

**DEPRIVATION OF LIBERTY SAFEGUARDS SERVICE UPDATE AND INITIAL INFORMATION RELATING TO THE TRANSFER TO THE LIBERTY PROTECTION SAFEGUARDS LEGAL FRAMEWORK**

**Report of the Head of Adult Care Operations and Health**

1. **Recommendation:** This report is for information only.
2. **Background/Introduction**
  - 2.1 This briefing will provide an update on the success of the Deprivation of Liberty Safeguards (DoLS) investment project in reducing the risks posed by the service waiting list during June 2018-May 2019.
  - 2.2 In addition, this briefing will provide an early outline of the new statutory functions of Devon County Council under the Liberty Protection Safeguards (LPS) Amended Mental Capacity Act, which are expected to come into force on the 1<sup>st</sup> October 2020 and will replace the Deprivation of Liberty Safeguards.
3. **Deprivation of Liberty Safeguards Service Investment Update**
  - 3.1 **Background**
    - 3.1.1 Following the Supreme Court Ruling re P v Cheshire West and Chester and P&Q v Surrey County Council (2014), Devon along with other local authorities continues to receive high levels of applications for Authorisations under the Deprivation of Liberty Safeguards legal framework. This led to many Local Authorities, including Devon, holding a waiting list. Following reports highlighting the risks posed to the individuals waiting for assessments, the financial and reputational risks posed to the organisation, a significant 12 month non-reoccurring investment was made to the DoLS Service.
  - 3.2 **Project Actions**
    - 3.2.1 The DoLS Service employed a number of temporary Best Interests Assessors and commissioned the specialist Doctors required to undertake additional assessments and reduce the waiting list. Administrative staff were also employed to manage extensive administrative tasks associated with the DoLS process.
    - 3.2.2 The funding was also used to ensure that those individuals assessed had access to advocacy in line with the legal framework requirements.
    - 3.2.3 The DoLS Investment project had two significant aims:

**3.3 Aim 1: The reduction of the waiting list by 1,000 cases to bring Devon in line with our mid-range statistical neighbours/peer authorities.**

**Aim 2: To maximise the services ability to manage identified high risk cases and cases where appeal to the Court of Protection is indicated within reasonable timescales. Reducing the risk of harm to the service user and reducing reputational/financial risk to the organisation.**

3.3.1 The following text describes our delivery on these two aims:

**3.3.2 Aim 1: The reduction of the waiting list by 1,000 cases to bring Devon in line with our mid-range statistical neighbours/peer authorities.**

3.3.3 At the start of the project the waiting list stood at 3,130. By the project end this had reduced to 2,365. During the project the service experienced an unexpected increase in the average weekly referral rate to the service from 44 cases per week to 50 cases per week (312 additional cases within the project period). Taking this challenge and the recruitment issues into account, aim 1 of the project can be viewed as very successful.

3.3.4 The positive impact of the investment period is also reflected in the increase in the number of individuals who now have their rights protected by way of an Authorisation. Currently there are 714 individuals subject to a DoLS Standard Authorisation compared to 338 at the start of the investment period.

3.3.5 A further intention of the project was to bring Devon County Council's waiting list average in line with other mid-range peer authorities. Our position is reported by NHS Digital on an annual basis. The project funding covered two reporting periods, the first set of data is expected to be published in October 2019 and the second in October 2020. We anticipate our position will show improvement in both reporting periods, with the most significant improvement being evidenced in the October 2020 publication.

3.3.6 Following the end of the investment there is a risk that the waiting list will steadily increase with a prediction that within 18 months this could revert to pre-investment levels. Some carry over funds have been allocated for this financial year to lessen the impact. The waiting list is holding steady at an average of around 2,370 cases.

