



Bath & North East Somerset  
Local Safeguarding Children Board



# **Bath & North East Somerset Local Safeguarding Childrens and Adults Boards**

## **Mental Capacity Act 2005 Multi- Agency Policy Statement**

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## 1 Introduction

- 1.1 This multi-agency policy statement sets out the high level aims and objectives of all health, social care and education providers across Bath and North East Somerset (B&NES) to implement the Mental Capacity Act 2005 (MCA).
- 1.2 The MCA came into force in 2007, but was later amended on the 1<sup>st</sup> April 2009 (by way of the Mental Health Act 2007) to include the Deprivation of Liberty Safeguards. This statement will also address the Safeguards.

## 2 The Key Provisions of the MCA

- 2.1 The MCA can be summarised as providing a statutory framework to empower and protect adults who may have difficulty making at least some decisions, due to a lack of mental capacity, **because** of an impairment of or disturbance in the functioning of the mind or brain.
- 2.2 It is of particular relevance to those who work with children and young people to note that the MCA applies from the age of 16, therefore it is important to understand the interface between the Act and other childcare legislation. In addition, childcare workers should be aware that there may be occasions when they will need to assess a parent or carer's capacity to make a decision in relation to their child.
- 2.3 The Act makes it clear who can take decisions, in which situations and how they should go about this. It also makes a number of provisions that enable adults (over the age of 18) to plan ahead for a time in the future when they may lack capacity. For example, the ability to make a Lasting Power of Attorney (LPA) for finance and/or health and welfare, and advance decisions to refuse treatment.
- 2.4 In short, the MCA enshrines in statute, best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf.
- 2.5 The Act also introduced a new Court of Protection that can deal with welfare matters as well as financial ones and an Office of the Public Guardian to keep a register and monitor LPA's and Deputy's appointed by the Court.
- 2.6 The MCA applies in England and Wales to everyone who provides care, treatment or education to people aged 16 years or over who may lack capacity to make some decisions for themselves.

- 2.7 The Act provides a statutory definition of when a person lacks capacity and sets out a two stage test for determining this, but importantly, the Act's first principle states that capacity must be assumed unless there is clear evidence to establish otherwise.
- 2.8 The MCA also provides a checklist for determining what is in the Best Interests of a person who lacks the capacity to make decisions for themselves. This includes a duty to consult with people who have an interest in the person's welfare (both professionals and family members).
- 2.9 The MCA provides a level of protection from liability for staff for the acts taken on behalf of an incapacitated person if it can be shown that the provisions of the Act have been followed.
- 2.10 The Act introduced a statutory advocacy service for people who lack capacity called the Independent Mental Capacity Advocate (IMCA) service. The IMCA service **must** be consulted in some circumstances and **may** be consulted in others.
- 2.11 It also introduced new **criminal** offences (under Section 44) of wilful neglect or ill treatment for carers who care for a person who lacks capacity to consent to at least some elements of their care or treatment.
- 2.12 The Deprivation of Liberty Safeguards (DoLS) were introduced to provide a legal process and suitable protection for people in **care homes and hospitals**, who lack capacity to consent to their care arrangements which deprive them of their liberty within the meaning of Article 5 of the European Convention on Human Rights.
- 2.13 The DoLS scheme provides the framework for authorising the deprivation of liberty if it is evidently in the person's best interests, and necessary to ensure that they receive care and treatment to maintain their health and wellbeing. The Safeguards also ensure that the person and their representative, have a legal right to challenge the Authorisation in the Court of Protection.
- 2.14 However, if care arrangements amount to deprivation of liberty in a community setting, where the state is involved in arranging or providing care, the Local Authority or in some instances the Clinical Commissioning Group are responsible for making an application to the Court of Protection to seek lawful authorisation for the care arrangements.
- 2.15 Issues around deprivation of liberty for 16 and 17 year olds (who lack capacity to consent to their care arrangements and have a mental disorder) have particular relevance for childcare professionals. For example, young people in care homes, residential schools, shared lives placements or even foster care could be being deprived of their liberty. Please see the recent case of Birmingham City Council v D v

W [2016] EWCOP 8 which deals with the matter of deprivation of liberty and the care of a 16 year old young person with complex learning disabilities.

- 2.16 Importantly, the same young person's case was in court when he was 15, and being treated in a psychiatric hospital. On that occasion, the judge ruled that his parents could consent to his detention, but not when he turned 16 (Trust A v X and A Local Authority [2015] EWHC 992 (Fam)).

### **3 Legal and Policy Context**

3.1 This policy statement sits within a wider legal and policy framework as follows:

- The Mental Capacity Act 2005
- The Mental Capacity Act Code of Practice (DH 2007)
- The Deprivation of Liberty Safeguards Code of Practice (DH 2008)
- The Care Act 2014
- B&NES Safeguarding Adults Policy and Procedures
- The Data Protection Act 1998
- The Equality Act 2010
- The Human Rights Act 1998
- The Mental Health Act 1983
- The Mental Health Act 2007
- The Health and Social Care Act 2008
- The Children Act 1989
- The Children Act 2004
- The Children and Families Act 2014

### **4 Policy Statement**

4.1 Health, social care and education providers across B&NES are committed to ensuring that people who use their services, and who lack capacity to make decisions, are provided with high quality care from a trained and competent workforce that appropriately applies the MCA in day to day practice.

4.2 The importance of the MCA is recognised by all providers in B&NES as fundamental to support human rights around autonomy, choice and control for adults (and young people age 16 & 17) who experience difficulty with decision making with regard to their health and care needs.

