

Local Members' Interest
N/A

Safer and Stronger Select Committee – 8 November 2018

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 and Wellbeing

Summary

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

The Safe and Strong Communities Select Committee is being asked to provide their views on the Deprivation of Liberty Safeguards: update on the impact of central government cuts on assessment and updated on progress relating to the Deprivation of Liberty Safeguards.

Report

Background

1. 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.
2. 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.
3. 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.
4. 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
5. 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.
 6. 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.
 7. 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.
 8. 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”.
 9. 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).
 10. 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.
 11. 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.
 12. Referrals for DoLS up until March 2014 had been steadily increasing; this increase was met by training additional assessors across all the partner agencies.

The DoLS Process:

13. An assessment, carried out by a Best Interest Assessor (BIA) can take a number of hours depending on the complexity of the assessment. A Section 12(2) doctor has to assess the citizen to ensure they have an eligible mental health condition. The BIA then has to go to assess the citizen, whilst discussing them with paid carers, read relevant case notes, speak to the family, and meet with the citizen themselves. If there are communication issues, interpreters may be required – if the citizens first language isn't English or has a sensory impairment for example. In addition, it may take a number of visits to enable a thorough assessment of the citizen, depending upon their physical health, impact of their disability, and whether an independent advocate is involved. The BIA then needs to complete a comprehensive report which needs to be authorised senior managers within Staffordshire County Council. This can mean that an assessment could take anywhere between 6 and 30 hours dependent on the above concerns/issues.

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	2927
2018/2019 (6months)	1613

Additional DoLS Grant

14. 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 and this allowed the Council 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

15. Data published by NHS Digital 2nd October 2018 relating to 2017/2018.

Key Facts

16. There were 227,400 applications for DoLS received during 2017-18, with almost three quarters relating to people aged 75 and over. This represents an increase of 4.7% on 2016-17 although the rate of increase is slowing compared to previous years.
17. There were more DoLS applications received than were completed (181,785) in 2017-18. The number of DoLS applications that were completed increased by 19.6% from 151,970 in 2016-17. The proportion of these that were granted was 61.1% in 2017-18.
18. The reported number of cases that were not completed as at year end was 125,630. Of these just under 40% (48,555) were received prior to 1 April 2017.
19. Analysis of the 2017-18 local authority data again shows a wide range of variation across the country in the volumes of DoLS applications, their outcomes and how they were administered.
20. In 2013/2014, pre-the Cheshire West Supreme Court decisions, **13,715** DoLS applications were received.

Prioritisation Tool

21. 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 uses 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.

Current Situation in Staffordshire

22. A report was presented to SLT on the 25th April 2016 and Informal Cabinet on the 4th May 2016 with an options appraisal. The decision taken by Cabinet was to focus resources on those individuals who meet the criteria to be considered high priority; noting that all other applications were unlikely to be assessed.
23. The Local Government and Social Care Ombudsman has raised a concern about DoLS that is currently being investigated and which may have implications for our prioritisation approach.

Current Data April – September 2018

Applications – 6 months April 18 – Sept 18	1613
High priority	490 (30%)
Medium priority	374 (23%)
Low priority	749(47%)

Assessments completed	516
Unallocated high priority referrals at end September 2018	33

Mental Health Assessors

24. Since 2009 the NHS has 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. The Council has sought legal guidance, which has confirmed that this is our responsibility. We are currently identifying a process to commission this work for 2019/2020. The cost of these assessments is currently not clear but is in the region of £130,000 per annum based on the current number of assessments completed. This is built into the MTFs as a cost pressure.