**3.4 Aim 2: To maximise the services ability to manage identified high risk cases and cases where appeal to the Court of Protection is indicated within reasonable timescales. Reducing the risk of harm to the service user and reducing reputational/financial risk to the organisation.**

3.4.1 The Local Authority has an obligation outlined in the legal framework and subsequent case law to ensure individuals subject to a DoLS Authorisation are enabled to apply to the Court of Protection to appeal. This obligation applies in circumstances where they or their family are objecting to the arrangements in place.

- 3.4.2 Court of Protection work is increasing, currently we are involved in 18 active cases, we are working alongside 21 individuals who are subject to final Court orders and a further 11 cases have resolved. This area of specialist work for the DoLS Service takes considerable staff time and service resource. This work is essential in upholding the rights of the individuals concerned and reducing reputational and financial risk to Devon County Council.
- 3.4.3 The investment project has maximised our ability to assess high risk cases in a timely manner by enabling the core team-based staff to focus on identified high risk cases and Court of Protection work.
- 3.4.4 Aim 2 of the project has also been met.

#### **4. The Introduction of the Liberty Protection Safeguards**

- 4.1 The Liberty Protection Safeguards will replace the Deprivation of Liberty safeguards legal framework. The expected date for implementation of the new Act is the 1st October 2020.
- 4.2 Due to the scant nature of the Act our 'knowns' are limited. In depth detail is expected to follow with the publication of a 'Code of Practice' and the publication of 'Statutory Regulations', both of which are now not expected before late-spring 2020.

Key known changes:

- a. The 'Supervisory Body' currently the Local Authority, who is responsible for authorising deprivations of liberty will be replaced by the 'Responsible Body'.
- b. The commissioner of care will take on the Responsible Body responsibilities. The impact of this will be Trusts and CCGs will be responsible for individuals who come within the scheme and are resident in hospital or receiving CHC funding. Local Authorities will be responsible for all other cases including self-funders.
- c. The safeguards will now apply to anyone over the age of 16, not 18 years as is currently the case. This age change reflects the wider provisions of the Mental Capacity Act.
- d. The legal framework will cover all accommodation types, so in addition to hospitals and care homes, supported living, shared lives and even private/domestic settings will be included.
- e. Authorisations currently cover residence and will in the future also cover: residence, care and treatment arrangements, conveyance and could cover multiple settings at any one time.
- f. The functions currently undertaken by Best Interests Assessors will be replaced by a new Approved Mental Capacity Professional role (AMCP's).

Although any Responsible Body can employ AMCP's, Local Authorities will be required to make arrangements for the approval of AMCP's and to ensure they have sufficient numbers of AMCP's in their locality.

4.3 The change from b) will decrease the number of referrals into the Council whilst the change in c) will increase the number of referrals. The change in d) is neutral as this already applies with community DoL applications. However, we know our practice is weak in this area and as it improves the number of referrals will increase.

4.4 The following new roles will be created:

- Reviewing Officer – the role identifies the person within the Responsible Body granting the authorisation and originates from the need to guarantee independence from staff involved in the care management arrangements.

The Reviewing Officer's main function is to clearly demonstrate scrutiny of the proposed arrangements and to ensure that the qualifying criteria for the granting of an order are met. Therefore, those acting in this capacity will need to be suitably experienced and senior with the ability to undertake scrutiny of the assessment/care planning documents.

- Approved Mental Capacity Professional (AMCP) – this new role replaces the role of the BIA and aligns with that of the Approved Mental Health Professional role (AMHP) under the Mental Health Act. It is believed the role will mirror the AMHP role in terms of qualifications, regulation and independence.
- The assessing AMCP cannot be someone who was involved in the arrangements of or the decision-making process for the individual's care.

4.5 There will be a statutory requirement for the Reviewing Officer to refer to an AMCP in cases where the individual objects to the proposed arrangements and where individuals are deprived of their liberty whilst in a Private Hospital. This duty will ensure that those individuals who are most at risk will have an additional level of specialist scrutiny/oversight and effective recourse to appeal to the Court of Protection.

- There is a statutory requirement for the Local Authority to appoint a manager with responsibility to oversee the conduct, performance and approval of AMCP's and for this manager to be accountable directly to the Director of Adult Social Services.

