The Mental Capacity Act 2005

Strategic Intention:

- Ensure the safety, the dignity and the rights of the public are placed at forefront of all WMP decisions on policing and mental health.
- Ensure collaborative partnerships operate effectively.
- Ensure reliance upon the MCA to keep people safe is timely, proportionate, necessary and lawful.
- Ensure WMP fulfils its responsibilities under the Mental Capacity Act 2005 and its Code of Practice.
- Ensure WMP is not operating beyond its legal authority.
- Ensure WMP officers are not operating beyond professional competence.

These documents reflect the 'offer' from WMP to our statutory partners and the public on the key topics in policing and mental health. They are *guidelines*, not binding instructions:

All inter-agency situations are, by definition complex, and must be judged on their *individual merits*, using the *National Decision Model* and *THRIVE+* to assess threats and risks against available legal options.

"Over-policing" is as serious a risk as "under-caring".

WMP OBJECTIVES

- *TASK: lawful, proportionate application of the MCA.*
- *TASK: minimise risk & maximise safety, where deployed.*
- *RISK: over-reliance upon the MCA to intervene.*
- *RISK: removal to hospital **solely** for MH purposes.*
- *RISK: failure to distinguish over-reliance from necessity.*

FORCE CONTACT

- **What intention is behind a request for the police?**
- **What is the purpose of the proposed action?**

- *TASK: ensure officers deployed where appropriate.*
- *RISK: removal to hospital **solely** for MH purposes.*

POLICE OFFICERS

- **Is restraint proportionate to the likelihood and the seriousness of harm?**
- **Is this situation life-altering or life-threatening?**
- **What would be likely to happen if we did nothing?**

- *TASK: safeguard those who lack capacity.*
- *RISK: confusion about 'legal powers' under the MCA.*
- **See 'Conveyance, and escalate, if required.**
- **See 'Crisis Incidents', and escalate, if required.**

SUPERVISORS

- *TASK: ensure management of risk and threat.*
- *TASK: liaise with other agencies, if necessary.*
- *RISK:* confusion about 'legal powers' and the 'least restrictive' approach.
- *RISK:* understanding where 'capacity' incidents require MHA approaches.
- **See 'Conveyance', and escalate, if required.**
- **See 'Crisis Incidents', and escalate, if required.**

WMP understands it has a role to play in support of other agencies where the Mental Capacity Act 2005 is being considered; and that WMP officers may rely upon this legislation in an emergency to keep an adult safe where they lack capacity. Case law and a number of inquests show there are regular problems in how agencies work together during their consideration of the MCA, during its application and its interface with the MHA.

When requesting police support for an intervention under the MCA, WMP call handlers and operational officers will require **confirmation of the following information**, to allow them to weigh up their legal options to support the vulnerable person and the other agency:

- Confirmation someone over 16yrs of age has been assessed as lacking capacity.
- A summary of the perceived risk to the person if no intervention took place – is this a life-changing or life-threatening situation; or are the risks less serious?
- Confirmation the intervention is not just focussed upon the need for a mental health or Mental Health Act assessment: in the *Sessay* case (2011) the High Court ruled the MCA cannot be relied upon purely for this purpose.
- If MH assessment or MHA intervention is required (esp. in private premises), agencies will need to consider contacting GPs, mental health services or AMHP services, as appropriate – police support for such processes is covered in the other WMP 'Offer' documents.

In order for WMP to lawfully carry out any actions under the MCA, officers must be able to show, *on the balance of probabilities*, that any restraint was proportionate to the likelihood and seriousness of the harm which would otherwise be suffered by the person. Any urgent deprivation of liberty must arise from a situation that is, essentially, life-changing or life-threatening.

COERCIVE INTERVENTION

Officers must be briefed on the issue of undertaking coercive interventions:

- **Section 5 MCA** – provides a general defence to acts done for someone who lacks capacity.
- **Section 6 MCA** – confirms restraint must be proportionate to the likelihood and the seriousness of harm, including not only *the use of force,* but also any *implied or threatened use of force.*
- **Section 4B MCA** – urgent deprivations of liberty may *only* be undertaken where this is necessary to provide a life-sustaining intervention or to undertake a vital act to prevent a serious deterioration in the person's condition. Essentially, "life-changing or life-threatening".

