

Meeting:	Adults and wellbeing scrutiny committee
Meeting date:	Tuesday 17 July 2018
Title of report:	Deprivation of Liberty Safeguards
Report by:	Director for adults and wellbeing

Classification

Open

Decision type

This is not an executive decision

Wards affected

(All Wards);

Purpose and summary

The purpose of this report is to provide the committee with information about:

- the current approach taken by the council in relation to Deprivation of Liberty Safeguards (DoLS) and how they are delivered
- the approach taken by the council to manage risks in relation to the Deprivation of Liberty Safeguards

in order that the committee may determine any recommendations it wishes to make to the executive with a view to further mitigating risks and securing improvement.

Recommendation(s)

That the committee determine any recommendations it wishes to make to the executive to consider which may deliver further improvement and risk mitigation.

Alternative options

1. There are no alternative options to the recommendation; it is a function of the committee to make reports or recommendations to the executive with respect to the discharge of any functions which are the responsibility of the executive.

Key considerations

Background

1. The Deprivation of Liberty Safeguards (DoLS) came into being in the 2007 Mental Health Act as an amendment to the Mental Capacity Act 2005 and were implemented in 2008. The purpose of DoLS was to create a legal framework whereby the UK could comply with Article 5 of the European Convention on Human rights. The European Convention on Human rights is enshrined in UK law through the Human Rights Act. Article 5 includes the following:-
 - 1) *Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law*
 - (e) *The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.*
2. The purpose of DoLS is to provide a procedure prescribed by law, which allows hospitals, registered care homes and registered nursing homes to accommodate people and impose restrictions that amount to a deprivation of liberty, but are in the best interests of the individuals being restricted. This only applies to people who lack capacity to agree to these restrictions. If a person has capacity to agree to any restrictions and they are in agreement with the restrictions they are not deprived of their liberty.
3. In March 2014 following a ruling by the Supreme Court in the cases of *P v Cheshire West & Chester Council & another*; (2) *P & Q v Surrey County Council* the scope of DoLS was greatly widened, with increasing numbers of people in residential care/nursing homes and hospitals now falling within the criteria for DoLS.
4. As a consequence the number of referrals for DoLS nationally increased tenfold in the following 12 months. This high level of referrals has continued and as a consequence councils throughout England have struggled to meet demand. Most councils now find themselves in a position where they have a backlog of cases which have not yet been assessed.
5. In the case of Herefordshire the number of referrals has risen nearly fifteen fold in the years following the Cheshire West ruling; this is significantly above the increase experienced in other areas. The higher level of referrals in Herefordshire is due largely to the fact that Herefordshire has a higher percentage of people over the age of 65 (24% of the population) than other counties within England; this impacts on the number of people who are suffering from Dementia Illnesses and consequently the number of people in care homes and hospitals within the county who lack capacity to make decisions about where they live. As a consequence of the high levels of demand Herefordshire Council is maintaining a backlog. The council has worked hard to reduce that backlog and since its peak in 2016 has managed to halve the backlog of cases awaiting assessment; this is in spite of receiving 1300 new referrals in the year 2017-18. As at the end of May 2018 336 referrals were awaiting assessment.

Response to the increase in demand

6. At the time of the Cheshire West case there was no dedicated DoLS team or DoLS lead within Herefordshire Council. In the months and years following the Cheshire West ruling the council has responded by substantially increasing resources for DoLS including appointing a DoLS lead and creating a DoLS team. In the year prior to the Cheshire West ruling (2013/14) the money invested in DoLS by the Council was £46,956. The investment in the DoLS service increased year on year up until last year when the amount spent was £678,490.
7. In terms of response from central government each council was given an additional sum of money in 2015/16 to assist them in coping with the increase in numbers of DoLS referrals. In the case of Herefordshire the amount we received was £93,932. Whilst any additional funds are helpful this one off payment was insufficient to help Herefordshire address the massive increase in DoLS referrals that it experienced, especially given that it was a one off payment. It is estimated that it would cost approximately £1 million a year for the council to assess all of the referrals that it receives on an annual basis based on current referral rates.

