Mental Capacity Act and Deprivation of Liberty Safeguards Policy

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1 INTRODUCTION

As a domiciliary care provider, 1st Homecare and its staff must be aware of and take into account, the provisions of the Mental Capacity Act 2005 ("the Act") (as amended).

The Act provides a statutory framework to protect people who may lack capacity to make some, or all, decisions, while also maximising their ability to make decisions or to participate in decision making as far as they are able. It provides the legal framework for decisions to be made on behalf of those who are unable to make decisions alone. It also provides a framework for people who wish to plan ahead for a time when they may lack capacity, and to appoint someone else to make decisions about their health, welfare and finances when they can no longer do so themselves. It introduces key principles that must be followed when assessing capacity and in carrying out acts and making decisions on behalf of those who are judged to be lacking capacity.

Many people fall within the Act, including those with dementia, those with a learning disability, those with a brain injury, those with a severe mental illness, anyone planning for the future and someone suffering a temporary loss of capacity e.g. someone who is unconscious because of an accident or anaesthesia or because of alcohol or drugs.

Care workers are expected to help clients come to everyday decisions or else make the decision for them if they lack capacity. It is very important that all staff know and understand the key principles of the Act, and how to apply the Act in practice. There is also a Code of Practice ("the Code") for the Act giving practical guidance on how the Act works on a day to day basis. **1st Homecare and its staff have a legal duty to have regard to the Code when doing things and making decisions to which the Act applies.**

2 CAPACITY AND CONSENT

The expression "mental capacity" means the ability of an individual to make a decision for himself or herself. The Act assumes that everyone has mental capacity unless it is proven otherwise.

The need to involve people in decisions about their care and treatment, and to seek their agreement and consent to the care and treatment, is central to all care provision. Consent is critical: it is the difference between care that is lawful and care that is not. To enable a person to give informed consent they need to:

- Have been given all relevant information about their care treatment or support
- Understand the different options available and the possible consequences of each
- Be free from any duress and understand that they have the right to refuse
- Be able to weigh up the options and use this information to make a decision and communicate this.

It is a core regulatory requirement of the Health and Social Care Act 2008 that care and treatment of service users must only be provided with the consent of the relevant person, or a person acting lawfully on their behalf, and if they lack the capacity to give consent

then the care provider must act in accordance with the Mental Capacity Act 2005 (refer to the Health and Social Care Act 2008 (Regulated Activities) Regulations 2014). The Act gives protection from civil and criminal liability to staff who follow the 5 key principles of the Act when providing care, treatment and support.

It is very important to note that if a person lacks capacity to consent to care and treatment, **the family of the person cannot consent on his or her behalf unless they have legal power to do so**: the views of the family should be **sought** as part of the care planning process but they do not have automatic **legal authority** to provide permission for the care or treatment. The only people who would have such authority are those with a health and welfare Lasting Power of Attorney (LPA) or who have been appointed by the Court of Protection as a deputy. Both of these have a duty to act in the best interests of the person in accordance with the principles of the Act. A person who does not have the legal authority to consent can only act on the basis of a best interest's decision.

3 THE FIVE KEY PRINCIPLES OF THE MENTAL CAPACITY ACT

Section 1 of the Act establishes the 5 key principles that must be followed:

- A person must be assumed to have capacity unless it is established that they lack capacity (presumption of capacity)
- A person is not to be treated as unable to make a decision unless all appropriate help and support has been given to them to help them make their own decision
- A person is not to be treated as unable to make a decision just because they make an unwise decision
- An act done, or a decision made, under the Act for or on behalf of a person who lacks capacity must be done or made in their best interests
- The best interest's decision must be one that is the least restrictive of the person's rights and freedom of action.

4 WHAT IS CAPACITY?

The expression "mental capacity" means the ability of a person to make decisions for him or herself. A person who "lacks capacity" is a person who is unable to make a particular decision at a particular time.

The inability to make the decision must be caused by an **impairment or disturbance** in the functioning of the mind or brain, whether temporary or permanent. It is important to remember that capacity can vary over time and depends on the type of decision. Mental capacity is decision specific and time specific, meaning that the person must be assessed as to whether they are able to **make a particular decision** at the **time** it needs to be taken.

