

# Christies Care

Est. 1987

Living independently at home

## Mental Capacity & Significant Restrictions of Liberty (SROL).

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## 1. INTRODUCTION

The Mental Capacity Act 2005 (MCA) and the Capacity and Self-determination (Jersey) Law 2016, (CSDL), provides the legal framework for acting and making decisions on behalf of individuals who lack the mental capacity to make particular decisions for themselves. The Capacity and Self-determination law is supported by the practical guidance within The Code of Practice, referred to as the Code came into force in October 2018.

When you are working with an adult who may lack the capacity to make specific decisions themselves, you must comply with this Act/ Law when making any decisions on their behalf or when acting in their best interest.

There are however certain decisions that can never be made on behalf of a Client who lacks the capacity to make these specific decisions. This is because they are either so personal to the individual concerned, or governed by other legislation. These are summarised below:-

- 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
- give the person treatment for a mental disorder
- consent to the person being given treatment for mental disorder
- decision on voting
- assisting suicide

However this does not prevent action from being taken to protect an adult at risk from abuse or exploitation.

## 2. SCOPE

This policy applies to all employees of Christies Care Ltd.

## 3. POLICY AIMS

The purpose of this policy is to ensure that our Clients are supported and encouraged to make decisions themselves where they have the capacity to do so, and where they lack capacity to make specific decisions, that decisions are made in their best interest.

This policy sets out how and when to assess a Client's capacity, how and when to assist a Client to make decisions themselves, who the most appropriate person to make the decision is and how best to act in someone's best interest. It also sets out the importance of recording our actions and decisions.

## 4. THE FIVE CORE PRINCIPALS

The Mental Capacity Act has five key principles which emphasise its fundamental concepts and core values. These must be borne in mind when working with, or providing care or treatment for, people who lack capacity.

- 1) The Client must be assumed to have capacity unless it is established that they lack capacity.

\*Every person has the right to make their own decisions unless it can be established that they cannot make that particular decision at that particular time.

- 2) The Client is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success. Doing everything that we can do or tryfirst, for example giving the information in a format they can understand.

- 3) The Client is not to be treated as unable to make a decision merely because they make an unwise decision.

\*People have a right to make a decision that others do not agree with. If there is concern a person is acting in a way that isn't consistent with previous behaviour, or they are making decisions that may put them at risk of harm, then a mental capacity test should be undertaken

- 4) An act done, or decision made, under this Act for or on behalf of a Client who lacks capacity must be done, or made, in their best interests.

- 5) Before the act is done, or the decision is made, it must be considered whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the Client's rights and freedom of action.

## 5. SUPPORTING A CLIENT TO MAKE DECISIONS

*What kind of support might Clients need to help them make a decision?*

- using a different form of communication (for example, non-verbal communication)
- providing information in a more accessible form (for example, photographs, drawings, or tapes)
- treating a medical condition which may be affecting the Client's capacity or having a structured programme to improve a Client's capacity to make particular decisions (for example, helping a Client with learning disabilities to learn new skills)
- are there particular times of the day when the Client's understanding is better, for example some medication could affect a Client's capacity, and could the decision be delayed until the side effects have subsided
- are there particular locations where they may feel more at ease

- could the decision be put off to see whether the Client can make the decision at a later time when circumstances are right for them
- be aware of cultural, ethnic, or religious factors that shape the Client's way of thinking, behaviour, or communication. For example, in some cultures it is important to involve the community in decision-making. Some religious beliefs (for example, those of Jehovah's Witnesses or Christian Scientists) may influence the Client's approach to medical treatment and information about treatment decisions.

### *What happens in emergency situations?*

In emergency medical situations (for example, where a Client collapses with a heart attack or for some unknown reason and is brought unconscious into a hospital), urgent decisions will have to be made and immediate action taken in the Client's best interests. In these situations, it may not be practical or appropriate to delay the treatment while trying to help the Client make their own decisions, or to consult with any known attorneys or deputies. However, even in emergency situations, healthcare staff should try to communicate with the Client and keep them informed of what is happening.

