

8 September 2021

## **Correspondence between Cathy Jack and Sean Holland on Deprivation of Liberty (DOL) for Residents in both Nursing and Residential Care Homes within Belfast Trust for the years 2019, 2020 and 2021**

### **Request:**

All communication between Sean Holland (Chief Social Worker NI) and Cathy Jack (Chief Executive BHSCT) in relation Deprivation of Liberty (DOL) for Residents in both Nursing and Residential Care Homes - Belfast Trust years 2019, 2020 and 2021.

### **Answer:**

See below correspondence:

**SH451:** Letter dated 12 November 2020 from Sean Holland to Trust Chief Executives

### **Incl. Assurance Report Template**

**SH408:** Letter dated 9 June 2020 from Sean Holland to Cathy Jack

**SD/ew:** Letter dated 26 January 2021 from Shane Devlin (obo all Trust Chief Executives) to Sean Holland



Chief Executives of HSC Trusts,  
PHA, HSCB and RQIA

Castle Buildings  
Stormont Estate  
Belfast  
Northern Ireland  
BT4 3SQ

Tel: 028 9052 0561

Email: [sean.holland@health-ni.gov.uk](mailto:sean.holland@health-ni.gov.uk)

Our Ref: SH451

Date: 12 November 2020

Dear Colleagues

## **Mental Capacity Act – Extension to Deprivation of Liberty Safeguards Implementation Period**

As you are aware, the Mental Capacity Act (Northern Ireland) 2016 was commenced on 2 December 2019 for the purposes of deprivation of liberty, research and money and valuables in residential care and nursing homes.

At the time, the Department provided a policy position that the Deprivation of Liberty Safeguards (DoLS) should be fully implemented by 2 December 2020. I understand that the implementation has been difficult, in particular around sourcing medical practitioners. Implementation has been further impacted by the effects of the Covid-19 pandemic.

Minister Swann has therefore agreed to extend the DoLS implementation period by 6 months until 31 May 2021. In practice that means that the Department now expects DoLS to be fully implemented by 31 May 2021 and that the criminal offence of unlawful detention which was due to be commenced on 2 December 2020 will now be commenced on 31 May 2021.

It is important to remember why we require the deprivation of liberty safeguards. Ultimately it is to protect some of the most vulnerable people in our community and to ensure that people's autonomy is protected. However, it is also about protection for our frontline staff.

A deprivation of liberty is a limitation of a person's human rights. The European Convention on Human Rights Article 5 provides that everyone has the right to liberty, and if that liberty is limited this can only be done in procedures prescribed by law. In a health and social care setting in Northern Ireland, that is either the Mental Health (Northern Ireland) Order 1986 for mental disorder or mental impairment in hospital or the Mental Capacity Act (Northern Ireland) 2016 if a person lacks capacity in any setting. If a deprivation of liberty is not authorised, the person carrying out the act does not have protections against liability.

On 31 May 2021 the offence of unlawful detention will come into force. This is a criminal offence where someone is knowingly detaining another person without following the statutory frameworks in the Mental Health Order or the Mental Capacity Act. The Mental Capacity Act also provides corporate liability, meaning that senior officials in a body corporate where an unlawful detention has taken place with the senior official's consent, connivance or neglect can be held personally liable.

The Department are seeking assurances from each HSC Trust on a regular basis on a number of indicators that can be found in Annex A. This will help focus on any issues particular to your Trust in order to achieve full DoLS implementation by 31 May 2021. **It is imperative that the replies are provided promptly to the Department in line with the reporting schedule below using the template in Annex A.**

The reporting schedule is as follows:

1. Friday 27 November 2020
2. Tuesday 5 January 2021
3. Friday 29 January
4. Friday 26 February
5. Friday 26 March
6. Friday 30 April
7. Friday 14 May

For each report it is expected that an update on the current position on the indicator is provide, that the RAG rating for success by due date is updated and that problems are highlighted.