Capacity can be affected by things such as location, time of day, environment, and medication. Staff must not assume that a client lacks capacity just because of the client's age, physical appearance, condition or any aspect of behaviour.

5 ASSESSING MENTAL CAPACITY

Under the Act, the starting point is always that the individual is presumed to have capacity. If there is a suspicion that a client may lack capacity, then an assessment should be made using a two-stage test:

1) Is there an impairment of, or disturbance in, the functioning of the person's mind or brain?
2) If so, is the impairment or disturbance sufficient to cause the person to be unable to make that particular decision at the relevant time?

Staff doing the assessment must take into account:

- The person's behaviour
- Their circumstances
- Any concerns raised by other people
- His/her general intellectual ability, memory, attention and concentration, reasoning, verbal comprehension and expression, cultural influences and social context.

A person is held to be unable to make a decision for her or himself and therefore lack capacity if the person is unable to:

- Understand the information relevant to the decision – this includes the reasonably foreseeable consequences of deciding or failing, to make the decision
- Retain that information
- Use or weigh that information as part of the process of making the decision or
- Communicate his/her decision, whether by talking, sign language or any other means.

If a person is only able to retain information relevant to the decision for a short period, this does not mean that he or she should be regarded as unable to make the decision.

Records must always be kept of any assessment. If the individual is assessed as not having capacity to make a particular decision, then evidence must be included as to why he or she has been assessed as not having capacity.

Where appropriate, 1st Homecare will carry out a Capacity Assessment at the time care planning is taking place and when the care documents are reviewed.

The Code of Practice makes it clear that the person making the assessment is not expected to be expert in assessing capacity but must show he or she has taken reasonable steps to find out if the person has capacity to make the particular decision and that he or she has reasonable grounds for believing the person lacks capacity.

With regard to carers, the Code is clear that there does not need to be a formal assessment for everyday decisions taken frequently such as washing, taking a person to

the toilet or helping them to bed. Instead, a record must be made of decisions made in the best interests of the client with regard to such everyday matters. Carers should make this record in the notes for the daily activities they help clients with.

6 BEST INTERESTS

As noted above in this Policy, if a person lacks the mental capacity to make a particular decision, then that person is not able to consent. Instead, under the Act, if there is no person with legal authority to take decisions or give consent for the person lacking capacity, then actions or decisions may be taken in the person's "best interests". It is very important to be aware that acting in the best interests of somebody is not the same as **consenting** on that person's behalf. As noted above, only a person who has a health and welfare Lasting Power of Attorney or is a Court of Protection appointed deputy can legally make decisions about the care or treatment of a person who lacks capacity.

Where a "best interests" decision has to be taken, even though the person concerned lacks capacity, he or she **must be involved as much as possible** in coming to the decision, and his/her wishes, feelings, values and beliefs (including those known from the past) should be taken into consideration, as well as the views of people close to him or her. "Best interests" is not defined in the Act but when making decisions, certain factors must be taken into account in order to decide what is in a person's best interests, including all relevant circumstances, and whether it is likely that the person will at some point regain capacity in relation to the matter in questions, and if so, when that is likely to be (and if the decision can be postponed until that time). It may be necessary to consult certain other people such as those who care for the person or are interested in his or her welfare, or anyone granted a lasting power of attorney to make decisions on the person's behalf, or any deputy appointed by the court.

Who may be a decision maker for someone lacking capacity?

Health and social care staff, family and unpaid carers can all be decision makers when decisions relate to the carrying out of an act on behalf of somebody who cannot consent. Care workers will in practice be helping and supporting clients all the time with everyday decisions and taking best interest's decisions on behalf of clients who lack capacity to make a particular decision at the relevant time.

Under section 5 of the MCA, decision makers will be held to be acting lawfully in connection with care and treatment – including acts of personal care - and will be protected from liability, **provided that all the requirements imposed under the MCA are met.**

7 APPLICATION OF THE MENTAL CAPACITY ACT TO 1ST HOMECARE

1st Homecare staff must understand the principles of the Act and how to apply them in practice. New staff are given training in the Mental Capacity Act and the Code at induction and then given refresher training on an ongoing basis. Care workers need to have an understanding of the Act so that they can ensure that they comply with it when

caring for clients. Care workers will need to monitor the capacity of the client to make decisions and to consent to care and support and may have to seek advice if there was any indication that the client's capacity had altered or that they lacked capacity. Any such change must be reported to the Office.

