

Mental Capacity Policy

1. Introduction

- 1.1 This policy outlines our approach where people might not understand their rights and responsibilities due to mental capacity this maybe in relation to personal care, medication, their finances or issuing and ending tenancies.
- 1.2 This policy aims to ensure that those who apply to us for housing or support or are existing customers who may lack capacity, are treated with respect and fairness and are supported to take control and make choices about where they live.
- 1.3 We issue tenancies and support people who may lack the capacity to make decisions in certain areas of their life. Examples of the people we support who may lack capacity are those with:
 - Dementia
 - Severe learning disabilities
 - Mental health problems
 - Confusion, drowsiness or unconsciousness because of an illness or the treatment for it
 - Brain injuries
 - Alcohol and substance misuse.
- 1.4 A tenancy agreement is a legal contract and therefore some 'legal capacity' is required otherwise the contract is not valid and we cannot enforce the terms of the tenancy agreement, such as taking legal action if someone is in rent arrears.
- 1.5 This policy should be read in conjunction with the following policies:
 - Safeguarding Adults Policy
 - Cash Handling Policy
 - Data Protection Policy
 - Medication Policy
 - Tenancy Policy
 - Assessment and Care Planning
 - Equality, Diversity and Inclusion Policy

2. Scope

- 2.1 This policy applies to all Peabody Group customers (residents and service users). It should be applied to any occupancy agreement that we issue; it deals with the following situations:
 - Issuing a tenancy to a new applicant who lacks capacity to enter into an agreement.
 - Ending a tenancy when a person lacks the capacity to make the decision themselves.
 - When a person lacks capacity to make decision on personal care, medication, or their finances.

3. Key terms and definitions

- 3.1 **Legal Capacity** means:
 - Being able to make a decision.
 - Understanding there is a choice and wanting to enter into a contract.

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- Understanding the obligations of the contract e.g., to pay rent, keep to terms of the tenancy etc.
- Understanding the risk of eviction if they do not comply with the terms of the tenancy.

3.2 The **Mental Capacity Act 2005** says that we should:

- Assume that someone has the capacity to make a decision, unless proven otherwise
- Take all practical steps to help and support a person make their own decisions.
- Do not assume a person lacks capacity because their decision is seen as unwise.
- Make decisions in the person's best interests if it is proven that they lack the capacity to make the decision themselves.
- Make sure that any action we take is the least restrictive option to protect the person's rights and freedom of action.

3.3 **Lasting Power of Attorney (LPA)** – this is a legal document that lets someone appoint one or more people (known as 'attorneys') to help make decisions on their behalf. The person must be 18 or over and have mental capacity (the ability to make their own decisions) when you make their LPA.

3.4 **Enduring Power of Attorney (EPA)** – this works in a similar way to Lasting Power of Attorney. However, only EPAs made and signed before 1 October 2007 can still be used. After that date people are required to make LPAs instead.

3.5 **Court of Protection** - this is a court that deals with decisions or actions taken under the Mental Capacity Act. A social worker or someone helping a person who lacks capacity would need to apply to the Court if someone needs permission from the Court to make decisions about their health, welfare, financial affairs or property.

3.6 **Court of Protection Deputy** - A Deputy is a person appointed by the Court of Protection to manage the personal welfare or the property and affairs of another person, who lacks the mental capacity to manage them themselves.

3.7 **Best Interests Decision** – If a person is assessed as lacking capacity, then in line with the Mental Capacity Act 2005, any action taken, or any decision made for, or on behalf of that person, must be made in his or her best interests. The reasons for the decision must be recorded.

3.8 **Liberty Protection Safeguards (LPS)** – provide protection for people aged 16 and above who are or who need to be deprived of their liberty to enable their care or treatment and lack the mental capacity to consent to their arrangements. The Liberty Protection Safeguards were introduced in the Mental Capacity (Amendment) Act 2019 and will replace the Deprivation of Liberty Safeguards (DoLS) system. Under LPS, there will be a streamlined process for authorising deprivations of liberty.

4. Our approach

Tenancies

4.1 Peabody will always work from the assumption that an applicant has the capacity to understand a tenancy or support being given unless proven otherwise. We will do what we can to help a person understand our tenancy/support by providing them with a sample tenancy/support agreement to look at in a format that is suitable for their needs, such as simple language or visual format.

4.2 Sometimes people can have legal capacity when they sign their tenancy agreement, but lose it later, due to the onset of dementia for example. If this happens then the tenancy agreement is

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still valid and we can enforce it, but we will need to work closely with family, other agencies and advocates to ensure that any decisions taken about their tenancy are in that person's best interests.

- 4.3 Where we have concerns, we will request that a Mental Capacity Assessment is completed by a social worker or a medical professional and seek confirmation that it is in the applicant's best interests.

Issuing tenancies to new applicants who lack capacity.

- 4.4 We cannot issue a tenancy to a person who lacks the capacity to understand the contract unless they have someone representing them who can legally sign the agreement, such as:
- Enduring Power of Attorney (EPA) or Lasting Power of Attorney (LPA) over their property and financial affairs
 - Deputy appointed by the Court of Protection (COP)
 - The Court of Protection (COP) ordered agreement to enter into a tenancy agreement.
- 4.5 We cannot keep a property available for an applicant if they lack capacity at the point of referral or nomination from a local authority. The applicant can reapply once a Court of Protection Order has been made.
- 4.6 In some services, we may receive referrals / nominations from joint applicants, such as older persons services or general needs housing, where both or one of the applicants lacks capacity. Colleagues should refer to departmental procedures for further guidance on how to proceed in these situations.
- 4.7 Where we have concerns regarding an applicant's capacity to understand a tenancy, we will request a social worker, family, advocate or support agency to arrange a mental capacity assessment before we proceed with issuing a tenancy agreement.
- 4.8 In exceptional circumstances we may agree to allow a person who lacks capacity to understand or enter into a tenancy agreement to move to one of our properties if it is in their best interests and there is evidence that it would be detrimental to their health and well-being if they were to wait for a Court of Protection order. This will be on a case-by-case basis and at the sole discretion of Peabody. Colleagues should refer to their departmental procedures for examples of when this might be appropriate.

