

ADULTS SCRUTINY COMMITTEE

27th OCTOBER 2020

DEPRIVATION OF LIBERTY UPDATE

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 1st 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, 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.
5. DOLS assessors were directed by DoH guidance not to undertake face to face assessments unless necessary. Further guidance was issued on the 8th September recommending the reintroduction of face to face assessments where it was practicably possible. COVID 19 restrictions impacted on the DOLS process. There were some difficulties in completing robust capacity assessments due to completing these remotely. There was also an impact on some RPR's being able to monitor the relevant person. In anticipation of the change in guidance, and following an updated risk assessment, Darlington Borough Council restarted face to face assessments from the beginning of August.

6. DOLS is planned to be replaced by Liberty Protection Safeguards (LPS) in April 2022. DoH provided a revised timescale after the original implementation date of October 2020 was postponed. This was a DoH decision as further considerations were being made. The development of LPS practice guidance by the DoH is ongoing and will be consulted upon although no date had been given.

Recommendation

7. 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

8. 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].
9. 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?
10. If the person meets both these criteria then they are being deprived of their liberty.
11. 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.
12. 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	2016-17	2017-18	2018-19	2019 - 20	2020-Aug 20
Granted	40	57	755	800	744	841	824	800	229
Not granted	29	40	161	193	61	45	41	51	11
Total	69	97	916	993	805	886	865	851	240

13. The total number of DOLS requests for 2019/20 was 1,552 including 701 requests received which did not proceed to authorisation. The above column only includes the requests that progressed to an outcome of either granted or not granted. Also note the 2020 figure represents 5 months data, compared to the full year figures.
14. National statistics show that in England during 2018 / 2019 there were 240,455 thousand applications for DOLS. 200,225 were approved DOLS in England. This has shown an average increase of 15% per year. The North East of England has consistently had the highest levels of DOLS requests and authorisations.

Challenges

15. Increases in the number of requests, required additional resources to be sourced in 2018/19. If authorisations are not completed within timescales the Local Authority is failing to meet its statutory obligations and this could place the Local Authority at risk of legal challenge. This may include judicial review or financial penalties as well as damage to reputation.
16. In order to avoid this, Darlington Borough Council have taken a proactive approach to manage requests for authorisations with the aim being to complete within timescales.
17. We have also trained Social Workers to undertake the, Best Interest Assessor's role, (BIAs), within Darlington Borough Council. We have, as a result, increased the number of trained staff who are available to undertake the role. A further BIA was employed into the BIA team in 2018 increasing the staffing to three full time equivalents.
18. In 2019/20 there was a further pressure in other areas of essential business and two of the three full time equivalent BIA's temporarily supported another team. The authority maintained its statutory responsibility by using independent BIA's. This did result in the expenditure on independent BIA's returning to previous levels (see table below). Currently in 2020/21 all BIA's in the team have returned to their roles.
19. There has been an impact on the budget for Deprivation of Liberty due to using independent BIAs, however the alternative would be leaving people unlawfully deprived of their liberty. To ensure consistency, and manage cost, three independent BIA's have been authorised by Adult Social Care at an agreed cost. In addition there is a cost for Mental Health Assessors, as all DoLS requests, require a Mental Health assessment to be carried out as part of the process. The costs prior to Cheshire West in 2013/14 were 0 for the use of independent BIA's and £56,653.90 for Mental Health Act Assessors and in subsequent years:

	2014/15	2015/16	2016/17	2017/18	2018/19	2019/20
Independent BIA's	£84,442. 84	£108,441 .33	£154,141. 84	£140,048. 02	£115,633 .87	£144,027. 38
Mental Health Assessors	£125,052 .00	£138,420 .54	£162,814. 57	£143,434. 24	£165,000 .00	£177,077. 70

20. The number of requests for DOLS authorisation has significantly increased. There is a proportion of assessments that have been commenced but were not required to be concluded which has had a further financial impact to the council.

