

NORTH YORKSHIRE COUNTY COUNCIL

CARE AND INDEPENDENCE OVERVIEW AND SCRUTINY COMMITTEE

2 July 2015

Deprivation of Liberty Safeguards

1.0 Purpose of Report

- 1.1 This paper briefs Members of the Deprivation of Liberty Safeguards and its significance for the Directorate.
- 1.2 This issue is of particular significance for the Committee because:
- a) It affects some of the most vulnerable adults in our communities.
 - b) Safeguarding adults is a particular responsibility for Members of this Committee.
 - c) Latest developments in connection with Deprivation of Liberty Safeguards are having a direct impact upon Directorate obligations and resources. In addition to recognising the additional burdens, it is important that the Committee reassures itself that all possible steps are being taken to respond proactively to the recent legal requirements.

2.0 BACKGROUND

- 2.1 Article 5 of the Human Rights Act states that 'everyone has the right to liberty and security of person. No one shall be deprived of his or her liberty [unless] in accordance with a procedure prescribed in law'. Some people who live in hospitals and care homes cannot make their own decisions about their care or treatment because they lack the mental capacity to do so. Sometimes, caring for and treating people who need extra protection may mean restricting that freedom. The Deprivation of Liberty Safeguards (DoLS) is the procedure prescribed in law when it is necessary to deprive of their liberty a resident or patient who lacks capacity to consent to their care and treatment in order to keep them safe from harm.
- 2.2 The DoLS Safeguards apply to people in England and Wales who have a mental disorder and lack capacity to consent to the arrangements made for their care. They were introduced in 2009 and provide legal protection for vulnerable people who are, or may become, deprived of their liberty within a hospital or care home. They exist to provide a proper legal process and suitable protection in circumstances where, for a person's best interest, deprivation of liberty appears to be unavoidable.

2.3 DoLS apply to anyone:

- aged 18 and over;
- who suffers from a mental disorder or disability of the mind – such as dementia or a profound learning disability;
- who lacks the capacity to give informed consent to the arrangements made for their care and / or treatment; and for whom deprivation of liberty (within the meaning of Article 5 of the European Commission for Human Rights (ECHR)) is considered after an independent assessment to be necessary in their best interests to protect them from harm.

2.4 The Deprivation of Liberty Safeguards (DoLS) can only apply to people who are in a care home or hospital. This includes where there are plans to move a person to a care home or hospital where they may be deprived of their liberty. The care home or hospital is called the Managing Authority in the Deprivation of Liberty Safeguards.

2.5 Where a Managing Authority thinks it needs to deprive someone of their liberty, they have to ask for this to be authorised by a Supervisory Body. They can do this up to 28 days in advance of when they plan to deprive the person of their liberty.

2.6 For care homes and hospitals the Supervisory Body is the local authority where the person is ordinarily resident. Usually this will be the local authority where the care home is located unless the person is funded by a different local authority.

2.7 The Managing Authority must fill out a form requesting a standard authorisation. This is sent to the Supervisory Body which has to decide within 21 days whether the person can be deprived of their liberty.

2.8 The Supervisory Body then appoints assessors to see if the conditions are met to allow the person to be deprived of their liberty under the safeguards. Staff who undertake assessments of whether to make someone subject to DoLS are known as Best Interests Assessors (BIAs).

2.9 In 2013/14 NYCC undertook 113 DoLS Best Interest Assessments.

3.0 KEY POINTS FROM THE SUPREME COURT RULING

3.1 On 19 March 2014, the Supreme Court handed down its judgment in the case of “P v Cheshire West and Chester Council and another” and “P and Q v Surrey County Council”. The judgment is significant in deciding whether arrangements made for the care and/or treatment of an individual who might lack capacity to consent to those arrangements amount to a deprivation of liberty:

Revised test for deprivation of liberty:

The Supreme Court clarified that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights if a person is subject both to continuous supervision and control and not free to leave. This is referred to as the 'acid test', and the focus is not on the person's ability to express a desire to leave, but on what those with control over their care arrangements would do if they sought to leave.

Deprivation of liberty in "domestic" settings

The Supreme Court held that a deprivation of liberty can occur in domestic settings, such as supported living arrangements in the community. This must be authorised by the Court of Protection.

