NursingDirect

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MENTAL CAPACITY ACT

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MENTAL CAPACITY ACT POLICY AND PROCEDURE

The Aim of this policy is to ensure that Nursing Direct Healthcare Limited (hereinafter referred to as "Nursing Direct") as a care provider, upholds its legal duties and responsibilities in providing regulatory and best practice guidance under the Mental Capacity Act 2005 (hereinafter referred to as the MCA) and relevant Amendments.

This policy applies to all staff, including Agency Workers, who are involved in the care, treatment, or support of service users aged 16 and over who lack the capacity to make some or all decisions for themselves. This lack of capacity may be due to mental impairment caused by illnesses, disabilities, or the effects of drugs or alcohol.

In view of the above aim, Nursing Direct focuses on:

- Upholding its responsibilities towards MCA when undertaking its regulated activities by considering MCA Code of Practice that helps supports health and social care professionals especially all staff including Agency Workers working with service users whose decision-making capacity is limited, fluctuating, absent or compromised, whilst ensuring that MCA is duly followed.

- Applying Mental Capacity Act 2005 (MCA) to provide a legal framework outlining key features of the Act to protect adult service users who lack capacity for the purpose of acting and making decisions on behalf of them to maximise their ability decisions as far as they are able to do so.

- Adopting MCA code of practice with regard to the mental capacity measures and requirements in place for their service users for the purpose of using as a guidance for making decisions under MCA by all/relevant staff including Agency workers who are working with or caring for their adult service users who lack capacity to make decisions for themselves

- Nursing Direct will implement policies, procedures, and processes that align with the provisions of the Mental Capacity Act (MCA). These measures will support the organisation in meeting the Key Lines of Enquiry/Quality Statements (New) which encompass safe, effective, caring, responsive, and well-led services. This alignment ensures the adoption of safer practices for service users, promoting and managing safe care, support, and treatment.

1. PURPOSE

1.1 The primary purpose of the MCA is to promote and safeguard decision making within a legal framework;

- By empowering the service users to make decisions for themselves wherever possible and by protecting people who lack capacity by providing a flexible framework that places individuals at the centre of the decision-making process
- By allowing service users to plan ahead for a time in the future when they might lack the capacity

1.2 The MCA is applicable to all staff including Agency Workers who are engaged in the care, treatment, and support of service users, aged 16 and above living in England and Wales, who are unable to make all or some decisions for themselves.

- **Purpose of the MCA:** The MCA is designed to protect and restore power to vulnerable service users who lack capacity. All healthcare professionals working with these individuals must comply with the MCA Code of Practice, which offers support and guidance to all staff, including Agency Workers.
- **Legal Obligations:** The Mental Capacity Act 2005 introduced a criminal offence for the ill-treatment or wilful neglect of a service user/individual who lacks capacity. It is imperative for all staff to be aware of and adhere to this legal requirement.
- **MCA Code of Practice:** The MCA Code of Practice elaborates on the key features of the MCA and provides detailed guidance on its daily application. This code is essential for those working with people who may lack capacity, ensuring they understand how to support and protect these individuals effectively.
- **Recent Amendments:** The new Mental Capacity (Amendment) Act and Liberty Protection Safeguards will be incorporated into an updated Code of Practice. This revised code will include updated case studies and findings from recent case law to further fulfil the MCA's purpose. All staff must familiarise themselves with these updates to remain compliant with current legal and ethical standards.

1.3 To meet the provisions of the Mental Capacity Act 2005 (MCA) and understanding and using the MCA with application of the Deprivation of Liberty Safeguards is vital for the service users as their mental capacity or ability to make certain decisions may be impacted by:

- A stroke or brain injury
- A mental health problem
- Dementia
- A learning disability
- Confusion, drowsiness, or unconsciousness because of an illness of the treatment for it
- Substance misuse

This list is not exhaustive but highlights some potential factors.

1.4 To support Nursing Direct in meeting the following Key Lines of Enquiry/Quality Statements as set out in the Care Quality Commission (CQC).

