Department of Health

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To: MCA-DoLS leads in local authorities and the NHS

Dear Colleague,

Update on the Mental Capacity Act and following the 19 March 2014 Supreme Court judgment

I wanted to write to you with an update on developments following the 19 March 2014 Supreme Court judgment and also on developments concerning the wider Mental Capacity Act 2005 (MCA) following the House of Lords Select Committee report and subsequent Government response.

Mental Capacity Act

Following the publication in June 2014 of the Government response[1] to the House of Lords report, the Department and our partners have been focussing on taking forward our commitments. Of particular note for the coming weeks and months:

- The Government has now confirmed its intention to establish a new "**National Mental Capacity Forum**". This Forum will bring stakeholders from health and social care together with those from other sectors (for example, finance, legal, police, housing) to identify complementary actions that member organisations can pursue, especially at a local level, to improve MCA implementation. We shall begin the recruitment of an independent chair for the Forum as soon as possible. Please get in touch with me if you are interested in joining the Forum.

- A new on-line "**MCA Directory**" containing MCA tools and guidance for all sectors will be launched on the web-site of the Social Care Institute of Excellence (SCIE) by the end of February. We hope that this resource will provide a spur to local implementation efforts. There is still time to submit your materials to SCIE. Please send them by email to mca@scie.org.uk.
- On 13th March 2015 the "**Chief Social Worker's MCA Seminar**" will bring social workers together with other professionals to share learning, best practice, and concerns/ challenges face-to-face. We also hope this event will kick-start local multi-agency collaborations to raise MCA awareness. Further details, including how to express your interest in attending plus a useful summary of social

[1] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/318730/cm8884-valuing-every-voice.pdf

workers thoughts on how social work can help drive better MCA implementation can be found in the enclosed letter from Lyn Romeo.

The coming year will be a busy one as we seek to build on the opportunity provided by the House of Lords report. I have spoken with a number of you about the benefits of ensuring good communication from the national through the regional and to the local level. As you may be aware, the national organisations with a key role in MCA implementation sit on a DH-led MCA Steering Group that meets every few months.

You may be interested in a few documents this group has produced and which I have enclosed with this letter:

- A "**statement of ambition**" that describes the aims of the MCA Steering Group and which all member organisations have signed up to.

- A description of the **roles and responsibilities** of each member organisation of the MCA Steering Group. We hope this may assist stakeholders in understanding which organisations to look to for specific assistance.

- A document entitled "**MCA expectations**". This is our attempt at a list of key MCA attributes that stakeholders can consult and consider addressing when preparing guidance, toolkits etc. Any comments welcome.

To help keep you and other colleagues up to-date with developments at the national level I intend to post Twitter updates (@NiallatDH). Please look out for these and feel free to re-tweet to your colleagues.

Of course, communication works both ways, especially as the key driver of better MCA implementation will be local level action. Please do feed your local updates up to your regional leads. I will be meeting with regional leads throughout the year to ensure that what we do nationally is informed by your needs. The list of regional MCA leads is attached at Annex to this letter.

Supreme Court judgment

The official statistics from the Health and Social Care Information Centre (HSCIC) paint a clear picture of the very significant increase in Deprivation of Liberty Safeguard (DoLS) applications since the 19 March 2014 Supreme Court judgment. Over 55,000 applications in the six months following the judgment points to a more than 8 fold-plus increase on 2013-14 figures. (The next data set is due for release on 3 February 2015).

Let me put on record again the Department's thanks for the impressive response you and your teams have made to this challenge. I hope that as you reflect on the last nine months you will take comfort from the knowledge that thousands more individuals have received valuable scrutiny of the conditions of their care.

The Department continues to stress the importance of an MCA-centred approach to the challenge posed by the Supreme Court judgment. The focus should always be on the individual and supporting their well-being. The Department is aware that many local authorities are struggling to meet legal deadlines for processing applications and that local authorities are working hard across a number of different areas and priorities (for example, implementation of the Care Act). We do not expect that local authorities who are following national DH, ADASS and CQC guidance (and who have a plan in place for responding to the Supreme Court judgment in a way that makes clear that paramount importance of the well-being of vulnerable individuals) should be unfairly penalised.

The CQC will be publishing its annual DoLS report shortly and will be reflecting on the Supreme Court judgment and the challenge for the year ahead.

