions on behalf of a service user unless they can show that it is necessary and the service user at the time is unable to take that decision him or herself. Any such incident must be fully recorded.

Zenith Care Recruitment expects its staff to take decisions for service users lacking capacity only because they have reasonable beliefs that they are necessary and in the person’s best interests. When in doubt that they can proceed in this way they must seek advice from their line manager.

## Training

## We know that choice has become increasingly important for service users and we will attempt to advance this principle throughout our operations. We will ensure that every service user who receives our service has positively opted to use our services.

## We will try to provide service users with the chance to exercise choice about the carers with whom they interact and will change the worker in instances when the service user requests it. We are particularly sensitive to matching workers and service users where issues of gender, culture or ethnicity play a role.

## Zenith Care Recruitment will train staff on all aspects of mental capacity to improve their knowledge and develop skills in working with service users over their decision-making abilities.

## Relevant legislation:

## • The Care Act 2014

## • The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014

## • Deprivation of Liberty Safeguards (DoLS) Policy

## • Human Rights Act 1998

## • Mental Capacity Act 2005

## • Mental Capacity Act Code of Practice

## Signed: \_\_\_\_\_\_\_Kechi Anyanwu\_\_\_\_\_\_\_\_\_\_\_\_\_

## Date: \_\_\_\_\_\_05th November 2021\_\_\_\_\_\_\_\_\_\_\_\_

## Policy review date: \_\_\_\_\_20th April 2022\_\_\_\_\_\_\_\_\_\_\_\_\_\_