

Policy/Procedure Name:	Mental Capacity Act		
Policy/Procedure Number:	SMT003		
Date of Approval:	5 th March 2014		
Effective Date:	May 2018		
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Review by Date:	August 2025		
Policy/Procedure Author:	Head of Safeguarding		
Policy/Procedure Owner:	Principal		
Management Committee Approved By:	SMT		
Governor Committee (where appropriate) Approved By:	NA		
For Action By:	All staff		
For Information to:	Students and Parents		
Approval requested to upload on the Treloar's Website:	Yes <input type="checkbox"/> (tick if requested)		
Who is carrying out EIA?	SMT	Date of EIA?	5/3/14
Have we shown due regard for the 9 protected characteristics within the policy/procedure?	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		
Are all opportunities to promote equality taken within the policy/procedure?	Yes <input checked="" type="checkbox"/> No <input type="checkbox"/>		
Refer Policy/Procedure to EDI Co-ordinator for further assessment	Yes <input type="checkbox"/> No <input checked="" type="checkbox"/>		

1. Policy/ Procedure Aim –

The aim of this policy is to ensure that staff comply with the Mental Capacity Act (MCA) 2005 and its associated codes of practice in all they do in relation to students to who it applies. The policy describes how all students should be helped to make decision, when an assessment may be needed, who should do the assessment, and how it should be carried out.

2. Policy/Procedure Details

Key Responsibilities

The Head of Safeguarding has overall responsibility for compliance with the Mental Capacity Act.

All managers must ensure that their staff understand and implement this policy.

All staff are responsible for acting in line with the Mental Capacity Act and the Mental Capacity Code of Practice.

3. Implications of Policy/Procedure

The Act is intended to be enabling and supportive of people who lack capacity, not restricting or controlling of their lives.

It aims to protect people who lack capacity to make particular decisions, but also to maximise their ability or make decisions, or to participate in decision making, as far as they are able to do so.

A person lacks capacity in relation to a matter if, at the material time, he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. (MCA 2005 c.9)

The definition makes clear that capacity is time and decision specific. The legislation is flexible and recognises that some people may be able to make some decisions while lack capacity to make others and that this state may change over time.

The Act challenges a blanket assumption that because a person may not have the mental capacity to for example, to organise their finances, that they don't have mental capacity to decide what treatment or care they receive. A person may be able to make day to day decisions but lack capacity to make decisions that are more complex.

FIVE Statutory Principles – How to apply them



You may choose to use the 'finger symbols' from your MCA training as a way to remember them

Principle	Application	
Principle 1 'Thumbs up'	Assume Capacity Every adult has the right to make their own decisions if they have capacity to do so. All staff, families, social workers etc. MUST assume that the student HAS the capacity of make decisions, unless it can be established that the student does not have capacity.	Assessing Capacity
Principle 2 'Forefinger wagging'	Maximum Support Given Students should receive support to help them make their own decisions. Before concluding that a student lacks capacity to make a particular decision, it is important to take ALL possible steps to help them reach a decisions themselves	
Principle 3. 'Middle Finger – up yours gesture'	Unwise decisions allowed Students have the right to make decisions that others think are unwise . A student who makes a decision that are others think is unwise should not automatically be labelled as lacking capacity to make a decision	
Principle 4. 'Ring Finger'	Best Interest Decision Any act done for, or any decisions made on behalf of a student who lacks capacity must be in their best interests	Best Interest Decision Making
Principle 5 'Little Finger'	Least restrictive option Any act done for, or any decision made on behalf of a student who lacks capacity should be an option that is the less restrictive of their basic rights and freedom - as long as it is still in their best interests	

Assessing Capacity

Anyone assessing someone's capacity to make a decision for themselves should use the two-stage test of capacity.

1. Does the student have an impairment of the mind or brain, or is there some form of disturbance affecting the way their mind or brain works? (It doesn't matter whether the impairment or disturbance is temporary or permanent).
2. If so, does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made?