I am pleased to confirm that the new standard forms supporting the DoLS process have now gone live. I hope that the reduction in the number of these forms from 32 to 13 will help your teams negotiate the significant extra number of applications. The forms can be found at the following link and new short guidance on their use will be available shortly. Although these forms are not prescribed by statute I would strongly encourage you to use them. There are clear benefits in all local authorities and managing authorities operating from the same set of forms.

http://www.adass.org.uk/mental-health-Drugs-and-Alcohol/key-documents/New-DoLS-Forms/

I am also happy to say that new guidance from the Law Society to assist practitioners in understanding what may constitute a deprivation of liberty following the Supreme Court judgment is in the final stages of production and will be available by the end of February.

In addition, the revised Code of Practice for the Mental Health Act will be published shortly. The Code includes a new chapter on the interface between the Mental Health Act and MCA-DoLS which you will want to take note of. The new Code will be available online – I will post a twitter message to alert you.

Finally, I am particularly grateful to ADASS for leading the Task Group that has been examining practical solutions and assistance for local authorities. Their most recent guidance note – including a helpful DoLS application prioritisation tool – can be found at the link below.

http://www.adass.org.uk/uploadedFiles/adass_content/policy_networks/mental_health/key_documents/DoLS%20Guidance%20note%20November%202014.pdf

A good place to find resources to assist your response to the Supreme Court judgment is the Mental Capacity Law and Policy website. It includes further links to CQC briefing, guidance from the Intensive Care Society, and details of the new (and now live) system for Court of Protection applications from community settings.

http://www.mentalcapacitylawandpolicy.org.uk/resources-2/cheshire-west-resources/

Specific implications

The Supreme Court judgment continues to have a number of knock-on implications in addition to the increase in applications. In all these cases, our priority is to establish a proportionate approach that prioritises the well-being of the individual who may lack capacity; considers closely the wishes and feelings of family, friends and carers; and which ensures the system as a whole focuses on delivering care, support and scrutiny that benefits the individual. In short, we do not wish a system that puts paperwork before people.

Palliative care

One area that has caused particular concern is that of palliative care. For the purpose of this guidance, we consider palliative care to be concerned with the last few weeks of life.

The first thing to say here is that if a person receiving palliative care has the capacity to consent to the arrangements for their care, and does consent, then there is no deprivation of liberty.

Furthermore, if the person has capacity to consent to the arrangements for their care at the time of their admission or at a time before losing capacity, and does consent, the Department considers this consent to cover the period until death and that hence there is no deprivation of liberty. (An important exception would be if the care package to which the individual consented were to change in a manner that imposed significant extra restrictions or which included care contrary to the previously expressed wishes and preferences of the individual. In such circumstances, the individual's consent is unlikely to cover the changed care and an application for a DoLS authorisation or a Court of Protection order may be required if there is or will be a deprivation of liberty.)

Where an individual lacks capacity and there is no valid consent, there will be no deprivation of liberty unless the Supreme Court judgment "acid test" is met:

- Are they "free to leave"? Just because they are physically unable to leave of their own accord does not mean they are not free to leave for the purpose of the test – they may for example be able to leave with family assistance.

- Are they under "continuous control and supervision"? If the individual is in a private room and checked only every few hours then they may not necessarily be under continuous control and supervision.

In providing this guidance we would make clear that a person who lacks capacity and is receiving palliative care is entitled to the same rights under the law as every other citizen. Such individuals can indeed have a care and support package that results in a best interests deprivation of liberty. If there is no valid consent, and the acid test is met, such a deprivation of liberty must be authorised. Managing authorities and local authorities must be alert to this.

We must remember that the reality on the ground is, that in the great majority of palliative care cases, the family and loved ones of the individual concerned do not recognise any "deprivation of liberty" in a conventional sense. Rather they see a normal care situation. Practitioners will be only too aware that an unnecessary DoLS assessment could cause considerable distress to the family with no benefit to the individual.

Meaning of "mental disorder"

It is important to remember that standard authorisations can only be given under Schedule A1 of the MCA if the person concerned is suffering from mental disorder within the meaning of the Mental Health Act (but disregarding any exclusion for persons with learning disability), and therefore meets the mental health qualifying requirement to be eligible for an authorisation.

