OP05 Mental Capacity Act and Deprivation of Liberty

1. Policy Statement

1.1 Shared Lives South West believes that every individual has the right to make choices about their life and will be supported to do so.

1.2 Shared Lives South West recognises its responsibilities to work within the Mental Capacity Act 2005 (MCA) framework to promote wellbeing and to uphold human rights for people who have care and support needs.

2. MCA Key Principles

2.1 The Mental Capacity Act 2005 (MCA) is designed to protect and empower people who may lack the mental capacity to make their own decisions about their care and treatment. It applies to people aged 16 and over.

2.2 The Mental Capacity Act sets out five key principles:

- A person must be assumed to have capacity to make a particular decision unless it established that they lack capacity.
- A person should receive all the support they need to be able to make a decision.
- A person is free to make an 'unwise' decision.
- Any actions taken on behalf of someone must be in their 'best interests'.
- Any action taken on behalf of someone must be the least restrictive option.

2.3 If there is reasonable belief that someone lacks the capacity to make a decision, a capacity test is necessary, bearing in mind the principles above.

2.4 Sometimes the decision may not be urgent, and you can delay if you think there is a chance that the individual may regain capacity e.g. recovering from a stroke or other illness.

3. General Principles

3.1 The MCA sets out who can make decisions, in which situations, and how they should go about it. It applies to all those involved in providing health and social care in England and Wales. The Act is supported by a Code of Practice 2007 (CoP) which gives guidance on its implementation.

3.2 The MCA sets out how capacity should be assessed and procedures for making decisions on behalf of people who lack mental capacity.

3.3 The MCA covers day-to-day decisions such as what to eat and wear, and also more complex or life changing decisions such as whether to undertake major surgery.

3.4 The MCA defines lack of capacity in the following way: "A person lacks capacity in relation to a matter if, at the specific time, they are unable to make a decision for themselves in relation to the matter because of an impairment of, or a disturbance in the functioning of the mind or brain."

4. Procedure and Practical Guidance

4.1 There is a two-stage diagnostic test which should be used when determining if a person may lack capacity under the definition provided by the Act;

- Does the person have an impairment of the mind or brain or is there some sort of disturbance affecting the way their mind or brain works? If so,
- Does that impairment or disturbance mean that the person is unable to make the decision in question at the time it needs to be made.

4.2 If yes, a four-stage functional test is undertaken to assess a person's ability to make a decision for themselves:

- Can they understand the information about the decision to be made?
- Can they retain that information?
- Can they use or weigh that information as part of the decision-making process?
- Can they communicate their decision?

4.3 Determining capacity is always a decision and time specific matter.

5. MCA Assessments

5.1 Assessments should be completed by the most appropriate person. This may include:

- Day-to-day decisions - Shared Lives staff and Carers may be the most appropriate person to complete this assessment.
- Complex or life-changing decisions - Lead professionals with the person and relevant others from the person's circle of support. This may include Shared lives staff, Carers, family and other professionals.

6. Making a Best Interest Decision

6.1 The Best Interest decision maker is the person who will establish what is in the best interests of the individual lacking mental capacity. Usually this is the person who assesses the person's capacity to make a decision and is the person who is directly concerned with the individual's care at the time the decision needs to be made.

6.2 The decision maker must record the outcome and demonstrate the decision is based on all available evidence and has taken in to account conflicting views.

6.3 The MCA Code of Practice 2007 should be referred to throughout. A revised code is being considered but is yet to be implemented.

7. Lasting Power of Attorney (LPA) or Enduring Power of Attorney (EPA) and Court appointed Deputy

7.1 A Lasting Power of Attorney (or Enduring Power of Attorney) and/or Court appointed Deputy may be appointed to make decision on someone's behalf for;

- Health and welfare
- Property and finance

7.2 When a person has a Lasting Power of Attorney/Deputy, this should be clearly documented in their Shared Lives Plan. The appointed person/persons should be involved in specific decisions linked to the above.

8. Independent Mental Capacity Advocate (IMCA)

8.1 The MCA introduced the role of the independent mental capacity advocate (IMCA).

8.2 IMCAs are a legal safeguard for people who lack the capacity to make specific important decisions: including making decisions about where they live and about serious medical treatment options. IMCAs are mainly instructed to represent people where there is no one independent of services, such as a family member or friend who is able to represent the person.

8.3 Shared Lives staff and Carers will work alongside any allocated IMCA.

9. Advanced Decisions

9.1 An advanced decision is prepared when a person has capacity. It is a decision to refuse specific treatment and is binding (must be written and witnessed if life-sustaining treatment is being refused). This should be clearly documented in the persons Shared Plan.

10. Deprivation of Liberty Safeguards (DoLS)

10.1 The Deprivation of Liberty Safeguards are part of the Mental Capacity Act 2005. The safeguards aim to make sure that people in care homes and hospitals are supported in a way that does not inappropriately restrict their freedom.

10.2 Since March 2014, and a Supreme Court ruling known as Cheshire West, it also applies to community settings, and this includes Shared Lives.

10.3 The "acid test" refers to the conditions that indicate whether a person is being deprived of their liberty. The two key parts of the test are:
- Is the person subject to continuous supervision and control?
- Is the person free to leave? What would happen if they sought to leave? (Would you or someone else return them?)

10.4 For a person to be deprived of their liberty, they must be subject both to continuous supervision and control and not be free to leave.

10.5 In all cases, the following is not relevant:
- The person's compliance or lack of objection
- The relative normality of the placement and
- The reason or purpose behind a particular placement

10.6 Where we have a reasonable belief that an adult lacks capacity to consent to live where they live and they meet both parts of the acid test, then an application has to be made to the Court of Protection.

10.7 Shared Lives will always refer this to Adult Care and Support as it is they who make the application to the Court of Protection.

10.8 Liberty Protection Safeguards (LPS) intended to replace DOLS remains delayed with no confirmed timeframe. The existing DOLS framework remains the legal mechanism for authorising deprivations of liberty.

11. Recordkeeping

11.1 Assessments of capacity and best interest decisions for day-to-day decision-making do not always need to be formally recorded. However, it is good practice for these everyday decisions to be part of the person's Shared Lives Plan.

11.2 Formal mental capacity assessments for complex life changing decisions and DoLS should be recorded and referred to in the person's Shared Lives Plan.

12. Review

12.1 This policy will be renewed every three years, or earlier if necessary.

13. Responsibilities

13.1 The Registered Manager has overall responsibility for the implementation of this policy, and for ensuring that the organisation is compliant with MCA legislation.

13.2 All operational staff are responsible for ensuring that all MCA matters are notified to relevant organisations and that this policy is followed in the approach to handling mental capacity.

13.3 All staff, Carers and volunteers are responsible for undertaking MCA training and understanding the principles of this policy.

14. Resources

Mental Capacity Act Code of Practice:
https://www.gov.uk/government/publications/mental-capacity-act-code-of-practice

How to make decisions under the Mental Capacity Act:
https://www.gov.uk/government/collections/mental-capacity-act-making-decisions

Deprivation of liberty safeguards: Supreme Court judgments