A disturbance or impairment of the mind or brain can be permanent or temporary e.g.

- Dementia
- Conditions associated with some forms of mental illness
- Significant Learning Difficulties
- Delirium
- Effects of drugs or alcohol
- Unconsciousness
- Brain damage or brain injury

But remember, these conditions don't in themselves mean that an individual lacks capacity

Only if 1 and 2 apply do you go on to the next stage. If they don't, the student has capacity.

Consent

Students aged 16 and over who have capacity can make their own decisions and consent to their care. This does not always need to be written consent as they can refuse at anytime.

If the student lacks capacity the relevant person will make a best interest decision about the decision. Parents (and key others) should always be consulted but should not be relied upon to provide consent (once the student is over 18 and not therefore within the bounds of Parental Responsibility) unless they have been appointed Deputy by the Court of Protection, or they have Lasting Power of Attorney granted by a student who had capacity at the time of appointing them.

Assessing the ability to make a decision

Is the student unable to do one of the following?

1. Understand the information

Does the student have a general understanding of what decision they need to make and why they need to make it? Does the student have a general understanding of the likely consequences of making or not making this decision?

2. Retain the information long enough to make a decision?

3. Weigh up the information?

Is the student able to understand, retain, use and weigh up the information relevant to this decision?

4. Communicate a decision

Can the student communicate their decision (by their chosen means of communication)?

If a student can perform *all* elements of decision making they have capacity. If they cannot perform *any* of the four elements then they do not have capacity.

Support for Decision Making

Please see “Mental Capacity” care need within a student’s care plan for specific guidance as to how to support a student to make a decision.

The kind of support a student might need to help them make a decision varies. It depends on personal circumstances, the kind of decision that has to be made and the time available to make the decision. It might include:

- Giving them the relevant information in a clear manner
 - Take time to explain
 - Try not to overload them with too much information – as this might confuse them
 - Explain the risk and benefits. Describe the foreseeable consequences of making or not making the decision
 - Explain the effects of the decision on them and those around them
 - If they have a choice – give them the same information in a balanced way for all the options
 - For some decisions they may need to seek independent or specialist advice
- Using a different form of communication
 - Use the best form of communication to meet the student’s needs
 - Providing information in a more accessible form (photographs, symbols, tapes)
 - Break down difficult information into smaller points that are easier to understand
 - Might need to repeat information or go back over points several times
- Treating a medical condition which may be affecting the person’s capacity
 - Check their Caresys YPP for information on this as it should be flagged up
- Returning to the decision at a different time of the day, when the student is more responsive/alert.
 - Some medication could affect a student’s capacity e.g. medication which causes drowsiness or affect memory – can the decision be delayed until the side effects have subsided

- Some of the student's medical conditions may cause them to be less alert/responsive at certain times of the day – again can the decision be made when they are feeling more alert
- Taking steps to put the student at ease?
 - Consider the Location
 - Consider the Timing
 - choose a time of day then the student is most alert
 - Take one decision at a time – try to avoid making the student tired or confused
 - Don't rush
 - Avoid or challenge time limits that are unnecessary
 - Other people – sometimes having a relative, friend or another person that the student feels comfortable with can be helpful support and reduce anxiety. However, always respect a person's right for confidentiality.
- Having a structured programme to improve a person's capacity to make particular decisions
 - This should be something within the student's ILP/IEPs goals and targets and being worked on by the student with the support of their MDT

Decision making

People who may lack capacity need to make day to day decisions, such as what to wear, as well large decisions such as where to live. Different types of decision require different intensity and different processes, but the principles and the two staff assessment process remain the same for all decisions

Small Decisions

Small decisions are made everyday by staff and it is not practicable to consult with others on each occasion. If a member of staff believes that a student is unable to make a small decision, e.g., they do not know what clothes to wear, and they should do all they can to help the student make the decision (Principle 2). Can the decision wait? Can it be explained better? Is there another member of staff who can help?

