

**Report by the Local Government and Social Care
Ombudsman**

**Investigation into a complaint against
Staffordshire County Council
(reference number: 18 004 809)**

8 March 2019

The Ombudsman's role

For 40 years the Ombudsman has independently and impartially investigated complaints. We effectively resolve disputes about councils and other bodies in our jurisdiction by recommending redress which is proportionate, appropriate and reasonable based on all the facts of the complaint. Our service is free of charge.

Each case which comes to the Ombudsman is different and we take the individual needs and circumstances of the person complaining to us into account when we make recommendations to remedy injustice caused by fault.

We have no legal power to force councils to follow our recommendations, but they almost always do. Some of the things we might ask a council to do are:

- > apologise
- > pay a financial remedy
- > improve its procedures so similar problems don't happen again.

Section 30 of the 1974 Local Government Act says that a report should not normally name or identify any person. The people involved in this complaint are referred to by a letter or job role.

Report summary

Adult Social Care

Since May 2016 the Council unlawfully decided not to carry out assessments of low and medium priority Deprivation of Liberty Safeguards (DoLS) applications and significantly delayed assessing the remaining applications.

Finding

Fault causing injustice and recommendations made.

Recommendations

To remedy the injustice to those who may be affected, and to prevent similar problems from recurring, we make the following recommendations.

- The Council should produce an action plan for how it is going to deal with all incoming DoLS requests and the backlog of unassessed DoLS requests.
- The Council should produce the action plan within three months of the amendment to the Mental Capacity Act 2005 being finalised by Parliament.
- The action plan should take into account any changes to the law and Government guidance.
- 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.
- The Council should review the action plan should there be any further changes to the law or Government guidance.

The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

The complaint

1. Since May 2016 the Council unlawfully decided not to carry out assessments of low and medium priority Deprivation of Liberty Safeguards (DoLS) applications and significantly delayed assessing the remaining applications.

Legal and administrative background

The Ombudsman's role and powers

2. We may investigate matters coming to our attention during an investigation, if we consider that a member of the public who has not complained may have suffered an injustice as a result. (*Local Government Act 1974, section 26D and 34E, as amended*)
3. We investigate complaints about 'maladministration' and 'service failure'. In this report, we have used the word 'fault' to refer to these. We must also consider whether any fault has then had an adverse impact on any person affected by the matters that came to the Ombudsman's attention. We refer to this as 'injustice'. If there has been fault which has caused an injustice, we may suggest a remedy. (*Local Government Act 1974, sections 26(1) and 26A(1), as amended*)

The Deprivation of Liberty Safeguards (DoLS)

4. The Mental Capacity Act 2005 (and the Code of Practice 2007) describes the steps a person should take when dealing with someone who may lack capacity to make decisions for themselves. It describes when to assess a person's capacity to make a decision, how to do this, and how to make a decision on behalf of somebody who cannot do so themselves.
5. The Deprivation of Liberty Safeguards (DoLS) is an amendment to the Mental Capacity Act 2005 and came into force on 1 April 2009. The safeguards provide legal protection for individuals who lack mental capacity to consent to care or treatment and live in a care home, hospital or supported living accommodation. The DoLS protect people from being deprived of their liberty, unless it is in their best interests and there is no less restrictive alternative. The legislation sets out the procedure to follow to get authorisation to deprive an individual of their liberty. Without the authorisation, the deprivation of liberty is unlawful. It is the responsibility of the care home or hospital to apply for authorisation.
6. The Government issued a DoLS Code of Practice in 2008 as statutory guidance on how DoLS should be applied in practice. The Law Society published non-statutory guidance, *Identifying a deprivation of liberty: a practical guide* (April-2015) to help those involved with DoLS to understand the process.
7. The Supreme Court decided on 19 March 2014, in the case of P v Cheshire West and Chester Council and another and P and Q v Surrey County Council, that deprivation of liberty occurs when: "*The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements*".
8. Once there is, or is likely to be, a deprivation of liberty it must be authorised under the DoLS scheme in the Mental Capacity Act 2005.
9. The 'managing authority' of the care home (the person registered or required to be registered by statute) must request authorisation from the 'supervisory body' (the local authority). There must be a request and an authorisation before a person is lawfully deprived of his or her liberty.

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10. There are two types of authorisation: standard authorisations and urgent authorisations. Standard authorisations are made by the local authority.
 11. On application, the supervisory body must carry out assessments of the six relevant criteria: age, mental health, mental capacity, best interests, eligibility and 'no refusals' requirements. A minimum of two assessors, usually including a social worker or care worker, sometimes a psychiatrist or other medical person, must complete the six assessments. They should do so within 21 days, or, where an urgent authorisation has been given, before the urgent authorisation expires.
 12. Urgent authorisations are made by the managing authority of the care home in urgent cases only, for seven days, pending application for a standard authorisation or while awaiting a response to a standard authorisation request. In exceptional circumstances, a supervisory body can extend an urgent authorisation to a maximum of 14 days.

