

**5 October 2015****Agenda Item: 6****REPORT OF THE SERVICE DIRECTOR, MID NOTTINGHAMSHIRE****NATIONAL CONSULTATION ON REFORM OF DEPRIVATION OF LIBERTY  
SAFEGUARDS****Purpose of the Report**

1. To inform the Committee about the Law Commission's national consultation paper on proposed changes to Deprivation of Liberty legislation and to comment on the key responses that the Council proposes to submit regarding how these might impact on Nottinghamshire County Council.

**Information and Advice****National context**

2. The Law Commission's consultation paper on deprivation of liberty was published on 7 July (Law Commission, *Mental Capacity and Deprivation of Liberty: A Consultation Paper* (2015), CP No 222). The consultation paper considers how in future the law should regulate deprivations of liberty involving people who lack capacity to consent to their care and treatment arrangements.
3. The Mental Capacity Act aims to protect people who lack mental capacity. The Deprivation of Liberty Safeguards (DoLS) were set up under the Act to provide independent procedures for assessing and authorising the deprivation of liberty in a hospital or care home of someone who lacks the mental capacity to make decisions about their own care. The DoLS apply largely to older or disabled people and require six assessments of someone's situation. The decision can be challenged through a review procedure in the Court of Protection.
4. However, the DoLS have been subject to considerable national criticism, for being overly lengthy, bureaucratic, imposing a one-size fits all approach and not being of sufficient benefit to the person whose liberty may be curtailed. They place significant burdens on local councils and can create tensions between local authority functions as a supervisory body under the DoLS and their commissioning and safeguarding functions. They are also narrow in focus; for example, they do not protect people who live in other forms of accommodation e.g. those in supported living settings. Individuals report that they face many practical obstacles in challenging decisions.

5. Two significant events occurred in March 2014:
  - a House of Lords scrutiny committee on the Mental Capacity Act published a report which concluded that the DOLS were “not fit for purpose” and proposed their replacement
  - a Supreme Court judgement (known as the “Cheshire West ruling”) gave greater clarity on what deprivation of liberty means which meant that many more people should be made subject to DoLS.
6. Following the Supreme Court decision, the system has struggled to cope with the increased number of cases. The House of Lords concluded that the system does not make sense as it stands and is ‘deeply flawed’. As a result, the Government asked the Law Commission to undertake a review to address these issues. The Law Commission has now developed proposals to replace the DoLS and is consulting on these:  
[http://www.lawcom.gov.uk/wp-content/uploads/2015/07/cp222\\_mental\\_capacity.pdf](http://www.lawcom.gov.uk/wp-content/uploads/2015/07/cp222_mental_capacity.pdf).
7. There are over 100 provisional proposals and consultation questions. The consultation period ends on 2 November 2015 and the Law Commission plans to publish recommendations in 2016 and present them to the Government. It will be for Government and Parliament to decide whether to change the law.

### **Local context**

8. Like other local authorities, Nottinghamshire County Council has experienced a clear and significant upward trend in DoLS referrals over the previous financial year. In 2013/14, the Council received only 300 DoLS referrals. Between 1 April 2014 and 31 March 2015, the total number of DoLS referrals received was 1,748, rising to an average of 45 referrals a week (including re-authorisations required within the year). Numbers of referrals are predicted to rise in 2016/17 to between 3,600 and 4,000.

### **The proposals**

9. The proposed reforms would end the current DoLS arrangements and establish a new system called ‘protective care’ and a new Code of Practice. Key aspects include the following:

#### **Supportive care:**

- i) People who lack capacity to make a decision about where they live, or are considering moving into a care home, supported living or ‘shared lives’ accommodation, would be given a preventative set of safeguards intended to ensure that their accommodation, care and treatment are right for them. The aim being to reduce the need for intrusive interventions in the longer term. This system would be known as ‘supportive care’ and would be one element of the wider scheme of ‘protective care’. There is no requirement for this assessment to be independent and it could be undertaken by anyone the Local Authority feels is appropriate, including social workers or nurses already working with an individual.