All "best interests" decisions taken by care workers must be recorded clearly

The risk assessments and Care Plan prepared for each client should reflect the personal needs of the client and balance the provision of safe and effective care to the client that meets their needs with the client's own right to make decisions for him or herself, including unwise decisions, and provide ways of managing those risks. For example, a client may refuse medication. The Company and/or care worker should discuss with the client the potential consequences of their action and where necessary involve the client's GP/district nurse and family in the discussion and how the situation may best be managed.

1st Homecare will ensure it obtains the consent of the client to each aspect of the care and support plan or an assessment of capacity stating that the person lacks capacity, following the principles of the MCA and the consent of anyone legally empowered to do so, or else make a best interests decision for the client.

What 1st Homecare care workers should do

Care workers must learn the principles of the Act and familiarise themselves with the Code of Practice and this Policy. In day to day work it is very important to remember the following:

- All clients have a right to make their own decisions and should be assumed to have mental capacity unless proved otherwise
- Not to make assumptions about whether a client has the capacity to understand and make a decision about something – check!
- A client's ability to make a decision can be affected by time of day or the effects of medication, for example, so if possible, the decision should be delayed until a time when the client is most able to make the decision
- Just because a client does not have capacity to make complicated decision, it should not be assumed that the client cannot make *any* decisions.
- Where you need to make a decision on a client's behalf, you must make the decision that is in the best interests of the client and maintains the client's rights and freedoms
- Check the Care Plan for any information relating to decision making including any statements of wishes by the client and information as to the client's value, preferences and beliefs
- Record your assessment of the client's capacity and any best interest decisions.
- Use your knowledge of the client when making a decision – think about what you know about them, what they might choose based on what you know about the person's culture, background and preferences and refer to these in the record you make of the decision you took.

8 DEPRIVATION OF LIBERTY SAFEGUARDS AND LIBERTY PROTECTION SAFEGUARDS

The Deprivation of Liberty Safeguards (DoLS) were included as an amendment to the Mental Capacity Act 2005. Whilst the Mental Capacity Act 2005 allows restraint and restriction to be used only if they are in a person's best interest, the DoLS are additional safeguards that apply where the restrictions and restraints used will deprive a person of their liberty. The law provides that the DoLS must be used if people need to have their liberty taken away in order to receive care and/or treatment that is in their best interests and protects them from harm. The DoLS can only be used if the person will be deprived of their liberty in a care home or hospital. In other settings, the Court of Protection can be asked if a person can be deprived of their liberty.

Restrictions and restraints include using locks or key pads that stop a person going out into different areas of a building/going outside the building; the use of some medication e.g. to calm a person; close supervision in the home; requiring a person to be supervised when they are out; restricting contact with friends/family including if they could cause the person harm; removing items from a person that could cause them harm; holding a person so that they can be given care or treatment; use of bedrails, wheelchair straps and splints, and the person having to stay somewhere against their wishes, or against the wishes of a family member.

The DoLS are due to be replaced by the Liberty Protection Safeguards (LPS), following the passing of the Mental Capacity (Amendment) Act 2019. It is unclear when this will take place - publication of draft regulations is expected in early 2022 followed by a consultation period. Key points to note include:

- LPS is rooted firmly within the Mental Capacity Act 2005 (MCA) and all the key principles of the MCA fully apply.
- LPS will be about safeguarding the rights of people who are under high levels of care and supervision but lack the mental capacity to consent to those arrangements for their care.
- LPS will apply to people in care homes, hospitals, supported accommodation, Shared Lives accommodation and their own homes.
- LPS will apply to everyone from the age of 16 years.
- LPS will need to be authorised in advance where possible by what will be termed 'the Responsible Body'
- Where a person is deprived of their liberty before an authorisation has been given, the MCA has been amended to provide the authority to continue to care for the person.

