



Mental Capacity Act Policy Note for Housing Department

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History of most recent Policy Changes – Must be completed			
Date	Section	Change	Origin of change (eg change in legislation)

East Devon District Council

Mental Capacity Act Policy Note for Housing Department

1 Why has the council introduced this policy?

The Mental Capacity Act 2005 provides the legal framework for acting and making decisions on behalf of adults who lack capacity to make some decisions for themselves.

The Act applies to everybody who has dealings with people who may lack capacity, and particularly if they have a professional relationship with the person.

EDDC staff interact with residents and members of the public on a day to day basis across the range of its business and functions, often on complex issues requiring understanding and comprehension of the decision being made, and the implications of that decision.

Many of these interactions and decisions will involve a level of risk that also needs to be understood by the customer when considering whether to engage (or not) with council staff to make the decision. The risk may be significant (eg: to do with individual or public safety, compliance or legal liability, the threat of legal action or eviction) and an assessment of mental capacity may be required if a customer does not appear to have sufficient understanding of the issues to make the relevant decision.

There are increasing numbers of vulnerable people living in the community whose mental capacity is inhibited by disease, mental ill health, injury, or disability, and the council has a responsibility to safeguard their interests in line with the statutory requirements of the [Mental Capacity Act](#) and best practice set out in the [Code of Practice](#).

The Act can be used to make decisions for someone who lacks capacity on everything from what to wear to where to live. The Act provides the legal framework for ensuring that decisions are made and recorded in a consistent, transparent way and are in the person's best interests.

In applying this policy, staff will consider whether there are any related safeguarding concerns requiring the application of the council's safeguarding policy and procedures. This policy will be applied across the Housing Services Department to:

-) Facilitate the necessary decisions to be made in relation to council housing services, including homelessness.
-) Ensure the best interests of individuals whose mental capacity may be in doubt.
-) Minimise recourse to litigation.

2 What is the council's policy?

Mental Capacity Act 2005 – Key Principles

The Council will take into account the the Act's five key principles in it's interactions with customers of the Housing Services Department:

- **A 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
- **Supporting individuals to make their own decisions** – a person must be given all practicable help before anyone treats them as not being able to make their own decisions
- **Unwise decisions** – just because an individual makes what might be seen as an unwise decision, they should not be assumed to lack capacity to make that decision
- **Best Interests** – an act done or decision made under the Act for or on behalf of a person who lacks capacity must be done in their best interests
- **Least restrictive option** – anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms

Housing Staff Awareness

EDDC will support customer facing staff in the Housing Services Department to understand the requirements of the Mental Capacity Act and the obligations on them to comply with the principles of the Act. Staff will be expected to have a general level of awareness of the 5 principles as part of induction, and to operate on the basis of presumed capacity.

They will also keep in mind that an individual's apparent inability to understand or to make decisions may be due to incapacity, requiring further consideration in how to proceed. As part of this, consideration must be given to any potential related safeguarding issues which should be discussed with the Safeguarding Champion and a decision made (and recorded) on whether to contact social services.

Information and learning resources are available for those requiring a higher level of knowledge and expertise, see section 3.

Housing Procedures

The council will take the opportunity to confirm capacity when appropriate (eg. for homelessness applications; at tenancy sign up, review and termination; during arrears discussions, anti-social behaviour incidents and complaints). Customers will have the opportunity to nominate someone to act on their behalf, should the need arise.

Staff will use simple plain language in their interaction with customers, and all contacts will be recorded on the relevant database.

Housing procedures incorporate different methods of communication including telephone, written, and face to face to facilitate engagement and understanding of decisions to be made by customers.

Several attempts to make contact will be made in different ways, on different days and at different times. For prescribed housing functions and those determined by statute, operational procedures will specify the number and type of contact to be made (eg. pre- eviction protocols).

Offers of practical assistance will be made such as aids to communication, having a friend, relative, or advocate present, or communication via a nominated person. It should also be established whether there is a lasting power of attorney covering welfare and/or property and affairs in place.

The council will undertake all reasonable methods to maximise a person's ability to make a capacitated decision before determining that they are incapacitated.