- ii) Many people will already require an assessment and review under the Care Act 2014 or NHS Continuing Health Care regulations. The supportive care assessment will need to form part of these existing assessments and will require additional time to complete. For some self funders, however, this may be the first independent check of their capacity to make the relevant decision regarding their care and treatment arrangements, with potentially significant further associated resource implications.

### **Restrictive Care and Treatment:**

- i) Additional safeguards would apply if someone living in one of these settings requires restrictive forms of care or treatment and lacks capacity to consent to their care and treatment. Under the proposals, this would be authorised by a new independent professional called an Approved Mental Capacity Professional (AMCP). The AMCP would then certify that objective medical expertise had been provided and that the deprivation of liberty was in the person's best interests. The AMCP would then authorise the DoL, taking responsibility for imposing conditions and monitoring compliance. The AMCP would be able to delegate tasks to district teams.
- ii) **Approved Mental Capacity Professionals.** AMCPs would have similar legal responsibilities to Approved Mental Health Professionals (AMHPs), acting as independent decision-makers on behalf of the Local Authority. The Local Authority would be required to ensure that applications for protective care appear to be 'duly made' and founded on the necessary assessments. The AMCP would be required to ensure that:
  - the decision-making processes and care arrangements continue to comply with the Care Act, Mental Capacity Act and Continuing Health Care regulations;
  - regular review meetings take place (involving the family); and
  - an advocate or appropriate person, and representative have been appointed.
- iii) **Hospitals.** A separate scheme of safeguards would apply for those accommodated in hospital settings and palliative care and would be tailored to recognise that people's accommodation in these settings is usually temporary. Two medical professionals would be able to assess and authorise deprivation of liberty for up to 28 days.
- iv) **Domestic settings.** The safeguards of the proposed scheme would apply where a deprivation of liberty is proposed in a domestic setting. An AMCP would be required to authorise the deprivation of liberty, or seek alternative solutions (such as the provision of services to end the deprivation of liberty). In some cases the matter may need to be settled by the court. If the deprivation of liberty is authorised, the person would be subject to the same safeguards as those provided under the restrictive care and treatment scheme.
- v) **Advocacy provision** would be streamlined and consolidated across the Care Act and Mental Capacity Act (in its entirety, not just those sections dealing with DOLS) so that the existing Independent Mental Capacity Advocates would be replaced by a system of Care Act advocacy and appropriate persons. Anyone subject to the protective care scheme would be provided with an advocate to represent their views

and wishes, and any restrictive treatment and care decisions would be challengeable in a specialist tribunal, rather than in a court.

- vi) The Mental Health Act would be amended to establish a formal process and safeguards for people who require treatment for a mental disorder, including an independent advocate and a requirement for a second medical opinion.
- vii) In emergencies, rather than the current system of self-authorisation by care providers, the first recourse of the care provider would be to an AMCP who would be able to give temporary authority for up to 7 days (extendable by a further 7 days) care and treatment pending a full assessment.

