

Local Members' Interest
N/A

## **Audit and Standards Committee – Wednesday 12 June 2019**

### **Deprivation of Liberty Safeguards**

#### **Recommendations:**

Following the recommendations made and agreed by Cabinet in May 2019 in respect of the Local Government and Social Care Ombudsman report dated March 2019 it was agreed that the report would also be considered by the Audit and Standards Committee. Cabinet agreed to:

- a. Review the legislation amending the Mental Capacity Act 2005 and the associated codes of practice in relation to Deprivation of Liberty Safeguards when finalised.
- b. Produce an action plan to implement this legislation in compliance with the recommendations of the Local Government and Social Care Ombudsman as set out in paragraph 18 and on page 3 of their final report dated 8 March 2019.
- c. In the interim amend the approach to Deprivation of Liberty Safeguards to complete full assessments on medium and low priority cases if resources allow and use additional one-off funding to support new full assessments and reduce the back-log of full assessments.
- d. Extend the Deprivation of Liberty Safeguards triaging process to community deprivation of liberty and prioritise assessments that are high priority individuals.

#### **Report of the Director of Health and Care**

#### **Reasons for Recommendations:**

#### **Deprivation of Liberty Safeguards**

1. The Mental Capacity Act 2005 (MCA) was introduced in April 2007 and fully implemented in October 2007. It is a statutory framework to protect people who may lack the capacity to make certain decisions – it makes it explicit when public bodies must make decisions on a person's behalf because they are unable to do so and makes it a duty for public bodies to make those decisions in the person's best interests.
2. It was recognised at the time that there was a gap in the provisions of MCA, relating to people (who were not eligible for detention under the Mental Health Act) who needed to be deprived of their liberty in a hospital or care home in order to provide their treatment and care safely and effectively. Specifically, MCA did not grant powers to allow this deprivation to occur, nor did it put safeguards in place to protect people in this situation.
3. The Mental Health Act 2007 (MHA), which received Royal Assent in July 2007, included an amendment to the MCA to introduce additional Deprivation of Liberty Safeguards to fill this gap from 1<sup>st</sup> April 2009.

4. The Deprivation of Liberty Safeguards (DoLS) provide additional protection for the most vulnerable people living in residential homes, nursing homes or in hospitals; they enshrine in law the requirement that care will always be provided in a way that is consistent with the human rights of people lacking capacity, who are not otherwise protected or safeguarded through the use of the Mental Health Act or Court of Protection powers.
5. DoLS apply to people:
  - a. aged 18 and over;
  - b. who suffer from a mental disorder or disability of the mind – such as dementia or a profound learning disability;
  - c. are in hospitals or care homes whether placed under public or private arrangements;
  - d. who lack the capacity to give informed consent to the arrangements made for their treatment and / or care;
  - e. for whom deprivation of liberty is considered, after an independent assessment, to be necessary in their best interests to protect them from harm.
6. DoLS were designed to protect the interests of an extremely vulnerable group of service users and to:
  - a. ensure people can be given the care they need in the least restrictive regimes;
  - b. prevent arbitrary decisions that deprive vulnerable people of their liberty;
  - c. provide safeguards for vulnerable people;
  - d. provide them with rights of challenge against unlawful detention; and
  - e. avoid unnecessary bureaucracy.
7. If there is no alternative but to deprive such a person of their liberty, the DoLS require that a hospital or care home (the Managing Authority) must apply to the Local Authority for authorisation. The Local Authority is known as the Supervisory Body.
8. The Safeguards add an extra requirement for Independent Mental Capacity Advocates (IMCAs) to represent people's interests throughout the assessment process (if the people being assessed have nobody other than paid carers to fulfil this role or as a support to those family members/friends). The Local Authority has a duty to ensure that the IMCA service is commissioned to meet this requirement.
9. On the 19 March 2014 a Supreme Court judgement in P v Cheshire West and Chester Council and another and P and Q v Surrey County Council changed the definition of what constituted a deprivation of liberty as defined within the Mental Capacity Act 2005. A wider definition of restrictions - defined as being: *"The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements"*.
10. This decision resulted in a significant increase in DoLS requests to all Local Authorities in England. In 2017/2018 there was a seventeen-fold increase to about 227,400 requests, from 13,000 requests in 2013/14. Nationally there is a backlog of 126,000 DoLS applications.
11. This resulted in many Local Authorities prioritising DoLS applications in order to ensure that the highest priority people could be given a full assessment. The Association of

Directors of Social Services produced guidance to assist Local Authorities with the prioritisation process.

12. The Law Commission in 2017 recommended that the DoLS be repealed and replaced. The current legislative framework has been deemed not fit for purpose. The Mental Capacity (Amendment) Bill has now passed through the houses of parliament and has received Royal Assent. This is expected to come into force in 2020 although no specific date has been announced. Consultation relating to the associated Code of Practice is expected over the summer. An amended impact assessment is expected shortly (June 2019) which will contain resource information relating to the new legislation. (Information relating to the replacement legislation can be found in Appendix c).