Consideration of Mental Capacity Issues

Everybody who works with people who may lack capacity has a responsibility to assess capacity in relation to what they do with the person. No-one can be labelled incapable simply because they have a particular diagnosis or medical condition (e.g. a learning disability or dementia).

The test for incapacity is two fold:

1) Functional test:

1. Can the person **absorb** basic information about the pros and cons of an issue, simply communicated?
2. Can the person **retain** the information for long enough to process it?
3. Can the person be said, objectively, to be **weighing up the pros and cons** against their own (subjective) value system and arriving at a decision?
4. Can they **communicate** it somehow?

2) Diagnostic test:

- If the answer to any of the above is no, is this **because of** an impairment or a disturbance in the functioning of the mind or brain? (doesn't have to be permanent or formally diagnosed)
- If so, capacity is no longer presumed.

Their "decision" is merely a preference, and if, in acting upon it, the person comes to harm which could have been anticipated, those with a duty to care could be deemed negligent.

The formal application of the 2 stage test is only likely to be needed in exceptional circumstances where all efforts to facilitate a capacitated decision being reached have been exhausted. The council's legal services will need to be involved if a formal assessment of capacity is being considered.

When should capacity be assessed?

An assessment should be carried out when a person's capacity is in doubt, either because their behaviour causes concern about lack of capacity or because they have been diagnosed with an impairment or disturbance that affects the way their mind or brain works. An assessment of a person's capabilities needs to be carried out each time a decision has to be made.

Process for Housing Staff

Where housing staff are unable to engage with an individual or they appear either unable to understand or to make the decision before them, mental capacity must be considered as a possible reason. Any consideration of capacity must be about a particular decision, and not a range of decisions. Where there is any concern about capacity, the relevant manager will be alerted to determine whether to involve other professional expertise at that stage (eg. legal/health/social care).

The questions in the incapacity test (see above) should help in initially assessing capacity against the required decision, and deciding whether to proceed formally or informally. The more significant the decision to be made, the more formal the approach to determining capacity should be. Key principles of the process should be:

-) Involve the individual as far as possible
-) Consult and involve people who know individual
-) Identify all relevant issues and circumstances
-) Use past knowledge of the individual.

The relevant Council staff with an existing relationship with the person will be involved as necessary to facilitate a decision in the best interests of the individual.

Working out a person's best interests is only relevant when that person has been assessed as lacking, or is reasonably believed to lack, capacity to make the decision in question or give consent to an act being done.

Every step of the process should be recorded on the appropriate system by the relevant staff so that the actions taken and sequence of events are clear.

Tenancy Agreements

Tenancy agreements are legal documents, and a specific form for assessment of capacity to sign these is included at Appendix 1 where mental capacity may be in doubt.

Cases Involving Litigation

On reaching the stage prior to legal proceedings being instigated, the relevant manager and a member of the legal team will review the case to ensure that all opportunities to enable a capacitated decision have been provided.

If there is no alternative but to take legal action, a formal assessment of capacity will be requested from the relevant professional, using the form at Appendix 2 (see section 3 below). If incapacity to engage in litigation is confirmed, the legal process to appoint a "Litigation Friend" should be followed.

3 Appendices and other relevant information

Appendix 1: [Form for Assessment of capacity to sign a Tenancy Agreement](#)

Appendix 2: [Mental Capacity Assessment Form](#)

Housing Learning Improvement Network resources:

) [Factsheet 20 and 4 information sheets](#)

) [Court of Protection Guidance on MCA and Tenancies](#)

Devon County Council's comprehensive guidance and resources for professionals:

[https://new.devon.gov.uk/care-and-health/guide/mca-practice-guidance/Devon County Council MCA-Flowchart.pdf](https://new.devon.gov.uk/care-and-health/guide/mca-practice-guidance/Devon%20County%20Council%20MCA-Flowchart.pdf)

4 Links related Policies/Strategies, Procedures and Legislation

[Mental Capacity Act 2005](#)

[Mental Capacity Act 2005 Code of Practice](#)

[Mental Capacity Act 2005 Making Decisions A guide for advice workers](#)

[EDDC Safeguarding Policy and Procedures](#)