

National Federation of Voluntary Bodies

National Conference 2016

‘Safeguarding – Everyone’s Responsibility’

Safeguarding: The Legal Context

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Overview

- *Assisted Decision-Making (Capacity) Act 2015*
 - Very brief update
- National Intersectoral Safeguarding Committee
 - Some Safeguarding issues identified
- Legislative Right to an independent advocate
- Data Protection Act
- Deprivation of Liberty

- Conclusion

Assisted Decision-Making (Capacity) Act 2015

Brief Update

- Enacted in December 2015
- 2 Commencement Orders in October 2016
 - Establishment of the Decision Support Service
 - Establishment of the Working Group on Advance Healthcare Directives
- HSE Assisted Decision-Making Steering Group for healthcare professionals
 - Drafting Guidance
 - Education and Training
 - Communications
- NDA
 - Work on detailed codes for interveners and professionals

National Safeguarding Committee (NSC)

- Established in December 2015
- Independent Intersectoral committee – **safeguarding vulnerable adults is not nor should it be the responsibility of one agency** – societal obligation to combat abuse
- Working Groups to date
 - Strategy and Resources
 - Public Awareness
 - State Payments
- Terms of Reference

NSC – Terms of Reference

- Promote **zero tolerance for abuse** of adults who are vulnerable.
- Provide strategic guidance to the Government, HSE and other National Stakeholders, in relation to the **promotion of the rights and independence of all vulnerable adults**.
- Promote the rights of adults who may be vulnerable through **public awareness** and through the activities of the National Safeguarding Committee.
- Develop a national plan for the **promotion of the welfare and safeguarding from abuse** of adults (to include protection from abuse by persons and institutions).
- Provide oversight, guidance and **influence on legislation, policies and procedures**, when required, in order to ensure that the promotion of safeguarding principles are enshrined in policies and procedures and that complaints and concerns are addressed appropriately.
- Ensure that information gathering and analysis systems operate to inform effective management and learning in all organisations.
- Explore and propose options for the commissioning of research, public awareness campaigns and training aimed at promoting the rights of adults who may be vulnerable.
- Report, on an agreed basis, to the HSE National Director Social Care in liaison with the Director of Decision Support Service (when established).
- Contribute to the review of the ***Safeguarding Vulnerable Persons at Risk of Abuse – National Policy and Procedures***.
- Develop a five year plan of activities by the National Safeguarding Committee to promote the welfare, empowerment and independence of adults who may be vulnerable.

NSC - Strategy

- Strategy Statement due to be launched in December
- Objectives include:
 - To promote the protection and rights of people who may be vulnerable by encouraging organisations and services to recognise, prevent and deal with exploitation and abuse effectively
 - To inform and influence Government policy and legislation to safeguard the rights of people who may be vulnerable
- Actions include:
 - Initiate conversations with Government and Oireachtas Committees on the development of legislation to include adult safeguarding, advocacy, the use of chemical restraint and deprivation of liberty.

NSC – Raising Public Awareness and Understanding

- Safeguarding of Vulnerable Adults: Public Attitudes Survey
 - Specific questions
 - Results to inform public awareness campaign
 - Plans to promote thinking and planning ahead
- Developing Poster campaign
 - Organisations can adapt messages
- Membership of NSC – Intersectoral approach/consistent message

NSC – State Payments

- State payments in 2015
 - Pension payments €6.9 billion to 576,682
 - Illness/Disability/Carers payments €3.55 billion

DSP expenditure 29.1% of gross government expenditure

Figures

- Nursing Home Support Scheme
 - Total Aug 2016 23,025
 - HSE 5,974
 - Private 17,041 = 74%
 - c8,500 pay less than pension – balance who decides??
- PPP Accounts
 - 2014 136,336,000
 - Central Unit in HSE
 - Investment in NTMA
- Pensions received Oct 2016 HSE
 - Persons who lack capacity = 70%

Arrangements

- Payments into bank accounts c47%
 - When are the red flags raised?
- Agency Arrangements (Type 1 and Type 2) (Type 2 < 1,000)
 - Number of Type 2 Agency – must put one on enquiry
- Patient's Private Property Accounts (HSE)
- Private Nursing Homes – agency arrangements
 - Transparency
- Family/Joint Accounts/EPAs/Informal arrangements
- **Oversight arrangements by the Department of Social Protection?**

Data Protection Legislation

- S.2B Processing of personal data shall not be processed by the data controller unless:
 - Consent is explicitly given
 - If by reason of physical/mental incapacity or age, is unable to appreciate the nature of such consent, it is given by [category of family members] of the data subject and the giving of such consent is not prohibited by law.
 - The processing is necessary to prevent injury or other damage to the health of the data subject or serious loss of or damage to property of the data subject or otherwise to protect his or her vital interests of the data subject
 - The processing is necessary
 -For the performance of a function conferred on a person by or under an enactment....