1.5 **Relevant Legislations, Rules, and Regulations:**
Nursing Direct has taken into consideration the following legislations when complying with its obligations as a care provider in meeting the legal requirements for its' regulated activities, that it is registered to provide;

- Equality Act 2010
- 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
- Health and Care Act 2022

2. SCOPE

2.1 The following roles may be affected by this policy:

- All staff including Agency workers
- Registered Manager
- Other management staff

2.2 The following Service Users may be affected by this policy:

- All adult 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:

- Family/NOK/The family and friends of Service Users who might lack mental capacity as defined under the Act in England and Wales
- Advocates/Power of Attorney holders as duly authorised
- Representatives
- Commissioners
- External health professionals
- Local Authority/NHS/ICB/CCG

3. OBJECTIVES

3.1 To ensure that Nursing Direct follows the statutory framework of the MCA, including the five principles attached to it as key features, to empower and protect vulnerable people who may lack capacity to always 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 all staff including Agency Workers are aware of the key features of MCA and have a thorough understanding on it so that they assume Service Users have capacity until proven otherwise by use of a decision and time specific mental capacity assessment.

3.3 To ensure that all staff including Agency Workers understand that the empowering, human rights-based ethos of the Mental Capacity Act is a crucial framework for ensuring human rights-based care and interactions with any Service Users who may lack capacity to make some decisions at the time they need to be made.

3.4 To ensure that all staff including Agency Workers empower and protect Service Users who are not able to make their own decisions by use of the Mental Capacity Act Framework. By following the mental capacity code of practice, all staff including Agency Workers are supported to make decisions in a Service User's best interests and encouraged to identify the least restrictive of all available options.

3.5 To ensure that all staff including Agency Workers are given training in the Mental Capacity Act relevant to their role regarding who to assess as well as how and when to assess a Service User's mental capacity, and how to make best interests decisions, when relevant and necessary, whilst also ensuring that all staff including Agency workers are aware of their responsibilities and are legally protected through following the principles of the MCA.

4. POLICY

4.1 It is the responsibility of all staff including Agency Workers to adhere to this MCA policy and procedure and relevant guidance and best practice documents at Nursing Direct , as well as relevant health and safety legislation.

4.2 **Mental Capacity Act: 5 Principles**
Nursing Direct will ensure that all staff including Agency Workers to know and work within the **Mental Capacity Act and its 5 underpinning principles as outlined in section 1 of the Act:**

1. **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 and established that they lack capacity
2. **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
3. **Unwise decisions** – A person is not to be treated as unable to make a decision merely because they make an unwise decision- 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
4. **Best interests** – Anything done for, or decision is made under this Act or on behalf of people who lack capacity must be in their best interests
5. **Least restrictive option** – Before any act is done or a decision is made, all staff including Agency Workers 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

4.3 **Supporting Service Users to Make their Own Decisions - Consent**
All staff including Agency Workers must ensure that they support Service Users to make their own decisions at every opportunity by using all available means to enhance their capacity for each specific decision.

Nursing Direct understands the importance of supporting people to make their own informed decisions through informed choice and will ensure:

- All staff including Agency workers know how to present the right information in the right way, providing accessible information and resources, including using easy read or pictures where suitable, and being clear about all the available options
- All staff including Agency Workers 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
- All staff including Agency Workers 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
- All staff including Agency Workers allow time for the Service User to ponder on the decision, or go away and discuss it with trusted relatives or friends

Nursing Direct will never pressure or coerce Service Users or withhold information which is relevant to their decision-making process.

4.4 **Assessing Capacity**
Nursing Direct understands that all Service Users will be presumed to have capacity unless there is reason to believe otherwise. Nursing Direct understands a capacity assessment is not required if there is no doubt about an individual's capacity.

When a Service User lacks the mental capacity to make a particular decision, all actions taken are in the best interests of that person and align, as far as possible, with the Service User's wishes and feelings.