The DoLS process

8. The DoLS process is very complex and includes a statutory requirement that six assessments are completed. The completion of these assessments has to be done by a specially qualified Best Interest Assessor and a specially qualified doctor. Both these professionals need to write reports following their assessments. These reports then have to be scrutinised by the DoLS team before being sent to a senior manager for final scrutiny and sign off. (See appendices 2,3,and 4 for details of the forms used and appendix 5 for a flow chart detailing the DoLS process)
9. In addition to the above process it may be necessary to undertake a review of a case that is currently authorised under DoLS if the person's circumstances change or at their request or the request of their relevant persons' representative.
10. Herefordshire Council is also involved in DoLS cases where the person who is deprived of their liberty or their representative has appealed against being deprived of their liberty by making an application to the Court of Protection. To date, since 2014, 26 Herefordshire cases have gone to the Court of Protection under appeal and in all of these cases the council's decision to deprive the person of their liberty has been deemed to be in the person's best interest and the DoLS has been upheld.
11. In response to the backlog of cases that the council currently holds we are using a prioritisation tool that has been developed and approved by the Association of Directors of Adult Social Services in order to ensure that higher risk cases are prioritised for assessment (see appendix 1)

Future plans in relation to Deprivation of Liberty Safeguards

12. In March 2014 a House of Lords Scrutiny Committee produced a report into the implementation of Mental Capacity Act 2005. Within the report it expressed a very clear view that the Deprivation of Liberty Safeguards were not fit for purpose and that they required reviewing with a view to their being replaced. The ruling by the Supreme Court in the same month as outlined above and the resulting demands that this has put on the process, further demonstrates that the Deprivation of Liberty Safeguards are not fit for purpose.

13. As a result of the above concerns about the current process the Law Commission was tasked with reviewing the DoLS process and developing a possible replacement. Following a process of development and consultation the Law Commission published a draft bill on 13 March 2017 proposing a new process called “Liberty Protection Safeguards”. The Government’s final response was published on 14 March 2018 in which it agreed the current DoLS system should be replaced as a matter of pressing urgency and broadly agreed with the Liberty Protection Safeguards model. The legislation will be brought forward when parliamentary time allows, however no timetable has yet been publicised.

Community impact

14. The DoLS process contributes to the council’s Corporate Plan in relation to the priority “Enabling residents to live safe, healthy and independent lives”. The DoLS process helps to ensure that citizens of Herefordshire who are residing in hospitals and residential care settings, but lack the mental capacity to agree to these arrangements, are receiving the care and treatment that they need in their best interests. The DoLS process aims to ensure that citizens are kept safe and healthy, but in a way that upholds their human rights by keeping restrictions to a minimum.
15. The DoLS team supports partners within the NHS and providers of care in ensuring they apply the principles of the Mental Capacity Act and uphold the Human Rights of those that they care for.

Equality duty

16. The Equality Act 2010 established a positive obligation on local authorities to promote equality and to reduce discrimination in relation to any of the nine ‘protected characteristics’ (age; disability; gender reassignment; pregnancy and maternity; marriage and civil partnership; race; religion or belief; sex; and sexual orientation). The DoLS process does not discriminate against any citizens with any of the protected characteristics. The citizens who are subject to the DoLS process and are subject to an authorisation under DoLS are all suffering from a mental disorder within the meaning of the Mental Health Act 2007 and therefore clearly fall into the protected category of disability in addition to any other protected characteristic they may have. The DoLS process is designed to uphold the human rights of these individuals who may struggle to advocate for themselves in relation to the care and treatment they receive. The DoLS process requires Best Interest Assessors in undertaking best interest assessments to work within the Mental Capacity Act 2005. Chapter 4 of the Act in regard to best interest decisions states the following:-

In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—

(a) the person's age or appearance, or

(b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

17. In following the Mental Capacity Act 2005 and the Mental Capacity Act and DoLS code of practice the DoLS assessors are aware of their duties under the Equality Act when making recommendations regarding restrictions imposed on the individuals they are assessing.

Resource implications

18. The budget for the DoLS service for 2018/19 is £650,417, which also covers the cost of running the Daytime Approved Mental Health Professional (AMHP) service, and the out of hours emergency duty service. The spend on the DoLS Service for 2017/18 (excluding the cost of the AMHP and Out of Hours service) was £678,490. £549,000 of expenditure was provided through the better care fund. The current budget for the DoLS and AMHP service is £150,000 less than the previous year. Efficiencies have been achieved by reducing the fees paid to Independent Best Interest assessors to bring payments in line with the national average. It is expected that due to the efficiencies identified that performance levels will not be adversely affected.

