

APRIL 2009

MCA DOLS NEWS

Gateway reference: 11629

This is the third edition of the MCA DOLS News, an e-bulletin from the Mental Capacity Act 2005 Deprivation of Liberty Safeguards (MCA DOLS) Project.

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To contribute to discussions on any of the items/issues raised below, or post questions: e mail dols@dh.gsi.gov.uk

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1. News

MCA DOLS come into force today to strengthen the protection of vulnerable people

Some of the most vulnerable people in society will be better protected against abuse and poor care as a result of new legislation coming into force today.

People who lack capacity in hospitals and care homes will now be protected by a new law known as the 'Mental Capacity Act Deprivation of Liberty Safeguards'.

The new law introduces new safeguards, so that, if a care home or hospital needs to deprive someone of their liberty for their own safety or wellbeing, they must now apply for permission. The law only applies to people in hospital and care home settings who are unable to make decisions on their own care or treatment and who need to be deprived of their liberty in their own best interests to protect them from harm.

The new safeguards only make it lawful for a person to be deprived of their liberty, based on a rigorous, standardised assessment and authorisation process. It gives people the right to challenge any decision to deprive them of liberty, a representative to act for them and protect their interests and the right to have their status reviewed and monitored on a regular basis.

Care Services Minister Phil Hope said:

"Vulnerable people will now have rights where previously they had none. Before this law came in, care homes or hospitals were able to lock someone up or sedate them without their consent, without that person having any kind of right to appeal or protest.

"This will improve care. The safeguards will flush out poor care and prevent people from being deprived of liberty in a care home or hospital unless it is absolutely necessary for their own safety. It is absolutely right to provide an independent legal framework so that vulnerable people are protected from potential abuse.

"This law will only be used as a last resort where it is necessary to keep a person safe and all other options have been exhausted. Protective care must be the exception and not the rule."

These safeguards mean that, if a hospital or care home wants to deprive someone of their liberty to keep them safe from harm, they must apply to the local health trust or council for permission. This triggers a series of six assessments carried out by trained assessors. These are:

- The deprivation of liberty is in the person's best interests to protect them from harm and is a reasonable response to the likelihood of the person suffering harm and the likely seriousness of that harm.
- The person must be over 18.
- The person must have a mental disorder.
- The person must not be subject to a requirement of the Mental Health Act.
- The person must lack the capacity to consent to their own care or treatment.
- The authorisation must not conflict with an advance decision made by the person; or valid decision made on the person's behalf by a donee of a lasting power of attorney or a deputy appointed for the person by the court.

Only if all these criteria are met will an authorisation be granted. At any stage, the person or their representative will be able to appeal against their deprivation of liberty to the Court of Protection. In an emergency, the hospital or care home can issue an urgent authorisation, for seven days, which speeds up the normal process of authorisation.

It is expected that there may be around 21,000 applications in the first year with around 25 per cent being authorised. So twenty one thousand people are expected to benefit from the new safeguards – both those whose applications are authorised and those where there will be no authorisation. The overall benefit is more safeguards for all with enhanced scrutiny of the care people receive in care homes and hospitals.

The legislation was welcomed by the National Autistic Society, the British Institute of Learning Disabilities (BILD) and Action on Elder Abuse.

Mark Lever, National Autistic Society (NAS) Chief Executive said:

“Since a man with autism was deprived of his liberty against his will in 1997, we have been campaigning, along with his carers, to stop this kind of injustice from ever happening again. Autism affects over half a million people in the UK and many are prevented from enjoying the same rights and freedoms as the rest of society due to a lack of awareness and understanding. These new safeguards are a much needed step forward in protecting people with autism from discrimination and ensuring those affected by this complex disability have control over their own lives.”

Keith Smith, Chief Executive of the British Institute of Learning Disabilities said:

“The Deprivation of Liberty Safeguards are the way to give people who lack capacity the special protection they need. The British Institute of Learning Disabilities have been working with the Department of Health on this project and welcome the launch of the Safeguards as part of valuing and protecting the rights of people with learning disabilities”

Gary Fitzgerald, Chief Executive of Action on Elder Abuse said:

"Action on Elder Abuse warmly welcomes the introduction of the new safeguards. We believe that they will provide an essential protection for many of the most vulnerable members of our society. We have worked closely with a number of stakeholders in the run up to this launch and look forward to continuing this work as the impact of the safeguards becomes clearer"

"We hope that the new safeguards will herald a fresh debate about the care we offer to adults with so called challenging behaviour. The new safeguards and the principles of the Mental Capacity Act should provide the basis by which services are commissioned, purchased and provided."

