CITY OF BRADFORD METROPOLITAN DISTRICT COUNCIL
DEPARTMENT OF HEALTH AND WELL BEING
POLICY

THE MENTAL CAPACITY ACT 2005

1.0 SCOPE

This Policy provides advice and guidance to employees of City of Bradford Metropolitan District Council (CBMDC) regarding the Mental Capacity Act 2005.

2.0 POLICY STATEMENT

2.1 The Mental Capacity Act 2005 (MCA) provides a statutory framework to empower and protect vulnerable people who may not be able to make their own decisions. It makes it clear who can take decisions, in which situations, and how they should go about this. It enables people to plan ahead for a time when they may lose capacity to make some decisions themselves.

2.2 The MCA enshrines in statute, current best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf. It provided reform and update of the statutory schemes for enduring powers of attorney and Court of Protection receivers.

2.3 CBMDC will comply with the basic principles of The MCA:

- A presumption of capacity - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
- The right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
- That individuals must retain the right to make what might be seen as eccentric or unwise decisions;
- Best interests – anything done for or on behalf of people without capacity must be in their best interests; and
- Least restrictive intervention – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms

2.4 **Assessing lack of capacity** – We use a single clear test for assessing whether a person lacks capacity to make a particular decision at a particular time. It is a “decision-specific” test. No one is labelled ‘incapable’ as a result of a particular medical condition or diagnosis. A lack of capacity will not be established merely by reference to a person’s age, appearance, or any condition or aspect of a person’s behaviour that might lead others to make unjustified assumptions about capacity.

2.5 The person who assesses an individual’s capacity to make a decision will usually be the person who is 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. More complex decisions are likely to need more formal assessments and a professional opinion on the person’s capacity might be necessary.

2.6 **Best Interests** – Everything that is done for or on behalf of a person who lacks capacity will be in that person’s best interests. The Act provides a checklist of factors that decision-makers must work through in deciding what is in a person’s best interests. A person can put his/her wishes and feelings into a written statement if they so wish, which the person making the determination must consider. Also, carers and family members will be consulted.

2.7 **The Decision Maker(s)** – The MCA Code of Practice states that under The Act, many different people may be required to make decisions or act on behalf of someone who lacks capacity to make decisions for themselves. The person making the decision is known as the "decision-maker" and it is their responsibility to decide what would be in the best interests of the person who lacks capacity.

2.8 For most day-to-day actions or decisions, the decision-maker will be the carer most directly involved with the person at the time. Where the decision involves the provision of medical treatment, the healthcare staff member responsible for carrying out the particular treatment is the decision-maker. If a Lasting Power of Attorney (LPA), or Enduring Power of Attorney (EPA) has been made and registered, or a deputy has been appointed under a court order, the attorney or deputy will be the decision-maker, for decisions within the scope of their authority.

2.9 In some cases the same person may make different types of decision for someone who lacks capacity to make decisions for themselves. For instance, a family member may carry out certain acts in caring for someone on a day-today basis, but if they are also an attorney, appointed under an (LPA) they may for example also make specific decisions concerning the person's property and affairs or their personal welfare.

2.10 There are also times when a joint decision might be made by a number of people. For example when a care plan for a person who lacks capacity to make relevant decisions is being put together, different healthcare and social care staff might be involved in making decisions or recommendations about the person's care package. Sometimes these decisions are made by a multi-disciplinary team as a whole. At other times, the decision will be made by a specific individual within the team and a different member of the team may then implement the decision, based on what has been decided is in the person's best interests.

2.11 No matter who is making the decision, the most important thing is that the decision-maker tries to work out what would be in the best interests of the person who lacks capacity.

2.12 **Acts in connection with care or treatment** – Where a person is providing care or treatment for someone who lacks capacity, then the person can provide the care without incurring legal liability. The key is a proper assessment of capacity and best interests. This covers actions that would otherwise result in a civil wrong or crime if someone has to interfere with the person's body or property in the ordinary course of caring. For example, by giving an injection or by using the person's money to buy items for them.

2.13 **Restraint/deprivation of liberty.** Section 6 of the Act defines restraint as the use or threat of force where an incapacitated person resists, and any restriction of liberty or movement whether or not the person resists. Restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to the incapacitated person, and if the restraint used is proportionate to the likelihood and seriousness of the harm.

2.14 **Lasting powers of attorney (LPAs**) – A person is able to appoint an attorney to act on their behalf if they should lose capacity in the future. The Act also allows people to let an attorney make health and welfare decisions.

2.15 **Court appointed deputies** - The Act provides for a system of court appointed deputies who are able to take decisions on welfare, healthcare and financial matters as authorised by the Court but not able to refuse consent to life-sustaining treatment. They are only appointed if the Court cannot make a one-off decision to resolve the issues.