### **Management of Deprivation of Liberty Safeguards in Staffordshire**

13. All applications for DoLS are initially assessed by a social care professional and triaged into three categories: high, medium and low (Appendix B). Cabinet decided in 2016 to proceed to full assessments only for those applications considered high priority in order to focus limited resources and ensure that full assessments could be completed for the most vulnerable and highest risk individuals.
14. An example of a high priority referral is Mr A who has indicated that he wishes to move from the care home he has been placed in following discharge from hospital and wants to return to live at home. Mr A is getting very upset and unsettled and constantly attempts to leave the care home to go home. Currently he remains in the care home following a recent review. An example of a low priority referral is Mrs B who chose to move into a care home six years ago following a decline in her general health and wellbeing. Mrs B who now lacks capacity is settled in the care home with regular contact with family.
15. In 2018/19 the Council had 3451 applications for DOLS, of which 1153 (33%) were triaged as high priority. 1144 full assessments were completed during this 12-month period. The backlog of full assessments at 31 March 2019 from this and previous years is shown in table 1.

**Table 1: backlog of DOLS full assessments at 31 March 2019**

<b>High priority</b>	<b>88</b>
<b>Medium priority</b>	<b>656</b>
<b>Low priority</b>	<b>2827</b>
<b>Total</b>	<b>3571</b>

### **Local Government Social Care Ombudsman (LGSCO) investigation**

16. During 2018 the LGSCO launched an investigation into management of DoLS in Staffordshire. This was in the absence of any complaint or specific concern about risk to any individual and arose after the prioritisation process came to their attention during their work on another enquiry.
17. The findings of the LGSCO investigation were published in March 2019. The report states:

*The Council has acted with fault in deciding not to assess low and medium priority Deprivation of Liberty Safeguards applications. The Council is also taking too long to deal with urgent applications. This is causing a potential injustice to the thousands of people in its area who are being deprived of their liberty without the proper checks that the restrictions they are subject to are in their best interests.*

*The Council decided to stop assessing a majority of DoLS requests in response to financial pressures. This is fault because the Council is failing to comply with the legislation and guidance that is currently in place, the Mental Capacity Act 2005 and DoLS Code of Practice.*

*This is causing a potential injustice to about 3,000 people who have had no or delayed access to the proper legal process designed to check that any decision to deprive a person of their liberty is:*

- *properly made;*
- *lawful; and*
- *implemented for only as long as necessary.*

18. The report acknowledges comments made by the Council:

*The Council says it considers no individual has complained about the Council's policy. It also says that:*

- *the Council's triage system ensures no harm to individuals is likely because it assesses those cases where there is a real possibility that a person may be deprived of their liberty inappropriately;*
- *in the unlikely event a person was deprived of their liberty inappropriately, they would have a court remedy and would probably be entitled to compensation.*

19. The LGSCO made the following recommendations – set out on page 3 of their report:

- a. An action plan should be produced to set out how Staffordshire County Council is going to deal with DOLS requests in compliance with amended legislation once in force and how it is going to deal with the backlog of unassessed DoLS requests.
- b. This action plan should be produced within three months of the amendment to the Mental Capacity Act 2005 being finalised by Parliament.
- c. The action plan should take into account any changes to the law and Government guidance.
- d. The action plan should include a mechanism for addressing those cases where the request is eventually not approved, and an unlawful deprivation of liberty has had a potentially harmful impact on that person.
- e. Staffordshire County Council should review the action plan should there be any further changes to the law or Government guidance.

## **Next Steps**

20. The Council accepts the findings and recommendations of the LGSCO and will implement the recommendations as set out in paragraph 18 and on page 3 of their final report dated 8 March 2019.
21. The Council maintains that the process of initial assessment, triage and then full assessment focused on high priority cases is appropriate and in line with practice elsewhere. This process has been managing risk effectively and there is no evidence that any harm has arisen or that any individual has suffered an injustice.
22. The additional cost of completing full assessments for all new DOLS applications would be £1.5m to £2.0m annually, and the additional cost of completing full assessments for the backlog of medium and low priority applications would be in the range of £1.5m to £2.0m as a one-off sum. The Council does not consider that this is a priority for use of limited resources and will therefore continue with an approach of focusing full assessments on those applications considered high priority.
23. Currently available funding for DOLS of £250,000 for Best Interests assessors (BIA) annually will be maintained and the recommendation is that if resources allow then full assessments will be extended to medium and low priority applications. £50,000 of one-off funding will be made available to add additional resource into the DoLS team to support new full assessments and reduce the back-log of full assessments.

### **Deprivation of liberty in the Community**

24. Deprivation of liberty may also occur in people's homes where the State is responsible for making arrangements for their care. Deprivation of liberty in settings outside of care homes and hospitals must be authorised by the Court of Protection.
25. The Council has around 450 people with a learning disability in supported living arrangements and other community settings to whom a community deprivation of liberty may apply. Each community deprivation of liberty assessment with an application to authorisation to the Court of Protection takes around 37 hours. As a part of the process the Council is required to provide evidence of 'unsoundness of mind', which must be completed by a medical professional, and for which there is an additional fee of around £100. There is also a requirement to pay an application fee of £400 to the Court of Protection. The Court of Protection may authorise community deprivation of liberty for up to 12 months, at which point a further application must be made.
26. There have been 31 requests by a single care provider for the Council to undertake community deprivation of liberty assessments, alongside further requests from solicitors acting on behalf of individual people. 25 community deprivation of liberty applications have been authorised by the Court of Protection and a further 18 are currently ongoing.
27. In order to ensure that community deprivation of liberty assessments can be completed for the most vulnerable and highest risk individuals the recommendation is to extend the DoLS triaging process to community deprivation of liberty and prioritise assessments that are high priority. This was agreed by cabinet.

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**List of Background Papers/Appendices:**

**Appendix A** - Local Government and Social Care Ombudsman Report

**Appendix B** - Prioritising Tool

**Appendix C** - Information on MCA Amendment Bill

**Appendix D** - Community Impact Assessment