If the member of staff has done all they can, they will quickly assess. They should know if the student has an impairment of mind or brain. If there is no impairment, the person has capacity and is able to make or refuse to make a decision (Principle 3). If there is such an impairment the member of staff must determine that one of the four criteria apply:

- Can they understand?
- Can they retain the information needed to make the decision?
- Can they weigh it up?
- Can they communicate a decision?

If it is assessed that the student does not have capacity the worker will make the decision about what they will wear in their best interest (Principle 4). Best interest in this case is likely to be determined by what they normally like, or what is suitable for the day (e.g. smart clothes for work experience, warm clothes in the winter).

When the decision has been made it must be recorded in Caresys or Nourish in the Daily Care Record section, e.g.

John has a learning disability, today he refused to choose what to wear. I tried to help him make a decision by showing him different T-shirts, waiting 10 minutes, involving his key worker, but this failed. I know from experience which is his favourite, so chose that as it was in his best interest.

The assessment will take very little time, but is important to record it. Remember, he might be able to decide later so an assessment at one time does not mean that he does not have capacity later or for different decisions.

Big decisions

Big decisions follow the same pattern as for small ones, but need longer to assess and will involve more people. In this case the toolkit published by Hants County Council should be followed and recorded. Most big decisions will involve a student's family, but may also involve a social worker, solicitor, doctor etc. If in doubt, consult with your manager or the Head of Safeguarding. Please see the links to HCC guidance and that published by the Office of the Public Guardian.

<http://www3.hants.gov.uk/mentalcapacity-toolkit>
http://www3.hants.gov.uk/mca_toolkit_guidance_notes.pdf
<http://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/opg-603-0409.pdf>

Unwise Decisions

The Mental Capacity Act code of practice makes specific reference to persons being able to make "unwise" decisions, where they have capacity to understand, retain, weigh up and communicate these decisions.

We will aim to respect this at Treloar's, especially given the importance within education of students making their own decisions (including sometimes ones involving risk or negative consequences), and learning from this.

Staff will always look to make sure that students have the information needed in order to weigh up decisions, and will provide advice and support in decision making, but will seek to do so in a manner that allows the student freedom to make their own choices. This does not prevent Treloar's from applying consequences to behaviour in line with Treloar's behaviour policy, the student charter however.

Consent to care plan

If there is reasonable cause to believe that a student lacks capacity to consent to parts of their care plan, they will be assessed either as soon as possible after they arrive, or at the point when any change is noted. The pre-admission assessment will have considered

whether this is likely. This is led by the residential manager in consultation with MDT, family and other interested parties.

This assessment will be reviewed each year or more frequently if necessary.

The forms used are attached as an appendix.

Consent for everyday care can be verbal or implied, for example raising arm to be dressed, opening mouth when ready to eat.

Recording decisions

Not all decisions will need a formal mental capacity assessment. Consent for the person's care plan will cover many day-to-day decisions, but there will be times when a formal mental capacity assessment should be undertaken. Examples include but not exclusive to:

- Use of bed rails or restrictive devices
- Use of restraint
- Any invasive procedures
- Covert medication
- Refusal of care, treatment or equipment likely to result in harm
- Taking part in research

Equality and Diversity

Whenever assessing for mental capacity and making decisions in the student's best interest staff must consider any equality and diversity issues. Students' cultural needs will be detailed on Caresys, which will inform best interest decisions.

We would note that an individual having a disability does not, in and of itself, mean that they lack capacity. As such we would consider it discriminatory and unethical to assess the capacity of all of our students on the grounds that they have health and care needs.

Assessments will therefore take place in line with the provisions of the Act and the Code of Practice where there is reasonable cause to believe that a disturbance of mind or brain may be affecting that person's ability to make a decision.

