NORTH YORKSHIRE COUNTY COUNCIL

CARE AND INDEPENDENCE OVERVIEW AND SCRUTINY COMMITTEE

Mental Capacity Act and Deprivation of Liberty Safeguards

30th June 2016

1. PURPOSE OF REPORT

1.1 This paper briefs Members of the Mental Capacity Act (MCA) and Deprivation of Liberty Safeguards (DoLS) and its significance for the Directorate. This issue is of particular significance for the Committee because:

a) it affects some of the most vulnerable adults in our communities;
b) embedding the Mental Capacity Act into governance arrangements for the local authorities is a key objective for the Government. Following the guidance set by ADASS for local authorities is a means of achieving this, the committee needs to be reassured of the progress made and steps taken to implement the Mental Capacity Act into Governance arrangements and fully integrate it into working practice.
c) safeguarding adults is a particular responsibility for Members of this Committee; and
d) latest developments in connection with Deprivation of Liberty and the Deprivation of Liberty Safeguards are having a direct impact upon Directorate obligations and resources. In addition to recognising the additional burdens, it is important that the Committee reassures itself that all possible steps are being taken to ensure compliance with national guidelines from ADASS.

2. THE MENTAL CAPACITY ACT

2. 1 The Mental Capacity Act (MCA) has been in force since 2007. The purpose of the Act is to ensure that the vulnerable people of our society are protected by a process in law in regards to decisions making for care, treatment and financial decisions and:

- their human rights are given true weight by health and social care professionals by ensuring that people are involved in decision making and by ensuring that those who have capacity are empowered to make their own decisions;
- ensuring that those that lack capacity to make a decision have their views fully taken into account including their past and present wishes in regards to best interest decisions made on their behalf; and
- those who take an interest/are involved in the care of a person who may lack capacity are fully involved in the process and have their views taken into account as part of the best interest process.

2. 2 A major review of the MCA and DoLS came with the House of Lords Post Legislative Scrutiny Committee review in 2014. Their view about the Mental Capacity Act overall was that it was a good piece of legislation but the take up of it was variable

amongst professionals and it was not embedded within services. A number of recommendations were made by the Select Committee which included:

- The Government's need to address the low awareness amongst those affected by the MCA and DoLS, their families, carers, professionals and the wider public;
- a requirement that there would be assessments completed on how the core principles are used for decision making, which should include the banking sector;
- that the Government works with the Association of Directors of Adult Social Services (ADASS) and NHS England to encourage the wider use of commissioning as a tool for ensuring compliance with the MCA;
- that overall responsibility for the MCA be given to a single body; and
- that a comprehensive review of the Deprivation of Liberty Safeguards be undertaken.

2.3 Following the Select Committee's recommendations the Government responded by implementing the following:

- The responsibility to overview the MCA has been given to a select group of legal and medical professionals chaired by Baroness Finlay (National MCA Forum).
- The Law Commission completed a review of the Deprivation of Liberty Safeguards.
- Work has been undertaken by ADASS in order to aid local authorities and the NHS to fully embed the MCA into Governance arrangements by introducing an LGA/ADASS MCA implementation tool.

2.4 In order to be fully embedded, the Mental Capacity Act needs to become an Integral part of any governance reporting arrangements. The principles should form part of any decision making involving a variety of professionals working within the local authority who are required to obtain consent from people who use the services. There should be overarching policies and procedures which are followed by all staff to ensure compliance with the MCA and this should be underpinned by robust governance arrangements.

2.5 With this in mind it was agreed that there was a need to determine how the Mental Capacity Act was embedded within North Yorkshire County Council and within its wider partners. Pressures arising from the Cheshire West judgment have meant that there has not been the capacity within Health and Adult Services to carry out strategic and policy development around the MCA and DoLS within the Directorate, and with partners. As a result, a fixed term post has been established to ensure that the Governance arrangements and strategy and policy around MCA and DoLS reflect legislation and national best practice.

3. DEPRIVATON OF LIBERTY SAFEGUARDS

3.1 The Deprivation of Liberty Safeguards (DoLS) apply to people in England and Wales who have a mental disorder and lack capacity to consent to the arrangements made for their care. They were introduced in 2009 to rectify breaches to Article 5 of the European Convention of Human Rights (ECHR) following the case of *Bournewood v United Kingdom*. They provide legal protection for vulnerable people who are, or may become, deprived of their liberty within a hospital or care home. They exist to provide a proper legal process and suitable protection in circumstances where, for a person's best interest, deprivation of liberty appears to be unavoidable.

