
Meeting	Safeguarding Overview and Scrutiny Committee
Date	10 April 2014
Subject	Application of Mental Capacity Act 2005 and Deprivation of Liberty Safeguards
Report of	Cabinet Member for Adults
Summary of Report	This report documents the work of the Safeguarding Adults and Deprivation of Liberty Safeguards (DoLS) Team for the period 2013-2014 in relation to consideration and adherence to the Mental Capacity Act and Deprivation of Liberty Safeguards.

Officer Contributors	Barbara Jacobson, Acting Safeguarding Adults Manager
Status	Public
Wards Affected	All
Key Decision	No
Reason for urgency / exemption from call-in	Not applicable
Function of	Committee
Enclosures	None
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1. RECOMMENDATION

- 1.1 The Safeguarding Overview & Scrutiny Committee to give consideration to this report and make appropriate comments and/or recommendations to the Cabinet Member for Adults.**

2. RELEVANT PREVIOUS DECISIONS

None

3. CORPORATE PRIORITIES AND POLICY CONSIDERATIONS

- 3.1 The Corporate Plan 2013-16 outlines the Council's commitment to safeguarding which underpins everything we do and aims to protect the most vulnerable people, both children and adults, from avoidable harm or abuse. One of the strategic objectives is to: 'Support families and individuals that need it – promoting independence, learning and well-being.' Legislation from The Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS) serve to support the corporate objectives. One of the Safeguarding Adults Board (SAB) key objectives for 2013-15 is 'consideration of the application of the Mental Capacity Act'.

4. RISK MANAGEMENT ISSUES

- 4.1 The Best Interest Assessor (BIA) role is an independent role. The local authority is required to ensure that there are sufficient best interest assessors (BIA's) to complete assessments required for DoLS Legislation.
- 4.2 The DoLS Service has to adhere to BIA Training Standards to confirm that the practitioners have adequate training.
- 4.3 The DoLS service needs to ensure that the managing authorities (hospitals and care homes) have completed referrals in to the local authority (supervisory body) under the correct procedures. Failure to properly authorise the Deprivation of Liberty when this is required is unlawful.

5. EQUALITIES AND DIVERSITY ISSUES

- 5.1 Equality and diversity issues are a mandatory consideration in decision making in the Council pursuant to the Equality Act 2010. This means the Council and all other organisations acting on its behalf must have due regard to the equality duties as set out in s149 of the Equality Act 2010 when exercising a public function. The broad purpose of this duty is to integrate considerations of equality and good relations into day to day business requiring equality considerations to be reflected into the design of policies and the delivery of services and for these to be kept under review.
- 5.2 Within the deprivation of Liberty Safeguards equality and diversity issues are considered and monitored within the service.

6. USE OF RESOURCES IMPLICATIONS (Finance, Procurement, Performance & Value for Money, Staffing, IT, Property, Sustainability)

- 6.1 The budget for the DoLS service for 2013/14 is £134,793.00; this includes monies from the CCG.
- 6.2 The DoLS Service shows that there have been 50 requests to date (2 for which decisions haven't been received as they are currently being undertaken). There were also 8 extensions (request for the urgent authorisation to extend beyond 7 days allowed) requested.
- 6.3 Work within both safeguarding adults at risk and DoLS arenas require the involvement of Independent Mental Capacity Advocates (IMCA's). Barnet works with the 'Voiceability' Service and have continued the contract with Voiceability for 2014-2015 to work in partnership and to support the most vulnerable people in our community. Partner Contributions for the IMCA/DoLS (Paid Representative) service was provided by Voiceability in 2013/14. The total contract price was £107,311.00 (Barnet £39,815.00, Enfield £35,525.00 and Haringey £31,971.00).
- 6.4 The current standards of BIA training are currently being examined within the service to ensure that the standards of service are optimal in practice.
- 6.5 The local authority initially trained in-house best interest assessors in 2009 in response to the new addition to the MCA. Five additional BIA's are currently being trained. There are currently 15 best interest assessors who can undertake the assessments.
- 6.6 We hold MCA forums and BIA forums monthly. Forums have included discussions in relation to the MCA, the function of The Court of Protection and the important interface between the MCA and Mental Health Act (MHA).
- 6.7 Webinar sessions from *Browne Jacobson* Solicitors provide updates on Case Law for practitioners.
- 6.8 Safeguarding quarterly practice forums for staff focused on the application of the MCA and DoLS Legislation. This included a forum which considered 'Risk vs. Rights' of the service user in decision-making within the safeguarding process. The forum also considered the difficulty of assessing mental capacity and when the decision taken by the service user is 'risky' and highlighted the importance of involving the service user within the process, particularly in the best interest decision process.
- 6.9 During Safeguarding Month in November 2013, the Council held a workshop for staff on sharing good practice in safeguarding adults at risk by using the MCA. This was presented by the safeguarding team lead practitioner and the MCA/DoLS lead for Barnet.
- 6.10 The legislation changed in April 2013, where the local authority became the supervisory body over referrals from hospitals as well as care homes, Barnet Local Authority saw a 90% increase in DoLS health referrals for the service.