2. Standard Forms

The final versions of the standard forms for managing authorities and supervisory bodies are available in pdf on the MCA DOLS web pages. The standard forms have also been dispatched in the form of a CD rom to all hospitals, care homes, Primary Care Trusts, local authorities and IMCA providers.

The legislation includes a statutory requirement for all hospitals and care homes as well as PCTs and local authorities to keep clear and comprehensive records for every person deprived of their liberty. This includes records of applications for authorisations, details of the assessment process, information about the relevant person's representative and the documentation related to termination of authorisation.

To assist with this record keeping requirement, and to ensure the administration of the MCA DOLS system is as straightforward and seamless as possible, the Department of Health has developed a number of standard forms for use by both supervisory bodies and managing authorities. If used in their unedited form, these forms ensure compliance with the safeguards and promote a consistent approach to record keeping.

The standard forms for supervisory bodies and managing authorities can be accessed at: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089772

3. Communications

The full suite of MCA DOLS information booklets is now available in pdf format for download from the DH website. These publications are also available to order in hard copy for people with direct statutory responsibilities for delivering or administering the process. We are asking people to use discretion about the amount of booklets they order in hard copy to prevent supplies being exhausted by bulk orders at the 'go live'.

The full suite of MCA DOLS information is, as follows:

- MCA DOLS: A guide for care homes and hospitals
- MCA DOLS: A guide for primary care trusts and local authorities
- MCA DOLS: A guide for relevant person's representatives (to be distributed to the RPR when they are appointed under the MCA DOLS process)
- Making Decisions: The Independent Mental Capacity Advocate (IMCA) Service
- MCA DOLS: A guide for Family, Friends and Unpaid Carers

The above publications are also currently being dispatched in hard copy by direct mail to all care homes, hospitals, PCTS and local authorities.

These mailings will also include:

- A CD rom of all the standard forms necessary for the MCA DOLS processes and procedures

The Primary Care Trust and local authority as well as the hospital and care home has statutory obligations to provide information to particular family members (as outlined in the legislation) as part of the MCA DOLS processes and procedures. The following information (aimed at the person subject to the assessment and authorisation process) is also be available for download and distribution at the provider's discretion from our web site:

- audio version of EasyRead
- video presentation using animatics

- easy read version for the person made subject to the process (also available to order in hard copy)
- expanded EasyRead Booklet containing information about the MCA DOLS
- presented in a series of narratives

The British Institute of Learning Disabilities (BILD) are also producing a series JPeGs (in association with the National Autistic Society and Action on Elder Abuse) which explain the process for affected service users and their families. As soon as these become available, we will publish a link from our website.

DH would caution against distributing the publications and assistive communications for service users and families too widely. We take the view that these publications should only be provided for those service users and their families who are going through the assessment process.

Additional implementation information and guidance including general information for staff briefing sessions is available from the MCA DOLS web site at:

<http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm>

You might find the animatics presentation on the website particularly useful as part of any staff briefing sessions.

You can order hard copies of the publications mentioned in this e mail, as follows:

Online: www.orderline.dh.gov.uk

By e mail: dh@prolog.uk.com

By telephone: 0300 123 1002

Please use your discretion and limit the numbers ordered in hard copy to those with a direct statutory role in delivering or administering the MCA DOLS processes and procedures.

4. Monitoring

Regulations (which have now completed their passage through Parliament) have conferred the responsibility for monitoring the MCA DOLS on the Care Quality Commission (CQC), the new regulator for health and social care.

The CQC's role regarding the MCA DOLS will be to monitor a system supervised by local authorities with social services responsibilities and primary care trusts. CQC takes its role in monitoring the operation of the MCA DOLS very seriously, as part of its overall aims of driving up standards of care and protecting and promoting human rights.

CQC will intervene where it believes standards are failing and (where necessary) take appropriate action.

CQC and DH are working together to ensure a robust process and methodology for monitoring the operation of the MCA DOLS which will be in place from 1 April.

As the Deprivation of Liberty Safeguards fall outside of the existing regulatory system, the Commission will operate interim arrangements for monitoring the Safeguards until October 2010 when the bulk of the new registration system under the Health and Social Care Act 2008 will be introduced.

Interim arrangements include:

- Routine programme of visits and information gathering under the existing systems will include a sample of people deprived of their liberty.
- New data on the Safeguards collected by the Information Centre for Health and Social Care will be used to develop an evidence base to trigger additional fieldwork activity by the Commission throughout 2009/10.
- The CQC have made a commitment to include a reference to the MCA DOLS in their annual report to Parliament in 2009/10

In addition, CQC is considering a themed inspection of MCA DOLS activity in winter 2009 or spring 2010. This will provide useful information about the quality of MCA DOLS activity on the ground.