DoLS apply to anyone:

- aged 18 and over;
- who suffers from a mental disorder or disability of the mind – such as dementia or a profound learning disability;
- who lacks the capacity to give informed consent to the arrangements made or their care and / or treatment; and for whom deprivation of liberty (within the meaning of Article 5 of the European Commission for Human Rights (ECHR)) is considered after an independent assessment to be necessary in their best interests to protect them from harm.

3.2 The Deprivation of Liberty Safeguards applies to people residing in care homes or hospitals, but not to those living in their own homes or in supported living.(Deprivation of liberty can still apply in these settings, but the authorising mechanism is the Court of Protection). The manager of the hospital or care home wishing to make a DoLS application is called the managing authority, the supervisory body arranging the deprivation of liberty assessment is the local authority.

3.3 Following the Supreme Court Judgment in March 2014 there was an unprecedented increase in applications. Referrals continue to increase, and in 2015/16 we accepted a total 3076 referrals. Prior to March 2014 we received on average 100 referrals a year, in 2014/15 we accepted approximately 1500 referrals.

3.4 The increase in workload is being managed by applying the ADASS prioritisation tool. This enables the most at risk people to have access to the relevant safeguards, but does result in a back log of ‘low priority’ referrals going back to July 2015. This group however, continue to receive regular statutory social care reviews**,** and we are sustaining the agreed prioritised workload. Four local authorities have recently launched a judicial review asking for the increase in DoLs cases as a result of the 2014 Cheshire West judgement to be treated as a ‘new burden’.

4. DEPRIVATION OF LIBERTY IN THE COMMUNITY (DoL)

4.1 The Supreme Court Cheshire West judgment also extended the judgment to people living in supported accommodation in the community for example supported living schemes and domestic settings.

4.2 A scoping exercise was undertaking to identify how many people may potentially be deprived of liberty in supported living schemes. The scoping tool was divided into six priority levels, level 1 being people in supported living schemes within learning disabilities that have waking staff or are under continuous supervision and control. The total number of priority 1's that have been identified amounts to 264**.** Work will now need to be undertaken in order to authorise these via the Court of Protection.

4.3 An action plan has been agreed to prioritise the workload required to meet applications for Court of Protection authorised 'DoL' in community settings, and a priority system is being applied for applications to Court of Protection.

4.4 Application to the Court of Protection (CoP) for DoL will be made for those people who have been identified as priority 1 on the scoping exercise. However, there are still others identified as potentially being deprived of liberty but who have been identified as a lower priority. Due to resource implications it is only possible to complete 100 a year. The scoping tool did not look at those within domestic settings which Cheshire West judgment extends to. The new legislation to replace DoLS should address these risks, but they are likely to remain until its enactment.

4.5 It is estimated that costs of completing the CoP process is £2500 per case if all elements were purchased including Social Work assessment time, doctors assessment, litigation friend, solicitor rate, court application, hearing costs, and barrister costs. It is estimated that each 50 applications would equate to a full time social Care Assessor, to complete the process. An additional two Social Care Assessors are being recruited to complete the bulk of the applications, provide a quality assurance role, guidance and develop expertise.

4.6 After the initial authorisation, cases will have to be reviewed regularly, potentially every 8 weeks, any changes made to the care plan that make it more restrictive will need to be referred back to the court, and it will have to go back to the court at least every twelve months and additional services and processes will need to be developed.

5. THE LAW COMMISSION'S CONSULTATION AND INTERIM STATEMENT

5.1 The Law Commission completed a report for consultation in July 2015. The recommendations were around a new system of safeguards called Protective Care. Broadly speaking the proposed protective care scheme had three aspects: the supportive care scheme, the restrictive care and treatment scheme, and the hospitals and palliative care scheme. However, there was a view from Government that the original proposals were unrealistic, and too expensive to implement in the current economic situation.

5.2 On 19th May 2016 the Law Commission produced an interim statement following the response to the consultation. It reaffirms the "compelling case" for replacing DoLS and the scale of workloads and pressure on resources mean that "any notion that the existing system can be patched up to cope, even in the short term,

was deemed not to be sustainable". It accepts that reform must "demonstrably reduce the administrative burden", and provide "maximum benefit for the minimum cost". A much more limited scope scheme is being proposed, with less complexity and, presumably reduced costs (although a revised impact assessment will be needed). A summary of the proposals is attached as Appendix A.

