

**Mental Capacity Act Unit
Department of Health
Room D2.10, Castle Buildings
Belfast
BT4 3SQ**

12th December 2024

BY EMAIL ONLY

Dear Sir/Madam

Ref: Consultation on the Commencement of Provisions under the Mental Capacity Act (Northern Ireland) 2016 relating to "Acts of Restraint"

The Patient and Client Council (PCC) welcomes that the Department of Health (DoH) is consulting on the Commencement of Provisions under the Mental Capacity Act (Northern Ireland) 2016 relating to "Acts of Restraint". The PCC in particular acknowledges the important commitment to seek the views of people with lived experience and those who provide advocacy services, amongst others.

The Role of the PCC

The PCC is a statutory corporate body established in 2009 to provide a powerful, independent voice for patients, clients, carers and communities on health and social care issues within Northern Ireland¹ through:

- Representing the interests of the public;
- Promoting the involvement of the public;
- Assisting people making, or intending to make, a complaint;
- Promoting the provision by HSC bodies of advice and information to the public about the design, commissioning and delivery of services; and
- Undertaking research into the best methods and practices for consulting and engaging the public.²

We provide advocacy services for the public, which range from helpline advice, early resolution of issues, individual advocacy, to supporting people through formal complaints and serious adverse incidents.

If we identify a specific need that we cannot help with, we will try to connect individuals to a partner organisation within the voluntary and community sector or beyond, with the aim of ensuring people do not fall through gaps in the system.

We also bring members of the public, with common interest and lived experience, into direct conversation with decision makers from the Department of Health and HSC organisations to improve existing HSC services and plan for the future.

The PCC is not a mental health specialist body. This response is submitted on the basis that it relates to our broader statutory functions, experience of providing generalist advocacy support across health and social care, and to concerns about vulnerable individuals navigating an already complex system and healthcare delivery environment.

¹ DHSSPS Framework Document – September 2011, Department of Health

² Health and Social Care (Reform) Act (Northern Ireland) 2009

Full Commencement of Mental Capacity Act

The PCC understands the Mental Capacity Act (MCA) to be a unifying piece of legislation, to cover both care and treatment in relation to mental health, with full safeguards for the public and healthcare professionals being dependent on the legislation being commenced in full. The PCC would highlight the difficulties created by the phased implementation of the Act. This approach has created instances where health professionals and care providers are operating with two different pieces of legislation that regulate the same situations. The PCC is concerned about the potential risks that two complex pieces of legislation, with different legal purposes, operating simultaneously, may pose for members of the public, particularly in circumstances of increased vulnerability.

The PCC notes the evidence that has been provided to the Muckamore Abbey Hospital Public Inquiry regarding the commencement of the MCA. It is important that the commencement of remaining provisions, that contain significant safeguards, are not delayed further. The PCC would welcome the forthcoming updated MCA Implementation and Funding Plan that will cover the remaining MCA provisions, including the introduction of Independent Mental Capacity Advocates.

Mental Capacity Advocates

Within the PCC's advocacy work, clients have raised issues regarding the unnecessary use of force in restraining, disagreeing with the use of restraint against their loved one, and injuries due to an Act of Restraint used. Whilst acknowledging the broader challenges of phasing the commencement of a unifying piece of legislation, we note that specific safeguards, such as Mental Capacity Advocates, will not be in place at the commencement of the provisions pertaining to Acts of Restraint. Advocacy is essential to effecting individual's Human Rights in certain circumstances, especially when related to capacity. The PCC would highlight the need for there to be mitigations in place to manage and minimise associated risks. The PCC's experience from our casework suggests that current arrangements

regarding Nominated Persons are insufficient at present, and therefore are insufficient to mitigate the potential risks associated with delayed implementation of specific safeguards e.g. the introduction of Mental Capacity Advocates.

In certain situations, consideration must be given to the capacity of the client under the MCA, as they may have learning disabilities, cognitive issues, mental health problems, therefore Advocacy may have to be non-instructed, due to capacity of the person to consent. To accommodate these needs, specialist advocates who are able to provide non-instructed Advocacy must be in place. Without specialist advocacy support, groups affected by the MCA are vulnerable. PCC, as non-specialist advocates, would highlight the need for, and welcome, the commissioning of Independent Mental Capacity Advocates roles, so these gaps in support are filled. In addition, it should be clear how the commissioned Independent Mental Capacity Advocates relate to the PCC in the discharge of its statutory roles.

A strategic and regional approach to independent advocacy services

Listening to and hearing people's experience is the first line of defence when safeguarding vulnerable people. Having access to advocacy support is important for all members of the public; it plays a fundamental role in addressing social injustice.

PCC believe that supporting advocacy services provides a level of assurance that HSC organisations are committed to being learning organisations, meeting their statutory duty of quality and appropriately invested in the duty of candour and a culture of openness and transparency.

Advocacy support is not only vital for individuals and families, it is a key part of assurance within the Health and Social Care System. Advocacy is not a 'nice to have'. It:

- Reduces potential for compounded harm
- Addresses inequality and subsequently inequity in complaint and engagement processes.

- Provides assurance and can be a key part of the governance and assurance of any review process
- Enhances potential learning

Without the full implementation of the MCA there are risks that such opportunities, particularly regarding safeguarding and assurance, will be missed.

The current landscape of advocacy service provision is fragmented. The PCC believes that advocacy services should be regionally commissioned and independent of Trusts. The Independent Mental Capacity Advocates need to fit into a regional approach to advocacy services providing the right service, at the right place, and at the right time.

Public Understanding of MCA provisions and Acts of Restraint

The broader HSC system can be extremely complex for members of the public to navigate and there are existing challenges in providing consistent, timely and effective support. This is increasingly the case in a complex healthcare delivery environment and in a system under strain. Individuals are usually seeking support and information at times of distress – it is critical that this factor influences considerations about how members of the public will engage with services and treatments emanating from the MCA, and provisions relating to Acts of Restraint.

It is critical that the MCA is clearly and comprehensively understood by families and patients, whose capacity to make decisions requiring consent may fluctuate over time. Families and patients need to understand why an Act of Restraint might be used and what is meant by an Act of Restraint. For example, an Act of Restraint may range from not giving a Care Home resident the code for leaving their Care Home to prevent them from endangering themselves, up to and including an act of physical restraint. Families and patients must also understand the wider provisions under the MCA.

With this in mind, the PCC would underline the need for guidance documentation, designed for individuals and families that are easy to access and understand. Ideally this guidance would be co-produced with individuals with lived experience and their families, as well as with service providers who have experience of supporting them. PCC believes there is a need for greater strategic cohesion in public engagement across the HSC and we have been developing a number of conversations on this topic with different bodies, including the DoH. The PCC would be happy to discuss with DoH public involvement and engagement regarding MCA documentation and guidance.

Adult Protection Bill

The PCC would like to know how the MCA links to the forthcoming Adult Protection Bill. The PCC Adult Protection Engagement Platform have lived experience of Adult Safeguarding and a working knowledge of engaging to improve policy, processes and systems in this area. Some of our Platform Members have loved ones with experiences of Acts of Restraint. A common theme our Platform Members mention is employing the use of CCTV in residential homes. They believe this would act as a safeguard to help prevent abuses of restraint. One question regarding the interface of the MCA with the Adult Protection Bill is for example, whether there will be consequences for the Adult Protection Bill, with the MCA not being fully implemented.

The PCC is happy to discuss with the Department of Health any aspect of this consultation response.

Yours faithfully



Ruth Sutherland, CBE
Chair



Meadhbha Monaghan
Chief Executive