## 6. ASSESSING CAPACITY

Anyone assessing someone's capacity to make a decision for themselves should use the two-stage test of capacity.

- Does the Client have an impairment of the mind or brain, or is there a disturbance in the functioning of the mind or brain?
- If so, does that impairment or disturbance mean that the Client is unable to make the decision in question at the time it needs to be made?

You do this by providing evidence that the person has difficulty doing any of the following things:

- Understanding the information related to the decision
- Retaining the information related to the decision
- Using/assessing the information while considering the decision
- Communicating the decision by any means – does not have to be verbal and the person does not have to be literate

An assessment that a Client lacks the capacity to make a decision must never be based simply on:

- Their age
- Their appearance
- Assumptions about their condition, or
- Any aspect of their behaviour

### *What proof of lack of capacity does the Act require?*

Anybody who claims that an individual lacks capacity should be able to provide proof. They need to be able to show, *on the balance of probabilities*, that the individual lacks the capacity to make a particular decision, at the time it needs to be made. This means being able to show that it is more likely than not that the Client lacks the capacity to make the decision in question.

It is important to review capacity regularly, as some Clients can improve their decision-making capabilities. In particular, someone with an ongoing condition may become able to make some, if not all, decisions. Some Clients (for example, those with learning disabilities) will learn new skills throughout their lives, improving their capacity to make certain decisions. So assessments should be reviewed regularly. Capacity should always be reviewed:

- Whenever a care plan is being developed or reviewed
- At other relevant stages of the care planning process, and
- As particular decisions need to be made

It is important to acknowledge the difference between:

- Unwise decisions, which a Client has the right to make, and
- Decisions based on a lack of understanding of risks or inability to weigh up the information about a decision

Information about decisions the Client has made based on a lack of understanding of risks or inability to weigh up the information can form part of a capacity assessment – particularly if someone repeatedly makes decisions that put them at risk or result in harm to them or someone else.

### *What practical steps should be taken when assessing capacity?*

- You should make sure you understand the nature and effect of the decision to be made yourself. You may need access to relevant documents and background information.
- You may need other relevant information to support the assessment (e.g. views of other staff involved in the Client's care – pop in agency)
- Family members and close friends may be able to provide valuable background information (for example, the Client's past behaviour and abilities and the types of decisions they can currently make). But their personal views and wishes about what *they* would want for the person must not influence your assessment.
- You must again explain to the Client all the information relevant to the decision. The explanation must be in the most appropriate and effective form of communication for the Client.
- Check the Client understands after a few minutes. The Client should be able to give a rough explanation of the information that was explained. There are different methods for Clients whose non-verbal means of communication (for example observing behaviour or their ability to recognise objects or pictures).
- Avoid questions that need only 'yes' or 'no' answer (for example, did you understand what I just said?).  
They are not enough to assess the Client's capacity to make a decision. But there may be no alternative in cases where there are major communication

difficulties. In these cases, check the response by asking questions again in a different way.

- Skills and behaviour do not necessarily reflect the Client's capacity to make specific decisions. The fact that someone had good social or language skills, polite behaviour or good manners doesn't necessarily mean they understand the information or are able to weigh it up.
- Repeating these steps can help confirm the result.

### *What is 'reasonable belief'?*

We do not have to be experts in assessing capacity. But to have protection from liability when providing care or treatment they must have a 'reasonable belief' that the person they care for lacks capacity to make relevant decisions about their care or treatment.

To have this 'reasonable belief' they must have taken 'reasonable' steps to establish that the Client lacks capacity to make a decision or consent to an act at the time the decision or consent is needed. They must also establish that the act or decision is in the Client's best interests.

We do not usually need to follow formal processes, such as involving a professional to make an assessment. However, if somebody challenges their assessment, they must be able to describe the steps they have taken.