It may be helpful for you to be aware that the Department of Health does not consider a state of unconsciousness in itself as being a mental disorder. As such, we would not consider that an individual who is unconscious and who does not have a mental disorder would be eligible for a standard authorisation.

Coroner's investigations

You may be aware that the Chief Coroner recently issued guidance to coroners on the Supreme Court judgment. This can be found at the link below.

http://www.judiciary.gov.uk/wp-content/uploads/2013/10/guidance-no16-dols.pdf

In this guidance, the Chief Coroner notes his view (which is not binding on local coroners) that the death of an individual who is subject to a DoLS authorisation (or a relevant Court of Protection Order) is, under the law, classified as a death in "state detention" and as such the death should be subject to a coroner's investigation.

The Department of Health recognises the current law and the view of the Chief Coroner regarding state detention. We do wish to note, however, that while the death of an individual who is subject to a DoLS authorisation (or a relevant Court of Protection Order) may in legal terms be a death in "state detention" - and while we of course would fully support a robust investigation where there may be suspicion of any untoward factors - it is important to recognise that on the ground and for the family, in the great majority of cases, the death has occurred in a "normal" care environment.

Where it is clear that there is no suspicion of untoward factors contributing to the death, we would hope that any inquest puts the least possible stress on the family and is completed as rapidly as possible. DH and the CQC have heard concerns of bereaved families being visited by uniformed police officers assigned to investigate deaths on behalf of the coroner or of delays in releasing the body of a loved one to their family. We would strongly urge that such situations be avoided wherever possible.

It is likely to be of great benefit for coroners to keep in close communication with the DoLS Lead in their local authority so that they can ensure a consistent message is given to providers and so that they can work together in dealing with the considerable extra activity as a result of the Supreme Court judgment. Part of the challenge in responding to the Supreme Court judgment is in raising awareness with our partners of the true nature of DoLS. For example, that DoLS does not cause a deprivation of liberty, rather it exists to ensure that any deprivation of liberty is in the best interests of the individual concerned.

Deprivations of liberty in the community

I'm sure you will be aware that on 17 November 2014, a new streamlined process went live for applications to the Court of Protection to authorise deprivations of liberty outside of care homes and hospitals. This is known as the "Re X procedure" and is supported by a new Court of Protection application form and a new practice direction. The following guide produced by 39 Essex Street is a useful reference and contains links to the relevant documents:

http://www.39essex.com/docs/newsletters/judicial_deprivation_of_liberty_authorisations_guide.pdf

The Court of Protection will be monitoring the number of applications received and clearly the Department will be studying these closely to determine the level of applications made under this new process. As with DoLS applications we urge a proportionate, risk-based approach that seeks to identify individuals who stand to benefit most from this additional scrutiny and ensure these individuals receive timely access to the Court.

It is already clear that local authority MCA-DoLS teams (already processing increased numbers of DoLS applications) and NHS organisations (who may also be making applications to the Court on behalf of service users) will need the assistance and engagement of local partners in identifying these individuals in community settings potentially deprived of their liberty. Implementing the MCA and DoLS is a shared responsibility for all professionals caring for and treating those who may lack capacity.

Best Interest Assessors operating in Wales

Finally, a few local authorities have asked me whether Best Interest Assessors (BIAs), trained and registered in England, are able to perform best interest assessments for an English local authority that has placed an individual for whom they have responsibility into accommodation in Wales. The Department believes there is no block to this happening.

Concluding thoughts

I hope this information is helpful to you. The implications of the Supreme Court judgment continue to emerge and there remain many challenges ahead. However, I hope you will look back on your achievements to-date with considerable pride.

In terms of our long-term plan, the Law Commission's work to fundamentally review DoLS and propose new legislation that covers care homes, hospitals and community settings continues apace and I again would encourage you to engage with this work. The Department believes that it is only through this consultative approach, considering all issues in the round, that we will achieve future legislation that better balances the need to protect the rights of individuals with the need to avoid unnecessary bureaucracy.

Please do keep in touch over the coming year. Thank you again for all you are doing to move this important work forwards.

Yours sincerely

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Mental Capacity Act & Deprivation of Liberty Safeguards
Department of Health

Annex
Regional MCA-DoLS Leads

Region	Name of Lead	Email
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