

REPORT TITLE	Response to the Ombudsman's Report relating to the Mental Capacity Act
REPORT OF	Simon Garner Lead Commissioner, All Age Disability

REPORT SUMMARY

In July 2017 the Local Government and Social Care Ombudsman published a report entitled "The Right to Decide: Towards a greater understanding of mental capacity and deprivation of liberty". It was a focus report to illustrate learning from complaints. This report has been written to identify learning we have taken from this document and how we intend to take such lessons forward.

The report is available via the internet:

(<https://www.lgo.org.uk/assets/attach/4162/DOLS%20AND%20MCA%20-%20FINAL.pdf>)

and is attached as an appendix (*Appendix 1*).

RECOMMENDATION/S

That Members take note of the ongoing work in this area.

SUPPORTING INFORMATION

1.0 REASON/S FOR RECOMMENDATION/S

N/A

2.0 OTHER OPTIONS CONSIDERED

N/A

3.0 BACKGROUND INFORMATION

- 3.1 The MCA was introduced in 2007 and DoLS in 2009. The MCA provides a legal framework that allows others to take decisions on behalf of incapacitated adults (16+). The MCA has five principles that must be complied with by those using it. There are also a Codes of Practice that provide statutory guidance to professionals and others operating under the Act.
- 3.2 DoLS was introduced as a way of ensuring that people who lacked capacity to consent to live and receive care in a hospital or care home were lawfully deprived of their liberty under Article 5 of the European Convention of Human Rights (ECHR). The definition of what amounted to a deprivation of liberty was amended by the Supreme Court in a judgement handed down in March 2014. This new definition vastly increased the numbers of people that have become subject to its provisions

The Ombudsman's Findings

3.3 Mental Capacity Assessments

The Ombudsman identified that capacity assessments were not being completed when they should have been. Two examples are given. In the first example, a care home had "taken a generalised approach to assessing a service-user's mental capacity and relied on the views of others. It had a responsibility to carry out its own decision-specific assessments, which should have been triggered by the service-user's refusal of care and been done on a daily basis."

Actions Wirral Council have undertaken:

- 3.3.1 Social workers, when placing a person who lacks capacity to consent to the admission in a care home, are required to provide the care home with a copy of their capacity assessment and best interest decision. This document will model for care homes what a capacity assessment and best interest decision will look like.
- 3.3.2 A series of training events on the MCA and DoLS was offered by the Council and were well attended by providers and Council social care staff. Further discussion is ongoing around commissioning training in using the MCA. On Liquid Logic there is a capacity assessment tool that will ensure the statutory questions are asked.

3.3.3 As part of the work stream of the professional standards team there will be planned audits of compliance with the MCA. The audits by the professional standards team will focus on the commissioned assessments undertaken on behalf of the Council by social care staff employed within health settings. These audits will cover the issues raised within this report including quality of assessments, evidence based decision making, timeliness of assessments and compliance with the MCA Code of Practice and the statutory tests.

3.3.4 As part of the quality assurance of social care providers by the quality and safety team they will be monitoring the application of the Mental Capacity Act within the care planning documentation used by providers of domiciliary and residential care. This is also an area which the Care Quality Commission will be judging Wirral providers against as part of their regulatory framework.

3.4 Best Interest Decisions

The Ombudsman's report identifies two cases where process were not followed and families and the person themselves were not involved in decision making. The scenarios highlight the distress and anxiety caused to individuals when the proper processes are not followed. In addition, there was concern that in one case an application to the Court of Protection was not made when evidence identified this should have been done.

Actions Wirral Council have undertaken:

3.4.1 As mentioned above social care staff have already undertaken update training in the MCA but further training will be offered in 2018. On Liquid Logic there is a best interest decision tool that will ensure the statutory questions are asked.

3.4.2 As part of the work stream, professional standards will be auditing the quality of best interest decisions. Any audit will look at compliance with the MCA Code of Practice and compliance with the statutory tests.

3.4.2 There is a greater awareness within the commissioning process of the need to comply with the MCA. Those professionals seeking resources to meet service-user's needs will more readily asked about their compliance with the MCA.

3.5 Disagreements with the process and involving families

This is the most challenging area of work we face. Sometimes disagreements with families arise. Colleagues always attempt to negotiate with family members to reduce areas of disagreement. The Code of Practice and the Court of Protection expect us to try to reduce disagreements before applying to the Court. We need to be able to demonstrate we have made sufficient attempts to resolve any issues but ensure that there is no significant breach of the person's human rights.

Actions Wirral Council have taken:

3.5.1 A legal surgery has long been established and under the new working arrangements it will continue in two or three formats. Legal advice is available for urgent situations. In addition, colleagues have access to the team manager for professional standards who leads on the MCA and DoLS for relevant advice.

3.5.2 Consideration is being given to commissioning court skills training for social workers.

3.5.3 The use of advocates also supports the resolution of disagreements as does involving professionals from other disciplines. For example in one case the involvement of a registered nurse was sufficient to convince a family that their loved one needed to remain in a care home because of the high levels of need that person had.

3.6 Deprivation of Liberty Safeguards

The Ombudsman in one scenario identifies that a family member was not told of their rights to challenge a local authority decision to move their relative. The Ombudsman also identifies that local authorities are taking too long to undertake DoLS assessments.

Actions Wirral Council have taken:

3.6.1 The Council in its correspondence, when a standard authorisation is issued, ensures care homes, hospitals, the relevant person and their representative are aware of their rights to request a review under Part 8, Schedule A1 MCA and apply to the Court of Protection under section 21A MCA.

3.6.2 This large volume of assessments continues to be a live issue for the Council as it is for all other councils across England and Wales and will continue to be so for some time to come. Significant resources are in place to support those high priority assessments and authorisations.

3.6.3 The Law Commission in June 2017 proposed significant changes to DoLS and the MCA. However, their recommendations were not included in the Queen's Speech. Commentators indicate it will now be 2019 at the earliest before such legislation is introduced. It will then take between two years or thereabouts for it to become enacted. In February 2018 Parliament has called for evidence as to whether this process should be speeded up.

3.6.4 Although there have only been four recent complaints which have related to mental capacity issues the Council has identified learning from these and as a result specific in depth training around assessing capacity and making best interests decisions is being commissioned from a local provider. We are also in discussion with NHS partners in Wirral Community Foundation Trust to offer places to their staff.

3.6.5 A piece of work to look at the processes the Council uses to make applications to the Court of Protection for property and affairs deputies is also being undertaken. It was identified that improvements in capacity assessments and governance arrangements needs to be made to best protect service-users, their families and the Council.

4 FINANCIAL IMPLICATIONS

4.1 N/A

5 LEGAL IMPLICATIONS

5.1 N/A

6 RESOURCE IMPLICATIONS: ICT, STAFFING AND ASSETS

6.1 Children and Young People’s services will need to have knowledge of the MCA when working with young people over 16 years of age.

7 RELEVANT RISKS

N/A

8 ENGAGEMENT/CONSULTATION

8.1 N/A

9 EQUALITY IMPLICATIONS

9.1 There is no relevance to equality as the arrangements for commissioning services for people with a disability will achieve an overall improvement in the experience of people who use services.

REPORT AUTHOR: **Simon Garner**
(Lead Commissioner, All Age Disability)
telephone: (0151 666 3726)
email: simongarner@wirral.gov.uk

APPENDICES

Appendix 1 – LGO Report “The Right to Decide: Towards a greater understanding of mental capacity and deprivation of liberty”

SUBJECT HISTORY (last 3 years)

Council Meeting	Date