2.16 There are two public bodies established to support the statutory framework:

a) The Court of Protection
b) The Office of the Public Guardian

See Section 9 for further information

2.17 **Further key provisions to protect vulnerable people**

Independent Mental Capacity Advocate (IMCA)

An IMCA is someone appointed to support a person who lacks capacity but has no one to speak for them. The IMCA makes representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity if necessary.

Advance decisions to refuse treatment

Statutory rules with clear safeguards confirm that people may make a decision in advance to refuse treatment if they should lose capacity in the future. It is made clear in the Act that an advance decision will have no application to any treatment which a doctor considers necessary to sustain life unless strict formalities have been complied with. These formalities are that the decision must be in writing, signed and witnessed. In addition, there must be an express statement that the decision stands "even if life is at risk".

A criminal offence

The MCA introduced a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

2.18 **Research**

a. Research involving, or in relation to, a person lacking capacity may be lawfully carried out if an "appropriate body" (normally a Research Ethics Committee) agrees that the research is safe, relates to the person's condition and cannot be done as effectively using people who have mental capacity. The research must produce a benefit to the person that outweighs any risk or burden. Alternatively, if it is to derive new scientific knowledge it must be of minimal risk to the person and be carried out with minimal intrusion or interference with their rights.

b. Carers or nominated third parties must be consulted and agree that the person would want to join an approved research project. If the person shows any signs of resistance or indicates in any way that he or she does not wish to take part, the person must be withdrawn from the project immediately.

3.0 MENTAL CAPACITY

3.1 A person lacks mental capacity in relation to a matter if at the material 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.
It does not matter whether the impairment or disturbance is permanent or temporary.

3.2 A person is unable to make a decision for themselves if they are unable to:

- Understand the information relevant to the decision,
- Retain that information,
- Use or weigh that information as part of the process of making the decision, or
- Communicate their decision (whether by talking, using sign language or any other means).

3.3 A person is not to be regarded as unable to understand the information relevant to a decision if they are able to understand an explanation of it given to them in a way that is appropriate to their circumstances (using simple language, visual aids or any other means).

3.4 The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent them from being regarded as able to make the decision. Capacity is confirmed

where a person is able to understand and retain information long enough to make an informed decision.

3.5 The information relevant to a decision includes information about the reasonably foreseeable consequences of:

- Deciding one way or another, or
- Failing to make the decision.

3.6 A person's capacity to make decisions may be temporarily impaired due to physical or mental illness or injury. It may be possible to delay a decision until person has recovered and capacity has improved

3.7 A person may have the capacity to make some decisions but not others. Decisions on capacity must relate to a specific issue e.g. a person who cannot understand the financial issues around entering long term care might still have the capacity to make a choice about whether they want to go into long term care at all and, if so, which home.

3.8 Care must be taken to ensure that no undue pressure is being exerted on the person who lacks capacity by other parties, including carers or family members

3.9 Decisions (& reasons / rationale behind them) will be recorded.

4.0 BEST INTERESTS

4.1 The MCA provides a checklist of factors that decision-makers must work through in deciding what is in a person's best interests. A person can put their wishes and feelings into a written statement if they so wish, which the person making the determination must consider. Also, carers and family members gain a right to be consulted.

4.2 In determining what is in a person's best interests, the person making the determination must not make it merely on the basis of:

- The person's age or appearance or medical condition
- An aspect of their behaviour, which might lead others to make unjustified assumptions about what might be in their best interests, or
- Any Advance Statement made by that person.

4.3 They must consider all the relevant circumstances and, in particular, take the following steps:

- Whether it is likely that the person will at some time have capacity in relation to the matter in question, and
- If so, when that is likely to be.

4.4 They must, so far as reasonably practicable, permit and encourage the person to participate, or to improve their ability to participate, as fully as possible in any act done for them and any decision affecting them.

4.5 They must consider, so far as is reasonably ascertainable:

- The person's past and present wishes and feelings (and in particular any relevant written statement made by them when they had capacity),
- The beliefs and values that would be likely to influence their decision if they had capacity; and
- The other factors that they would be likely to consider if they were able to do so.

4.6 When considering what would be in the person's best interest, they must take into account, if it is practicable and appropriate to consult, the views of:

- Anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
- Anyone engaged in caring for the person or interested in their welfare,

- Any donee of a lasting / enduring power of attorney granted by the person, and
- Any deputy appointed for the person by the court.

4.7 In the case of an act or a decision by a person other than the court, it is sufficient if (having complied with the requirements of MCA section 4.2) they reasonably believe that what they do or decide is in the best interests of the person concerned.

5.0 ACTS IN CONNECTION WITH CARE OR TREATMENT

5.1 Section 5 of the MCA allows carers, health workers, and social workers to carry out certain tasks without liability. These tasks involve personal care, healthcare, or treatment of people who lack the mental capacity to consent to them.