7. LEGAL ISSUES

- 7.1 The deprivation of a person's liberty in the context of a care home or hospital engages Article 5 of the European Convention on Human Rights which states: 'Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.' Therefore any deprivation must have a lawful basis otherwise it is a breach of Article 5.
- 7.2 The legal basis is set out in The Mental Capacity Act 2005. Deprivation can be authorised by way of an Order from the Court of Protection under section 16 of the Act or by the process set out in Schedule A1 to the Act where a person is deprived of their liberty in a care home or hospital. Deprivation in other settings or where the deprivation is opposed by relative or carer should be authorised by a Court Order.
- 7.3 If proper authorisation is not in place the resident may bring a claim for damages for unlawful detention, bringing with it legal costs and reputational damage.

8. CONSTITUTIONAL POWERS (Relevant section from the Constitution, Key/Non-Key Decision)

- 8.1 The scope of Overview and Scrutiny Committees is contained within Article 6 of the Constitution.
- 8.2 The Terms of Reference of the Overview and Scrutiny Committees are set out in the Overview and Scrutiny Procedure Rules. The Safeguarding Overview and Scrutiny Committee has within its terms of reference the following responsibilities:
- To scrutinise the Council and its partners in the discharge of statutory duties in relation to safeguarding.
 - To scrutinise Barnet's Safeguarding Adults Board and any relevant Sub-Groups, including policies, procedures and performance through consideration of the Board's Annual Report.
 - To scrutinise the provision of Adult Social Care services (including those who have physical disabilities, sensory impairment, learning disabilities, mental health needs or other special needs) to ensure that residents are safeguarded and supported to lead as independent lives as possible in their own homes

9. BACKGROUND INFORMATION

- 9.1 The Mental Capacity Act 2005 should be seen to be at the heart of safeguarding adults at risk. It is a strong piece of legislation, designed to promote empowerment of the most vulnerable people in our society and to serve to protect their rights. If a person is unable to make a decision at a particular time, this renders them more vulnerable and so they may be at greater risk than if they had mental capacity to make the decision.

- 9.2 The Mental Capacity Act provides guidance and should inform all decision-making for approximately 2 million people who may lack capacity for decision-making in some aspect of their lives. All providers and commissioners of care need to have a solid understanding of the MCA and how it is applied, for example, considering the MCA from the very beginning of the safeguarding process. It is our responsibility to promote autonomy and independence where possible for the customer.
- 9.3 If a person (relevant person) is unable to make a specific decision at a particular time then a best interest decision will be made on their behalf. The act explains how these decisions should be made to ensure that the vulnerable person's 'wishes and feelings' are heard within the process.
- 9.4 The professional who undertakes the work needs to adhere to several areas. They need to consider if the employment of the DoLS is in the person's best interest, whether it is necessary to prevent harm and also if it is a proportionate response to the harm. Only then can it be applied for, for a maximum of a year. The length of the application has to be justified. When a DoLS is in place, this can only be as the least restrictive option in the person's best interests. If a DoLS is granted then the relevant person will receive a representative, either paid (through 'Voiceability' Service) or unpaid, when a representative is chosen by the relevant person or the BIA has chosen a representative (relevant person's representative). The relevant person has to agree to this role of monitoring the DoLS. The representative may be a family member or a friend, for example.
- 9.5 The Mental Capacity Act is the foundation for the Deprivation of Liberty Safeguards and provides the legal framework for people who may lack capacity to make their own decisions.
- 9.6 Section 39 within the MCA states that an Independent Mental Capacity Advocate must be appointed and consulted if the placement is arranged by the local authority and there is no family or other appropriate person to consult before placement.
- 9.7 The DoLS can only be applied to those persons living in care homes or hospitals. Barnet has one of the largest number of care homes in Greater London. There are 105 care homes registered with the Care Quality Commission within the borough, 85 of which are residential and 19 registered as nursing homes. In total these homes provide 2800 beds for a range of older people and younger people with disabilities.
- 9.8 The hospital or care home is known as the managing authority. They are not permitted to deprive a person of their liberty without lawful authority. The person would need to lack capacity in making a particular decision and not be in agreement with the proposed care arrangements that deprive the person of their liberty are in their best interests.
- 9.9 The appropriate assessments of capacity have to be carried out, including all possible attempts to empower people to make relevant decisions for themselves.
- 9.10 The BIA can carry out either four or five of the six assessments that are required. One of the assessments, the mental capacity assessment, can only

be completed by a section 12 approved mental health doctor who has had special training for the role.

- 9.11 The DoLS Services must take in to account that there is further care planning required to meet the demands of an ageing population and longer life spans for people with learning disabilities, which means that there is an increasing proportion of people who receive health and social care. This together with the increase in dementia is expected to impact on the number of DoLS requests to the service for the future.

10. LIST OF BACKGROUND PAPERS

- 10.1 http://webarchive.nationalarchives.gov.uk/20130107105354/http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_087309.pdf
- 10.2 <https://www.justice.gov.uk/downloads/protecting-the-vulnerable/mca/mca-code-practice-0509.pdf>
- 10.3 <http://www.scie.org.uk/publications/reports/report66.pdf>

Cleared by Finance (Officer's initials)	JH
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