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**DEPRIVATION OF LIBERTY UPDATE**

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**SUMMARY REPORT**

**Purpose of the Report**

1. To provide an update on Deprivation of Liberty Safeguards (DoLS) and Deprivation of Liberty in supported living and home environments, including outcomes for people.

**Summary**

2. DoLS came into force in England and Wales on 1<sup>st</sup> April 2009. They were introduced as amendments to the Mental Capacity Act 2005 (MCA) via the Mental Health Act (MHA) 2007). They were a response to a breach of the European Convention on Human Rights (ECHR). The ECHR found that UK law did not give adequate protection to people who lacked mental capacity to consent to care or treatment and who required some restrictions on their liberty to keep them safe.
3. DoLS are a legal framework which exists to ensure that individuals who lack the mental capacity to consent to the arrangements for their care, where such care may (because of restrictions imposed on an individual's freedom of choice or movement) amount to a "deprivation of liberty", have the arrangements independently assessed to ensure they are in the best interests of the individual concerned.
4. The Local Authority has a statutory responsibility as Supervisory Body for operating and overseeing the MCA DoLS. This includes assessing and granting, or otherwise, of all DoLS authorisations received from Managing Authorities. The Managing Authority is the person or body with management responsibility for the hospital or care home in which a person is, or may become, deprived of their liberty. It is the responsibility of the Managing Authority to request authorisation of DoLS and to implement the outcomes, comply with any conditions and monitor the Relevant Person's Representative (RPR) contact with the individual.

**Recommendation**

5. It is recommended that that Scrutiny note the content of this update and the implications

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## MAIN REPORT

### Information and Analysis

#### The Supreme Court Judgement

6. On 19th March 2014 the Supreme Court overturned the Court of Appeal in the cases of P v Cheshire West Council and P & Q v Surrey County Council [2014].
7. The Supreme Court Judgement referred to the “acid test” to determine whether a person is being deprived of their liberty. This consists of two questions:
  - a. Is the person subject to continuous supervision and control?
  - b. Is the person free to leave?
8. If the person meets both these criteria then they are being deprived of their liberty.
9. The Supreme Court Judgement in effect lowered the threshold for what constitutes a DoL. This resulted in a significant increase in the number of requests for authorisations as more individuals met the criteria for being deprived of their liberty. This is reflected in the figures below.
10. Since the Supreme Court Judgement there has been a tenfold increase in applications across England and Wales.

#### Darlington Figures

	2012-13	2013-14	2014-15	2015-16
Granted	40	57	755	800
Not granted	29	40	161	193
Total	69	97	916	993

11. There were an additional 92 requests received for 2015/16 which did not proceed for various reasons including: incorrectly referred to DBC (should have been a different local authority), review requests, admitted to hospital, person had moved back home, admitted to hospital, discharged from hospital or had died.
12. In term of urgent and standard authorisation requests for the year 2015/16, 637 of these were urgent and 448 were standard. The total of the urgent and standard equals 1085. This is the total number of requests received for the year. The above column only includes the requests that progressed to an outcome of either granted or not granted. The remaining 92 requests received did not progress further as above. Urgent requests have to be completed within 7 days, with a possible extension up to 14 days and standard requests have to be completed within 28 days.

#### Challenges

13. Due to the increase in the number of requests for authorisation, additional resources have been required to ensure that all necessary work is completed within

timescale. If authorisations are not completed within timescales then the Local Authority is failing to meet its statutory obligations and this could place the Local Authority at risk of legal challenge. This might include judicial review or financial penalties as well as damage to reputation.

14. In order to avoid this Darlington Borough Council have taken a proactive approach to manage requests for authorisations with the aim being to complete as many as possible within timescales.
15. In the recently NHS digital comparator publication dated 28/9/16 which compared similar local authorities Darlington is doing well. As an example 98% of applications in Darlington were reported as being completed within 3 months. The peer group average was 82% and England average 76%.
16. There has been a significant impact on the budget for Deprivation of Liberty as it has involved using independent Best Interest Assessors (BIAs) at a considerable cost but the alternative would be leaving people unlawfully deprived of their liberty. In addition there is a cost for Mental Health Assessors as all DoLS also require assessments to be carried out by them. The costs prior to Cheshire West in 2013/14 and in subsequent years are shown below:

	2013/14	2014/15	2015/16	Predicted for 2016/17
Independent BIA's	0	£84,442.84	£108,441.33	£141,342
Mental Health Assessors	£56,653.90	£125,052.00	£138,420.54	£179,789

17. There is a plan in place to work towards reducing this cost by limiting our reliance on independent BIAs. This includes making better use of the BIAs within Darlington Borough Council, training more social workers to become BIAs and changing how we pay independent BIAs.