Where appropriate (for more major decisions), all staff including Agency Workers will be aware of the use the MCA best interests checklist in informing best interest decision making.

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. The Registered Manager or a designated and trained individual can undertake capacity assessments, alongside relevant healthcare professionals, when they are required.

4.5 **Best Interest Decisions**
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, the Registered Manager or appointed trained staff apply the mandatory checklist of factors laid out in the Mental Capacity Act.

4.6 **Restrictive Practices**
All staff including Agency Workers refer to the associated policies and procedures at Nursing Direct , such as restraint/physical interventions and restriction of freedom of movement, when considering capacity and best interest decision making and ensure that their actions are in accordance with the MCA.

All staff including Agency Workers know, how the Mental Capacity Act 2005 defines restraint, and that restraint can be:
- Physical or mechanical
- Environmental
- Chemical

Any physical intervention must be agreed as part of a multidisciplinary decision involving external health professionals and senior management in Nursing Direct.

All staff including Agency Workers who may be required to use physical intervention/ restraint must be trained in Prevention and Management of Violence and Aggression (PMVA) and have annual refreshers. All individuals trained in PMVA must follow the strategies as detailed by the approved, accredited training provider.

4.7 **Deprivation of Liberty**
Following the completion of mandatory training, all staff including agency workers, will be informed that under the Mental Capacity Act 2005, an individual cannot be deprived of their liberty in homecare settings, unless this is in accordance with the Deprivation of Liberty policies and procedures of Nursing Direct.

Deprivation of Liberty Safeguards (DoLS) are checks under the Mental Capacity Act 2005, ensuring the rights of individuals receiving Care with restricted freedom.

The DoLS assessment evaluates the alignment of Care with the person's best interests, covering age, mental health, capacity, best interests, eligibility, and refusals. Post-authorisation, safeguards continue, such as appointing a representative and setting review dates.

All staff including Agency Workers must be aware of, and understand, any conditions attached to a Deprivation of Liberty Authorisation. Further information can be found in the Deprivation of Liberty policies and procedures at Nursing Direct .

4.8 **Third Parties with Legal Responsibilities**
Nursing Direct understands that families and friends do not have the legal right to make decisions on behalf of Service Users without their consent, or if they do not have capacity.

The code of practice gives guidance to all staff including Agency Workers who:
- Work with service users who cannot make decisions for themselves
- Care for service users who cannot make decisions for themselves

Nursing Direct will ensure that they have a record of those lawfully able to act on a Service User's behalf and under what circumstances.

The Mental Capacity Act 2005 and amendments (MCA) says certain people must think about the code of practice when they act or make decisions on the other person's behalf.

This includes:
- An attorney appointed under a Lasting power of Attorney (Health and Welfare)
- An attorney appointed under a Lasting Power of Attorney (Property and Finance)
- Enduring powers of attorney (signed and dated before 2007 and applicable to the decision and circumstance)
- Court Appointed Deputies (a deputy appointed by the Court of Protection)
- An independent mental capacity advocate
- A person doing research approved in accordance with the MCA
- A person who acts in a professional capacity for, or in relation to, people who cannot make decisions for themselves
- A person who is paid to act for or in relation to people who cannot make decisions for themselves

Nursing Direct will ensure that all legal requirements are met, including registration, before accepting the above.

4.9 **Advance Statements of Wishes**
Nursing Direct are aware that the MCA creates statutory rules with clear safeguards so that service users may make a decision in advance to refuse treatment if they should lack capacity in the future. These are not legally binding, but it is good practice to encourage service users to think about the ways they would like to be cared for if they should lose mental capacity. Nursing Direct will make sure that any Advance Statements are considered thoroughly, and the service users wishes included in the care plan.

4.10 **Advocacy/IMCA**
In cases where a Service User lacks capacity and has no relatives or friends to be consulted about their wishes and feelings apart from paid staff including Agency Workers, and there is a need for serious medical treatment or a change in accommodation (e.g. moving into a care home), all staff including Agency Workers should know that an Independent Mental Capacity Advocate (IMCA) must be appointed by the relevant NHS body or local authority.