- 3.2 The effect of this judgment is a significant increase both in the number DoLS assessments, and the number of applications to the Court of Protection.
- 3.3 The Law Society was commissioned to write a report regarding the interpretation of "continuous supervision and control", which was published in March this year. This document makes clear that the broader interpretation of the definition is the appropriate one, and makes clear the need for local authorities to also be proactive in taking cases of Deprivation of Liberty in Supported accommodation and Domestic settings, to the Court of Protection. This report, coupled with the lack of any expected case law that again addresses the issue, strongly suggests that we have this current situation for at least 3-4 years.

4.0 INITIAL ASSESSMENT OF THE KEY ISSUES FOR NYCC

Potential Increase in requests

- 4.1 The Association of Directors of Adult Social Services (ADASS) had advised that Local Authorities should in the year 2014/2015 expect a **10 fold increase** in the number of DoLS referrals compared to the previous year, but predicting the potential increase in the number of DoLS requests is complex and speculative. The outcome, for NYCC, was in fact a **13 fold increase**.
- 4.2 As a consequence of the "acid test" it is likely that the number of patients being detained under the Mental Health Act will increase, which will significantly impact on the number of people requiring aftercare in accordance with section 117 of the Mental Health Act, although the implications of this are not yet fully understood. Similarly, the implications for the increased applications to the Court of Protection are not fully understood.
- 4.3 During last financial year 1,790 authorisations were requested, resulting in 1,497 being progressed to the assessment stage. Of these, 1,082 breached the statutory timescales.
- 4.4 In addition to this, there are the applications that will need to be made to the Court of Protection re a Deprivation of Liberty in Supported Living and in

Domestic settings. Initial scoping has identified 201 cases of people with learning disabilities, with an unknown quantity of individuals who are older people or people who have mental health support needs.

5.0 Significant Risks And Mitigation

Risks associated with increased referrals

5.2 There are a number of risks arising from the increased numbers, taking into account the requirements within the Mental Capacity Act and our statutory responsibilities.

- There is currently a waiting list of 179 Best Interest Assessments and 139 Mental Health assessments.
- Key Staff -The Mental Capacity Coordinator and Mental Capacity Project Officer - have been diverted from their roles to focus on DoLS applications and Best Interest Assessments, which is having a negative impact on the wider aspect of the Local Authority obligations within the Mental Capacity Act.
- Large numbers of authorisations are being requested at the same time causing a strain to complete assessments within the legislative timescales (assessments must be completed within 7 or 21 days), with potential cost implications if timescales are not met. Requests for assessments from providers are being carefully managed, risk assessed and prioritised.
- There is the potential for erosion of some of the elements of the Mental Capacity Act principles and practice, as well as quality assuring the volume of applications which will become increasingly difficult.

6.0 ACTIONS TO MANAGE THE INCREASED DEMAND

6.1 Following the initial assessment of the key issues for NYCC, an action plan has been developed around maximising existing resources, increasing resources and managing risks to ensure the response is in line with legislative requirements. For those aspects which are managed in-house, the increased demand is challenging, and has to be balanced with the need to continue to manage existing service delivery. Steps being taken include:

i. Reconfiguring In-House Services

By enhancing current staff skills, greater management input where appropriate and increasing staff capacity generally, for example, will ensure existing qualified BIA's skills and practice are refreshed and training is maximised and recurring. Increasing the number of staff doing the accredited training necessary to achieve the BIA qualification and therefore the number of staff able to undertake assessments.

ii. Purchased Resources

- The market for Independent BIA's may be able to pick the outstanding assessments, however, there is active competition between authorities who are all experiencing increasing numbers of requests. As a result, costs are increasing per assessment. Since February, the balance has further moved towards independents and agencies undertaking a greater proportion of assessments and meaning greater costs for the authority.

Workers	Number of Assessments between April 2014 and March 2015
In House	507
Casual (NYCC Staff)	297
Independent	214
Agency	421
Unallocated	58
Total	1497

iii. Risk Management

- Risk is being managed by operating a risk management framework regarding the prioritisation of applications as agreed as advised by ADASS.

iv. Working with partners and other relevant organisations

- We are dealing on a daily basis with enquiries from providers, and are managing discussions around "bulk applications" from organisations. A number of communications have been issued to providers, and the updated DoLS training materials are available to them. In addition to the internal DoLS review group, a partnership meeting with representatives from Clinical Commissioning Groups, acute trusts, mental health trusts, independent providers, CYPS, Partnership Commissioning Unit, and NYCC legal team, meets on a bi-monthly basis.