5.3 The Law Commission will produce their full report and draft bill in December 2016 with implementation estimated to be by the end of 2019. Following publication of the report, an impact assessment will need to be completed in order to ascertain the impact for the County Council.

6. LGA/ADASS MCA IMPROVEMENT TOOL

6.1 In order to self-assess against national standards and practice, we have completed the LGA/ADASS MCA/DoLS improvement tool. This has been developed with funding from the Department of Health and support from the LGA and ADASS. Its key areas of focus have been used in a number of peer challenges and as a means of self-assessment to assess a service, identify and promote good practice and to highlight areas for further development. It describes the characteristics of a well-performing and ambitious organisation in the following themes:

a) Outcomes for, and the experiences of, people who use services
What has been achieved by Adult Safeguarding and the quality and experience for people who have used the services and support.

b) **Leadership, Strategy and Working together**
The overall vision for Adult Safeguarding in regards to the MCA; the strategy that is used to achieve that vision and how this is led at all levels in the organisations involved.

c) Commissioning, Service Delivery and Effective Practice
How services are commissioned in relation to local needs and then how they are actually provided, including the involvement of people using services.

d) Performance and Resource Management
How the performance and resources of the service, including its people, are managed.

6.2 The self-assessment has identified a number of areas of good practice within the directorate in relation to training and the deprivation of liberty safeguards. There are however, a number of areas where the need for further work has been identified, the details of which are set out in Appendix B:

- Governance;
- Information;
- Performance;

- Communications and Engagement;
- Quality;
- Practice;
- Training; and
- Partnership Working

7. CONCLUSIONS

7.1 There continues to be an increase in DoLS applications, the volume of which cannot be met within the original time frames, the prioritisation tool is in place but this means that there will always be a number of applications identified as being low priority that have not been authorised. This situation has been accepted nationally with more local authorities implementing the ADASS implementation tool into practice. There is, however, still a low litigation risk in regards to the outstanding applications that may be deprived of liberty without authorisation.

7.2 The added DoL Court of Protection applications which are waiting to be completed add to the administrative, resource and financial burden for North Yorkshire County Council.

7.3 The implementation of the LG/ADASS action plan will greatly strengthen the County Council's and Safeguarding Adult Board's governance and reporting arrangements in regards to the Mental Capacity Act and Deprivation of Liberty Safeguards.

7.4 The action plan will ensure that the people within services who may have been deprived of their liberty, have their views heard, and that the views of their families/carers and the Independent Mental Capacity Act Advocacy are fed back in order to shape future practice.

8. RECOMMENDATIONS

It is recommended that the Committee recognises:

a) NYCC as a Supervisory Body, alongside other local authorities nationally, continues to see an increase in Deprivation of Liberty authorisations which cannot all be met;
b) The approach taken to the Deprivation of Liberty in the community and Court of Protection applications, which will mean that some applications will be prioritised;
c) the actions identified following completion of the self-improvement tool to develop MCA practice; and
d) that the burden in regards to Deprivation of Liberty Safeguards is unlikely to change within the next 2-4 years.

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Appendix A

1. Summary of Interim Statement by Law Commission

1.1 The responsibility of establishing the case for a DoL would be shifted from the provider of the care to commissioner (ie usually the local authority or CCG), using a) a capacity assessment; (b) objective medical evidence of the need for a deprivation of liberty on account of the person's mental health; (c) arranging provision of advocacy (or assistance from "an appropriate person"); (d) consultation with family members and others; (e) an existing care plan. There would still be rights to reviews, and appeal. There is no indication as to how applications will be made for self-payers or for people who are jointly funded.

1.2 The role of the Best Interest Assessor (BIA), which had been strengthened in the role of the Advanced Mental capacity Practitioner (AMCP) in the original proposals, is considerably reduced. There may be 'a defined group of people who should receive additional independent oversight of the DoL' by an AMCP, but the central role of the AMCP as independently scrutinising and authorising the DoL in every case is lost, and the current universal role of the BIA is dropped. This means a proportion of those deprived of liberty will apparently have no independent oversight, this is perhaps the most controversial aspect of the new proposals as the reason why the threshold for deprived of liberty was lowered in the *Cheshire West* judgment was to promote independent scrutiny. This new approach would be a single scheme applied uniformly across every setting, ie dropping plans for the dedicated hospital / hospice scheme in the original consultation.