IMCAs are a statutory safeguard for people who lack capacity to make some important decisions. All staff including Agency workers will cooperate with any IMCA who is instructed. All staff including Agency Workers can refer to the Advocacy Policy and Procedure at Nursing Direct for further details.

4.11 **Training**
All staff including Agency Workers are given training on the Mental Capacity Act 2005. All staff including Agency Workers know and work within the Mental Capacity Act principles and codes of practice, including knowing what deprivation of liberty is, the legal framework to support Service Users lacking mental capacity, and the procedures that must be followed in such circumstances.

5. PROCEDURE

5.1 **Roles and Responsibilities**
The Registered Manager of Nursing Direct is responsible for this policy and the dissemination of its contents.

The Registered Manager of Nursing Direct maintains and raises awareness among all staff including Agency Workers of the Mental Capacity Act 2005 principles and practice, including:
- Recognising the central importance of the MCA to protect the human rights of vulnerable people
- An understanding among all staff including Agency Workers that the MCA springs out of human rights law combined with existing best practice in health and social care, so it is intuitive to work within, and aligns with good, person- centred practice
- The requirements to do everything possible to enable Service Users to make their own decisions, even small ones, wherever they can do so.
- The definition of restrictive interventions/restraint within the MCA, and how to recognise when deprivation of liberty is unavoidable in the Service User's best interests.
- The requirement to interfere with the Service User's basic rights and freedoms as little as possible, while keeping them as safe as possible

The Registered Manager of Nursing Direct is responsible for;
- Assessing capacity and arranging best interest meetings, as well as more complex best interest decisions for Service Users if this is required, or delegating responsibility to a trained deputy
- Reporting all breaches and raising safeguarding concerns to the regulator and local authority
- Checking the registration of those with third party legal responsibilities

All staff including Agency Workers have a responsibility to read this policy and procedure and direct questions to the management team if there is any element they do not understand.

All staff including Agency Workers have a responsibility to follow this policy and procedure and report any intentional or accidental breach of the process.

Training will be set by the Registered Manager of Nursing Direct and all staff including Agency Workers have a duty to attend or make alternative arrangements to attend. It is all staff including Agency Workers responsibility to maintain this knowledge and raise any concerns or gaps in knowledge with Registered Manager or the designated member of the management team.

All staff including Agency Workers should access the Raising Concerns, Freedom to Speak Up and Whistleblowing if they have witnessed any wrongdoing and wish to use this process to report a concern.

5.2 **Consent**
Any decision about a Service User's care or treatment must involve the informed and lawful consent of the Service User. A list of considerations can be found in the Policy section to ensure that the Service User is offering their informed consent.

If staff including Agency Workers have concerns that a Service User is unable to give informed and lawful consent (whether that be a refusal or agreement on the issue), the staff including Agency Workers must inform the Registered Manager and record this information in the Care Notes to see if a capacity assessment needs to be completed.

5.3 **Supporting Service Users to Make Decisions and the MCA Process**
Where it is helpful for the Service User, all staff including Agency Workers or a family member, advocate or representative may sit with them during the assessment process to reassure them and help them relax and feel comfortable.

All staff including Agency Workers adopt the following best practice in relation to supporting Service Users to make decisions:
- Knowing how to present the right information in the right way, including being clear about all the available options
- Actively looking for the best ways to communicate with a Service User, including checking whether they can see and hear as well as possible, or need an interpreter, or need to have pictures to understand their options
- Putting the Service User at ease, choosing the right time of day to explain about a decision to them, or asking whether they would like a relative or friend present
- Taking care to enable the Service User, wherever possible, to take away the information (in an accessible format such as easy read where suitable) and think it over, or discuss it with trusted friends or family

- Actively trying to create options that will fit with the Service User's wishes, feelings, history, and personality
- Documenting any support given to help the Service User make decisions in the Service User's Care Plan

5.4 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 their best interest and recorded by staff including Agency Workers.

