

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

Castle Buildings
Stormont Estate
Belfast
Northern Ireland
BT4 3SQ

Tel: 028 9052 0561

Email: sean.holland@health-ni.gov.uk

Our Ref: SH451

Date: 12 November 2020

Chief Executives of HSC Trusts,
PHA, HSCB and RQIA

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) and copied to both Mark Lee (mark.lee@health-ni.gov.uk) and Tomas Adell (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