Mental Capacity Act (2005) Subgroup

Liberty Protection Safeguards (LPS) is coming…

Context

The Deprivation of Liberty Safeguards were brought into effect in 2009 under the Mental Capacity Act (2005) to ensure due process is followed to deprive people of their liberty in care homes and hospitals outside of the remit of the Mental Health Act.

In 2014 a Supreme Court Judgement about DoLS resulted in creation of an 'Acid Test' and a huge increase in applications. The Law Commission undertook a review and published a number of recommendations in 2017.

In July 2018 the government published the Mental Capacity (Amendment) Bill which incorporated some of the Law Commission proposals. It went through consultation and scrutiny stages through parliament.

The Mental Capacity (Amendment) Act was passed into law in 2019 to repeal the Deprivation of Liberty Safeguards and replace them with the Liberty Protection Safeguards.

Revised Timescales for Implementation

- Notification came from DHSC that October 2020 implementation would be delayed
- Spring 2021- draft Code of Practice
- 12-week Consultation
- Autumn 2021- consultation response to be laid before parliament
- Winter 2021- Code of Practice to be published
- Jan 2022- Approved Mental Capacity Professional (AMCP) Regulations to be in force
- April 2022- Full implementation planned

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Key Features

- Start from age 16
- No specific definition of deprivation of liberty
- Acid Test still stands
- Authorisation is portable across settings
- First and second authorisation up to 1 year, then renewal up to 3 years
- Widened settings beyond care home and hospital
- Deprivations of liberty have to be authorised in advance by the Responsible Body (RB)
- For NHS Hospitals the RB is Hospital Manager
- For CHC outside of hospital, RB is CCG
- In all other cases the RB is the Local Authority
- The assessment process should be embedded into existing care planning
- Procedure is:
    - Assessments
    - Pre-authorisation review
    - Authorisation
- RB organises the above, monitors it, renews it and attends Court of Protection
- AMCP for cases of objection & cases in independent Hospitals

When mental capacity assessments must delve beneath what people say to what they do

Professionals often assume capacity should only be considered when they interview the person in cases where assessments must explore their ability to carry the decision through

This article by Dr Emma Cameron and James Codling considers some of the complexities that are part and parcel of completing capacity assessments under the Mental Capacity Act 2005.

It highlights the need for professionals to look beyond an individual's capacity at the moment of the capacity assessment interview and to also explore the individual's ability to carry the decision through.

This means revisiting the phrase "at the material time", with their suggestion that this does not just refer to an individual's ability to make a specific decision at the time of the conversation with the person.

It can also mean the time at which the decision will be implemented. This emphasises the different types of decisions that can be made:

- Decisional (just in the moment)
- Decisional and performative in their nature (i.e. application of information also takes place outside of the discussion)

For more information, please visit the link below:

When mental capacity assessments must delve beneath what people say to what they do | Community Care

Mental Capacity Act (MCA) 2005 Training Slides

Derby and Derbyshire Safeguarding Adults Boards have developed a PowerPoint Presentation on Helping People to Make Decisions: Putting MCA (2005) into Practice. These slides are for partners across Derby City and Derbyshire to use and to embed as part of their internal MCA Training.

The PowerPoint includes the following:

- What is capacity?
- Key Principles: Capacity Assumed, Practicable Steps, Unwise Decisions, Best Interest, Less Restrictive Option

Derbyshire Safeguarding Adult Review (SAR18A) Learning Brief Publication

On 9th February 2021 the Derbyshire SAB published the learning brief for Safeguarding Adult Review SAR18A. SAR18A was commissioned by the Board in 2018 in accordance with the Care Act 2014 in relation to an adult we refer to as 'Lisa'. The Board agreed there was some potential learning for agencies in this case and that as a partnership we needed to explore the background and what led up to the circumstances facing 'Lisa'. The SAR is now complete and, in addition to a comprehensive report, it was agreed that a learning brief outlining the background, findings, including good practice and next steps was required. Read the SAR18A learning brief.

The learning brief should be read and discussed amongst practitioners and be used as a 'tool' to understand cases of a similar nature and promote professional curiosity. Multi-agency training is an obvious opportunity for this to occur, but individuals need to self-reflect too. The SAR process does not conclude with this publication and the Board will continue to oversee progress in relation to the recommendations of the SAR.

Two recommendations were made in the SAR which related specifically to MCA which are detailed below, and we would welcome thoughts from readers of this newsletter about how the Board can assist and support practitioners in these areas. Any ideas or feedback can be sent to DerbyshireSAB@derbyshire.gov.uk to be included in ongoing discussions taking place within the MCA subgroup of the Derbyshire and Derby City Safeguarding Adult Boards.

- Recommendation: Guidance should be provided on how to approach the assessment of Mental Capacity in such challenging circumstances. Additionally, dissemination of learning will also provide the opportunity for practitioners to reflect on their approach to successfully engaging with service users in challenging circumstances.
- Recommendation: That Derbyshire Safeguarding Adults Board seeks assurance from the Derbyshire Approved Mental Health Practitioner service that they have reflected on the learning from this case and request they review, and if necessary revise, any guidance on the interface between the Mental Health Act and the Mental Capacity Act.