5.5 **Day-to-Day Decisions**
All staff including Agency Workers must work from the Care Plan for day-to-day decisions. For more important decisions, best interests decisions should be recorded. This can be done by completing the forms that accompany this policy with the Service User.

5.6 **Advance Care Planning/Advance decisions**
All staff including Agency Workers should ensure that Service Users who are at risk of losing capacity to make decisions and Service Users with fluctuating capacity have the opportunity to discuss advance care and support planning prior to commencing a package of Care with Nursing Direct and when Care Plans are reviewed. This will ensure that the Service User's wishes are known and documented for the future.

5.7 **Who Should Assess Capacity?**
A Service User's capacity should be assessed by the relevant healthcare professional as directed by the commissioning body, when the decision needs to be made.

The relevant healthcare professional, as directed by the commissioning body, completing capacity assessments must be trained, confident and competent to carry out assessments, and have the communication skills and ability, as necessary.

If a healthcare professional is proposing treatment, it is their responsibility to assess capacity. For complex decisions, a formal assessment may be required from a social worker, occupational therapist, psychologist, or psychiatrist, who will advise those making the decision.

5.8 **Assessment of Capacity**
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. It is not about a range of decisions.

The relevant healthcare professional should involve the Service User's family or significant others or an Independent Mental Capacity Advocate if one has been appointed.

The relevant healthcare professional assessing a Service User's capacity to make a decision for themselves should use the two-stage test of capacity.

Stage 1:
Does the Service User have an impairment of the mind or brain, or is there some sort of disturbance affecting the way their mind or brain works? (It does not matter whether the impairment or disturbance is temporary or permanent.)
- If a Service User does not have such an impairment or disturbance of the mind or brain, they will not lack capacity under the Act

These could include:
- Conditions associated with some forms of mental illness
- Dementia
- Significant learning disabilities
- Long-term effects of brain damage
- Delirium
- Physical or medical conditions that cause drowsiness or loss of consciousness

If 'yes', does that impairment or disturbance mean that the Service User is unable to make the decision in question at the time it needs to be made?

Stage 2:
Does the impairment or disturbance mean that the Service User is unable to make a specific decision when they need to, after being given all the practical and appropriate support to help them make the decision for themselves? Staff must have supported the Service User to make the decision for Stage 2 to apply.

A Service User is unable to make a decision if they are unable to do the following:
- Understand information relevant to the decision that is to be made
- Retain that information in their mind
- Use or weigh the information to reach a decision, and
- Communicate their decision, by any means at all that can be understood

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 solely because of a diagnosis (such as dementia), or because someone thinks their decision is unwise, or because of their age, or their appearance.

When assessing a Service User's capacity, the Service User does not have to prove that they have capacity to make a certain decision. It is up to the person(s) 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.

If it is decided that, on the balance of probabilities, and after all possible help has been given to enable them to do so, 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 the Service User's best interests and recorded by the Care Worker.

5.9 **Fluctuating Capacity or Temporary Capacity**
Some Service Users may have fluctuating capacity, meaning at times they can make decisions, but at other times their condition may affect their ability to make decisions. This could include:

- A psychotic episode during a delusion phase
- Manic depression during a manic phase
- Acute illness, severe pain, effect of medication

The relevant healthcare professional must assess the Service User's capacity to make the particular decision at the time it needs to be made. They should also consider if the decision can wait until the Service User has the capacity to make it.

5.10 **Complete Record of Assessment**
The relevant healthcare professional who is responsible for assessing capacity must ensure that all the required documentation is completed to evidence that the Mental Capacity Act 2005 has been followed.

If relevant to the care being provided, all staff including Agency Workers must refer to the completed mental capacity assessment provided.

The capacity assessment must clearly document:
- The decision to be made
- The domains of capacity that the Service User is lacking (understanding, retaining, weighing, and/or communicating)
- Details of how staff have attempted to maximise the Service User's capacity

All staff including Agency Workers must work to a Care Plan which is clearly based on the assessment of capacity and best interests and is subject to review in accordance with local agreement and the Service User care and support planning policies and procedures at Nursing Direct.