A deprivation of liberty occurs where someone is placed "under constant supervision, control and unable to leave" – The *Cheshire West Case.*

It remains the responsibility of those undertaking a restrictive intervention to satisfy themselves it is both lawful and necessary. *Clarity of communication by everyone is essential* if officers are to be persuaded and satisfied that there is a lawful basis for intervention to keep someone safe.

There are no 'powers' under the MCA for a particular group of professionals, unlike in the Mental Health Act 1983. If something needs to be done under the MCA, anyone involved in the incident may do so, whether they are police officers, medical professionals or members of the public.

This means that whilst nothing prevents the police from assisting others, paramedics and other professionals can also act – and they do so, regularly. Providing CPR to a heart attack patient, carrying unconscious people to stretchers and removing people to hospital may all be carried out in accordance with the Mental Capacity Act, in particular the Code of Practice.

There may be a limit to the level of resistance, aggression or violence that non-police professionals can reasonably be expected to handle where people are conscious and actively resisting being helped – and this is where others may seek police support.

It is important to ensure police involvement is unavoidable for what will most usually be a medical incident. The risks of "over-policing" can be as serious as the risks of "under-caring."

Upon receipt of a request for support under the MCA from WMP officers in respect of someone who is said to lack capacity, it is important to clarify certain things at the first point of contact –

TWO QUESTIONS

- **What is the request?** – It will most usually be to assist in removing someone from one location, possibly their home, to an Emergency Department for *urgent treatment*, but not always. Officers will need to know this to determine whether to respond and the resources required.
- **What is the purpose of the proposed action?** – There is case law (the '*Sessay*' case from 2011), which states officers *cannot* remove someone from private premises to hospital where the only purpose is mental health or Mental Health Act assessment. **<< See 'Offer' on welfare checks**.

Life-changing / life-threatening – the MCA *can* be relied upon where the medical risk to someone from no-one taking action in their best interests is 'life changing or life-threatening', in which case WMP officers will also require NHS support, usually an ambulance.

THREE OPTIONS

- **Life-changing / life-threatening** – where an agency is confirming an issue with a person's capacity involving such risks and resistance, officers can be deployed and a supervisor should be informed.
- **Removal for MH / MHA assessment** – if WMP receive a request to remove someone 'under the MCA' from their home to hospital *solely* for MH or MHA assessment, this should be *declined*: it would be unlawful. If a person in private premises requires such assessment, NHS or AMHP services need to be sought by those requesting police support under the MCA.
- **Criminal or Common Law** – if either situation involves a crime or a Breach of the Peace, officers may be deployed if the intention is to use police powers *for their intended purpose*: to investigate crime or prevent a Breach of the Peace and bring someone before a Court.

The Mental Capacity Act may be relevant in ensuring a proper policing response to any mental health or medical incidents we face. When WMP receives requests from other agencies for support under the MCA officers may consider it as part of their response to police incidents, especially where s136 or the MHA cannot apply. **<< See Offer on Crisis Incidents in Private Premises.**

The Act can be misunderstood by those who work in the medical and law enforcement professions –

- **The MCA is not just about mental health** – it can apply to anyone who is **at least 16yrs of age** where their cognitive functioning is so impaired it affects their ability to take decisions; eg head injuries, acute intoxication, etc.. But it *may* be about mental health and its consequences.
- Where possible, capacity assessment for medical and psychiatric issues should be undertaken by care professionals and officers should request NHS support where time allows for this.
- Nothing prevents police officers (or anyone else) making assessments and taking action to keep people safe, if this is *urgently necessary* and the MCA applies.
- Capacity, as it affects decision making processes, is event *specific*. It will usually, but not always arise around someone receiving treatment for an illness or injury from the emergency services.
- **An unwise decision does *not* amount to an automatic lack of capacity** – people are entitled to make unwise decisions and decline medical treatment, where they have legal capacity to do so.
- Any action taken must be *the **least restrictive thing** done in that person's best interests*.