Data Protection Legislation

- S.8 Any restrictions on the processing of personal data do not apply if the processing is required urgently to prevent injury or other damage to the health of a person or serious loss of or damage to property
- Required by or under any enactment or by a rule of law or court order
- Furnishing of personal data to and by HSE in certain circumstances
 - HSE may request DSP or Revenue Commissioners to furnish personal data for the purpose of assessing or reviewing the eligibility of persons for services...
 - DSP may request HSE to furnish data ...for the purpose of calculating the means of persons to assess or review entitlement of persons to receipt of benefits and services....
 - Revenue Commissioners may request HSE.....for the purpose of assessing or collecting any tax, duty or other charge payable to the Revenue Commissioners

Data Protection

- Positive obligation to disclose/report where issue raised or where there is a real suspicion
- Data Sharing – public bodies to protect individual rights
 - Extend data sharing (non public body) where safeguarding necessary
- Data Protection interface with Safeguarding legislation so that clear boundaries can be set out and understood
- Role for Director of Decision Support Service
- Big issue where person not interacting with services – financial institutions

Current legislation

- Health Act 2007 (Protection Disclosure of Information S.103)
 - Protection of disclosure of information by an employee of a ‘relevant’ body
- Criminal Justice (Withholding of Information on offences against Children and Vulnerable Persons) Act 2012
 - Offence of withholding information on certain offences against vulnerable adults
 - Common law offence of false imprisonment, rape, sexual assault
- Protected Disclosure Act 2014
 - Protection of persons from action in respect of making certain disclosure in the public interest
- Health Act 2007 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 (SI 415 of 2013)
 - Registered provider must take all reasonable measures to protect residents from abuse
 - Person in charge must investigate any incident or allegation of abuse
 - Person in charge subject of allegation, registered provider must investigate the matter or nominate a person is a suitable person to investigate the matter

Guiding Principles

Suggestions that might inform Legislative Framework:

- Promote individual 'well-being' (to include physical, mental and emotional well-being) – prevention
- Right to support and assistance (independent advocate)
- Protection from abuse and neglect
- Need to respect rights of each person as an individual human being which means - all are entitled to live in the manner they wish and to accept or refuse support, assistance or protection as long as they do not harm others and **they are capable of making decisions about those matters**
- Principle of least restrictive option – interventions must be necessary and proportionate

What is required?

- Need for safeguarding to be on a statutory basis
 - A definition of 'person at risk'/'vulnerable person'
 - A definition of 'abuse'/'neglect' – including a detailed code
 - Report abuse or neglect – by whom and to whom
 - Statutory obligation to determine if person needs support or assistance
 - Circumstance in which a person can refuse
 - Investigative powers and duty to make enquires e.g. S.42 Care Act (England)

Section 42 of the Care Act, a [local authority] has a duty to make enquiries itself or cause others to make enquires in cases where it has reasonable cause to suspect that an adult:

- has needs for care and support (whether or not the local authority is meeting any of those needs)
- is experiencing, or at risk of, abuse or neglect
- as a result of those care and support needs is unable to protect themselves from either the risk of, or the experience of, abuse or neglect

Further Legislative Provisions

- Corresponding obligation of person to respond/offence if hinders or obstructs investigation
- Power to gain access to **any** premises to investigate
 - Current gap particularly where person is living at home
- Outcome of investigation – duty to report any offence
- Involvement of other agencies/also have safeguarding remit
 - Director of Decision Support Service
 - Mental Health Commission
- Court orders – to include orders against persons who are perpetrators
- Existing structures can be basis for new legislation
 - An Adult Safeguarding Board
 - National Safeguarding Office
 - Safeguarding and Protection Committees