All staff including Agency Workers know that they can raise issues that might show that the Care Plan should be reviewed more urgently with senior management. Examples of this include when the staff including Agency Workers think that the Service User has regained capacity, or that there is a decision they used to be able to make but now might have lost that capacity.

The records of all assessments must be completed fully, signed by the relevant healthcare professional (assessor), and dated. Assessments will be kept with the Care Plan so they are readily available and can be revisited when reviewing aspects of the Service User's Care.

All information will be stored in line with data protection law and the UK General Data Protection Regulation.

5.11 Where a Service User lacks capacity over a long period of time for many kinds of decisions, capacity must 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.

5.12 **Disputes**
If there is a dispute about best interests, firstly the decision-maker/assessor must ensure they 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:

- Families and friends with legal responsibilities will not always agree about what is in the best interests of an individual. However, they usually have greater knowledge than all staff including Agency Workers of what this Service User would have wanted, and sometimes of what the Service User now wants
- The decision-maker/assessor will need to clearly demonstrate in the record kept that the decision is based on all available evidence and has taken into account all conflicting views. Particular care will be taken to look for the option that is the least restrictive of the Service User's rights.

5.13 If there is a dispute, decision-maker/assessor will consider the following things to assist in determining what is in the Service User's best interests:

- Where it might help, involve an advocate who can represent the Service User and highlight their relevant wishes and feelings
- Hold a best interest meeting to identify all the possible options and explore the pros and cons of each, or, if for example, relatives or some professionals cannot attend in person, enable all relevant views to be properly recorded and shared
- Consider mediation
- As a last resort, apply to the Court of Protection for a ruling (normally undertaken by the relevant Local Authority or NHS Trust when a complex and serious decision is to be made)

The Registered Manager of Nursing Direct must ensure that all documents completed are both signed and dated.

5.14 **Best Interest Meetings/Mental Capacity Act Check List**
In making a decision in a Service User's best interests because they lack capacity to make this decision for themselves, the Mental Capacity Act 2005 makes it compulsory to use a checklist covering matters to be considered, except in an emergency.

Decisions can be complex or life changing, and a formal best interest decision meeting may be required. A number of different people may be involved if the decision would benefit from their input for the Service User such as:
- Nursing Direct staff including Agency Workers
- Third parties such as those with power of attorney
- Family/close friends

A record of the conversations and conclusions must be recorded when making a decision in a Service User's best interests, and the following must be taken into account (except in an emergency, when there is no time).

This checklist is a mandatory requirement under the Mental Capacity Act 2005 of matters to be considered by a decision-maker as directed by the commissioning body:

- Is the Service User 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 Service User to take part in the making of the decision, even though they lack the capacity to make the decision
- Give great weight to the Service User'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 Service User if they were able to make their own decision
- Be sure that you are not making assumptions about the Service User's best interests simply based upon the Service User's age, appearance, condition, or behaviour
- As far as possible, the decision-maker must consult other people who might have views on the Service User's best interests and what they would have wanted when they had mental capacity, especially the following people:
- Anyone previously named by the Service User lacking capacity as someone to be consulted
- Staff at Nursing Direct , close relatives, friends, or anyone else interested in the Service User's welfare
- Any attorney appointed under a Lasting Power of Attorney
- Any deputy appointed by the Court of Protection to make decisions for the Service User

Making a decision in a Service User's best interests requires evidence of the following:

- That the Act's statutory principles and best interests' checklist are carefully considered
- That the Service User remains central to the decision or decisions needing to be made and they are involved in the decision-making process where possible
- That relevant professionals and informal networks are properly consulted and if the statutory criteria are met, an Independent Mental Capacity Advocate is instructed
- A clear structure to the meeting, promoting partnership and collaborative working, the sharing of relevant information, the positive expression of different views, and an analysis of the risks and benefits attached to different options

