

The Mental Capacity Act 2005 And The Deprivation of Liberty Safeguards

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AIM OF THE SESSION

1. Update following the House of Lords Select Committee Scrutiny Panel report on the Mental Capacity Act 2005
2. Update following the Supreme Court Ruling regarding the Deprivation of Liberty Safeguards

THE MENTAL CAPACITY ACT 2005 KEY ASPECTS

Visionary piece of legislation , applicable to people ages 16+

- 1.MCA places the individual at the heart of decision making
2. Capacity to be presumed unless proven otherwise
3. Unwise decisions not to be used as an indicator of a lack of capacity.
Entitles those with impairments to take risks and make poor decisions
4. When lacking capacity to make specific decision the Best Interest process
ensures wishes and feelings of the individual remain central to decision being made
5. Promotes consideration of less restrictive options

Provides protection from harm to vulnerable people.

HOUSE OF LORDS SELECT COMMITTEE

Asked to report on whether the MCA 2005 is working as Parliament intended.

On the 13th March 2014 the report was published.

Some findings of the report include:

1. In the main MCA continues to be held in high regard, however, its implementation has not met the expectations that it rightly raised:
2. It is seen as being an optional add on and far from being central
3. The Act has suffered from a lack of awareness and understanding
4. The empowering ethos has not been delivered
5. The rights conferred by the Act have not been widely realised
6. The duties imposed by the Act are not widely followed

Concerns both those who work in health and social care

COMMENTS WITHIN THE REPORT INCLUDE:

1. The empowering ethos of the Act has not been widely implemented.
2. Capacity is not always assumed (key principle 1)
3. Capacity Assessments are not often carried out and when they are the quality of them is often poor.
4. Supported decision making and the adjustments required to enable it are not well imbedded (key principle 2)
5. Concept of unwise decision making faces institutional (key principle 3) obstruction due to prevailing cultures of risk aversion and paternalism
6. Best Interest decision making is not undertaken in the way set out in the Act.(Key principle 4)
7. The less restriction option is not always considered (Key principle 5)
8. The wishes, thoughts and feelings of the individual are not routinely or adequately considered.

RECOMMENDATIONS WITHIN REPORT

There were 39 recommendations in total, made to the Department of Health, with a timescale of 12 months to respond.

Some recommendations include:

Rec 3 Overall responsibility for implementation to be given to a single independent body

Rec 5 The standards against which CQC inspects should explicitly incorporate compliance with the MCA as a core requirement.

Rec 9 The Government along with the Association of Directors for Adult Social Care and NHS England encourage wider use of commissioning as a tool for ensuring compliance

Rec 22. The Role of the Independent Mental Capacity Advocate to be far greater used.

Rec 25 Consideration is given regarding the poor understanding of the role of Lasting Power of Attorney, paying specific attention to the status of an Attorney in decision making.

Rec 26 A need to address the low level of understanding amongst the general public and health and social care professionals regarding Advance Decisions to refuse medical treatment

DEPARTMENT OF HEALTH RESPONSE TO THE REPORT

June 13th 2014

‘Valuing every Voice, respecting every right.

Making the case for the Mental Capacity Act 2005’

Some key responses include:

1. Do not agree that Independent regulatory Body is required specifically for the implementation of MCA, existing processes will be implemented. However consideration will be given to establishing a new independently chaired MCA Advisory Board to the Govt.
2. DOH will commission a review of all current guidance and tools that can be widely disseminated (Gold standard) Social Care Institute for Excellence will provide guidance and tools by end of 2014. A decision regarding the updating of the MCA Code of Practice will be taken following this review.
3. Greater emphasis to be placed on the MCA within professional training.
4. Care Quality Commission to prioritise MCA in the fundamental revision of its regulations and inspection model
5. Office of the public Guardian to increase to work towards increasing awareness re LPA’s and to work with CQC to make sure that questions on LPA feature in inspections of health and social care providers.

THE DEPRIVATION OF LIBERTY SAFEGUARDS

What are they?

1. Protective measures for people aged 18+
2. Who reside in care home or hospital
3. Lack the mental capacity to consent to reside in a care home or hospital for the purpose of receiving care and or treatment
4. Where those care arrangements have the effect of depriving them of their liberty (Article 5 Human Rights Act 1998)
5. Provide safeguards for vulnerable person and a legal framework prescribed by law

They do not apply to people detained under the Mental Health Act 1983

DEPRIVATION OF LIBERTY SAFEGUARDS

House of Lords Select Committee also considered and reported on the implementation of DoLS.