### **Implications and consultation feedback:**

10. The proposals for both restrictive and supportive care indicate the need for some analysis of the staffing and associated resources required, as well as of additional training implications to operate to the protective care scheme. This might include:
  - a broader training programme in relation to the Mental Capacity Act and deprivation of liberty across adult social care
  - the possible transition of current Best Interests Assessors (BIAs) and the workforce implications of the new AMCP role. It is not yet clear whether retraining would be required
  - it is unclear at this time what the implications for advocacy provision might be.
11. In summary, it is proposed that Nottinghamshire County Council feeds back the following key issues into the national consultation:
  - a) the Council broadly supports the proposals to shift towards a more preventative and proactive focus that would have more focus on better outcomes for citizens
  - b) the lack of independent assessment for supportive care needs further consideration regarding its potential to be used as a way of avoiding the restrictive care process
  - c) that overall, the proposals do not indicate a reduction in resource implications but rather a different deployment of staff and new roles
  - d) a two tier system may further complicate matters due to managing transition between the two, as well as decision making and responsibilities being unclear e.g. AMCP delegating to district teams
  - e) that business support administrative requirements do not appear to be reduced
  - f) to highlight the fact that the AMCP role is significantly more autonomous than even the AMHP role because of no involvement of other professionals in decision making
  - g) the urgent response proposal will have significant resource implications for Local Authorities, as the care provider will not be able to authorise restrictive care themselves.
12. As part of developing the consultation, views will be sought from staff and managers, including Best Interests Assessors. Details of the consultation will be sent to existing citizen engagement groups and views sought from at least one existing service user engagement group.

13. The deadline for submitting a response to the Department of Health is 2 November. It is proposed that the final response is approved by the Corporate Director, Adult Social Care, Health and Public Protection, in consultation with the Chair of the Adult Social Care and Health Committee, prior to submission, in accordance with the key issues identified in paragraph 11. A copy of the Council's final response to the consultation will be circulated to Members.

### **Other Options Considered**

14. This report is concerned with developing a Council response to national consultation on a proposed change to legislation.

### **Reason/s for Recommendation/s**

15. To ensure that the views of Nottinghamshire County Council are represented in the national consultation.

### **Statutory and Policy Implications**

16. This report has been compiled after consideration of implications in respect of crime and disorder, finance, human resources, human rights, the NHS Constitution (Public Health only), the public sector equality duty, safeguarding of children and vulnerable adults, service users, sustainability and the environment and ways of working and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

### **Financial Implications**

17. From available information, it is estimated that there will be no less resource requirements than at present. Supportive care assumes an available level of ongoing care management which is not currently provided to the number of people likely to fall within the new provisions. The urgent AMCP response proposal has potentially significant additional resource implications.

### **Human Resources Implications**

18. From the information currently available it is likely that the new legislation will require that approximately the same number of staff will be required, although they may be undertaking different tasks and roles. A training programme will need to be developed and implemented.

### **Human Rights Implications**

19. It is a basic tenet of the Law Commission review that the new protective care scheme must be fully compatible with the European Convention on Human Rights

### **Public Sector Equality Duty implications**

20. The new scheme aims to be not only compatible with the UN Disability Convention, but supportive of its aims and aspirations. The Local Authority will be under a duty to implement the new legislation and Code of Practice.

### **Implications for Service Users**

21. The proposed reforms shift the emphasis away from a central focus on authorising deprivations of liberty, to providing appropriate care and better outcomes for people who lack mental capacity, as well supporting their family and carers. The proposals are tailored according to different settings.

## **RECOMMENDATION/S**

That:

- 1) the Committee notes the national consultation and comments on the key issues identified, as detailed in paragraph 11
- 2) a consultation response is submitted by Nottinghamshire County Council to the Law Commission proposals, with the final response being approved by the Corporate Director of Adult Social Care, Health and Public Protection, in consultation with the Chair of the Adult Social Care and Health Committee, prior to submission.

**Sue Batty**  
**Service Director, Mid Nottinghamshire**

**For any enquiries about this report please contact:**

Tina Morley-Ramage  
Principal Social Worker/Service Manager for AMHP and DOLs Teams  
T: 0115 8546325  
E: [tina.morley-ramage@nottsccl.gov.uk](mailto:tina.morley-ramage@nottsccl.gov.uk)

### **Constitutional Comments (SMG 22/09/15)**

22. The proposals in this report fall within the remit of this Committee.

### **Financial Comments (KAS 21/09/15)**

23. The financial implications are contained within paragraph 17 of the report.

### **Background Papers and Published Documents**

None.

### **Electoral Division(s) and Member(s) Affected**

All.