Scrutiny Briefing Note

The Health and Adult Social Care Scrutiny Panel have asked to receive a briefing on the following issues. This briefing contains the latest position as at 17th September 2021.

Subject: Mental Capacity Act 2005

A briefing on the challenges arising from pending change to Mental Capacity Act 2005 (MCA) in the form of the Liberty Protection Safeguards (LPS) as replacement for the Deprivation of Liberty Safeguards (DoLS) and equivalent Court of Protection (CoP) processes.

A person can only be deprived of their liberty where there is a lawful process to do so and there is a right to appeal. For the purpose of this briefing, oversight of the 'lawful process' and appeals is predominantly discharged by adult services. In adult health and social care, deprivations of liberty are authorised by either the Mental Health Act 1983 (MHA) (in settings registered for this purpose) or in care homes and hospitals (where the main purpose is not for the assessment and or treatment of mental disorder) by the MCA via the DoLS system. Where deprivations of liberty occur in other settings (such as the person's own home) these need to be authorised via an application to the CoP. This briefing does not cover deprivations of liberty authorised by the criminal justice system.

The dramatic increase in applications for authorisation result from the "Cheshire West" case which further defined what constitutes a deprivation of liberty. Consequently, most systems are backlogged, with a "waiting list". Following on from review of the present system by The Law Commission the Mental Capacity (Amendment) Act 2019 (which introduces the LPS) gained royal ascent and is presently due to come into effect in April 2022. LPS will apply to all deprivations of liberty, regardless of setting, for individuals aged 16 or more.

Key strategic risks re implementation of LPS include:

1. One of the RBs (responsible bodies) identified as having statutory accountability under LPS will cease to exist by April 2022 as CCGs become part of the ICS/ICP. The implications for managing LPS on the wider footprint of the CCG's successor body (the Independent Care System – ICS) are unclear. The ICS will be responsible for authorising NHS Continuing Healthcare (CHC) funded arrangements, and the LA will be responsible for both social care funded arrangements and independent hospital (Navigo are defined as an independent hospital in respect of their in-patient arrangements). The LA & CCG will need to plan carefully to preserve local integrated arrangements. It will need to work across a wider footprint to influence areas where working at scale could bring benefit, e.g. in awareness raising, publicity campaigns and training

2. Insufficient mental health assessors. The LPS process requires a mental health assessment to diagnose the mental disorder which results in an individual being unable to make their own care/ treatment decisions. The current statutory role of mental health assessor has not been transposed to LPS. The Department of Health and Social Care's (DHSC) expectation appears to be that GPs will offer these assessments. GPs may not feel able to discharge this function and may need additional training

3. Insufficient numbers of AMCPs (approved mental capacity professionals). In some circumstances, the LPS process requires oversight by an AMCP. Broadly the AMCP role can be equated to the current best interest assessor (BIA) role; we do not have enough BIAs to service current requirements. It will be the responsibility of the LA to ensure that there are "sufficient" AMCPs in a

similar way to the requirement to ensure there are enough AMHPs (approved mental health professionals). All responsible bodies will be looking to a limited 'pool' of professionals to fulfill assessor roles

4. Insufficient numbers of IMCAs (independent mental capacity advocates); practitioners must consider the appointment of an IMCA to support individuals as soon as the LPS process is triggered. This is likely to result in an increase in the number of IMCAs required

5. Inadequate knowledge of the MCA. Implementation of LPS is reliant on sound understanding of the MCA, as functions currently delivered by highly qualified professionals are transferred to the less experienced 'front line'. Unauthorised deprivation of liberty carries financial risk; December 2020 case law 'valued' unauthorised deprivation in a care home at £1.5k per month, per case

6. Inadequate staff capacity to implement and apply LPS, within the CCG and otherwise. Health partners in particular have expressed grave concern about managing a significant programme of implementation work in the context of a pandemic and its ongoing repercussions. Lower levels of MCA competency within some settings, as well as in children's services, may exacerbate this challenge

7. If the implementation date of April 2022 is still to be achieved, then significantly less time will be available for the consultation on the draft Code of Practice and regulations

8. A recent LGO case has highlighted the risk to individuals and their families where there is poor management and oversight of DoLS. The LA in question was obliged to compensate the family with £500, review the timeliness of all its DoLS cases from 2019 to date and compensate for any injustice found

9. Under the DoLS system there is difficulty in assessing and authorising deprivations in hospital trusts in a timely manner. Under LPS, hospital trusts will be able to authorise deprivations of liberty without reference to an 'external' body. The ICS will need assurance regarding the way in which trusts approach deprivation of liberty. Use of mechanisms for authorisation will need to be monitored and reviewed in a similar way to sections of the MHA to ensure that no abuse of the system occurs.

In concluding, it is worth noting that the DoLS system was developed before the present legal definition of what constitutes a deprivation of liberty was clarified. As such, instead of it operating proactively (the legal process coming before the action) as was intended, it has become inundated and reactive, leaving individuals, commissioners and providers at risk of legal challenge.

For the LPS to operate correctly, it will need to be run in similar way to MHA authorisations, in that the legal process is (mostly) completed before the person has arrived in the placement where their liberty will be deprived. Local modelling suggests that this will result in an increase in the number of assessments that need to be carried out promptly, and cases requiring authorisation.

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