5.2 These types of care include:

- Helping with washing, dressing, or personal hygiene
- Helping with eating and drinking
- Helping with mobility
- Carrying out tests to identify an illness
- Providing professional medical or dental treatment or giving medication

For further examples see Chapter 6 of the MCA code of practice

5.3 Those carrying out these actions only receive protection from liability if the person is reasonably believed to lack the mental capacity to give permission for the action. The action must be in the person's best interests and follow the Act's principles.

5.4 If restraint is being considered, it must be necessary to prevent harm to the person who lacks the capacity to consent, and must be a proportionate response to the likelihood of the person suffering harm and to the seriousness of that harm. See Section 6 and 7 below for further information.

6.0 RESTRAINT

6.1 Section 6 of the MCA defines restraint as the use or threat of force where an incapacitated person resists, and any restriction of liberty or movement whether or not the person resists.

6.2 Restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to the incapacitated person or others, and if the restraint used is proportionate to the likelihood and seriousness of the harm.

6.3 Section 6(5) makes it clear that it does not provide any protection for an act depriving a person of his or her liberty within the meaning of Article 5(1) of the European Convention on Human Rights.

6.4 It is important that in circumstances where a person who lacks capacity is refusing or resisting care or treatment, discussions are held with senior managers to consider how to ensure that appropriate care is delivered.

7.0 DEPRIVATION OF LIBERTY SAFEGUARDS (DOLS)

7.1 The MCA Deprivation of Liberty safeguards (formerly known as the Bournewood safeguards) were introduced into the Mental Capacity Act 2005 through the Mental Health Act 2007 (which received Royal Assent in July 2007).

7.2 On 19 March 2014, the Supreme Court handed down its judgment in the case of "P v Cheshire West and Chester Council and another" and "P and Q v Surrey County Council".

The requirements for the Deprivation of Liberty Safeguards are unchanged and there are still 6 requirements which need to be met:

a) 18 and over

b) Suffering from a mental disorder

c) Lacking capacity for the decision to be accommodated in the hospital or care home

d) No decision previously made to refuse treatment or care, or conflict relating to this such as LPA

e) Not ineligible for DoLS

f) The person needs to be deprived of liberty, in their best interests.

The Supreme Court confirmed that to determine whether a person is objectively deprived of their liberty there are two key questions to ask, which they describe as the 'acid test':

i. Is the person subject to continuous supervision and control? (all three aspects are necessary) and

ii. Is the person free to leave? (The person may not be saying this or acting on it but the issue is about how staff would react if the person did try to leave).

This now means that if a person is subject both to continuous supervision and control and not free to leave they are deprived of their liberty.

7.3 The following factors are no longer relevant to this:

i. the person's compliance or lack of objection;

ii. the relative normality of the placement and

iii. the reason or purpose behind a particular placement.

7.4 The judgment is significant in determining whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty

7.5 A deprivation of liberty for such a person must be authorised in accordance with one of the following legal regimes: a deprivation of liberty authorisation or Court of Protection order under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act 2005, or (if applicable) under the Mental Health Act 1983.

7.6 If it is possible that any intervention may result in the deprivation of liberty of someone who lacks capacity then see the DoLS Policy and Procedures (MCA02).

8.0 PAYMENT FOR GOODS & SERVICES

8.1 Staff should be aware that previous legislation and common law rules have now been brought together by the MCA regarding a person lacking capacity and the purchase of 'necessaries' in terms of goods and services.

8.2 It makes it clear that a person lacking capacity must pay a 'reasonable price' for goods and services supplied to them.

8.3 A person who is acting under section 5 MCA may arrange something for a person's care or treatment and promise that the person receiving the care and / or treatment will pay for it.

8.4 This is restating the common law rules which provide that a person acting as an 'agent of necessity' should not be out of pocket for acting in good faith.

8.5 The MCA does not provide for a person acting for an individual lacking capacity to access that individual's bank or building society account. Formal steps may be taken to arrange this i.e. registering a power of attorney or obtaining a court order.

9.0 LASTING POWERS OF ATTORNEY

9.1 The MCA allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. This is like the previous Enduring Power of Attorney (EPA). However, the MCA allows people to let an attorney make health and welfare decisions.

9.2 Existing EPAs endure following implementation of the Act. They are not automatically replaced by LPAs nor will EPAs need to apply to become LPAs.

9.3 Receivers appointed before April 2007 became deputies when the MCA was implemented.

9.0 COURT OF PROTECTION

9.1 The MCA provides for two public bodies to support the statutory framework, both of which will be designed around the needs of those who lack capacity:

Court of Protection

The Court has jurisdiction relating to the MCA and is the final arbiter for capacity matters. It has its own procedures and nominated judges.

Public Guardian

The Public Guardian is the registering authority for LPAs and deputies. They supervise deputies appointed by the Court and provide information to help the Court make decisions. They also work together with other agencies, such as the police and social services, to respond to any concerns raised about the way in which an attorney or deputy is operating.