We must also have objective reasons for believing the person lacks capacity to make the decision in question.

Day to day decisions should be recorded in the care log on Birdie by carers, Mental Capacity risk assessments carried out by Local Area Managers should be recorded on Birdie within the Mental Capacity risk assessment section.

### *What if someone refuses to be assessed?*

There may be circumstances in which a Client whose capacity is in doubt refuses to undergo an assessment of capacity or refuses to be examined by a doctor or other professional. In these circumstances, it might help to explain to someone refusing an assessment why it is needed and what the consequences or refusal are. But threats or attempts to force the Client to agree to an assessment are not acceptable.

If the Client lacks capacity to agree or refuse, the assessment can normally go ahead, as long as the Client does not object to the assessment, and it is in their best interests.

Nobody can be forced to undergo an assessment of capacity. If there are serious worries about the Client's mental health, it may be possible to get a warrant and assess the Client for treatment in hospital – but the situation must meet the requirements of the Mental Health Act 1983 (Section 135). But simply refusing an assessment of capacity is in no way grounds for an assessment under this Act.

## 7. WHO SHOULD ASSESS CAPACITY?

The person who assesses an individual's capacity to make a decision will usually be the person who is most appropriate and directly concerned with the individual at the

time the decision needs to be made. This means that different people will be involved in assessing someone's capacity to make different decisions at different times.

For most day-to-day decisions, this will be the person caring for them at the time a decision must be made. For example, a Carer might need to assess if the Client can agree to being bathed. Then a district nurse might assess if the Client can consent to having a dressing changed.

For acts of care or treatment, the assessor must have a 'reasonable belief' that the Client lacks capacity to agree to the action or decision to be taken.

If a doctor or healthcare professional proposes treatment or an examination, they must assess the Client's capacity to consent.

For legal transactions (for example, making a will) a solicitor or legal practitioner must assess the Client's capacity to instruct them. In cases of doubt, they should get the opinion from a doctor or other professional expert.

More complex decisions are likely to need more formal assessments. A professional opinion on the Client's capacity might be necessary. This could be, for example, from a psychiatrist, psychologist, a speech and language therapist, occupational therapist or social worker. But the final decision about a Client's capacity must be made by the person intending to make the decision or carry out the action on behalf of the Client who lacks capacity – not the professional, who is there to advise.

There are times when a joint decision might be made by a number of people. For example, when a care plan for a Client who lacks capacity to make a decision on their care needs is being put together, different healthcare or social care staff might be involved in making decisions or recommendations about the person's care package.

### *What other factors should a 'decision maker' consider?*

- Expressions of pleasure or distress and emotional responses should be considered especially with those who cannot express their current wishes and feelings in words.
- The Client may have held strong views in the past which could have a bearing on the decision now to be made.
- Written statements made before the Client lost capacity may provide a lot of information about their wishes.
- If the decision maker does not follow something put in writing they must record the reasons why.
- It is important to note the distinction between a written statement expressing treatment preferences and a statement which constitutes an advance decision to refuse treatment.
- Everyone's values and beliefs influence the decisions they make. They may become especially important for someone who lacks capacity, these can be found in:-
  - Cultural background
  - Religious beliefs

- Political convictions
- Past behaviour or habits

### *Respecting confidentiality*

'Decision makers' must balance the duty to consult other people with the right to confidentiality of the Client who lacks capacity. So if confidential information is to be discussed, they should only seek the views of people who it is appropriate to consult, where their views are relevant to the decision to be made and the particular circumstances.