### **Deprivation of Liberty in settings other than care homes or hospitals**

18. The Deprivation of Liberty Safeguards cannot be used in settings other than care homes or hospital. However, people can still be deprived of their liberty in other settings, such as supported accommodation or within their own home. In these situations an application has to be made to the Court of Protection (COP) for the deprivation to be considered and authorised if appropriate.
19. In Darlington prior to the Supreme Court Judgement in Cheshire West there were 7 COP orders in place in relation to deprivation of liberty. These were for 2 children and 5 adults with learning disabilities and an order was granted in all cases. The reasons included move to more appropriate accommodation due to risks posed by family members, physical restraint being used within the family home, to implementing a support plan preventing a client engaging in sexual relations with others due to lack of capacity to consent.
20. After the Cheshire West ruling the Lifestages Service identified clients that would potentially be deprived of their liberty due to their circumstances meeting the "acid test". In 2014-2015 Darlington Borough Council made 1 application to COP to

authorise a deprivation of liberty in a supported living setting and 21 applications for children in residential settings. In 2015-2016, 6 applications were made. 1 was in a residential setting, but due to the high levels of physical restraint necessary, a decision was made to apply to COP rather than use DoLS. From April 2016 to the present, 5 applications have been made and a further 15 applications are in the process of being submitted.

## **Challenges**

21. The need for COP applications for client's living in supported living settings and their own home has significantly impacted on the workload of the Lifestages Service. At present it is assessed that there are currently 61 adults living in supported living settings where a COP application for a deprivation of liberty may be required, and a further 60 adults living in their own home, or family home.
22. This additional work for the staff within the Lifestages Service and can be very time consuming. There is also an impact, both on time and costs, and on the legal service who have to take all these applications to the COP.
23. In addition there are delays within the COP itself due to the volume of applications. In general an authorisation for a deprivation of liberty in supported living is taking approximately 6 months.
24. The Lifestages service has plans in place for completing assessments and, if required, court applications for individuals who live in supported living settings and or in their own home or with family. As part of this process, social workers are working with individuals to support them to be as independent as possible and to put in place the least restrictive support plans, which may mean that some people do not need to be deprived of their liberty.

## **Examples of positive outcomes for people deprived of their liberty**

25. BIA assessments can identify failings in the care for vulnerable adults and can result in real change and improvements to delivery of care. Examples are listed below:
  - a. A person labelled and treated by a care provider as lacking capacity was found to have capacity when properly assessed independently.
  - b. Improved social activities and access to community
  - c. Triggering a review of an inappropriate placement
  - d. Review of medication to manage behaviour
  - e. Specialist treatment requested (Occupational Therapy)
  - f. Inappropriate physical restraint reduced

## **Examples from BIA cases**

26. A person was found to have capacity and all restrictions that the care home had placed on them were lifted with no negative consequences and the person chose to remain in the care home but with a better quality of life.
27. Identified that an individual was placed in a care home that was not suitable and that they were at greater risk of harm because of this. The BIA was able to recommend that an alternative placement should be found resulting in the person moving to a more suitable placement and the risk of harm removed.
28. A BIA found the financial arrangements in place were leaving the person vulnerable to financial abuse and unnecessary financial outlay. A safeguarding adults concern was raised which was investigated by the local authority. As a result of this investigation actions were taken to remove the risk of further financial abuse.
29. A BIA was concerned about use of antipsychotic medication to manage behaviour and requested a review of medication which considered whether there was a less restrictive option.
30. Numerous cases where BIAs identify when a person is objecting to their placement which then triggers a referral to Court of Protection for them to decide if the person should remain in that placement or not. Had BIAs not identified this then the person would not have had their cases heard in COP.

## **Advocacy**

31. The Relevant Person's Representative role is a crucial part of the DoLS to protect the right of the individual. This role offers representation, support or protection for the individual and their family to give them a voice within the system. This includes supporting challenges to authorisations or conditions. In Darlington for the authorisations granted for the period 2015-16, 196 cases were represented by a paid advocate as there was not an appropriate family member to take on this role.

## **Law Commission Review of DoLS**

32. It was recognised that the current DOLs is poorly drafted and overly complicated and a review was commissioned. The next stage of the Law Commissions proposals for the review of DoLS, which will be the publication of the Commission's final report and draft legislation, has been postponed again until March 2017. It is unknown at the moment what the proposed new legislation will look like and what difference this will make to the number of applications or how these are managed. If the proposed new legislation is announced in March 2017 it is estimated that it will take up to two years to implement.