10.0 COURT APPOINTED DEPUTIES

10.1 The MCA provides for a system of court appointed deputies who are able to take decisions on welfare, healthcare and financial matters as authorised by the Court but are not able to refuse consent to life-sustaining treatment. They are only appointed if the Court cannot make a one-off decision to resolve the issues.

11.0 ADVANCE DECISIONS

11.1 Statutory rules with clear safeguards confirm that people may make a decision in advance to refuse treatment if they should lose capacity in the future. The decision must be made by a person who is 18 or over at a time when the person has capacity to make it and must specify the treatment that is being refused. This advance decision may be withdrawn by the person at any time by any means except in the case of life-sustaining treatment where the withdrawal must be in writing.

11.2 If there is doubt or dispute about the existence, validity or applicability of an advance decision then it should be referred to the Court of Protection for determination.

12.0 EXCLUDED DECISIONS

12.1 The MCA lists certain decisions that can never be made on behalf of a person who lacks capacity.

12.2 There will be no question of an attorney consenting or of the Court of Protection making an order or appointing a deputy to provide consent regarding these matters.
See **Appendix 1**

13.0 THE MENTAL HEALTH ACT 1983

13.1 The MCA section 28 ensures that the MCA does not apply to any treatment for a mental disorder which is being given in accordance with the rules about compulsory treatment as set out in Part IV of the Mental Health Act 1983.

13.2 Staff should be aware that the statutory safeguards which the Mental Health Act 1983 gives in relation to compulsory psychiatric treatment must always be afforded to those patients to whom the Mental Health Act 1983 applies.

14.0 RESEARCH

14.1 The MCA in sections 30,31,32,33 and 34 lays down clear parameters for research where people without capacity may be the subjects. The provisions are based on long-standing international standards e.g. World Medical Association. The appropriate authority must be sought prior to launching a research project i.e. the Secretary the State.

15.0 INDEPENDENT MENTAL CAPACITY ADVOCATE (IMCA)

15.1 An IMCA is someone appointed to support a person who lacks capacity but has no one to speak for them. The IMCA makes representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity if necessary.

15.2 Arrangements must be made to allow the IMCA to meet the person concerned and see the relevant health, social services and care records. This is to enable the IMCA to perform properly their function of representing and supporting the person who lacks capacity.

16.0 ILL TREATMENT OR WILFUL NEGLECT

16.1 Section 44 of the MCA introduced a new criminal offence of ill treatment or neglect of a person who lacks capacity by anyone responsible for that person's care, donees of Lasting Powers of Attorney or Enduring Powers of Attorney, or deputies appointed by the court. A person found guilty of such an offence may be liable to imprisonment for a term of up to five years.

17.0 RECORD KEEPING

17.1 When assessments of capacity to make significant decisions are undertaken, it is essential that health & social care professionals clearly document the process of assessment and the evidence that the person lacked capacity to make their own decision.
In these cases a Mental Capacity Record Form must be completed.

17.2 Routine low risk interventions, such as providing personal care, should be recorded in care records such as case notes or care plans. Notes should demonstrate how staff working with people who lack capacity to consent to the intervention have acted in their best interest and complied with the MCA.

18.0 APPENDICES

1. **List of Excluded Decisions**

APPENDIX 1

EXCLUDED DECISIONS

(Extract from MCA 2005 Sections 27, 28, & 29)

27 Family relationships etc.

(1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person-

(a) consenting to marriage or a civil partnership,

(b) consenting to have sexual relations,

(c) consenting to a decree of divorce being granted on the basis of two years' separation,

(d) consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation,

(e) consenting to a child's being placed for adoption by an adoption agency,

(f) consenting to the making of an adoption order,

(g) discharging parental responsibilities in matters not relating to a child's property,

(h) giving a consent under the Human Fertilisation and Embryology Act 1990 (c. 37).

(2) "Adoption order" means-

(a) an adoption order within the meaning of the Adoption and Children Act 2002 (c. 38) (including a future adoption order), and

(b) an order under section 84 of that Act (parental responsibility prior to adoption abroad).

28 Mental Health Act matters

(1) Nothing in this Act authorises anyone-

(a) to give a patient medical treatment for mental disorder, or

(b) to consent to a patient's being given medical treatment for mental disorder,

if, at the time when it is proposed to treat the patient, his treatment is regulated by Part 4 of the Mental Health Act 1983.

(2) "Medical treatment", "mental disorder" and "patient" have the same meaning as in that Act.

29 Voting rights

(1) Nothing in this Act permits a decision on voting at an election for any public office, or at a referendum, to be made on behalf of a person.

2) "Referendum" has the same meaning as in section 101 of the Political Parties, Elections and Referendums Act 2000 (c. 41).