COVID Impact

21. The Original guidance from DoH in March 2020 relating to DOLS and COVID 19 pandemic directed that DOLS assessments should not be conducted face to face unless absolutely necessary. This guidance was amended in September 2020 and states all DOLS assessments should be conducted face to face unless there was no other option, this would include care homes where a COVID 19 outbreak is being actively managed.
22. COVID 19 impacted upon practice due to the limitations relating to visits between March 2020 and August 2020. Capacity assessments have been more challenging for Mental Health Act Assessors due to individuals understanding being more difficult to evaluate remotely. Assessors have been permitted, as per the guidance, to use information from previous DOLS assessments to inform the Capacity assessment.
23. The role of the Relevant Person's Representative (RPR) is to maintain contact with the relevant person and to represent and support the person in all matters relating to the deprivation of liberty safeguards. Some RPR's nominated to represent the individual are family members, and in many cases during March 2020 to August 2020, care homes have not been able to receive visitors due to the pandemic. This issue is now being actively addressed with the reintroduction of RPR's and best interest assessors into care homes and cases being reviewed. In addition the Safeguarding Manager has highlighted the importance of this with care homes.
24. Colleagues within the commissioning and contracts team have been actively supporting care homes during the pandemic in a number of areas including the provision of PPE and infection control. The relationships that have been developed during this time will assist in supporting care homes in ensuring every effort will be made in accommodating Dols assessors and RPRs to carry out their duties and ensure care home residents are safe and protected.

Deprivation of Liberty in settings other than care homes or hospitals

25. 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. It is expected when LPS is implemented in April 2022 this will change and consideration of deprivation will be considered for all environments. During COVID, there have been a number of community DOLS identified, and Social Care have been able to complete all documents and have logged these with the court. Since COVID, the court process, whilst having been disrupted, has seen minimal delays. The court has adapted there systems to support by allowing electronic applications.

Advocacy

26. 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, of the authorisations granted for the period, 1 April 19 – 31 March 2020, 186 cases have been represented by a paid advocate as there was not an appropriate family member to take on this role. In the year to date from 1 April 2020 to 30 September 2020 this number is 81. It should be noted that these are based on the number of authorisations during the time periods and some individuals could have had more than one authorisation during this period and the paid RPR role would continue.

Law Commission Review of DoLS and introduction of Liberty Protection Safeguards (LPS)

27. It is nationally recognised that the current DOLs legislation is overly complicated. The government tasked the Law Commission to review the Deprivation of Liberty Safeguards. In 2017, the Law Commission found that there was a compelling case to replace the DoLS scheme. As a result the Law Commission recommended that the DoLS scheme be replaced with a new regime termed the LPS.
28. Statutory Guidance for LPS is being developed by the DoH and will be consulted upon, although no date has been set. Change is required which will be supported by regional ADDAS lead meetings and oversight. A project group has been created including Adult Social Care, Children's Social Care, Commissioning, CCG, Legal, Training and Development and Colleagues from Systems. This is currently on hold until the Statutory Guidance is available. LPS is planned to be implemented for April 2022.
29. The main areas of change with LPS:
- The legislation will include 16yr olds and over.
 - Local Authorities are responsible for approvals apart for those in NHS hospitals and Continuing Health Care, (CHC), funded individuals.
 - Legislation includes all settings e.g. Hospital, care homes, extra care, supported living, own homes, day care, day centres, foster care settings, residential schools and children's homes.
 - Local Authorities are responsible to ensure there are enough Approved Mental Capacity Act Professionals (AMCAP) and Independent Mental Capacity Advocate (IMCA) for all responsible bodies.
 - New AMCAP role will have very specific duties, e.g. objections, any individual in independent hospitals, and can complete pre-authorisation reviews.
 - All Social Work staff will be responsible for identifying a deprivation.
 - Local Authorities are responsible for Independent Hospitals, Self Funders, any individual not CHC or not in hospital and anyone on section 117.

- There will be a requirement for social workers to complete capacity assessments specifically relating to care arrangements.
- RPR role is anticipated to change. Where appropriate family member can represent an individual. If this is not possible an IMCA must be appointed.
- LPS will be part of every day care management.

30. The impact on this will mean that all social workers in children's (16 +) and adults will need due regard to deprivation for individuals in all areas. The BIA role, will cease and all LPS work will be required to be completed by the designated Social Worker. All staff will require additional training.

Summary

31. Darlington Borough Council continue to fulfil the statutory responsibility for DOLS. There will be further monitoring on the impact of COVID 19, and the implications to face to face visits, if there are further restrictions, or care homes are unable to receive visitors.
32. DOLS legislation is planned to be removed in April 2022 to be replaced with LPS. A task and finish group will continue to meet, and will facilitate the change and implementation of the new legislation.