5.15 **Advocacy**

An advocate is someone who can help the Service User express their wishes and views, and support them if:

- They have no family or friends and do not qualify for an Independent Mental Capacity Advocate (IMCA)
- Their family members disagree about their best interest
- There is conflict of interest with those who have been consulted over the best interest decision
- The Service User has previously used an advocate

5.16 **Independent Mental Capacity Advocate (IMCA)**

The IMCA service helps Service Users who lack the capacity to make important decisions about serious medical treatment and other changes such as accommodation or a Care provider, and who have no family or friends that it would be appropriate to consult about those decisions.

IMCAs are independent and will work with, and support, the Service User who lacks capacity, to express their views to those who are working out their best interests.

An IMCA must be instructed when a Service User with no one else to support them lacks capacity and:

- An NHS body is proposing to provide serious medical treatment, or
- An NHS body or local authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home, and
- The Service User will stay in hospital longer than 28 days, or
- They will stay in a care home for more than eight weeks

An IMCA should also be considered:

- Support/care reviews, where no one else is available to be consulted
- Adult protection cases, whether or not family, friends or others are involved

5.17 **Education and Training**

- All staff including Agency Workers are given training (including regular refresher training) in the Mental Capacity Act and the attendance of staff is recorded on a matrix at Nursing Direct
- All staff including Agency Workers understand the importance of seeking consent whenever staff intervene in a Service User's privacy or lifestyle, unless it can be shown the person lacks capacity to make this specific decision
- All staff including Agency Workers understand that capacity is 'decision and time specific', so they must do all they can to enable this person to make this particular decision at the time it needs to be made, for example, by clearly explaining their options and the likely outcomes of different decisions they might make
- All staff including Agency Workers recognise that Service Users have the important right to consent to, or refuse, any staff interventions in their lives, provided they have capacity to do so
- All staff including Agency Workers understand how to escalate the need to assess capacity when required, if appropriate
- All staff including Agency Workers evaluate how effective the training is and feedback their views to the management team.
- Forums such as supervisions, team meetings and observation of practice are used to continue improving staff practice in applying the MCA

Nursing Direct makes accessible documents and resources about the Act, including training resources available to staff including Agency Workers.

6. DEFINITIONS

6.1 **All/relevant staff including Agency Workers**

6.1.1 **Staff**

Denotes all the employees of Nursing Direct Healthcare Limited.

6.1.2 **Agency Workers**
Refers to individuals who are contracted with Nursdoc Limited or another employment business as an Agency Worker (temporary worker) provided to Nursing Direct Healthcare Limited to perform care services under the direction of Nursing Direct.

6.2 **Nursing Direct**
Nursing Direct, also known as Nursing Direct Healthcare Limited, is the entity regulated by the CQC (Care Quality Commission) and responsible for the care service provision, contracted to provide homecare services to service users in their homes, in placements, essential healthcare facilities and in the community.

6.3 **Nursdoc Limited**
As the sister company to Nursing Direct Healthcare Limited, Nursdoc Limited acts as an employment business, specialising in providing staffing solutions to the healthcare sector.

6.4 **CQC (Care Quality Commission)**
CQC throughout this policy, the term "CQC" refers to the Care Quality Commission (CQC) which is the independent regulator of health and social care in England.

6.5 **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
- All staff paid to work with any person aged 16 or above, who might lack mental capacity to make certain decisions at the time they need to be made due to a disability or disorder of mind or brain, must 'have regard to' the MCA code of practice.
- Note that a new code of practice is under development, and will supersede the existing code, perhaps in autumn 2023. Nursing Direct Healthcare Limited will update all its resources to take account of the new code in good time
- Most of the MCA applies to people from the age of 16 upwards
- Certain parts, such as the Deprivation of Liberty Safeguards (DoLS) and 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.
- Note that DoLS will be replaced, not before autumn 2023, by the Liberty Protection Safeguards (LPS), which will apply in any settings where a person lacking capacity to consent to their care arrangements might be, such as supported living, extra-care housing, or their own family homes. Nursing Direct Healthcare Limited will update all resources and policies in good time before implementation
- 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