Students at Treloar's may more widely have "Mental Capacity care needs" recorded, however these are in many cases aimed at providing those caring for them with information about how to support them (in line with "all practical steps") to make their own decisions. A presumption should still be made that they have capacity to take their own decisions, unless otherwise evidenced.

Raising concerns

If a student, or a member of staff supporting a student, feels that there is a concern relating to mental capacity then they should inform the Head of Safeguarding, and/or the Residential Manager responsible for that student's care as soon as possible.

Concerns could either be that a student hasn't been given the opportunity or freedom to make their own decisions, or a concern that they are being given responsibility for decisions

which they do not have capacity to make. Alternatively, there could be a concern about how the Act is being used, or about not following the Code of Practice (e.g. not using the “least restrictive” option).

The Head of Safeguarding (or another suitable manager) will consider and respond, involving the student and any others (e.g., parent, social worker, MDT) as appropriate.

Requests for formal assessments of capacity

We are aware that students at Treloar’s may require formal assessments of capacity to inform Court of Protection applications for Deputyship or for other purposes.

Given Treloar’s role as both an educational establishment and a commissioned provider of care we would not ordinarily agree to provide such assessments, unless they directly pertain to care provided by Treloar’s. This is partly in order to protect against any conflicts of interest and ensure that Treloar’s can remain student-focused.

Where Treloar’s is approached to arrange an assessment of this nature we would ordinarily recommend that a student or family member contact the local authority or the student’s General Practitioner to arrange this.

Where requests for formal Mental Capacity assessments are made these should be forwarded to the Head of Safeguarding who will consider and advise.

4.1 Training Requirements

Covered in Mandatory Training

4.2 Communication Requirements

How will the Policy/procedure be communicated:	Heads of Department, Moodle, MCA training	
Who will ensure the above communication is carried out::	Head of Safeguarding	
Do the changes made to this policy/procedure affect any other policies/procedures? If yes, has this been communicated to the policy/procedure author/owner	No	

5. Monitoring and Review

The Use of the MCA will be subject to audit.

6. Links to other related policies, procedures or documents (internal)

- Safeguarding Policy
- Deprivation of Liberty Safeguards Policy
- Restraint Policy

7. Further sources of information (external)

Hants Toolkit <http://www3.hants.gov.uk/mentalcapacity-toolkit>
Hants Guidance http://www3.hants.gov.uk/mca_toolkit_guidance_notes.pdf
Office of Public Guardian Guide <http://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/opg-603-0409.pdf>

8. Revision History

This is the first version.

Listed below is a brief audit trail, detailing amendments made to this policy procedure in last 4 years

Page/para No.	Brief description of the change(s)	Change made by	Date
P3	Note about consent	Jeremy Curtis	21/5/18
P7	Note about process for assessing capacity to consent care plan	Jeremy Curtis	21/5/18
Appendix	Added appendix with assessment to consent to care plan forms	Jeremy Curtis	21/5/18
Throughout	More detail added throughout the document	Ben Baxter	May 2020
Page 8 & 9	Additional section on recording decisions and raising concerns added. Further detail added to equality and diversity section	Ben Baxter	May 2020
Page 8	Specific reference and advice re unwise decisions	Ben Baxter	August 2021
Page 10	Info re: requests for formal MCA assessments	Ben Baxter	August 2021
P 6	Referenced guidance within care plan	Ben Baxter	August 23
P 9	MCA to be completed when treatment/care refused if risk attached	Ben Baxter	August 23
P 10	Clarification of formal requests	Ben Baxter	August 23

IMPORTANT NOTES:

It is essential for those with designated responsibilities to familiarise themselves with the sources of information, referred to above.

Policy documents describe mandatory minimum standards and will be subject to audit and review. Line managers are required to ensure suitable and sufficient arrangements are in place to meet policy requirements, including the provision of information and instruction to staff.

Consent to care plan forms - Initial Assessment

Section 1 – Eligibility

Name:

Date of birth:

Date of assessment:

Age at time of assessment:

Staff member undertaking assessment:

Is there an impairment or disturbance in the functioning of the person’s mind or brain?

