

People Improvement and Scrutiny Committee

Briefing Note – 23/05/18 – The Deprivation of Liberty Safeguards

Human Rights – The Right to Liberty and Security

Article 5 of the Human Rights Act 1998 – the right to liberty and security – requires that lawful processes are followed whenever people are deprived of their liberty (for example, if arrested or detained under a section of the Mental Health Act 1983).

The Deprivation of Liberty Safeguards (DOLS) is the statutory process that should be followed when it is in people's best interests to be deprived of their liberty in care homes or hospitals, if they lack the mental capacity to consent to be there.

Why does DOLS Matter?

People are often admitted to care homes at times of crisis such as following injury, illness or the sudden loss of a carer. Much timely work may then be needed to return them home, where most people want to be, before their houses and support networks are lost.

People who privately place relatives in care homes are often unaware of the support that is available in the community. Social workers may inadvertently be over-protective or underestimate mental capacity. The independent scrutiny of DOLS can help free people unnecessarily trapped in care homes, or find practical solutions to reduce restrictions.

Legal Framework

DOLS came into force in 2009 as an amendment to the Mental Capacity Act 2005. Statutory responsibility for most aspects of DOLS lie with local authorities.

For a deprivation of liberty to be authorised, several bureaucratic procedures must be followed. Two independent professionals (a Mental Health Assessor - usually a psychiatrist, and a Best Interests Assessor (BIA) - usually a social worker) assess the person and complete six assessments: *best interests, mental health, mental capacity, age, eligibility* and *no conflicts* (with advance decisions or decisions of attorneys or deputies).

A manager within the local authority then scrutinises these assessments and may authorise that person's deprivation of liberty. People can appeal against their deprivations at the Court of Protection, and receive legal aid without means-testing.

What constitutes deprivations of liberty in care settings is defined by case law, not legislation. During the first few years, the courts determined that DOLS authorisations were only needed in limited circumstances. For example, when people objected strongly to where they lived or to how they were supported.

March 2014 – DOLS became unsustainable

In March 2014, the House of Lords, in its post legislative scrutiny of the Mental Capacity Act, praised the principles underpinning DOLS, but concluded that it is overly complex, bureaucratic and 'not fit for purpose'.

Later that month, the Supreme Court gave its 'Cheshire West' judgement. Lady Hale, in her leading judgement, stated that a 'gilded cage is still a cage'. A new 'acid test' was given for deprivations of liberty that captures almost everyone in care homes and hospitals that cannot consent to stay there (even if they have no objections).

As a consequence, DOLS referrals increased nationally by a factor of fourteen. Derbyshire, in common with other local authorities, became unable to meet its statutory duties under DOLS, despite considerable investment (more than tripling the size of its DOLS team).

The Liberty Protection Safeguards

In 2014, after Cheshire West, the government asked the Law Commission to draft new legislation to replace DOLS, and ADASS (Association of Directors of Social Services) published a prioritisation tool to assist local authorities to identify urgent referrals. In March 2017, a draft Bill was published, the Liberty Protection Safeguards. The Law Commission estimated that 100,000 people had been unlawfully deprived of their liberty during the previous year in care homes and hospitals, and that 53,000 people were unlawfully deprived of their liberty in the community.

In March 2018, the government announced that it broadly supports the proposals within the Liberty Protection Safeguards, pending parliamentary time and reviews of other social care legislation. If the Liberty Protection Safeguards are enacted, this will involve a two tier system whereby only people objecting to their care, or subject to significant restrictions, will be assessed by independent professionals.

Risks to Local Authorities following Cheshire West

DOLS is unlikely to be replaced by the Liberty Protection Safeguards for at least four years, possibly much longer. Until it does, Derbyshire, in common with other local authorities, will not be able to meet all its DOLS statutory responsibilities without massive investment (and corresponding divestment from other key services). We endeavour to steer a middle path in comparison with other local authorities. DOLS is on DCC's corporate risk register. Performance is reported regularly to the Adults' Safeguarding Board.

Derbyshire's DOLS Team currently employs 12 BIAs (9 FTE), 5 admin workers and 2 part-time service managers job-share. Recruitment of suitable BIAs is a problem nationally. We are seeking to recruit and train more BIAs. This month, we offered posts to three full-time BIAs; this will result in a net gain of one. We have adapted the ADASS prioritisation tool to focus the scrutiny of DOLS where it is most needed. For example, upon people who are objecting to their care, people whose families object, people subject to significant restrictions, people who appear to be unnecessarily restricted and whenever we identify a risk of reputational harm to

DCC. Thus far, the courts have not awarded significant compensation to people unlawfully deprived of their liberty provided their care has been appropriate. Several local authorities have received fines and unwelcome publicity when people have been unnecessarily forced to live in care homes and DOLS assessments have not identified this.

Deprivation of Liberty Safeguards (DOLS) Report - Q4



Client Referrals

2016/17	2017/18
Q1 - 685	Q1 - 736
Q2 - 711	Q2 - 735
Q3 - 650	Q3 - 705
Q4 - 787	Q4 - 783
Total - 2833	YTD - 2959

Ethnicity (17/18 Q4)

Ethnicity	Total	%
White	771	98.5%
Mixed/Multiple	2	0.3%
Asian/ A British	2	0.3%
Black/ B British	5	0.6%
Other Ethnicity	1	0.1%
Not stated	2	0.3%
Not Known	0	0.0%



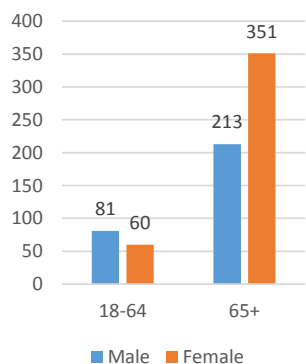
Outcome (17/18 Q4)

	Total	%
Granted	69	27.7%
Not Granted	130	52.2%
Withdrawn	50	20.1%

Age Group and Gender (17/18 Q4)

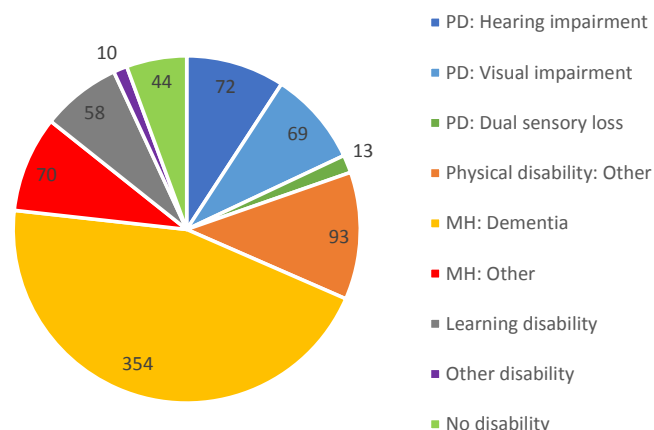
Age Group	Total	%
18-64	125	16.0%
65+	658	84.0%

Age Group by Gender



Type of Disability (17/18 Q4)

Disability	Total	%
PD: Hearing impairment	72	9.2%
PD: Visual impairment	69	8.8%
PD: Dual sensory loss	13	1.7%
Physical disability: Other	93	11.9%
MH: Dementia	354	45.2%
MH: Other	70	8.9%
Learning disability	58	7.4%
Other disability	10	1.3%
No disability	44	5.6%



Care Setting (17/18 Q4)

Setting	Total	%
Care Home	643	82.1%
Hospital	140	17.9%

Headline Information

There is a 0.5% decrease in the number of referrals in 17/18 Q4 compared to the same quarter in 16/17.