The report stated the following:

- 1.** The DoLS Provisions are poorly drafted overly complex and bear no relation to the language and ethos of the MCA 2005.
- 2.** The safeguards are not well understood and are poorly implemented.
- 3.** Recommendation that DoLS should be ripped up and the Govt should draft replacement provisions that are easy to understand and implement.
- 4.** The Govt should increase the number of staff available at the Court of Protection to speed up non –controversial cases.

GOVERNMENT RESPONSE TO THE HOUSE OF LORDS REPORT

The Government response report states the following:

1. The Government agrees that DoLS is not well understood or implemented
2. The Government **disagrees** that the DoLS legal framework should be ripped up and started again.

Therefore:

1. The Government will review the DoLS forms and issue guidance.
2. The Court of Protection will stream line its processes
3. The Law Commission will draft new legal framework for authorising a DoL in supported living, and will advise if the framework is too complex
(Law Commission's project has already started this work)

DEPRIVATION OF LIBERTY SAFEGUARDS

WHAT GOING ON?

1. Two cases (P and Q and Cheshire West v P) considered whether severely disabled adults who would need a high level of control wherever they lived were deprived of their liberty, and if so they would all need the DoLS or Court authorisation.
2. 2011 Court of appeal said each person was not deprived of their liberty, as restrictions did not go beyond what they would need in any setting, the homes were as 'normal as possible' and they were not objecting to their care.
3. Lord Justice Mummy
'Don't compare 'P' to a 'normal' person but to someone with similar disabilities.'
4. Seen as hugely controversial... and meant that many Care Homes placements now would **not** need a DoLS assessment.
5. The cases were referred (appeal) to the Supreme Court.

SUPREME COURT DECISION 19TH MARCH 2014

1. Supreme Court Judges unanimously rejected 'Mumby's comparator test'
2. Out of 7 Judges, 4 continued to approve the ECHR approach :
Is person under continuous supervision and control and not free to leave?'
3. Issues such as is the person objecting and relative normality seen as not relevant
4. Supreme Court ruled that on all 3 cases brought before them, each were by ECHR definition deprived of their liberty.
5. Massive implications for incapacitated people within supported living environments, children aged 16+ living in educational facilities and people living in their own homes where the state is imputable for their care
6. Massive implications for non objecting incapacitated people (people in your care who you would probably have not previously sought an application for)

CORRECT APPROACH TO DOLs FOLLOWING SUPREME COURT DECISION

Lady Hale

' What is means to be deprived of liberty must be the same for everyone, whether or not that they have physical or mental disabilities. If it were to be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision and unable to move away without permission, even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference.

A gilded cage is still a cage

The Local Authorities have in no doubt done the best they can to make their lives as happy and fulfilled as they possibly could bebut

in the end it is the constraints that matter'

WHAT IS A DEPRIVATION OF LIBERTY?

- In cases where there is no valid consent to the living arrangements the twin ingredients are:

The person is not free to leave
and

Under continuous supervision and control

(They must both be evident)

WHEN CAN SOMEONE BE DEPRIVED OF THEIR LIBERTY?

1. Where a person is under continuous supervision and control and is not free to leave
2. In their own Best Interest to protect them from harm
3. If it is absolutely necessary to protect from harm
4. If there is no less restrictive alternative, and therefore a proportionate response to the likelihood and seriousness of the harm

SUPPORTING ONE ANOTHER

Develop regular MCA/DoLS peer support group in Torbay:

- Keep up to date with and feed into national and local drivers
- Focus on specific areas of practice e.g assessment tools
- Share best practice, positive experiences, learning outcomes
- Keep updated with relevant Court rulings

Are you interested?

email: dolstorbay@nhs.net

LINKS FOR FURTHER INFORMATION ABOUT MCA/DoLS

- To get a copy of the codes, contact The Stationary Office
Tel no; 0870 600 552
Email: customerservices@tso.co.uk or www.tsoshop.co.uk

- To find further information regarding the Mental Capacity Act 2005 visit:

<http://www.torbaycaretrust.nhs.uk/ourservices/MentalCapacityAct/Pages/Default.aspx>

- To find further information regarding the Deprivation of Liberty Safeguards visit:

<http://www.tsdhc.nhs.uk/ourservices/mentalcapacityact/pages/deprivationoflibertysafeguards.aspx>