9 APPLICATION OF THE DoLS TO THE COMPANY

As noted above, a DoLS application will only be made by a care home or hospital, and therefore as a provider of home care services in the community, the Company will not make any deprivation of liberty applications. Indeed, in providing services to clients in

their own homes within the community, the Company is supporting the person in maintaining maximum independence, and having maximum choice and control over their life, and therefore 1st Homecare's services are intrinsically linked to the avoidance of restrictive standards. In any setting other than a care home or hospital, if it is believed necessary to deprive the person of their liberty in their best interests, an application would be made to the Court of Protection. 1st Homecare would never be the party making that application.

1st Homecare and its staff might come into contact with an application under the DoLS where there are plans to move a client to a care home or hospital and this may deprive them of their liberty. In this case, 1st Homecare may be asked to share information with the care home or hospital (managing authority) in connection with the request by the managing authority for a standard authorisation under the DoLS. Where 1st Homecare is asked to share information in such circumstances, it will do so in accordance with the fundamental standards of quality and safety, its own policies and procedures, and in compliance with all relevant laws and guidance, to ensure the maintenance of confidentiality with regard to the person and the transfer of information regarding the person.

As noted above, the DoLS are due to be replaced by the Liberty Protection Safeguards, which **will** apply to someone receiving care in their own home.

10 OTHER PROVISIONS OF THE MENTAL CAPACITY ACT IN SUMMARY

The Act introduced a number of other provisions, including the following:

- Independent mental capacity advocates (IMCAs), to represent those lacking capacity to make certain important decisions (subject to conditions)
- The introduction of two new bodies: the Court of Protection (which has the power to give rulings and to appoint deputies) and the Office of the Public Guardian
- Two different types of Lasting Powers of Attorney to cover a range of circumstances including personal welfare and healthcare, allowing a person to plan ahead
- The right to make advance decisions to refuse treatment (ADRTs) including end of life treatment
- The criminal offence of ill-treatment/wilful neglect.

11 PROTECTION OF ADULTS LACKING CAPACITY

1st Homecare is committed to ensuring that clients have the maximum choice and control over their care and that they are treated with dignity and respect, and is also committed to the importance of inclusion, diversity and protection of their human rights. 1st Homecare recognises the responsibility it and its carers have in relation to these matters and also in safeguarding people who use its services from abuse. Carers are given training on safeguarding at induction and on an ongoing basis, including on the 1st Homecare Safeguarding Policy.

Should a carer come across the circumstance where a client may be deprived of their liberty (eg. a plan to transfer a client away from their home to a care home or hospital for treatment/care, against his or her wishes or family's wishes) in circumstances where care could be provided to the person in a less restrictive way and/or the deprivation is not lawful (e.g. no authorisation has been sought by the relevant managing authority as required under the DoLS), the carer **should report the matter as set out in the 1st Homecare Safeguarding Policy, and the appropriate action will be taken by 1st Homecare.** This may include informing the managing authority so that they either change their care or seek the required authorisation under the DoLS; making a safeguarding alert to the local authority safeguarding team, and informing the CQC. Additionally, abuse of a client may amount to a criminal offence under the Mental Capacity Act, which as noted above introduced the criminal offence of ill-treatment or wilful neglect of a person lacking capacity. 1st Homecare should co-ordinate with the local authority safeguarding team regarding the need to inform the police of any suspected abuse.

12 GENERAL

This policy may be amended at any time and staff will be notified of any amended version. Any new policy will replace the previous version.

CHANGE HISTORY

Issue	Date	Description of Change and Reason
1	January 2014	First Issue
2	November 2014	Second issue – minor changes, formatting changes, and insertion of review date
3	June 2016	Third Issue – inclusion of capacity and consent, amendments to give practical reminder to staff what they should remember, reorganisation of paragraphs to read better.
4	July 2016	Fourth issue – inclusion of reference to Capacity Assessment being carried out at care planning stage and review
5	January 2017	Fifth issue – to make applicable to both offices, and to tidy up some parts
6	January 2019	Sixth issue – change of address, minor changes to text.
7	January 2020	Seventh issue – inclusion of KL address
8	February 2022	Eighth issue – inclusion of changes due to electronic care records replacing Daily Record Sheet and previewing Liberty Protection Safeguards

DOCUMENT CONTROL

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