Legal implications

19. Functions of the scrutiny committee are set out in paragraph 3.4.2 (a-h) of the council constitution.
20. Following the landmark case of HL v UK in 2004 (referred to as the 'Bournemouth judgement', the Mental Capacity Act 2005 was amended so that where a person is in a care home or hospital setting, a deprivation of liberty may also be authorised under the deprivation of liberty safeguards (DoLS) framework.
21. Urgent authorisations may be granted by a care home or hospital (a 'managing authority') for up to 7 days and may be extended for up to a further 7 days by a supervisory body on request
22. Standard authorisations may be granted by the supervisory body (in all cases the local authority) for up to one year, after which a further application will be required. A standard authorisation must be requested by the managing authority where it appears that a person is, or will within 28 days, be accommodated in a care home or hospital in circumstances amounting to deprivation of liberty. The duty of the council as supervisory body is to undertake an assessment of whether the person meets the six qualifying requirements as identified in paragraph 11 of the report.
23. If the requirements are met, the council must grant a standard authorisation and the council is permitted to attach conditions to a standard authorisation, having regard to any recommendations made by the Best Interests Assessor.
24. A House of Lords Scrutiny committee report in 2014 concerning DoLS found them to be "poorly drafted, overly complex, not well understood and poorly implemented." The Law Commission were requested by the Government to provide proposals for a 'new legislative framework'.
25. The Commission proposes a new scheme of 'Liberty Protection Safeguards' to replace DoLS. Liberty Protection Safeguards would cover deprivations of liberty in all settings. Responsibility for authorising deprivation of liberty would rest with the local authority or the NHS body for deprivations of liberty in hospital or relating to NHS CC patients.
26. The timescale for enactment of new legislation is unclear.

Risk management

27.

Risk / opportunity	Mitigation
<p><u>Cases that have been assessed and authorised under the DoLS process.</u></p> <p>1) There is a risk that any cases that are authorised by the council under the DoLS process may be taken to the Court of Protection by the Individual or their representative as an appeal against the DoLS under section 21A of the Mental Capacity Act. As a result of such an appeal the court may decide that the deprivation of liberty is unlawful if the DoLS process has not been followed appropriately and the council may face financial penalties and loss of reputation.</p>	<p><u>Cases that have been assessed and authorised under the DoLS process.</u></p> <p>1) All cases that are assessed under the DoLS process, where an authorisation is recommended by the assessor, are scrutinised twice, once by the DoLS team manager or a very experienced Best Interest Assessor and then a second time by senior manager within Adult Social Care prior to them agreeing to authorise a deprivation of Liberty. In addition all independent assessors have examples of their work scrutinised by the DoLS team manager prior to them being commissioned to undertake any DoLS work for the Council. To date none of the Herefordshire DoLS cases that have gone to section 21A appeals have resulted in a ruling that Herefordshire Council has illegally deprived someone of their liberty.</p>
<p><u>Risk for cases awaiting assessment under the DoLS process</u></p> <p>2) Whilst the council continues to hold a backlog of cases that have not been assessed under the DoLS process there is a risk that in some of these cases the citizens involved may be illegally deprived of their liberty. Anyone who is illegally deprived of their liberty may be experiencing restrictions on their freedom of movement which are not in their best interests and therefore may be at risk of harm.</p> <p>3) In addition to this there is a risk that the council is failing to meet its statutory duties under the DoLS process due to not assessing cases within the statutory timeframes. This could result in litigation by individuals or their representatives if they are being deprived of their liberty without a legal</p>	<p>2) All of the referrals that are received by the DoLS team are triaged using the ADASS prioritisation tool at appendix 1, this ensures that those most at risk of harm by being deprived of their liberty are assessed in a timely manner. As a result of this the risks of harm to citizens due to an inappropriate deprivation of liberty are reduced. Cases that are placed in the backlog are also periodically re-triaged to ensure any changes in circumstances are picked up</p> <p>3) Whilst there remains a risk of litigation with cases that have not been assessed the courts have to date taken a pragmatic view where it is clear that local authorities have taken all the steps they can to assess cases as soon as they can within their resources and</p>

framework being in place whilst they are awaiting a DoLS assessment. This could result in the council facing financial penalties and loss of reputation.

where breaches of the law are procedural. Financial penalties in these cases have been relatively low.

Consultees

None

Appendices

Appendix 1: ADASS prioritisation tool

Appendix 2: DoLS form 3

Appendix 3: DoLS form 4

Appendix 4: DoLS form 5

Appendix 5: DoLS Process Flow Chart

Background papers

None identified