The assurances should be sent to the generic Mental Capacity inbox in the Department ([MCImplementation@health-ni.gov.uk](mailto:MCImplementation@health-ni.gov.uk)) and copied to both Mark Lee ([mark.lee@health-ni.gov.uk](mailto:mark.lee@health-ni.gov.uk)) and Tomas Adell ([tomas.adell@health-ni.gov.uk](mailto:tomas.adell@health-ni.gov.uk)).

I am expecting that the assurance reports will be a standing issue on the regular MCA Implementation Group meetings and Trust MCA Lead Directors and Implementation Leads will be asked to provide updates. Strong leadership from lead Directors in each HSC Trust will be essential, including regular attendance at these meetings.

Departmental officials have been engaging with trade unions in relation to the extended implementation period and they, understandably, have some concerns as to how it may impact on staff. In response, the Department has developed a short guidance document specifically in relation to the extension and the availability to staff of MCA emergency provisions. This has been shared with the trade unions and will be issued to Trust Lead Directors and should be shared with all relevant staff. I would also ask you to ensure that you consult with your local trade union representatives with regard to any workforce planning or staff training issues in relation to DoLS that arise in your Trust area.

The Department has informed the trade unions that neither the Department nor the Trusts cannot offer any absolute guarantees with regard to the protection of staff during an extended implementation period; not all deprivation of liberty cases are straightforward and as long as DoLS procedures and processes are not fully in place, risks to both staff and patients will exist. However, the Department believes that, on balance, extending the implementation period and delaying the commencement of the criminal offence of unlawful detention to 31 May 2021 provides a lower risk approach for staff than retaining the 2 December 2020 date. While delaying commencement could be seen to delay protections for staff, the constraints faced in progressing implementation are fundamental and it is clear full implementation will not be achieved by 2 December 2020 whether or not we move the date. The message that delaying implementation and delaying the introduction of a specific offence sends to courts and others may help mitigate some of the risks. In this extended implementation period I am asking the Trusts to stand behind their staff and provide all support in the event that any of the risks to the staff are materialised. I also ask that you work proactively with the trade unions when providing this support.

I hope the implementation period extension is welcomed and that we can work towards full implementation of the deprivation of liberty safeguards by 31 May 2021.

Yours sincerely

A handwritten signature in black ink that reads "Sean Holland". The signature is written in a cursive, flowing style.

**SEAN HOLLAND**

Chief Social Work Officer/Deputy Secretary

cc: Richard Pengelly  
Marie Roulston - HSCB  
Royal College of Psychiatrists  
Royal College of Nursing  
TUS

## Annex A – Assurance Report template

### MCA DoLS – Extended Implementation Assurance Report

HSC Trust	
Return no	1
Date Due	Friday 27 November 2020

Topic	No	Indicator	RAG Rating	Update & reason for RAG rating
STDs	1a	<b>Medical Practitioners</b> sufficient numbers for all short term detentions to be authorised		<i>[Include estimated number of medical practitioners still required to implement short term detentions fully and details on progress made towards securing them]</i>
	1b	<b>Short term detentions Assurance</b> from 31 May 2021, all short term detentions in hospital will be authorised in full compliance with DoLS		<i>[Consider all elements such as workforce, training, resources, COVID-19 and highlight areas of concern. Compliance includes <u>reasonable</u> use of DoLS emergency provisions.]</i>
Trust Panels	2a	<b>Medical Practitioners</b> sufficient numbers for all deprivations of liberty in the community to be authorised		<i>[Include estimated number of medical practitioners still required to implement Trust Panels fully and details on progress made towards securing them]</i>
	2b	<b>Trust Panels Assurance</b> from 31 May 2021, all deprivations of liberty in the community will be authorised in full compliance with DoLS		<i>[Consider all elements such as workforce, training, resources, COVID-19 and highlight areas of concern. Compliance includes <u>reasonable</u> use of DoLS emergency provisions.]</i>
Legacy cases	3	<b>All legacy cases authorised</b> assurance that, from 31 May 2021, all legacy cases (i.e. cases where someone may be currently deprived of their liberty without an authorisation in place) will be authorised in full compliance with DoLS		<i>[Consider all elements such as workforce, training, resources, COVID-19 and highlight areas of concern.]</i>
		<b>Major concern</b> – risk of not being resolved by 31 May 2021, needs immediate action		
		<b>Some concern</b> – needs to be monitored closely but should be resolved by 31 May 2021		
		<b>On track</b> – currently satisfactory for completion on 31 May 2021		

