

Mental Capacity Act *and* Deprivation of Liberty Safeguards Policy

**Southend Safeguarding Adults Board
Essex Safeguarding Adults Board
Thurrock Safeguarding Adults Board**



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Document Control Sheet

Title:	Mental Capacity Act and Deprivation of Liberty Safeguards Policy.
Purpose:	To provide the framework for assessing people's mental capacity, as well as assessing best interests in line with the Mental Capacity Act 2005 including Deprivation of Liberty Safeguards 2009 and Codes of Practice.
Type:	Operational policy
Target Audience:	All those involved in assessment, planning, support, care management or review of adults receiving care and support services within Southend, Essex and Thurrock.
Date approved:	October 2016
Review Date:	October 2017
This replaces:	Mental Capacity Act Policy Deprivation of Liberty Safeguards Policy
This should be read alongside:	This Policy is compliant with all relevant legislation at the time of publication and adheres to the current SET Safeguarding Adults Guidelines and SET Safeguarding and Child Protection Procedures.
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1. Section 1 - Introduction

The Mental Capacity Act (2005) provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make specific decisions for their selves. Everyone working with or caring for an adult who may lack capacity must comply with the Mental Capacity Act (2005) and the Code of Practice (2007).

The full Codes of Practice of the Mental Capacity Act (2005) and the Deprivation of Liberty Safeguards (2009) can be found [here](#)¹ or on the respective Local Authority websites for Southend Borough Council, Essex County Council and Thurrock Council.

The Local Safeguarding Adults Boards for Southend, Essex and Thurrock

The Safeguarding Boards are committed to discharging their duties in relation to the Mental Capacity Act (2005) across Southend, Essex and Thurrock in full compliance with the Code of Practice and subsequent case law. Their approach will always be based on helping people to help themselves and in doing so, to promote progression and maximise independence.

Our goal is that people who we support through this process and their families and circles of support can say:

Information and advice	<p>“I have the information and support I need in order to make a decision.”</p> <p>“I have access to easy to understand information about the pros and cons of the decision I am being supported to make, which is consistent, accurate, accessible and up to date.”</p> <p>“I can speak to people who know something about what the decision is about and can make things happen.”</p> <p>“I have help to make informed choices if I need and want it.”</p> <p>“I know where to get information about what is going on and I feel part of it.”</p>
Making a specific decision	<p>“I felt people spent sufficient time with me and provided sufficient information for me to make an informed decision.”</p> <p>“I had the right information provided in the right way.”</p> <p>“I felt I was kept at the centre and that my wishes were respected”</p> <p>“I was told what was happening.”</p> <p>“Professionals working with me understood I have the right to make unwise decisions.”</p> <p>“I was not placed under any duress in making a specific decision.”</p> <p>“I had the right support to make an informed decision.”</p>

Flexible integrated care and support	<p>“I am in control of planning my care and support.”</p> <p>“I have care and support that is directed by me and responsive to my needs.”</p> <p>“My support is coordinated, co-operative and works well together and I know who to contact to get things changed.”</p> <p>“I have a clear line of communication, action and follow up.”</p>
Risk enablement	<p>“I can plan ahead and keep control in a crisis.”</p> <p>“I feel safe, I can live the life I want and I am supported to manage any risks.”</p> <p>“I feel that my community is a safe place to live and local people look out for me and each other.”</p> <p>“I have systems in place so that I can get help at an early stage to avoid a crisis.”</p>

Section 2 – POLICY

2.1 Principles

The Mental Capacity Act (2005) applies to individuals aged 16 and over and sets out five principles as below:

1. A person (aged 16 and over) must be assumed to have capacity unless it is established that he/she lacks capacity s.1(2)
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success S.1(3)
3. A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision S.1(3)
4. An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his/her best interests S.1(5)
5. Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person’s rights and freedom of action S.1(6).

This means:

Every person(aged 16 and over) capable of making decisions, has an absolute right to accept or refuse care, treatment or other intervention regardless of the wisdom or consequences of the decision. The decision does not have to be justified to anyone. Without consent, any invasion of the body, however well-meaning or therapeutic, will be a criminal assault.

2.2 Where there is an issue about mental capacity

Where there are doubts about an individual's capacity to consent to an action that concerns them, a formal assessment of their capacity to make this specific decision must be carried out in line with the five statutory principles, and the Guidance of the MCA 2005 Code of Practice and the following sections of the Mental Capacity Act (2005).

- A person must be assumed to have capacity unless it is established that he/she lacks capacity S.1(2)².
- A person lacks capacity in relation to a matter, if at the material time, he/she is unable to make a decision for him/herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain S.2(1).
- The question of whether a person lacks capacity must be decided on the balance of probabilities S.2(4).
- A person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success S.1(3)
- A person is not to be treated as unable to make a decision merely because he/she makes an unwise decision S.1(4).
- Where a person is unable to make a decision for him/herself, there is an obligation to act in his/her best interests S.1(5).
- Where a decision relates to life-sustaining treatment, the person making the decision must not be motivated by a desire to bring about death S.4(5).
- When determining what is in a person's best interests, consideration must be given to all relevant circumstances, to the person's past and present wishes and feelings, to the beliefs and values that would be likely to influence his/her decision if he/she had capacity, and to the other factors that he/she would be likely to consider if he/she were able to do so S.4(6).
- The presumption that the adult has capacity is fundamental to the Act. It is important to remember that the adult has to 'prove' nothing. The burden of proving a lack of capacity to take a specific decision (or decisions) always lies upon the person who considers that it may be necessary to take a decision on their behalf (or will invite a court to take such a decision). The standard of proof which must be achieved is on the balance of probabilities (S.2(4)). Accordingly, it will always be for the decision-maker to prove that it is more likely than not that the adult lacks capacity.

It is our policy to comply with the Mental Capacity Act, its Code of Practice and any other relevant national guidance, and leading judgements when making decisions about a person's capacity or deprivation of liberty.

² References are taken from the Mental Capacity Act and not the Code of Practice

2.3 Decisions not covered by the Mental Capacity Act and therefore outside the scope of this policy

Mental Capacity Act (2005) (s27) excludes;

- consenting to marriage or a civil partnership
- consenting to have sexual relations
- consenting to a decree of divorce on the basis of two years' separation
- consenting to the dissolution of a civil partnership
- consenting to a child being placed for adoption or the making of an adoption order
- discharging parental responsibility for a child in matters not relating to the child's property, or
- giving consent under the Human Fertilisation and Embryology Act 1990.