Plan agreed by SLT and Cabinet

25. **Recruitment of substantive Best Interests Assessor (BIA) roles** – Completed three full time posts. – **236** assessments completed in 2018/2019 (six months)
26. Increase performance of BIA rota from current 20 assessments a month from in partnership with SSOTP, both Mental Health Trusts and Independent Futures BIA rota - Not achieved
27. The partnership agreement with SSOTP is for a minimum of 200 BIA assessments over a 12-month period. Current performance BIA rota Data until end September 2018 (6 months). Please note, the rota is shored up by the WTE BIA's directly employed by SCC so the numbers identified below are by the BIA's on the rota.
- SSOTP – 65 assessments completed
 - SCC – 11 assessments completed
 - SSSFT – 8 assessments completed
 - ALDT (IF) – 10 assessments completed
 - NSCHT (North Staffs) – 1 assessment completed
28. Total **95** completed assessments in 2018/2019 an average of 16 assessments per month. This was lower than expected due to performance from SSOTP, ALDT and NSCHT.
29. Increase the numbers and capacity of independent BIAs.
30. Currently we have 8 independent BIAs with another 6 who have expressed an interest, including 2 who will be starting soon. The rules around IR35 have caused some challenges however we have now established that currently SCC is compliant with IR35 rules. **185** assessments have been completed in 2018/2019.

Budget

31. Financial Pressure 2018/2019

- a. Mental Health Assessors £130,000
- b. Best Interests Assessments pressure £23,000 due to maternity leave of full time BIA and lower than expected performance from SSOTP, NSCHT and ALDT.
- c. Total £153,000 in 2018/2019

S21A Appeals

32. Anyone deprived of their liberty has a statutory right to appeal against the deprivation of Liberty. Staffordshire currently has 6 ongoing cases. SCC work in partnership with partner agencies including the CCG's and partnership agencies to ensure the most efficient use of public financial resources to respond to these appeals.

S21a appeal example

33. Article 5(4) of the European Convention of Human Rights is at the heart of the DoLS appeal process. It provides that *'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful'*. In the context of a DoLS s.21A MCA is the mechanism in domestic law to ensure P's Article 5(4) rights are met. It permits the Court of Protection, upon an application, to determine the lawfulness of P's detention and to vary or terminate the Standard Authorisation. P and his or her representative can make an application to the Court of Protection at any time without permission.

34. Mrs X currently in Hospital having been admitted from home. A complex family situation meant further assessment was required and decision was made in Mrs X best interests to discharge from hospital for further assessment on a short term basis. Mrs X wished to return home and representative supported Mrs X. An application made by representative to appeal the DoLS.

35. The complex family dynamics and complex nature of the appeal necessitated two court hearings and the use of an external legal support (QC). The outcome was that the appeal was dismissed and Mrs X moved for further assessment.

36. There was no award for costs however legal expenditure, SCC officer time and partnership resource meant the total cost of this one appeal was in excess of £12,000

37. The number of DoLS appeals is currently a very small percentage of the current DoLS which are granted. However the impact of current investigation into Staffordshire's DoLS process by the Local Government and Social Care ombudsman (which is likely to lead to reputational damage and significant publicity) has the potential to increase risks in reputation and finance to the LA. This is due to the potential adverse publicity which will be in the public domain leading to increased awareness by both the public and legal profession. An additional factor is the risk relating to these individuals in which through the triage (prioritisation) process have not been assessed and remain unlawfully deprived of their liberty. Currently Staffordshire has 3207 cases (end September 2018) which are low and medium priority and unallocated. Based on adverse publicity should

cases be challenged this would lead to significant legal costs per case and compensation to the individual. The cost of assessing 660 medium priority cases £285,780 and the 2547 low priority case £1,102, 581 based on £260 BIA assessment and £173 for the MHA assessment a total of £1,388,531.

Deprivation of Liberty (outside of care home/hospital)

38. 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.

Future changes to the law (End of DoLS)

39. The Law Commission published a report and draft bill in March 2017 which put forward proposals to change the legal framework for Deprivation of Liberty. The government introduced proposed legislation in July 2018, which is currently in committee stage in the House of Lords with an expected implementation date of April 2020 (not confirmed). The new legislation will apply to all settings where individuals who lack capacity may be deprived of their liberty. Currently the Council is the supervisory body for DoLS across Staffordshire (excluding Stoke) in the new legislation it is proposed the responsible bodies will be the Local Authority, CCGs and Trust Boards hospitals. (See attached fact sheets)

Link to Strategic Plan

40. 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 – Liberty Protection Safeguards: 20 Key Facts

Appendix B – Liberty Protection Safeguards: Overview