Independent Advocate

- Key component to safeguarding
- *Assisted Decision-Making (Capacity) Act 2015*
 - Reference (code for advocates)
 - Application to court
 - Deprivation of Liberty
- Examples:
 - IMCAs under Mental Capacity Act 2005 (England and Wales)
 - Advocate under Care Act 2014 (England and Wales)
 - Adult Support and Protection (Scotland) Act 2007
 - Adult Guardianship Act (British Columbia)

Independent Advocate - Appointment

- IMCA – mandatory appointment
 - A long term accommodation move (hospital 28 days, residential 8 weeks)
 - Serious medical treatment
 - Adult protection (allegation of abuse or neglect by/to another person)
 - A care review (part of care plan)
- Care Act 2014 – may appoint
 - Carrying out needs assessment
 - Carrying out carer's assessment
 - Preparing care and/or support plan
 - Revising care and/or support plan

Deprivation of Liberty

European Convention of Human Rights

- Article 5
 - Everyone has the right to liberty and security of person. No one shall be deprived of his liberty savein accordance with **a procedure prescribed by law** – exceptions (Article 5.1)
- Article 3
 - No one shall be subject to ...inhuman or degrading treatment ...
 - This is an absolute right – no exceptions
- Article 8
 - Everyone has the right to respect for his private and family life

Deprivation of Liberty

UN Convention on Rights of Persons with Disabilities

- Article 14
 - State Parties shall ensure that persons with disabilities on an equal basis with others
 - (a) Enjoy the right to liberty and security of person
 - (b) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty, **is in conformity with the law**, and that the existence of a disability shall in no case justify a deprivation of liberty

Following decisions of European Court: there are two key questions (the so-called ‘acid test’) to be answered when a person lacks capacity to consent to, or refuse suggested arrangements for, care or treatment that is thought to be in their best interests:

- Is the person not free to leave?
- and
- Is the person subject to continuous supervision and control?

If the answer to both questions is ‘yes’, then the person is deprived of liberty

Equality/Disability (Miscellaneous Provisions) Bill (Part 13 of ADMC Act 2015?)

- Every person to have the right to:
 - Consent to or refuse admission to designated centre
 - Consent to/refuse supervision and control while there
 - Leave at any time
- Functional assessment of capacity – lack capacity
- Procedure prescribed by law if intervention necessary. Person must be given information on the:
 - reason for the intervention
 - nature of the intervention
 - effect of the intervention
 - right to appeal against the intervention
 - review process
- Right to an independent advocate/Panel DSS

Place of Residence

- Issue

- Consent of person is required for admission to a nursing home/designated centre

- A person who lacks capacity enjoys the same right to ‘physical liberty’ and security of person as everyone else and this can only be curtailed with proper safeguards

- Respite Care

- Right to decide on residence must be respected

- Legal implications of this

Chemical Restraint (1)

Art 3 ECHR

- Chemical restraint, is the intentional use of medication
 - to control or modify a person's behaviour or
 - to ensure a patient is compliant or not capable of resistance, when no medically identified condition is being treated, or
 - where the treatment is not necessary for the condition or the intended effect of the drug is to sedate the person for convenience or disciplinary purposes.
- Chemical restraint is inhuman and degrading treatment
 - Issue: **Is it Medical Treatment or Chemical Restraint?**
- The **appropriate use of drugs** to reduce symptoms in the treatment of medical conditions such as anxiety, depression, or psychosis, **does not constitute restraint**

Chemical Restraint (2)

- Informed Consent required for medication
- Inappropriate use of antipsychotic drugs
 - Can harm person (gait disturbance, memory impairment, sedation, withdrawal, movement disorder, functional decline, increased fall risk)
 - Increased risk of adverse side effects in older people
- Disturbed behaviour in older people may indicate
 - Physical discomfort, medical illness, sensory impairment or presence of unmet needs that cannot be easily communicated
- Understanding behaviour and triggers for behaviour
 - Personalised and comprehensive assessment necessary
- Behaviour should be described rather than labelled
- Very clear documentation for prescribing/reasons why
- Skilled staff/training required

Conclusion - Safeguarding

- Legislative framework for Safeguarding – essential
- Key component of legislation is right to have an independent advocate
- Robust governance and overarching designated body
 - Statutory interaction with other agencies
 - Body itself to make applications to court
- Reform of the Data Protection legislation
- Use provisions in *Assisted Decision-Making(Capacity) Act 2015* where appropriate
- Apart from legislation – Education and Training at all levels of society
- Respect for dignity and rights

Q and A

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Thank You