Please send all returns to DoH MCA Implementation Team –

[MCImplementation@health-ni.gov.uk](mailto:MCImplementation@health-ni.gov.uk)

(cc Mark Lee – [mark.lee@health-ni.gov.uk](mailto:mark.lee@health-ni.gov.uk) & Tomas Adell – [tomas.adell@health-ni.gov.uk](mailto:tomas.adell@health-ni.gov.uk))

From the Deputy Secretary, Social Services Policy Group/  
Chief Social Work Officer  
Seán Holland



Department of  
**Health**

An Roinn Sláinte

Máinnystrie O Poustie

[www.health-ni.gov.uk](http://www.health-ni.gov.uk)

Castle Buildings  
Stormont Estate  
Belfast  
Northern Ireland  
BT4 3SQ

Tel: 028 9052 0561

Email: [sean.holland@health-ni.gov.uk](mailto:sean.holland@health-ni.gov.uk)

Our Ref: SH408

Date: 9 June 2020

Dr Cathy Jack  
Chief Executive  
Belfast Health and Social Care Trust

[cathy.jack@belfasttrust.hscni.net](mailto:cathy.jack@belfasttrust.hscni.net)

Dear Cathy

### **Mental Capacity Act – Deprivation of Liberty, emergency provisions and Coronavirus**

As you are aware, last year the Department of Health and the Department of Justice agreed to commence the Mental Capacity Act (Northern Ireland) 2016 (MCA) for the purposes of deprivation of liberty safeguards (DoLS), money and valuables in care and nursing homes and research.

#### **Trust Panel authorisations**

Whilst depriving someone of their liberty can often be necessary to prevent someone who lacks capacity from coming to serious harm, it is a serious infringement on that person's human rights. For any deprivation of liberty to be lawful, and in accordance with the European Convention on Human Rights Article 5, it must be in done by procedures prescribed by law. The MCA provides such procedures and requires that deprivations of liberty in the community, and in certain circumstances hospitals, are authorised by a Trust Panel.

#### **Emergency provisions**

The MCA provides emergency provisions which allows a deprivation of liberty to take place even though a Trust Panel authorisation is not in place, if waiting for the authorisation would cause an unacceptable risk of harm to the person who lacks capacity. This allows a DoL to take place while a decision is made by the Trust Panel.

It has come to the Department's attention that on a number of occasions Belfast Trust staff have instructed residential care and/or nursing homes to rely on emergency provisions after the Trust Panel have refused an application, while a new application is made to the Trust Panel. This is outside the scope of the MCA and is not a proper use of the emergency provisions. Any such deprivations of liberty are unlawful. The Department requests that these practices are immediately stopped and that all staff are made aware that this is an improper use of the emergency provisions.



## DoLS and Coronavirus

The Trust Panel is a vital safeguard to protect against arbitrary detentions. There are detailed rules set out in both the legislation and Code of Practice around how Trust Panels operate (e.g. membership, timescales, powers etc). One of the key rules is that a Trust Panel must have three members, all of whom must be present during the Panel's proceedings.<sup>1</sup>

Certain services or practices across Trusts have had to be restricted or temporarily stood down due to the impact of Coronavirus pandemic – DoLS, however, should not be one of these. The DoLS provisions were introduced in order to comply with Article 5 of the European Convention on Human Rights (ECHR) – the right to liberty. Article 5 must be adhered to at all times, including during an emergency period, such as the Coronavirus pandemic.

The Department made temporary modifications to the legislation around DoLS which came into operation on 2 April 2020 – section 10(4) of and Schedule 11 to the Coronavirus Act 2020. These emergency modifications relax a number of the DoLS requirements in order to enable Trusts to continue to deprive people of their liberty, when required, in accordance with procedures prescribed by law, during unprecedented times.

