

Local Members' Interest
N/A

Safer and Stronger Select Committee – 9th November 2017

Deprivation of Liberty Safeguards

Recommendation

1. The Select Committee to consider and provide their views on the Deprivation of Liberty Safeguards: update on the impact of central government cuts on assessments

Report of Cllr Alan White, Deputy Leader and Cabinet Member for Health, Care and Wellbeing

Summary

What is the Select Committee being asked to do and why?

2. The Safer and Stronger Communities Select Committee is being updated on progress relating to the Deprivation of Liberty Safeguards.

Report

Background

3. The Deprivation of Liberty Safeguards (DoLS) provide protection for the most vulnerable people living in residential homes, nursing homes or hospital environments; the safeguards 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.
4. DoLS apply to anyone:
 - a. aged 18 and over
 - b. who suffers from a mental disorder or disability of the mind – such as dementia or a profound learning disability
 - c. who lacks the capacity to give informed consent to the arrangements made for their care and / or treatment and
 - d. for whom deprivation of liberty is considered, after an independent assessment, to be necessary in their best interests to protect them from harm.
5. The safeguards cover patients in hospitals and people in care homes registered under the Care Standards Act 2000, whether placed under public or private arrangements.

6. The safeguards are designed to protect the interests of an extremely vulnerable group of service users and to:
 - a. ensure people are given the care they need in the least restrictive way
 - b. prevent arbitrary decisions that deprive vulnerable people of their liberty
 - c. provide safeguards for vulnerable people
 - d. provide them with reviews and rights of challenge against unlawful detention
 - e. avoid unnecessary bureaucracy
7. If there is no alternative but to deprive such a person of their liberty, the Safeguards say that a hospital or care home (the Managing Authority) must apply to the local authority (the Supervisory Body) for authorisation.
8. Good practice dictates that DoLS should only be put in place where it is absolutely necessary and for the shortest period of time, with a maximum authorisation of 12 months. A further application is therefore needed for subsequent DoLS authorisations.
9. On 19th March 2014 the Supreme Court delivered its judgment on P v Cheshire West and Chester Council and P & Q v Surrey County Council in which it considered Deprivation of Liberty. The ruling means that substantial numbers of people who lack the capacity to make a decision about their admission to hospital or placement in a care home will now be considered to be deprived of their liberty.
10. It is clear that the intention of the Court was to extend the safeguard of independent scrutiny. They said that “a gilded cage is still a cage” and that “we should err on the side of caution in deciding what constitutes a deprivation of liberty”.
11. The Court has now confirmed that there are two key questions to ask, which they describe as the ‘acid test’:
 - a. Is the person subject to continuous supervision and control? And
 - b. Is the person free to leave? (This is no longer just about a person saying they want to leave or attempting to leave and now includes if they would be stopped if they did try to leave).
12. This means that if a person lacks capacity, is subject to both continuous supervision and control and not free to leave they are deprived of their liberty and an authorisation from the local authority should be sought.
13. The Court also indicated that the following are no longer relevant when deciding if a person is deprived of their liberty:
 - a. The person’s compliance or lack of objection;
 - b. The reason or purpose for the placement / admission or restriction
 - c. Comparison with what you would expect for someone in a similar situation.

14. Applications for DoLS up until March 2014 had been steadily increasing; this increase was met by training additional assessors across all the partner agencies.
15. Due to the Supreme Court judgement in March 2014 and in essence the lowering of the threshold of what is considered a deprivation of liberty applications increased dramatically.

DoLS application data

2009-2010	69
2010-2011	123
2011-2012	168
2012-2013	208
2013-2014	289
2014/2015	2213
2015/2016	3341
2016/2017	3388
2017/2018	1325 (Apr-September 2017)

16. DoLS applications are made by care homes and hospitals where the person is funded by SCC or Staffordshire CCG's or the person is self-funding residing in Staffordshire. The care home or hospital establishes that the person in question lacks capacity to make decisions about their accommodation arrangements and that they meet the threshold in relation to deprivation of liberty.

Additional DoLS grant

17. As a response to the surge in DoLS referrals (nationwide) the Department of Health provided a grant in 2015/2016 in Staffordshire this amounted to £377,000 this allowed Staffordshire to commission assessments through a social work agency and the backlog of outstanding assessment was kept to a minimum. This grant did not continue into 2016/2017.

National Picture

18. Nationally in 2015/2016 update **195,840** DoLS applications were received by Local Authorities this compares to the national data from 2013/2014 with **13,715** DoLS applications. The 2016/2017 data is due to be published 1st November 2017.

Prioritisation tool

19. ADASS issued a guidance note in November 2014 regarding DoLS and gave guidance on using a prioritisation process in order to identify the risk and complexity of DoLS applications. Staffordshire use a prioritisation tool which classifies applications into three strands high, medium and low priority. This is completed by examining the application data and matching this information to the prioritisation tool. This is completed by SCC officers including the Adult Safeguarding Manager and Best Interests Assessors.