4.3 All B&NES health, social care and education providers will apply the MCA Code of Practice but will also will have their own agency

specific policies, procedures and/or guidance to fully implement this policy statement and deliver on the stated outcomes.

- 4.4 Furthermore, those practitioners who are involved in more formal assessments of capacity (covering significant decisions), and making best interests decisions on behalf of service users, have a duty to evidence their application of the MCA Code in accordance with local recording frameworks.
- 4.5 B&NES health and social care providers will apply the DoLS Code of Practice and agency specific procedures and guidance to ensure compliance with the legislation.
- 4.6 All DoLS assessments and reviews will be carried out by appropriately trained and competent assessors and within the legally prescribed timescales wherever possible.
- 4.7 B&NES Council in its role as DoLS Supervisory Body, will ensure that it has appropriate procedures, processes and staff in place to maintain the effective delivery of the DoLS service, in light of the significant changes to the operation of the scheme brought about by the Cheshire West Supreme Court Judgment handed down on the 19 March 2014. In short, this judgement resulted in a 10 fold increase in DoLS referrals across the country, as it lowered the threshold for when care arrangements amount to a deprivation of liberty.
- 4.8 B&NES Council and BaNES Clinical Commissioning Group will take the necessary steps to make Court of Protection applications for anyone being deprived of their liberty in a domestic setting (or other setting for 16 and 17 year olds) who fulfil the necessary criteria. Although it has always been possible to be deprived of your liberty in a domestic setting, this is now more likely due to the judgment referred to in paragraph 4.7.
- 4.9 Each agency will take responsibility for ensuring that service users and carers are aware of their rights under the MCA through the reproduction of existing material or the distribution of agency specific material via print, web or other methods based on individual needs.
- 4.10 It is recognised that effective implementation of the MCA is dependent on a skilled and knowledgeable workforce therefore all providers in B&NES are committed to ensuring that:
  - Role and grade appropriate MCA training will be provided to all new staff as part of their induction
  - Appropriate staff (those tasked with making more significant decisions on behalf of service users) will receive more in depth training as soon as possible thereafter

- MCA refresher/update training will be provided periodically as determined by each agency
- MCA compliant practice will develop in line with emerging case law and guidance
- The MCA will feature regularly in staff supervision sessions and team meetings to ensure quality and consistency of practice
- Agencies will conduct self-determined regular MCA audit exercises as a way of measuring progress, identifying gaps and planning for improvement
- Records will be kept to evidence all of the above

## 5 Guiding Principles

- 5.1 This policy statement fully adopts the 5 statutory principles of the MCA. It is acknowledged that if these principles are followed, this should provide protection for the human rights of the incapacitated person and support professionals to implement the Act appropriately.
- A presumption of capacity** – every person has the right to make his or her decisions and must be assumed to have capacity to do so unless it is proved otherwise.
  - Individuals being supported to make their own decisions** – a person is not to be treated as unable to make a decision unless all practicable steps to help him/her to do so have been taken without success.
  - Unwise decisions** - a person is not to be treated as unable to make a decision merely because he/she makes an unwise decision.
  - Best interests** - an act done or decision made, under this Act for, or on behalf of, a person who lacks capacity must be done, or made, in his/her 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

## **6 Scope**

6.1 This policy statement applies to:

- All social care or healthcare service users or those in receipt of educational services in B&NES, who are 16 years or over and may lack capacity in relation to decisions or actions relating to their service provision
- All social care service users or patients in B&NES who are over the age of 18 years and subject to a DoLS referral, assessment, authorisation or review process
- All practitioners and managers employed by B&NES health and/or social care agencies who are working with service users/patients who may lack mental capacity to make decisions or give consent to any aspect of their care or treatment
- Those practitioners who place/admit service users and patients to care homes or hospitals which may bring them within the scope of the DoLS
- Best Interests Assessors and Mental Health Assessors who undertake DoLS assessments for people ordinarily resident in B&NES

6.1 This policy statement applies equally across all staff and client groups regardless of age (for those 16 years or over), race, disability, gender, religion or belief, sexual orientation or gender reassignment, pregnancy and maternity and marriage/civil partnership status.

## **7 Policy Outcomes**

7.1 The outcomes this policy statement aims to achieve are:

For the wider provisions of the MCA:

- All appropriate health, social care or education staff in B&NES are aware of their legal duty to apply the MCA in line with the Codes of Practice and developing case law
- All patients and service users in B&NES are aware that the services they receive will be fully MCA compliant as necessary

For the Deprivation of Liberty Safeguards:

- Both the Local Authority and care homes/hospitals in B&NES deliver on their commitment to apply the Deprivation of Liberty Safeguards in line with the DoLS Code of Practice and developing case law
- Staff in other settings, where deprivation of liberty may be occurring e.g. supported living, shared lives, are aware of their responsibility to raise their concerns with the commissioner of the care
- B&NES Council and BaNES CCG make necessary arrangements to make Court of Protection applications, in line with guidance from the Court, for anyone deprived of their liberty in a domestic setting including young people aged 16 and 17
- Those professionals in B&NES who admit people to care are aware of the DoLS requirements and what it means when someone is subject to a DoLS Authorisation

## **8 Monitoring, Review and Evaluation**

- 8.1 This multi-agency policy statement will be reviewed every three years by the B&NES MCA Quality and Practice Group, but may be reviewed sooner if this is warranted by a change in law or national policy.
- 8.2 The implementation of this multi-agency policy statement will be routinely monitored to ensure that agencies comply with it, and evaluated to determine whether the stated outcomes are being realised.