During the emergency period the MCA is modified to allow remote meetings where the three Trust Panel members are not all present. This option is only available when the members each provide a written opinion on the application and the decision of the panel is unanimous. This modification is responsive to pandemic pressures and is a temporary measure. When the Coronavirus Act amendments are stood down the expectation is that panels must meet in person.

It has been brought to the Department's attention that Trust Panels in the Belfast Trust authorised nine deprivations of liberty without all members being present prior to these emergency legislative modifications becoming operational on 2 April 2020. It is the view of the Department that any decisions taken by Trust Panels that meet outside the scope of section 297 of the Mental Capacity Act **are not valid**.

It is the view of the Department that these nine authorisations fall into that category as all three members were not present during the proceedings of the Panel. As a result, the additional safeguard of a Trust Panel authorisation is not in place, something which is required for the protection of liability of the person(s) who are carrying out the DoL, with the effect is that the deprivation of liberty is unlawful. Most importantly such panel authorisations would also not provide the required safeguards to protect against arbitrary detentions.

I am, therefore, writing to you to request these nine DoL applications be urgently resubmitted to Trust Panels (should they still be required).

The Coronavirus emergency provisions are still operational and the Code of Practice detailing which DoLS requirements have been relaxed is available on the MCA website – [www.health-ni.gov.uk/mca](http://www.health-ni.gov.uk/mca).

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<sup>1</sup> Mental Capacity Act (NI) 2016, section 297(2) and DoLS Code of Practice, para 14.6

I would be very grateful if the Belfast Trust MCA Lead Director would provide an update on the remedial action taken on each of these nine cases to Tomas Adell, DoH MCA Implementation Lead within 1 week ([tomas.adell@health-ni.gov.uk](mailto:tomas.adell@health-ni.gov.uk)).

Yours sincerely

A handwritten signature in black ink that reads "Seán Holland". The signature is written in a cursive style with a long horizontal flourish at the end.

**SEÁN HOLLAND**

Chief Social Work Officer

**Copy distribution list**

Charlene Stoops, Belfast HSCT

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Tomas Adell, DoH



**Chair**  
Eileen Mullan

**Chief Executive**  
Shane Devlin

Our ref: SD/ew

26 January 2021

Mr Sean Holland  
Chief Social Work Officer/Deputy Secretary  
Castle Buildings  
Stormont Estate  
BELFAST  
BT4 3SQ

Dear Sean

## **IMPACT OF COVID ON THE TRUSTS' ABILITY TO COMPLY WITH THE MENTAL CAPACITY ACT**

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The Chief Executives wish to alert you to the ongoing pressures across both the acute and community sectors as we continue to respond to the COVID demands on top of normal winter pressures. We remain committed to progressing with the partial implementation of the Mental Capacity Act (NI) 2016 but are keen to highlight the impact of COVID on this. In particular, we would highlight the impact of COVID related sickness, self-isolation and shielding within the workforce; the impact of outbreaks in care homes on the schedules for legacy cases; the challenge for acute hospital staff of completing short term detentions during surge; and of the impact of the processes associated with expedited flow out of acute hospitals which are leading to increased MCA demand in community services.

To date, Trusts have reported formally on two monthly returns to the Department of the challenges specifically in relation to the expectation of full compliance with the Act by 31 May 2021.

In addition to the issues raised in these reports, we note the current surge is impacting on delivery plans that had been in place. This may impact further on the 31 May 2021 position. We have agreed a more informed return will be compiled for the Department's consideration which will set out the regional challenges to MCA implementation in relation to COVID. We would hope to have this report completed in advance of the next assurance report to the Department which is due on Friday 29 January 2021. We would welcome an opportunity to discuss the Trusts' position following your consideration of this more detailed information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'SD', followed by a long horizontal line extending to the right.

**SHANE DEVLIN**  
**CHIEF EXECUTIVE**

**on behalf of all Trust Chief Executives**  
**Dr Anne Kilgallen, Dr Cathy Jack, Mrs Jennifer Welsh & Mr Seamus McGoran**