When an existing tenant loses capacity to make decisions regarding their tenancy

- 4.9 Many of our tenants live in our homes for a long time. There may be occasions when someone loses capacity, due to the onset of dementia or a deterioration in their mental health for example. If this does arise, we will work with other agencies, families and advocates to ensure that the best interest decisions are made before we take any action in relation to their tenancy or where they live. Colleagues should refer to their departmental procedures for further information.
- 4.10 We recognise that there may be occasions when an existing tenant who lacks capacity may need to transfer to another property for their health and well-being, for example, to move from first floor to ground floor accommodation where there is a serious risk of falls. Under these circumstances we may decide to agree to the move pending the outcome of a Court of Protection Order. Such decisions will be made on a case-by-case basis and at our sole discretion. The decision will be based on the best interests of the individual and current legal advice. Colleagues should refer to their departmental procedures for further information.

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Ending a tenancy

4.11 We will not accept a termination of tenancy from a tenant who lacks capacity, unless someone has:

- Enduring/ Lasting Power of Attorney
- Deputy appointed by the Court of Protection
- Court of Protection ordered agreement to enter into the tenancy agreement.

Colleagues should refer to their departmental procedures for further information on how to proceed in these situations.

4.12 In exceptional circumstances, we may end a tenancy via a Notice to Quit if it is in the tenant's best interest and a Best Interest Decision has been made in line with Mental Capacity Act 2005. Decisions will be made on a case-by-case basis and at the sole discretion of Peabody. Colleagues should refer to their departmental procedures for further information on examples of when this might be appropriate.

Disagreements over capacity

4.13 If there is a disagreement between any parties concerned over capacity, for example, if parents think that their child has capacity, but a social worker or solicitor does not, then we will not issue or end a tenancy. We will request the case to be referred to the Court of Protection for a final decision.

Care and Support of an Adult

4.14 Our care services are registered with CQC to deliver the regulated activity of personal care and adhere to the guidance set out in Mental Capacity Act 2005 and Health and Social Care Act 2008 (regulated Activities 2014)

4.15 We also support customers who do not come under the umbrella of the regulated activity, but we still adhere to the Mental Capacity Act and principles of mental capacity within the regulation guidance of the Health and Social Care Act 2008 (Regulated Activities 2014).

4.16 The regulations within the Health and Social Care Act 2008 that we consider when assessing and support planning with customers are:

- Regulation 9: Person Centered Care
- Regulation 10: Dignity and Respect
- Regulation 11: Need for Consent
- Regulation 12: Safe Care and Treatment
- Regulation 13: Safeguarding service users from Abuse and Improper Treatment
- Regulation 14: Meeting Nutritional and Hydration Needs
- Regulation 15: Premises and Equipment
- Regulation 17: Good Governance
- Regulation 20: Duty of Candour

4.17 If and when a customer's capacity is in question, we include the mental capacity assessment and outcome in the customer's paperwork. This might be on a local authority template or within a customer's support plan.

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4.18 In some services the provision of suitable accommodation to a person lacking mental capacity may involve depriving that person of their liberty under article 5 of the European Convention on Human Rights (ECHR), for example, ensuring that a person cannot leave the premises alone where to do so would place them at risk. The Court of Protection must authorise any such deprivation of liberty and must do so on an annual basis. Extra safeguards are needed if the restrictions and restraint used will deprive a person of their liberty. Colleagues should refer to their departmental procedures for further information on examples of when this might be appropriate.

5. Equality, Diversity and Inclusion

5.1 We value diversity and promote equality, ensuring people are treated accordingly to their individual needs. This ensures that no person or other organisation is discriminated against on the grounds of race, colour, nationality, ethnic origins, sex, disability, sexual orientation, gender reassignment, marital or civil partner status, pregnancy, unrelated criminal activities, illness or any other matter that may cause a person to be treated with prejudice.

5.2 We will endeavour to ensure that services are delivered fairly and equally to all and to the highest possible standard. We provide all customers, prospective customers and other stakeholders with the information they require, in a format to meet their individual needs, using clear language which is easy to understand.

5.3 This policy impacts on our most vulnerable customers, many who will have protected characteristics under the Equality Act 2010. Therefore, we have completed an Equality Impact Assessment to ensure that any action we take in relation to tenancies does not discriminate, is the least restrictive and enables the person as much choice and control over decisions as is possible.

6. Legislation and Regulation

- Mental Capacity Act 2005
- Mental Capacity (Amendment) Act 2019
- Health and Social Care Act 2008 (Regulated Activities 2014)
- Equality Act 2010

7. Responsibilities

7.1 The Managing Directors of all regions have overall responsibility for delivery and compliance with the policy.

7.2 The Directors of Care and Supported Housing have overall responsibility for delivery and compliance with the policy.

Approval

Version number	1.1
Effective from	01 April 2023
Policy owner	Managing Director South London and Hackney