

Mental Capacity Act: Deprivation of Liberty Safeguards

Mental Capacity (Deprivation of Liberty: Monitoring and Reporting) and (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence)(Amendment) Regulations 2009

Public Consultation organised by the Department of Health

***Response by the
Association of Directors of Adult Social Services***

January 2009

Introduction: the role of ADASS and its members

The Association of Directors of Adult Social Services (hereafter, ADASS) is a network of Directors in England and Wales. It now conducts most of its business through a series of eight formal Networks, including Mental Health, Older People, and Workforce Development. These Networks are chaired by individual Directors and are in turn supported by a range of staff drawn from areas of professional practice such as mental health, learning difficulties, and safeguarding adults.

Local Social Services Authorities/Councils with Social Services Responsibilities (hereafter, CSSRs) have played a key role to date in the implementation of the Mental Capacity Act 2005. CSSRs have an extensive range of professional and legal responsibilities to a large number of vulnerable people such as older people with dementia, people with learning disabilities, people with acquired brain injuries, and people with mental health problems. CSSRs have been in the forefront of managing local multi-agency implementation arrangements for the Act, commissioning new services such as the Independent Mental Capacity Advocate Service, and promoting the personalisation policy agenda for which the Act provides the key foundation.

ADASS has welcomed the introduction of the Deprivation of Liberty Safeguards as a way of ensuring that the care the most vulnerable receive is appropriate to their needs. ADASS also supports the need for legal justification of arrangements that infringe the human rights of these individuals in certain circumstances, whether in residential or nursing care or in hospital. CSSRs, alongside Primary Care Trusts, are now well advanced in establishing the local arrangements required to enable them to act as Supervisory Bodies under the Deprivation of Liberty Safeguards.

ADASS also welcomes the opportunity to contribute to the public consultation on these additional Mental Capacity Act Deprivation of Liberty Safeguards Regulations. ADASS has already made a significant contribution to shaping a range of Department of Health and Ministry of Justice guidance documents relating to the Mental Capacity Act and associated Regulations, including a previous consultation on monitoring proposals in November 2007 (as part of a public consultation on the then draft Deprivation of Liberty Safeguards Code of Practice). Therefore our comments in this response will be limited to those areas that we feel need further clarification and reinforcement.

The Consultation Questions

1. Do you support the proposal that power should be conferred on the Care Quality Commission for the purpose of the monitoring of, and reporting on, the Mental Capacity Act Deprivation of Liberty Safeguards?

1.1 Yes. ADASS will want to see evidence of a decline in the need for DOLS assessments over the next 5 - 10 years as professional practice in

care homes and hospitals improves. The latter will only be achieved if supported by the leadership of the Care Quality Commission coupled with a rigorous and effective inspection regime.

2. Do you support the proposal to give the Care Quality Commission general powers to:

- ❑ **Visit hospitals and care homes;**
- ❑ **visit and interview people accommodated in hospitals and care homes; and**
- ❑ **require the production of, and inspect, records relating to the care or treatment of people accommodated in hospitals or care homes who are, or should be, deprived of liberty under the MCA DOLS.**

2.1 Yes. A rigorous and effective inspection regime requires more than merely self-assessment by provider organizations. It also requires an element of planned and un-planned access to those providers in order that people subject to the Deprivation of Liberty Safeguards can be interviewed (as far as is practicable in the circumstances) and case records and Deprivation of Liberty Safeguards authorizations inspected.

2.2 The arrangements in the Mental Health Act for the visiting of detained patients by the current Mental Health Act Commission provides a useful model. The caveat is that in relation to the Deprivation of Liberty Safeguards, people subject to these arrangements will have been assessed as lacking in capacity to understand the nature of the deprivation to which they are subject.

2.3 Care Quality Commission inspectors should be expected to be able to consult with other people who are involved in the care of any person subject to the Deprivation of Liberty Safeguards, and be able to inspect care and treatment records that are relevant to the authorized deprivation. ADASS recognizes that this may create an additional burden for many organizations but it is consistent with the thrust of the Mental Capacity Act itself in supporting and extending best practice in care provision.