### *When might professional involvement be needed?*

- The decision that needs to be made is complicated or has serious consequences
- You conclude that the Client lacks capacity, but the Client challenges the finding
- Family members, carers and/or professionals disagree about a Client's capacity
- There is a conflict of interest between you and the Client being assessed. But if a disagreement cannot be resolved, the person who is challenging the assessment may be able to apply to the Court of Protection. The Court of Protection can rule on whether a Client has capacity to make the decision covered by the assessment.
- The Client being assessed is expressing different views to different people – they may be trying to please everyone or telling people what they think they want to hear
- Somebody might challenge the Client's capacity to make the decision – either at the time of the decision or later
- Somebody has been accused of abusing an adult at risk who may lack capacity to make decisions that protect them
- A Client repeatedly makes decisions that put them at risk or could result in suffering or damage

## 8. KEEPING RECORDS

Although there are no formal requirements to keep records on day-to-day decisions or consent to care, it is good practice for Carers to keep a record of the steps they take when caring for the person concerned.

It is good practice for professionals who carry out a formal assessment to record the findings in the relevant professional records.

You would need to show you have applied the principles of the Mental Capacity Act as mentioned above.

It might be possible to get a second opinion from an independent professional or expert in assessing capacity.

### *What protection does the Act offer for people providing care or treatment?*

Section 5 of the Act allows carers, healthcare and social care staff to carry out certain tasks without fear of liability. These tasks involve the personal care, healthcare, or treatment of people who lack capacity to consent to them. The aim is to give legal backing for acts that need to be carried out in the best interests of the person who lacks capacity to consent.

Actions which might be covered include helping with:-

- washing, dressing or personal hygiene
- eating and drinking
- communication
- mobility (moving around)
- take part in education, social or leisure activities
- doing the shopping or buying necessary goods with the person's money
- arranging household services (for example arranging repairs or maintenance for gas and electricity supplies)
- providing services that help around the home
- helping someone to move home
- taking someone to hospital for assessment or treatment
- dental care
- giving medication
- providing care in an emergency

## 9. INDEPENDENT MENTAL CAPACITY ADVOCATES (IMCA)

An IMCA is a role introduced by the Mental Capacity Act. The purpose of the IMCA service is to help particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions. IMCAs will work with and support people who lack capacity and represent their views to those who are working out their best interests. In certain circumstances, it is a legal duty to appoint an IMCA.

IMCA's have a right to information about the person who lacks capacity, they are able to research the person and act as a voice for the person – they are not able to make the decision.

Although there is no hard rule, the following may help suggest when an IMCA is needed:-

- There are no family members or close friends willing to be consulted (even when the person wants them to be consulted)
- Family members or close friends are too ill or frail to be consulted
- It is too impractical to consult close friends or family (for example, they live too far away)
- There is so much conflict over best interests that a decision cannot be made
- There are allegations or proved incidents of abuse by the family or friend
- The family member or friend does not want to involve the person in the decision

## 10. SIGNIFICANT RESTRICTION OF LIBERTY (SROL)

If a person who lacks capacity needs significant restrictions of their liberty, for example residing in a care home or being kept in hospital because it is in their best interests, then additional safeguards may apply. These are referred to as Significant restrictions of Liberty, (SROL).

Every application for an SROL is made to the capacity team, and dealt with on individual merit, and is covered by a thorough assessment procedure involving discussions on Mental Capacity, Mental Health, Eligibility and Best Interests.

A Best Interests Assessor will help to decide whether a potential order is proportionate to the likelihood / seriousness of having to protect that Client from harm.

The RPR – a Relevant Person's Representative - will also be part of the assessment group. This is usually a friend or relative of the Client who is there to support and represent the Client in any matter relating to the deprivation of liberty. They have a duty to act in that Client's best interests at all times. Any reported deprivation of liberty has to be dealt with urgently (within 24 hours).

We need to be sure any decision made, that it is in their **best interests** to protect the Client from harm, and there is no other less restrictive alternative. A lawful assessment from a DOL assessor would be arranged once all other least restrictive options and measures have been considered and tried. The authorisation can be short term but the maximum time it can last for is for one year and then it must be reviewed again. It would continue to be reviewed on a yearly basis or when necessary if changes were required.