How we considered this complaint

13. We produced this report after examining relevant documents and written information provided by the Council. This includes:
 - details of current and past backlog figures;
 - the Council's guidance on prioritising DoLS requests; and
 - sample requests, assessments and decisions.
14. We have also considered the Mental Capacity Act 2005 and associated statutory and non-statutory guidance.
15. The Council has had an opportunity to comment on a draft version of this report.

What we found

Background

16. While investigating another complaint, it came to our attention that the Council:
 - decided in May 2016 not to carry out assessments for most of the DoLS requests it receives;
 - was aware this does not comply with relevant legislation and statutory guidance;
 - made the decision during an informal cabinet meeting, because of lack of financial resources; and
 - had a backlog of 2,927 unassessed DoLS requests at the end of March 2018.
17. We considered the Council's actions may have caused an injustice to members of the public and decided to investigate this further, under Section 26D of the Local Government Act 1974.
18. 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.

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19. We decided to investigate this matter without individual complaints being brought to us because the people who are likely to be affected are vulnerable, may not be aware of their rights to complain or go to court, and may not be able to complain either in their own right or through representatives. Our conclusion below explains why we consider delay or a lack of assessment are in themselves an injustice.

National context

20. The 2014 Supreme Court judgment resulted in a significant increase in DoLS requests to local authorities across England. According to NHS Digital official statistics, there were 13,000 DoLS applications in England in 2013/14. In 2014/15, there was a tenfold increase to about 137,000 requests. The latest NHS Digital statistics say councils in England:
- received about 227,000 DoLS requests in 2017/18; and
 - had backlogs totalling about 126,000 requests including 40% (about 48,500) received before 1 April 2017.
21. In response to the increase in demand for DoLS assessments, the association of directors of adult social services in England (ADASS) has published a screening tool to help councils prioritise DoLS requests. ADASS's introduction to the guidance cautions that the "*use of this tool must be balanced against the legal criteria for the Deprivation of Liberty Safeguards which remains unchanged*". The tool suggests criteria for prioritising requests into 'higher', 'medium' and 'lower' priorities. It does not suggest that councils should not carry out assessments for requests classed as medium or lower priority.
22. In March 2017, a Law Commission report recommended the DoLS be repealed urgently and replaced with a scheme which simplifies assessments and extends who is responsible for giving authorisations.
23. In July 2018, the Mental Capacity (Amendment) Bill was introduced to the House of Lords. It seeks to replace the DoLS with a new, simpler system called 'Liberty Protection Safeguards'. At the time of writing, Parliament has not yet passed the new legislation, which is subject to change. The Bill is likely to become law in 2019. If it is passed in its current form, it will mean that local authorities will still be responsible for authorising deprivation of liberty in care homes. However, care homes will be responsible for arranging the relevant assessments.

What happened

24. During an informal cabinet meeting in May 2016, the Council decided not to carry out assessments for the DoLS requests it classes as low or medium priority. The Council accepts this does not comply with legislation and statutory guidance and says it made the decision because of lack of financial resources. It says it has experienced a 14-fold increase in DoLS requests because of the Supreme Court judgment, but only has enough resources to deal with the numbers of requests it had before the judgment.
25. The Council created its own guidance for ranking DoLS requests into high, medium and low priority. The Council has based its guidance on the ADASS screening tool but the criteria are slightly different, so in practice, fewer requests are categorised as high priority. The Council says that it used an adapted version because:
- using the ADASS tool would mean classing most of the requests as high priority;

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- it “*required a tool which would enable limited financial resources... to focus on those individuals in which the risks were perceived by a registered professional to be the greatest*”.
26. The Council has a rota of staff who examine and prioritise all incoming requests. The staff are all professionals who should have the knowledge and experience to identify requests with the most risk. The Council also runs ‘prioritisation moderation sessions’ which should ensure consistency in prioritising requests. For the period January to March 2018, the average time to prioritise a request was three days, compared with six days in the period April to June 2017. These figures indicate the Council has quick oversight of all incoming requests. However, the professionals’ judgement at this stage is based on the limited information provided by the managing authorities making the request.
 27. The Council should be carrying out assessments for standard authorisation requests within 21 days. The Council has shown that, on average it has met or done better than the 21-day timescale since July 2017 when assessing standard requests it has classed as ‘high priority’. However, it classes most of the requests as low or medium priority and does not assess them at all. Between 1 July and 31 December 2017, the Council assessed about 21% of all standard requests within 21 days. Between 1 January and 31 March 2018, this has increased to 26% of all requests. However, currently 74% of all standard requests are either not assessed at all or assessed late.
 28. The Council on average takes 18 days to assess ‘high priority’ urgent cases. Again, most of the urgent requests are not assessed at all because the Council does not class them as ‘high priority’. Currently, about 92% of urgent requests are either not assessed at all or assessed late.
 29. The Council says that, on average, it currently takes 17 days to issue a ‘not granted’ decision. This is within the statutory timescale for standard authorisations but significantly longer than the seven days it should take to assess and grant or refuse an urgent request.
 30. At the end of March 2018, the Council had a backlog of 2,927 DoLS requests for which it had not carried out the relevant assessments. This had increased to 3,033 at the end of June 2018, with the oldest unassessed request dated 11 August 2014. Without an authorisation in place, the people that are the subject of these applications are being unlawfully deprived of their liberty.
 31. Since May 2016, the Council has closed 1,957 applications without assessment because a person has died before an assessment could take place.
 32. The Council says the priority tool “is not designed to exclude individuals but prioritise the order in which assessments are completed”. However, by deciding not to assess anything but high priority requests, excluding individuals is precisely what the Council is doing.
 33. The Council says that, since July 2017, it has done the following to reduce its backlog.
 - Recruited more Best Interest Assessors (BIAs).
 - Direct learning and development work with BIAs.
 - Streamlined the assessment process and improved the way it assigns work to assessors.

