

The Mental Capacity Act and Deprivation of Liberty

Report of the Health & Adult Care Scrutiny Committee

Please note that the following recommendations are subject to confirmation by the Committee before taking effect.

Recommendation

that upon the passing of the Mental Capacity (Amendment) Bill the Committee receives, at the earliest opportunity, a report on the implications to the County Council.

Background

On 20 February 2019 the Health and Adult Care Scrutiny Committee's Standing Overview Group held a session with officers on the Mental Capacity Act and deprivation of liberty safeguards. The session explored the implications for practice, the organisation and the management of associated risks.

The following members of the Health & Adult Care Scrutiny Committee attended this session:

- Sara Randall Johnson (Chair)
- Andrew Saywell
- Richard Scott
- Phil Twiss
- Carol Whitton
- Councillor Colthorpe - Vice Chair, CIRS Scrutiny
- Councillor Leadbetter - Cabinet Member for Adult Social Care and Health Services

The Mental Capacity Act 2005

The Mental Capacity Act 2005 (MCA) provides a legal framework that aims to empower people to make decisions for themselves wherever possible and protects the rights of individuals who lack capacity to do so. Essentially protecting someone's right for freedom.

The MCA states what process must be adhered to when making decisions for people who cannot do so for themselves. It provides protection for those making decisions on behalf of the person who lacks capacity as long as the process for doing so is followed. The MCA also provides ways to plan for the future via the provision of Lasting Powers of Attorney for health / welfare and finances and advanced directives. The MCA places the needs of the individual at the centre and was ground-breaking in that it placed the principles by which we all must abide in statute.

Limits on Local Authority Involvement

Hillingdon LBC v Neary [2011] para 24: 'Decisions about incapacitated people must always be determined by their best interests, but the starting point is their right to respect for their family life where it exists. The burden is always on the State to show that an incapacitated person's welfare cannot be sustained by living with and being looked after by his or her family, with or without outside support.'

If the State wishes to overrule any family's care provision or decision there needs to be evidence of how the proposed care will be better than that chosen or provided by her family.

Practice Implications

- Practitioners need to be fully aware of the requirements of the Mental Capacity Act.
- If it is felt that a person lacks mental capacity a full assessment of capacity needs to be undertaken.
- All subsequent actions undertaken for the incapacitated person need to be in their "Best Interests".
- These requirements are legally enforceable and can be challenged in the courts.
- This means that there is a need to ensure that practitioners in Adult Care services are legally literate.

The Deprivation of Liberty Safeguards Process

- The DoLS process is bureaucratic in nature.
- Applies to hospitals and care home settings only.
- Requires 6 assessments to be completed Age, No refusals, Mental health, Eligibility, Mental Capacity and Best Interests.
- Provides safeguards – advocates, conditions to be attached to any authorisation, access to review and appeal to the Court of Protection.

The Implication of Case Law

- Placements in care homes and hospitals are imputable to the State.
- Therefore, any person in a hospital or care home that lacks mental capacity to reside there is almost certainly deprived of their liberty and will require a DoLS Authorisation.
- 2014 P v Cheshire West & P& Q v Surrey County led to a quadrupling of applications. The result is that the County Council now receives around 2000 applications per year up from 500 the year before the judgement.
- Significant investment over the last 12 months has led to the waiting list reducing to 2500 with the employment of more assessors, but there is still not the capacity to deal with the number of applications.
- Nationally all local authorities have been struggling but the County Council was an outlier in terms of performance, and now is working to get to level of mid-range comparators.
- DoLS is on the corporate risk register.

Management of Risk

Due to the volume of applications, the County Council has adopted a triage system to ensure those most at risk are assessed. Priority is given to:

- Those who object to their placement.
- Proceedings in the Court of Protection or where there is a need for positive obligation to assist the individual to appeal.

Community Deprivation of Liberty Safeguards

- Deprivation of liberty will also occur outside of a hospital or care home. For example; in supported living environments and potentially in a person's own home. In these circumstances the DoLS safeguards do not apply and an application will need to be made to the Court of Protection.
- Guidance has been developed to aid staff in making applications to the Court.

The Mental Capacity Bill

- The Bill is scheduled for report stage and the third reading in the House of Commons.
- Trusts and CCG's will be responsible for individuals who come within the scheme and are resident in hospital or receiving CHC funding, receiving local authorities will be responsible for all other cases including self-funders.
- Local authorities will be required to make arrangements for the approval of Advanced Mental Capacity Professionals (AMCP's) and to ensure they have sufficient numbers of AMCP's
- Referral to an AMCP will be required in all cases where the individual objects.
- Authorisations currently cover residence and will in the future also cover: residence, care and treatment arrangements, conveyance and could cover multiple settings at any one time.

Issues Identified by Members

The following issues were identified by members:

- The level of responsibility placed on care home managers.
- The waiting list for assessment. While cases are triaged as they come through the system, staff always hold an element of risk with those in the waiting list.
- Concern was expressed from members as to how sustainable capacity can be built in to deal with the backlog. When 12-month funding for additional staff ceases in the summer, if no changes in terms of legislation are made before then the waiting list will go up.
- The importance of integrated working between Health and Adult Social care.
- The competencies of partners across the system. Importance of each individual professional in a multi-disciplinary team bringing their area of expertise to the conversations.
- There are gaps in hospital discharge where the risk threshold is quite different.
- The Devon Safeguarding Adults Board is very helpful in terms of sharing training and expertise, to upskill a multi-disciplinary team.

Conclusion

Members agreed that the session on DoLS was extremely worthwhile in examining this complex area of the Council's business, and that it was essential moving forward for the Committee to continue to monitor progress addressing the waiting list for assessment.

**Councillor Sara Randall Johnson, Chair
Health & Adult Care Scrutiny Committee**

Electoral Divisions: All
Local Government Act 1972

List of Background Papers
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<u>Background Paper</u>	<u>Date</u>	<u>File Ref</u>
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Nil

There are no equality issues associated with this report