
Deprivation of Liberty Safeguards

A Summary of the Key Issues across Health and Social Care in Wales

March 2011

Introduction

This brief summary should be read alongside the two separate inspection and review reports published by Care and Social Services Inspectorate Wales (CSSIW) and Healthcare Inspectorate Wales (HIW) on 16 March 2010. The purpose of this summary is to highlight the key findings and common messages that arise for health and social care from the reports.

Useful Links

The reports are entitled:

MENTAL CAPACITY ACT 2005
Deprivation of Liberty Safeguards
Annual Monitoring Report for Health
1 April 2009 to 31 March 2010

Mental Capacity Act 2005
Deprivation of Liberty Standards
Monitoring report on the first year of operation
1 April 2009 to March 2010

They can be downloaded from the following websites or copies can be requested from :

www.hiw.org.uk

www.csiw.wales.gov.uk

Together the reports provide a thorough assessment of the way in which the Deprivation of Liberty Safeguards, (the Safeguards) have been implemented across Wales.

Both reports identify examples of notable or positive practice across Wales, in addition to areas for improvement. The key issues section of this summary concentrates on the key findings and common areas for improvement, but it is important to refer to the two main reports for the detail that will help to provide a balanced picture of progress across Wales.

What are the Safeguards?

We all expect to be able to make decisions about our own lives and every day actions constantly and freely within the limits of society and the law. The inability to make decisions can lead to loss of choice, and in certain circumstances loss of freedom.

The Safeguards were introduced as an amendment to the Mental Capacity Act 2005¹ in April 2009. They were introduced to protect people in hospitals or care homes, over the age of 18, who are experiencing mental incapacity² and who may have had their freedom restricted for their own protection. They provide a legal framework around the deprivation of liberty which is aimed at preventing breaches of the European Convention on Human Rights (ECHR).

The Safeguards provide no absolute definition of what is a deprivation of liberty, or when a combination of restrictions of liberty may combine to become a deprivation. Whether a deprivation exists is a decision based on a set of assessments and consideration of each individual's circumstances and needs. So it is possible that a similar set of restrictions may amount to a deprivation that is in one person's best interests but not in another's.

Any deprivation of liberty must be in the best interests of the individual, be the least restrictive course of action, and follow the law and guidance. The Safeguards have therefore put a framework in place that requires hospitals and care homes to comply with an authorisation process which is designed to ensure that any decision to deprive a person of their liberty is properly considered and justified. They, together with the accompanying Codes of Practice clearly set out:

¹ The Mental Capacity Act seeks to help people make whatever decisions they are able from life changing actions to every day choices. You can find out more about this from a series of booklets from the Office of the Public Guardian available from <http://www.publicguardian.gov.uk/mca/additional-publicationsa-newsletters.htm#mcab>

² Mental incapacity is where individuals have medical conditions which affect their ability to make decisions about their own wellbeing, safety or health. Common examples of these conditions can include Alzheimer's disease, stroke and brain injuries.

- **the process for making an** application for the authorisation of a deprivation of liberty;
- **details of** how an application for authorisation should be assessed;
- **what requirements** must be fulfilled for an authorisation to be given;
- **the process for reviewing** an authorisation;
- **details of the** support and representation that must be provided to individuals who are subject to an authorisation; and
- **the way in which** people can challenge authorisations.

Individuals who may be protected by the Safeguards, as well as their relatives and carers must be informed of their rights and of where they can get advice.

Useful Links

Code of Practice for the Mental Capacity Act -

<http://www.publicguardian.gov.uk/mca/code-of-practice.htm>

Code of Practice for the Deprivation of Liberty Safeguards -

<http://www.wales.nhs.uk/sites3/page.cfm?orgid=744&pid=36235>

Welsh Assembly Government Guidance on Deprivation of Liberty Safeguards

<http://www.wales.nhs.uk/sites3/page.cfm?orgid=744&pid=36235>

How are the Safeguards monitored?

The legislation introduced a duty for governments to monitor the implementation and operation of the Safeguards. In Wales, this duty fell on the Welsh Ministers, who delegated the responsibility to CSSIW and HIW. The requirements of monitoring and the expectations of how it would be taken forward are set out in Chapter 11 of the Code of Practice, including the requirement for an Annual Report.

CSSIW and HIW have worked together to develop a joint approach to monitoring the operation of the Safeguards. While individual reports have been produced to reflect the specific concerns in health and social care, CSSIW and HIW have worked together to collect and analyse the relevant data.

What were the key issues identified by the reports?

Overall, we have found that a great deal has been achieved during the first year of the Safeguards' operation. We consider they have made real improvements in protecting individuals' human rights and providing a clear process for managing requests for deprivation of liberty on safety and welfare grounds. However, there are some clear areas that need further development and review.

We have found that:

- The total number of applications made under the Safeguards was much lower than expected (547³) across Wales compared with the number predicted for in England and Wales which was around 21,000.
- Applications made by healthcare organisations accounted for 25% (135) of all applications made across Wales, with care homes accounting for the remaining 75%. The ratio of applications made by health and social care organisations was as predicted.
- A much higher percentage than expected of the 547 applications made under the Safeguards were successful.
- There was a wide variation in the number of applications made by healthcare and social care organisations across Wales. The variance is not directly related to population size and we expect that a more consistent pattern will emerge over the next 12-months.
- The majority of applications made related to individuals who were older, white and female. This profile is in line with the predictions set out in the impact assessment undertaken by the Department of Health.
- A higher number than expected of applications were made following an urgent authorisation. The high number of urgent authorisations made in the first year of the Safeguards could be because health and social care staff lack understanding of the boundary between what are protective restrictions and a deprivation of liberty.

³ Figure relates to applications from health and social care organisations.

- The provisions within the Safeguards which can be used by family members and others to protect an individual have been used infrequently in the first year. We believe this is due to a lack of information being available to the public.

What happens next?

Although a great deal has been achieved in this first year and some clarity has developed around the benefits the Safeguards can bring to individuals, it is clear that public understanding of the Mental Capacity Act and its Safeguards is under-developed. The Mental Capacity Act highlights the value of planning ahead; so that people make choices when they have capacity that can inform decisions should their capacity become reduced later on. People can only benefit from the Safeguards if they are aware of them and guidance is made clear.

The variability of practice highlighted in the reports must be properly evaluated by health and social care organisations. They need to ensure that all staff understand and properly apply the Safeguards and the Mental Capacity Act more generally. It must be understood that the Safeguards affect all who work in the health and social care sectors, not just those who specialise in providing care and treatment to those with a mental health issue or learning disability.

Over the year ahead we will continue to monitor the application of the Safeguards as a matter of routine and the information gathered in this first year will be used to inform the further development of our approach. We will also be working closely with those organisations where we have identified specific issues and concerns.

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