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34. The Council says this work is continuing and has so far led to a 59% increase in assessments, which is reducing the backlog. However, this only applies to those applications the Council classes as high priority. Other applications are still not being assessed.
35. Because the Council does not assess the majority of incoming requests, we simply do not know whether there are people waiting in the backlog who are wrongly being deprived of liberty when they actually have capacity or when less restrictive options are available.
36. The Council estimates it would cost about £3.5 million to clear the backlog and deal with all its incoming DoLS requests within statutory timescales. It says that:
- the only way it could find this money would be to reduce spending on other essential services;
 - its elected Members are unlikely to be able to justify this to its local population, as the money would be spent on complying with legislation which is considered 'not fit for purpose' and which is being replaced; and
 - even if the funds were available, the Council would not be able to recruit and train enough Best Interest Assessors before the new legislation comes into force, probably with retrospective effect on local authorities' backlogs of applications.
37. The Council has told us it has started to review its policy with a view to ensuring it is as sensitive as it can be to individual circumstances, any need to improve care packages, and the possibility that a person is experiencing a deprivation of liberty that needs to be ended. It says it is improving monitoring and communication with managing authorities and is in regular contact with other councils to find out how they are coping with similar problems.

A representative sample

38. We have examined a sample of 57 requests the Council received in one week in 2017.
39. The Council closed 16 of the requests because the individuals had moved or died. Eighteen are in the unassessed backlog because they are classed as low or medium priority. The Council assessed and granted 21 of the requests.
40. The Council decided not to grant two of the requests following assessment. The Council should have issued the 'not granted' decisions within seven days of receiving these urgent requests. The Council took about seven weeks for one and about 12 weeks for the other to issue the 'not granted' decisions. The individuals involved did not suffer a significant detriment other than the delay. This is because, by the time the Council did the assessments, they had regained mental capacity and were complying with their treatment.
41. In one of the cases we saw, we had significant concerns about how the person was being deprived of their liberty and whether that deprivation was having a potentially detrimental impact on that person. However, this individual's circumstances have now been considered by the Court of Protection. We are therefore barred from investigating this individual case in more detail.

Conclusions

42. 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.

43. 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.
44. Applying the process properly would not change the outcome for most of the people affected, other than confirming that it is in their best interests to be deprived of liberty. However, it is possible that some of the people stuck in the backlog for years should never have been deprived of their liberty.
45. We acknowledge the wider context in which the Council is operating.
 - National statistics indicate this Council is not the only one struggling with an increase of applications at a time of severe financial constraints. The backlog across England totals about 126,000.
 - 2015 Department of Health guidance issued in response to the Supreme Court judgment acknowledged that DoLS applications increased approximately ten-fold since the Supreme Court judgment and that many local authorities were *“struggling to process these within the legal time limit”*.
 - The Mental Capacity (Amendment) Bill, which seeks to replace the DoLS with a new, simpler system is progressing through Parliament. If it becomes law in its current form, it will pass much of the responsibility for the equivalent of DoLS assessments of care home residents from local authorities to the care homes themselves.
46. However, the current legislation is still in force. At the time of writing, it is the main legal protection available to vulnerable people deprived of their liberty in care home settings. Resource constraints are not a legitimate reason for failing to carry out assessments required by law or statutory guidance. It is only legitimate for public bodies to deviate from relevant guidance where they have cogent reasons for doing so; a lack of money is not such a reason.
47. We do not criticise the approach of prioritising applications as suggested by ADASS and endorsed by the Government. We also recognise the effort the Council is making to tackle the incoming high priority applications. But it is not acceptable that the only way low and medium priority applications are resolved is because the people involved move away or die.

Recommendations

48. The Council says it has started to review its policy and we commend this. To remedy the injustice to those who may be affected, and to prevent similar problems from recurring, we make the following recommendations.
 - The Council should produce an action plan for how it is going to deal with all incoming DoLS requests and the backlog of unassessed DoLS requests.
 - The Council should produce the action plan within three months of the amendment to the Mental Capacity Act 2005 being finalised by Parliament.

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- The action plan should take into account any changes to the law and Government guidance.
 - 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.
 - The Council should review the action plan should there be any further changes to the law or Government guidance.
49. The Council must consider the report and confirm within three months the action it has taken or proposes to take. The Council should consider the report at its full Council, Cabinet or other appropriately delegated committee of elected members and we will require evidence of this. (*Local Government Act 1974, section 31(2), as amended*)

Decision

50. 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.