7.0 Summary of impact on the work of the Mental Capacity Act (MCA) Forum

7.1 All MCA activity continues to be centred on the increase in allocations for Deprivation of Liberty assessments. The pressure recognised at a national level, is impacting on all connected and other services involved i.e;

- Reduction in quality of information on assessment requests
- Pressure on capacity to consult effectively with people and their carers involved in the process.

- Sheer volume has impacted upon quality and accuracy of reports
- Delays in appointing paid Relevant Persons Representatives – a statutory right
- Inability to appoint paid Relevant Persons Representatives in some out of County placements
- Overall the number of informal and formal complaints have increased
- Safeguarding alerts have been raised by the IMCA Service re poor MCA implementation.
- Impact of Court of Protection applications is unknown but 201 individuals have been initially identified and the process begun on a small cohort.
- Full impact of people in hospital and in domestic settings is yet to be fully realised.

8.0 Implications

Resource And Finance Implications/Benefits

Decisions to increase resources

- 8.1 Based on modelling, it is anticipated that there is a significant additional budget requirement for 2014/15 as agreed. There will also be additional increased costs associated with the Court of Protection applications, as further guidance is awaited, and does not take into account the number of DoLS reassessments which will be required in 2015/16, as a DoLS authorisation is for a maximum of 12 months.
- 8.2 The increasing costs fall into two main areas – the additional purchase of external provision, and additional resources to support the DoLS processes. The latter includes increasing the training as previously mentioned, increasing the capacity of the Business Support staff, and providing additional support to the MCA Coordinator to assist with the management of the DoLS process and ensure the wider role of the Mental Capacity Act does not lose focus.
- 8.3 Whilst it has recently been agreed that the Law Commission will undertake a review of DoLS, with a view to fundamentally changing the legislation, the full cost to the authority will not be known until the outcome of this work, expected in 2017, with the alternative being implemented between 2018 - 2020.
- 8.4 Original budget for MCA/Dols was £275k. Originally the request was for an additional budget of 500k to meet demand. The actual outturn year end figure for 14/15 was £45,810 further overspent.
- 8.5 For 15/16 predicted budget estimate to include is full year effect of staff; all cases to be reviewed based on 62% of last years plus new referrals is £1.15m.

8.6 Performance

- 8.7 Measuring NYCC's performance or benchmarking is quite difficult as there has become a reluctance to share what is very sensitive information across Supervisory Bodies. What we do know is that there is a significant prevalence of requests remaining unallocated across the region. This ranges from 6% of the requests to 45% across the 9 local authorities, with NYCC at 17%. 5 of these local authorities had higher rates of unallocated work.
- 8.8 We also know following an FOI request published in the Community Care journal is that the issues we are facing are repeated across the country. This included significant increase in demand; lack of BIA's available; Increase in expenditure; prioritising referrals is common practice; Risk of legal challenges is increased; Risk of destabilising other key areas of work through demands on the most highly trained staff; 50% of cases are not completed on time although bit reports that 23 local authorities met all timescales in 14/15 so far. Please also see Appendix 2 re some provisional figures based on the Q3 collection
- 8.9 Health and Social Care Information Centre/Omnibus returns are published on a regional basis which makes it very difficult to accurately gauge our performance against neighbouring authorities.
- 8.10 The Directorate commissioned an independent review of the above contingencies and their implementation against the ADASS advice and experience in other local authorities. This review indicated that the actions taken were as effective as could be expected given this unforeseen surge in applications. It also benchmarked the performance as good alongside that of the region.

9.0 Conclusions

- 9.1 All local authorities have faced a huge and unexpected surge in demand in respect of DoLS applications. Although this has placed the Directorate's performance in jeopardy all independent indications are that the response has been relatively effective and there will be continued monitoring of the situation.
- 9.2 Further information is expected on the national picture and this will be reported to members via the Mid Cycle Briefings.

10.0 Recommendations

1. That the Committee recognises that NYCC as a Supervisory Body, alongside most Local Authorities nationally, are currently under extreme pressure to apply the Deprivation of Liberty Safeguards as they are

intended.

2. That the Committee acknowledge that at this time, progress is affected in not undertaking the required work to develop MCA practice generally across the different agencies within the County.
3. That the Committee recognise that the burden associated with Deprivation of Liberty Safeguards is unlikely to significantly change within the next 2-4 years.

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