Current Situation in Staffordshire

20. A report was presented to SLT on the 25th April 2016 and pre cabinet on the 4th May 2016 with an options appraisal the decision taken by SLT and pre cabinet was to focus resource on those individuals who meet the criteria to be considered high priority applications all other applications are unlikely to be assessed.

Current Data April 2017 – September 2017 (6 Months)

Applications	1325
High priority	542 (41%)
Medium priority	210 (16%)
Low priority	569 (43%)
Assessments completed	561 compared to 268 same period 2016/2017
Backlog high priority (unallocated)	Currently 20* compared to 193 same period last year

21. The backlog of high priority applications is a running total and varies on a daily basis depending on the number of daily applications made. The figure quoted was on the 30th September 2017.
22. Appendix A and B for charts indicating the demand and current backlog.

Mental Health Assessors

23. Since 2009 Health bodies have funded the Mental Health Assessors (MHA) who complete part of the DoLS assessment process this was initially through PCT's then NHS England and latterly the CCG's. The CCG's are indicating that they do not intend to continue to fund these assessments. SCC are currently awaiting a formal response from the CCG's. The cost of these assessments is currently not clear but is in the region of £150-200K per annum.

Online electronic referral

24. It is anticipated that SCC will launch an online referral form for DoLS over the coming months with the aim to improve administration by ensuring forms are correctly completed first time and enabling the triage process to make decisions about prioritisation based on enhanced information.

Agreed Plan

25. **Recruitment of substantive Best Interests Assessor (BIA) roles** – Completed three full time posts.

26. **Increase performance of BIA rota from current 20 assessments a month from April 2017 in partnership with SSOTP, both Mental Health Trusts and Independent Futures BIA rota.**
27. The partnership agreement with SSOTP is for 200 BIA assessments over a 12 month period.
28. Current performance BIA rota Data until end September 2017
 - a. SSOTP – 82
 - b. SCC – 17
 - c. SSSFT – 12
 - d. ALDT (IF) – 10
 - e. NSCHT (North Staffs) – 3
29. Total 124 completed assessments an average of 20 assessments per month. This was lower than expected due to worse than expected performance from SSOTP and ALDT

Increase the numbers and capacity of independent BIA contractors

30. Currently we have 8 Independents with another 6 who have expressed an interest. The rules around IR35* have caused some challenges however we have now established that currently SCC is compliant with IR35 rules. This is sufficient for current high priority demand. IR35 is the short name used for the 'intermediaries legislation', which is a set of tax rules that apply to contractors if you work for a client through an intermediary – which can be a limited company or “personal service company” which is how many contractors operate. The Intermediaries Legislation was introduced in 2000 to tackle so-called 'disguised employment', where individuals use their own limited companies to carry out professional services, but operate in a manner more akin to a traditional 'employee'. Changes to the guidance were issued in March 2017. These changes were introduced to 'improve fairness in the tax system by ensuring that individuals are not able to sidestep employment taxes or NICs'.

S21A appeals

31. Anyone deprived of their liberty has a statutory right to appeal against the deprivation of Liberty. Staffordshire currently has 14 ongoing and expected cases. SCC work in partnership with partner agencies including the CCG's to ensure the most efficient use of public financial resources to respond to these appeals. An appeal can be issued by the person themselves but usually (if not always) is issued by the representative of the person. The appeal is heard by a judge in the Court of Protection and the person receives legal aid to enable the appeal to the DoLS. Staffordshire work with partners to ensure an efficient response avoiding duplication and cost. Often the Court requires the funding body to reconsider the accommodation options available to the person before making a final judgement as to the appeal.

Deprivation of Liberty (outside of care home/hospital)

32. DoLS applies to care home and hospitals only. To authorise a Deprivation of Liberty in other accommodation settings an application is required to the Court of Protection Staffordshire legal services continue to make applications to the court. This work is completed by the Adult Learning Disability Service, SSOTP and the Mental Health Trusts. This work has been included within the Section 75 agreement for SSOTP but otherwise is not resourced or identified with current partnership agreements. Resources outside of the SSOTP S75 partnership agreement would need to be identified within existing budgets.

Future changes to the law

33. The Law Commission published a report and draft bill in March 2017 which has put forward proposals to change the legal framework for Deprivation of Liberty. The Department of Health have not issued a formal response but are currently consulting on the new proposed legislation. The timescale for any new legislation is currently unknown. There is a planned meeting with DoH 2nd November 2017 (Appendix 3). The Law Commission proposal is intended to streamline the process for assessing whether a deprivation of liberty is necessary. It is planned that the new scheme would also ensure those deprived of their liberty in settings outside of care homes and hospitals are covered by the new scheme.

Link to Strategic Plan

34. The Deprivation of Liberty Safeguards supports the County Councils vision for a connected Staffordshire by ensuring that appropriate prevention and assessment mechanisms are in place to support people's health, wellbeing and independence.

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Appendices/Background papers

Appendix A - Government Briefing paper on Deprivation of Liberty issued October 2017

Appendix B - DoLS Requests

Appendix C - DoLS Backlog