6.6 **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 unable to make a particular decision at the time it needs to be made? (See explanation below of how to consider the '4 steps' to work this out)
    - Secondly, is their inability to make the decision BECAUSE OF some impairment of, or disturbance in the functioning of, their mind or brain? (This can be temporary or permanent; there will usually be a diagnosis of what is wrong with the mind or brain, but it is not essential)
- The person lacks capacity for this decision if there is one or more of the following steps that they CANNOT do:
    - 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)

6.7 **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 their wishes and feelings into a written statement if they so wish, which the person making the decision must consider

6.8 **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

6.9 **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

6.10 **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

6.11 **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 (as a safeguard that the person is not subject to undue pressure), with a clear statement of which treatment or treatments the person is refusing. In addition, there must be an express statement the person understands that this may put their life at risk but that the decision still stands
- A person can only refuse specified medical treatments; they cannot insist on any particular treatment. A person cannot refuse in advance to be admitted to a care home, or to be offered food and drink by mouth, or to being kept clean and comfortable.
  An advance decision to refuse treatment can be used to refuse, in advance, clinically assisted nutrition and hydration (CANH) because this is regarded as a medical treatment
- If it meets the rules above, and applies to the situation at hand, an advance decision to refuse treatment is just the same as if the person is refusing the treatment with capacity: the treatment cannot be given.
  Care workers 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.

6.12 **Independent Mental Capacity Advocate (IMCA)**

- An IMCA is an advocate appointed by a Local Authority or NHS body, in certain circumstances, to support a person who lacks capacity but has no one except paid staff who are interested in their welfare
- The IMCA finds out about the person's wishes, feelings, beliefs, and values, and brings 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
- Ms Leanne Harris must ensure that, if an IMCA has been instructed and will visit, staff understand the IMCA has a right to see the person alone if they wish and has a right to see relevant records
- It is good practice to sort out what notes will be relevant to the decision the IMCA will advise on, to welcome the IMCA as a colleague, and if applicable to provide somewhere private for the IMCA to meet with the person if they wish, to read the information and make notes

6.13 **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

6.14 **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

6.15 **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, 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)

6.16 **Deprivation of Liberty in Community Settings**

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 Nursing Direct Healthcare Limited suspects that a Service User is deprived of their liberty, they must notify the commissioner or Local Authority

6.17 **Winterbourne View and Mid Staffordshire Hospital**

- Reports into care by the Care Quality Commission and others, at Winterbourne View and Mid Staffordshire Hospital, have highlighted issues where basic human rights have not been recognised and patients have been neglected and abused as a result
- The MCA is part of a framework aimed at protecting the human rights of vulnerable patients and, if applied correctly, assures both the provider and the commissioner that this is indeed the case
- Much of what went wrong at Winterbourne View and other places might have been avoided if the service provider had understood and acted upon their duty to protect the liberty and security of those in their care as well as understood what the Act says about the duty to take decisions in the best interests of vulnerable individuals

OUTSTANDING PRACTICE

To be 'outstanding' in this policy area you could provide evidence that:

- All relevant staff can identify the principles of the Mental Capacity Act 2005
- Service Users are helped and supported in several ways and on a regular basis to make decisions for themselves
- Staff can describe the difference between restrictions and restraint allowed by the Mental Capacity Act and a deprivation of liberty requiring special authorisation through DoLS (and in future through LPS)
- Current good practice materials, including technology, are available to help Service Users who need support in decision making
- Decisions or choices made by Service Users who lack capacity are respected as far as possible, while keeping the Service User safe
- Service Users with capacity are not prevented by the service from making decisions, even though others may disagree with their choices

COMPLETED DATE:	16.07.2024
SIGN OFF DATE:	16.07.2024
REVIEW DATE:	16.07.2025
SIGNED:	 Marc Stiff – Group Managing Director