From October 2010 all providers will have to comply with a wider set of registration requirements on safety and quality which will of course cover the Deprivation of Liberty Safeguards. A range of enforcement powers under the Health and Social Care Act 2008 will allow the CQC to take action where failure to operate MCA DOLS amounts to a breach of registration requirements.

5. Information Collection

Ministers have asked for additional assurance that the rights and entitlements of people deprived of their liberty under the Safeguards are better protected. They have specifically asked for information to be kept centrally on the following issues:

- numbers of people with an MCA DOLS authorisation
- minority ethnic representation in the population of service users with an MCA DOLS authorisation
- lengths of stay for authorisations (to ensure that deprivation of liberty is in place for the shortest time possible)

This mandatory data collection for supervisory bodies includes the number of requests for deprivation of liberty authorisations; the number of rejections; and the reasons why the deprivation of liberty was not granted. Equality information (such as age, gender, ethnicity, sexuality) will be collected to ensure that no one group is disproportionately represented in the population of service users with an MCA DOLS authorisation.

In total sixteen separate data items need to be collected from information included on the MCA DOLS standard forms. All the information required for monitoring purposes can be taken from these standard forms. The aggregate data will be collected via the Omnibus system facilitated by the NHS Information Centre for Health and Social Care.

The Care Quality Commission will use this data collection to inform the evidence base for monitoring the operation of the MCA DOLS and reporting annually on activity. No separate collection is to be undertaken by CQC. Monitoring and management information will be

required from 1 April, the 'go live' of the MCA DOLS.

The proposed data collection does not just have a national application. Local health and social care economies can use the information to track activity, analyse trends and for local planning, monitoring and commissioning purposes.

We have worked extensively with the new regulator (as well as the Healthcare Commission, the Commission for Social Care Inspection and the Mental Health Act Commission) and the NHS Information Centre on the development of the data set and the information collection mechanism. We have explored existing data collection mechanisms which have proved unsuitable because this is a new collection for a new population and none of the existing systems are flexible enough to accommodate these new information requirements.

Data collection process

Legislation requires that managing authorities send information to supervisory bodies. Supervisory bodies are required to keep duplicate information. The information supplied is used to collate the data required for monitoring purposes. To facilitate this process, a data collation form has been designed to allow collection of the required aggregate data set. Data will be recorded on the NHS Information Centre Omnibus system by designated contacts within each supervisory body.

In some councils it may be the people who process these applications, commission assessments and are required by statute to collect data to be the place where information is collated and inputted to the proposed MCA DOLS data collection system. There are already established precedents for this, in many local authorities it is the mental health and not the information teams who collect information required under the Mental Health Act 1983.

Appendix A shows the proposed aggregate level data collection form. Guidance to support the completion of the form is in development.

Reporting is proposed to be undertaken on a quarterly basis for the first year of operation, 2009/10. This requirement may change to less frequent reporting over time as progressively fewer assessments are needed as all parties become familiar with the safeguards. There is a broad concern that the welfare and human rights of people without capacity who are subject to an MCA DOLS are properly protected. It is important that we can build an evidence base to inform the operations of the regulator so that we can ensure that the MCA DOLS are appropriately operationalised. This information collection will be a cornerstone of that evidence base and will be used by DH and the regulator to track activity across the country. Additionally, in the first year of operation detailed, timely information will enable both DH and the regulator to identify any potentially problematic issues around implementation.

Data definitions

Where possible, NHS Data Dictionary definitions have been used for the data items to be collected for monitoring purposes.

Several data requirements on the form have been amended in the light of discussion and comment at the ARG meeting such as to dovetail with social care systems of data collection.

Timetable

The safeguards come into effect from 1 April 2009.

The management forms and data set to be monitored are finalised. Omnibus development is scheduled to commence during early April, in preparation for the first quarterly collection from 1 July.

During the Omnibus development a prototype system will be developed to allow user acceptance testing (UAT) of the collection process with supervisory bodies. It is proposed that UAT be commenced in May. Full review of the data collection process and Omnibus development will occur during this period. Pilot organisations are being identified in conjunction with ADASS and the NHS Confederation.

The live data collection system will be launched in June, supported by user documentation.

The deadline for the return of aggregate data will two weeks after the month end of the reporting quarter. Reports will subsequently be produced on a quarterly and annual basis to demonstrate the implementation of the safeguards.

The data collation form and guidance can be accessed at:

<http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.html>

