

# Scrutiny Briefing Note

The Children's Scrutiny Panel have asked to monitor progress on the following issues. This briefing contains the latest position as at December 2021.

## Subject:

### 1. The Mental Capacity Act 2005 (MCA)

Broadly, delivery of social care and/ or health treatment starts with consent, i.e., the individual to whom the care/ health treatment is to be delivered, must consent to receiving it. Consent must be informed, capacitous and freely given. Practitioners must assure themselves that they have secured such consent before proceeding. *NB exceptions in the Children Act 1989, mental health and criminal justice legalisation fall outside of this briefing.*

Proceeding with care/ treatment in the absence of consent may amount to an offence. Where practitioners identify that they are unable to secure consent because the individual lacks capacity to give it, the MCA sets out the legal framework to be followed. By following the framework, practitioners can avoid liability for proceeding with care/ treatment in the absence of consent.

All of the MCA applies to individuals aged 18 and above; the vast majority of it – including everything referenced in this briefing – applies to individuals aged 16 and above. *The competence (ability) to consent of those aged below 16 falls outside of this briefing.*

Practitioners working with individuals aged 16 and above must understand whether those they are working with are able to make relevant decisions. This means that practitioners will need to consider, in respect of each relevant decision, whether the individual can i) understand, ii) retain, iii) use/ weigh, the information relevant to the decision, and iv) communicate their decision. If the individual is unable to do any of i) to iv), the practitioner will need to decide if that inability arises because they have a mental disorder, for example, a learning disability. *There may be other reasons why an individual is unable to make a decision, but such falls outside of this briefing.* If the individual is unable to decide because of their mental disorder, the MCA applies and the practitioner will then need to consider whether proceeding with the care/ treatment is in their best interests, taking into account all the factors set out within the MCA. For example, in deciding what is in an individual's best interests, their known wishes and feelings must be taken into account and those interested in their welfare (such as their parents) must be consulted. There may be circumstances in which parents can give consent for their child.

### Considerations for children's services

Members may wish to seek assurance regarding whether:

- Children's services staff, for whose roles the MCA is relevant, have been identified
- A comprehensive programme of training is in place across children's services, to ensure that staff are trained in the MCA at the appropriate level
- Staff are able to assess capacity to consent re a range of relevant decisions, using the MCA's test



- Where assessment evidences that an individual's capacity is lacking in respect of a specific decision, staff are able to make a best interests decision on their behalf, taking into account the factors set out in the MCA; and staff understand when parental consent may or may not be considered
- Staff routinely record their capacity assessment and best interests decisions in accordance with North East Lincolnshire's MCA policy
- Staff are able to access legal and practice advice/ support on the MCA, where necessary.

## **2. A pending change to the MCA: the Liberty Protection Safeguards (LPS)**

Some care/ treatment arrangements may be so restrictive that they amount to a deprivation of the individual's liberty. Broadly, a deprivation of liberty arises when an incapacitous individual's care/ treatment arrangements amount to confinement in a restricted place for a non-negligible period of time. This can occur in any setting.

To be lawful, deprivation of liberty of an individual aged 16 – 18 must be authorised by the court (parents cannot consent on their child's behalf). However, from April 2022, the process for authorising a deprivation of liberty will change; court applications will not be required automatically. Instead, councils or NHS bodies will be able to authorise arrangements giving rise to deprivation of liberty, for which they are responsible. New processes for authorisation are referred to as the LPS. The LPS will require councils/ NHS bodies to:

- a) Identify that care/ treatment arrangements amount to a deprivation of liberty and/ or receive notification from others that care/ treatment arrangements may amount to one
- b) Establish whether the individual deprived of their liberty requires support, for example from an advocate
- c) Undertake or access the assessments required for authorisation (specifically, an assessment of mental disorder, assessment of capacity, and an assessment that the care/ treatment arrangements are necessary to avoid harm to the individual and proportionate to the likelihood and severity of that harm)
- d) Provide information to the individual deprived of their liberty regarding the authorisation process, and consult with them and their relevant others (for example, their parents)
- e) Create a draft authorisation record, setting out the arrangements/ attaching the relevant assessments
- f) Provide an independent pre-authorisation review of the record/ assessments
- g) Authorise the arrangements if all requirements are met
- h) Review arrangements/ authorisations at planned intervals (initially, no less than annually).

In some situations, for example if there is reason to believe that the individual objects to the care/ treatment arrangements giving rise to deprivation of liberty, the pre-authorisation review must be undertaken by an approved mental capacity professional (AMCP). AMCPs will have higher levels of training and expertise to respond to more complex cases. In such cases, applications to the court may still be required. Excepting those cases where an AMCP is involved, it is expected that frontline practitioners undertake at least tasks a) to e), and h), above. The intention is that considerations of deprivation of liberty form part of 'routine' care planning, building on existing MCA practice i.e., capacity assessments and best interest decisions.



## Considerations for children's services

Members may wish to seek assurance regarding whether:

- Children's services staff are able to
  - identify a deprivation of liberty, and respond to notifications of one from others
  - access sufficient advocacy to meet likely demand, e.g., via a commissioned advocacy provider
  - undertake assessments of capacity and necessity and proportionality, and know where to access assessments of mental disorder
  - explain deprivation of liberty and the authorisation process in language that is accessible to individuals and their relevant others
  - create draft authorisation records, building on existing MCA recording
  - Identify when there is reason to believe the individual objects to the care/ treatment arrangements and refer to an AMCP
- Consideration has been given to
  - which staff may act as independent reviewers, and which staff as authorisers
  - which staff will act as AMCPs (councils must ensure that there are enough available for their area)
  - which staff will need to access training on the above, and how they will access it
  - what processes will need to be in place to facilitate the above.

**Please note: this briefing is only intended to offer a basic, generalised overview of a complex and evolving area of law.**

**Briefing author:** Emma Overton, Policy and Practice Development Lead (Care and Independence Team), [emmaoverton@nhs.net](mailto:emmaoverton@nhs.net)

**If you require any further information please contact the named officer or alternatively,**

**Beverly O'Brien**

**Scrutiny and Committee Advisor**

**Tel: 01472 326285**

If you would like to find out more about scrutiny you can contact us:

**by email** [democracy@nelincs.gov.uk](mailto:democracy@nelincs.gov.uk)

**on our website** [www.nelc.gov.uk/council/councillors-democracy-elections-/scrutiny/](http://www.nelc.gov.uk/council/councillors-democracy-elections-/scrutiny/)

**or by post** NELC Democratic Services,

Municipal Offices,  
Town Hall Square,  
GRIMSBY  
DN31 1HU.