If yes, please move on to Section 2. If the answer is no then the person is presumed to have capacity and no further assessment is required.

Section 2 - Assessment

- 1. Can the person understand key elements of their care plan?**
- 2. Can they retain this information?**
- 3. Can they weigh-up this information as part of a decision process?**
- 4. Can they communicate their decision?**

If the answer to any of these areas is no, then the person lacks capacity for the purposes of this assessment. The person may also require a DoLS application prior starting their placement with Treloar’s. This must be highlighted at admissions and referred to the relevant House Manager and Speech & Language Therapist for a final decision.

Section 3 - Recommendations

- 1. Does this person require a more in-depth assessment when they commence their placement?**
- 2. Does this person require a DoLS application to be made prior to commencement of placement?**

Section 4 - Guidance

This document is intended as an initial assessment of a person's likelihood of requiring a full assessment of their capacity to consent to vital aspects of their care and support when they begin their placement at Treloar's. It does not take the place of a full assessment, but will inform as to whether this student will require more in-depth assessment and a DoLS application prior to commencement of their placement.

The Mental Capacity Act is underpinned by 5 Principles:

- 1. The presumption of capacity - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise**
- 2. People must be given all appropriate help before anyone concludes that they cannot make their own decisions**
- 3. That individuals retain the right to make what might be seen as eccentric or unwise decisions**
- 4. Anything done for or on behalf of people without capacity must be in their best interests**
- 5. Anything done for or on behalf of people without capacity should be an option that is less restrictive of their basic - as long as it is still in their best interests.**

For the purposes of this document, we are concerned with the broad areas to which a person will need to consent in order for their placement at Treloar's to be legal. These areas are intended to give a context only – **they do not need to be individually assessed**, only record an indication of whether a person is likely to require further assessment.

a) Accommodation

- The suitability of their placement overall and whether they can consent to be here as opposed to at home or at a daytime provision
- If they receive 1:1 support
- If they would not be allowed to leave the site unaccompanied
- If they are monitored at night (via audio monitor for example)

b) Care

- The use of any harnesses or straps
- Bedrails
- If they are supported with personal care

c) Medication and Treatment

- If they take psychoactive medication regularly
- If they take any medications that might otherwise alter their consciousness
- If they require injections
- If they understand the consequences and side effects of any medications they take

d) Finance & Property

- Do they understand the concept of money?
- Do they understand the concept of 'theirs' (private property)?
- If they wanted to make a large purchase, would they understand the impact upon their budget?

- Are they able to keep their money themselves or do they need it to be locked away (in a safe in the office for example)?
- Is there anyone who currently deputises for their finances?

Reassessment

Section 1 – Eligibility

Name:

Date of birth:

Date of previous assessment:

Date of this assessment:

Age at time of this assessment:

Staff member undertaking this assessment:

Is there an impairment or disturbance in the functioning of the person’s mind or brain?

If yes, please move on to Section 2. If the answer is no then the person is presumed to have capacity and no further assessment is required.

Section 2 - Assessment

For each section, please note the outcome of the previous assessment and whether there are any changes in the person’s condition requiring a full re-assessment to take place. Please refer to the original document for guidance.

- Accommodation
- Care
- Medication and Treatment
- Finance & Property

Section 3 - Recommendations

- 3. Has this person’s overall capacity changed from their previous assessment?** If yes, then they require a full re-assessment. If no, please note evidence that capacity has not changed and outline any restrictions/best interests decisions that remain in place.
- 4. Are any associated best interests decisions still relevant?** A discussion should be held with any person(s) named on the previous form with regards to best interests.

Best-Interests Decisions			
Name of Person			
Date			
Person(s) meeting			
Issues discussed			
Record			
Signed		Date	
Signed		Date	

Signed		Date	
Signed		Date	