2.4 ADASS recognizes that there will be costs involved for provider organization in enabling inspection to take place by the Care Quality Commission.

2.5 The Regulatory Impact Assessment for these Regulations (*Impact Assessment of the Mental Capacity (Deprivation of Liberty: Monitoring and Reporting) and (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence)(Amendment) Regulations 2009: published by the Department of Health in December 2008*) shifts the responsibility for costing the impact of inspection to the Commission. The Commission will of course have its own internal costs but provider organisations will also need to know how much resource they might in turn be expected to provide to any visiting inspector. Supervisory Bodies

will also incur management and officer costs that will need to be made available to service the requests of the Commission's inspectors. ADASS asks that the Department of Health stress to the Commission the need to progress this matter as soon as practicable (ideally before April 2009) and to provide some illustrative cost examples. Failing this the Commission should set a date before which no physical inspections and visiting of people subject to the Deprivation of Liberty Safeguards will take place.

3. Do you support the proposal that supervisory bodies and managing authorities must disclose information requested by the Care Quality Commission within twenty-eight days?

3.1 This seems to be a reasonable timeframe within which to disclose information to the Commission. This should be a maximum period, with the expectation that information is disclosed much sooner. Irrespective of whether the task requires 5 days or 28 days, it would be helpful if the Regulations specified whether this refers to calendar days or working days.

3.2 However it is, at this stage, still very unclear precisely what monitoring information the Care Quality Commission may wish to view, and the extent to which that information may also be required through other performance management and monitoring arrangements, particularly for Supervisory Bodies. An early resolution and dissemination of those requirements would be appreciated.

3.3 The Regulatory Impact Assessment states (page 6) that *'There may be a requirement for managing authority managers to receive training on preparing for inspection visits. It is expected that any costs associated with training and awareness raising of the monitoring of the MCA DOLS will be met from the £40.34m allocated to health and social care services in 2009/10 for the purpose of implementing the Mental Capacity Act 2005.'* ADASS notes that this is a matter that is most unlikely to have been thus far accounted for by CSSRs and by Primary Care Trusts and will have a significant additional impact on already pressured implementation budgets.

4. Do you support the proposal that the Care Quality Commission should provide an annual report to the Secretary of State for Health as soon as possible after the end of each financial year? Do you have views on what this report should contain in respect of the monitoring of Schedule A1?

4.1 An annual report to Parliament and to the Secretary of State should simultaneously be made available in the public domain. This would ensure that the benefits of the inspection regime are considered by all – both managing authorities and supervisory bodies – and used to improve practice. It will be important that the report contains information relating to the operational experience of the process of Best Interests assessment and authorisation, highlighting areas of good practice and interagency

working, and also the identification of difficulties. A commentary on implementation progress and achievements would be welcomed and the report should stimulate debate and further service improvements. The biennial Mental Health Act Commission's report has in recent years provided a similar function in relation to people detained under the Mental Health Act.

5. Do you support the detail of the amendment to regulation 3 of the Mental Capacity Act (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 to include both insurance and indemnity cover for assessors?

5.1 The question of insurance and indemnity cover for best interests assessors and mental health assessors has been a matter of concern to many Supervisory Bodies. ADASS welcomes the Government's intention to revise Regulation 3 to make it clear that people undertaking these roles – particularly those who are self-employed - are suitably insured and indemnified for their practice.

Concluding comments

ADASS has welcomed the opportunity to provide a response to this public consultation. Councils with Social Services Responsibilities have considerable experience in supporting vulnerable adults as well as experience of partnership working with the NHS, at both primary care and more specialist provider levels, and as commissioners of care provided by the independent and third sectors.

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(Note: Greg Slay, the Mental Capacity Act lead officer for West Sussex County Council, and the ADASS Mental Health Policy Network's lead on implementation of the Mental Capacity Act, has prepared this response on behalf of ADASS. Contact details: greg.slay@westsussex.gov.uk).