1.3 The proposal to amend the Mental Health Act (MHA) is also dropped, on the basis that the policy aim can be met by provision that the existing powers under MHA should be used for patients who are compliant and lack capacity to consent to admission and treatment for their mental disorder. This in itself brings in its own set of resource issues for mental health hospitals.

1.4 The impact on inquests from Cheshire West should still be addressed by an amendment to the Coroners and Justice Act 2009 to explicitly remove the proposed scheme from the definition of 'state detention', which triggers the need for an inquest, in some cases with a jury.

1.5 A decision on the proposal for a tribunal to replace the Court of Protection urisdiction is still under consideration.

1.6 One of the most controversial aspects has been the terminology used. The favourite alternatives suggested were "liberty safeguards", followed by "capacity safeguards", and the Law Commission asks for further suggestions.

2. Implications

2.1 There is a lack of detail about how moving the responsibility for establishing when a DoL is occurring from the care provider to the commissioning body (NHS or LA) will work.

2.2 There is no indication as to whether the 'Cheshire West' Acid test for deprivation of liberty will remain or whether deprivation of liberty will be officially defined in the new legislation but even if it remains the same the new scheme could reduce the administrative burden and financial costs for NYCC for the following reasons:

- Local Authorities will no longer be responsible for those funded by health.
- Provisions for local authorities to rely on existing assessments (where appropriate) when considering a deprivation of liberty.
- The new scheme will be extended to supported living, shared lives and a person's own home, so authorisation through Court of Protection may not be required.
- The amendments to the MCA will mean new ways of working for social care staff and other professionals making best interest decisions, there will be a notable shift in regards to how best interest decisions are made.

Appendix B

Actions Identified following completion of LGA/ADASS MCA Improvement Tool

Governance

- The governance arrangements to be strengthened around MCA and DoLS both within the directorate and the Safeguarding Adults Board.
- development of a range of governance documents, including a Risk Register, Communications and Engagement Plan, Training Strategy and broadening and updating the existing Operational plan;

Information

- Review and update of North Yorkshire County Council website for the MCA and DoLS page to include more guidance for providers and families including a Q and A section.
- An MCA intranet page to be developed for staff providing information on good practice for MCA/DoLS as well as case law updates.
- A webinar to be introduced for providers on pertinent MCA and DoLS issues.

Performance

Whilst some data is currently produced on DoLS, this needs to be expanded to include data around MCA, and other areas identified within the self-assessment eg monitoring of trends. This will be included as part of the regular directorate Performance reports to the leadership team.

Communications and Engagement

- Engagement with people who use the services, family/carers and Relevant Person Representatives for feedback in regards to MCA/DoLS;
- IMCA feedback to be completed in order to gain a wider picture in regards to the experiences of people who use the services.

Quality

Work has begun to include more information about MCA and DoLS in the Quality Assurance baseline prompt sheet, and we are working with the Independent Care Group to develop a self-assessment to be sent to all providers to look at specific areas around, MCA,DoLS and person centred care prior to visits. Further consideration of the requirements of MCA/DoLS within standard commissioning contracts is needed.

Practice

There is an existing workplan around DoLS, reflecting the changes brought about by the Supreme Court judgment and subsequent HASLT decisions. These will be incorporated with the additional actions identified from the self-assessment. They include:

- a review of a sample of DoLS conditions in order to ascertain whether DoLS has improved the care of people who use services in relation to restrictions implemented as part of the care arrangements.;
- monitoring the level of contact with individuals of family members who are Relevant Person Representatives;

- a review of the best interest decision form to include a balance sheet approach which looks at the pros and cons of each decision as part of the best interest decision making process;
- Observations of DoLS assessments to be carried out in order to fully complete the relevant questions on the indicator tool;

Training

The North Yorkshire Safeguarding Adults, MCA and DoLS Training Strategy is the process of being reviewed. Methods of engaging more with providers/managing authorities are being explored,

As part of the review of performance data, we will improve the information available on the number of staff trained, and the basic classroom MCA training will be amended to ensure that staff are aware of the best interest balance sheet approach.

Partnership Working

- Tracking of Dols applications to be undertaken to ensure providers are applying for DoLs when required to do so and flagging up those providers that are not making applications.
- The exploration of MCA in the wider sense, e.g financial institutions such as banks, solicitors as well as health, GP's.
- MCA development with care and support plans
- Safeguarding policies and training to include MCA and DoLs procedure
- A review of the MCA forum including terms of reference and the purpose of the group
- A partner self-assessment based on MCA standards to be sent to all partners to determine how embedded the MCA is within partner organisations.