ASSESSING CAPACITY

You must presume capacity unless, a two-stage test suggests otherwise: can you "**ID a CURE**"? –

- **Impairment or Disturbance** – of the mind or brain. Is this person ill, injured or temporarily affected by drugs and / or alcohol to cause a cognitive impairment or disturbance?

  and, *arising from that:*

- **Communicate, Understand, Retain or Evaluate** – can the person communicate their decision; understand its implications; can they retain or evaluate information relevant to taking it?

THE LAW

- **Section 5** – *provides a general defence:* acts done (without restraint) are protected as long as they were done in accordance with MCA principles (above) in the least restrictive way.
- **Section 6** – any act involving restraint (the actual or threatened use of force) must also be proportionate to the likelihood and seriousness of the harm likely to occur.
- **Section 4B** – 'deprivation of liberty' must be avoided unless it is necessary to provide a life-sustaining intervention or prevent a serious deterioration in a person's condition. Does your proposed action place the person "under constant supervision, control and unable to leave"?

The *Sessay* case confirms that you *cannot* remove someone to hospital from their home or anywhere else, *purely* for MH or MHA assessment. **<< See Offer on Crisis Incidents in Private Premises.**

It may be necessary to support and oversee police incidents where the MCA is being considered by officers or by other agencies who are requesting police support. The Act is often misunderstood, communication relevant to its operation is not always sufficient and the legislation is opaque.

MAIN CHALLENGES

The following issues are those which are most likely to cause legal and practical problems –

- **Dwellings** – use of the MCA to remove someone from a private dwelling solely for the purpose of mental health or Mental Health Act assessment – the '*Sessay* case' (2011) ruled such practice to be unlawful. The judge gave clear direction that intervention of this kind must be conducted under the MHA, either admission under s4 MHA or the execution of a s135(1) MHA warrant. << See Offer on Crisis Incidents in Private Premises.

- This remains true even if the person lacks capacity arising from the mental health condition and it remains true if the person has been assessed under the MHA but they have not been 'sectioned' because of difficulty identifying a hospital who can receive the person. Where other agencies invite police intervention after MHA assessment, this should be declined and advice given to urgently escalate to their managers. << See Offer on No MH Beds

- **Urgent deprivation of liberty** – removal of a person to hospital with the intention of holding them there will normally amount to a 'deprivation of liberty'. This occurs where someone is placed 'under constant supervision, control and unable to leave'. Section 4B MCA states an urgent deprivation of liberty may only be undertaken where this is necessary to provide a 'life-sustaining intervention or to prevent a serious deterioration in someone's condition'. Essentially, this means a situation which is *already* life-changing or life-threatening.

- **Children** – the MCA cannot be relied upon for someone under the age of 16yrs – intervention for children must either be done under the Children's Act 1989, the Mental Health Act 1983 or with parental consent, as appropriate to the situation. There is no lower age limit for the application of the Children's Act or the Mental Health Act. << See Offer on Crisis Incidents in Private Premises.

- **Communication** – of risks and threats is crucial: Various inquests have shown inadequate communication often sits behind disputes between agencies about what may be done, whether the MCA is relevant or how it may apply. Most usually, communication needs to focus on what the medical risks would be to the patient if no action were taken; or clarity about why removal to hospital is 'the least restrictive' approach consistent with safety, compared to any other available options.

- **Risks from inaction** – where the police are requested to act by others, a key question will be "What is likely to happen to this person if we do nothing?" This invites clear assessment of how serious the situation is: intervention can be considered if the risk is serious enough to justify the action that would be necessary to mitigate that risk.

- **Legal justification for the Use of Force** – Police officers are not obliged to accept and act upon a request by healthcare professionals whose own knowledge or training around the application of the Mental Capacity Act may be no greater than that of police officers relying on this guidance. It is for officers to satisfy themselves that the action proposed is proportionate to the risks which would otherwise be faced and it is for them to seek clarification or challenge, if they are initially unpersuaded. Supervisors should be consulted to assist this dialogue, where necessary.