4.6 For ease of reference a comparison grid is contained at Appendix 1.

## **5. Consultations/Representations/Technical Data**

5.1 None applicable currently.

## **6. Financial Considerations**

- 6.1 Given the short timescale to proposed implementation of the Liberty Protection Safeguards (LPS) Act, work has started to scope the impact of this change on the Local Authority. However, our ability to fully assess the impact of the new legal framework is hampered whilst we wait for further detail and clarity that should be provided via the Code of Practice and Regulations.
- 6.2 Suffice to say there will be resourcing implications for the Council resulting from the new obligations under The Liberty Protection Safeguards.
- 6.3 Work is being undertaken to estimate potential financial impact. It is understood that the Government are to review the initial financial impact assessment which was widely felt to be underestimated.
- 6.4 Additional reports will follow once the landscape is clearer.

## **7. Carbon Impact Considerations**

- 7.1 Neutral impact currently.

## **8. Equality Considerations**

- 8.1 Equality implications related to the introduction of The Liberty Protection Safeguards will be considered during the implementation phase. All Equality Impact and Needs Assessments required will be undertaken at that stage.

## **9. Legal Considerations**

- 9.1 Considerations related to our current DoLS Service work
- 9.2 The DoLS Service continues to hold a waiting list. Cases where there are no significant high risks indicated for the individual concerned, or, where an application to the Court of Protection is not indicated remain unlikely to be assessed within the statutory timescales required. The DoLS service has a system in place to monitor these cases and to work alongside the care provider or hospital to ensure that the individual's assessment is re-prioritised and assessed more quickly if circumstances change.
- 9.3 There remains a risk of a breach of an individual's human rights in all cases where the assessment is not undertaken within the statutory timescales required. This places the individual at potential risk of a lack of oversight, increased risk of overly restrictive care provision and a lack of access to review by the Court.
- 9.4 Risk to the organisation is reputational and financial. Awards against L/As have been made e.g. in one case a Local Authority faced damages for a substantive human rights breach of £4,615 per month for 13 months and were also ordered to pay the Court/legal costs.
- 9.5 Legal considerations related to the introduction and implementation of The Liberty Protection Safeguards

- 9.6 The DoLS Service is working closely with the County Solicitor's department to ensure that implications/consequences of the new legal framework are considered and planned for.
- 9.7 We aim to ensure that all required policy, practice guidance resources, and training requirements will be in place and accessible to the work force, maximising our ability to apply the new framework across Adult and Community Services.

## **10. Risk Management Considerations**

### **10.1 Risk management considerations related to the current DoLS Service**

10.2 The Deprivation of Liberty Safeguards Service continues to hold a waiting list as is the case for most of the DoLS Services nationally. This continues to present a risk to the organisation and as such the service remains on the organisational risk register.

10.3 All practicable steps continue to be taken by the service in line with ADASS and locality agreed priorities/procedures to minimise the risks posed to individuals and the organisation resulting from any delays in assessments.

10.4 See also legal considerations section above.

### **10.5 Risk management considerations relating to the implementation of the Liberty Protection Safeguards**

10.6 Risk considerations relating to the transfer to LPS are currently being explored.

10.7 The following list is based on headline risks only and are assumptions given our current knows:

- Using the data we have available from DoLS and, estimates for cases in the community where data is limited, we approximate that around 2,500 cases per year will require collation of assessment material and Pre-Authorisation review by Devon County Council staff. This will require additional staff resource to ensure our statutory requirements are met.
- Ensuring that Devon County Council meets its statutory requirements in relation to the Provision of the new Approved Mental Capacity Professional poses a risk in terms of ensuring numbers of appropriately trained and approved staff are available in the locality.
- LPS requires that individuals in private hospitals who are experiencing a potential deprivation of liberty are assessed by an AMCP.

The number of private hospital beds in Devon, including the building of a 45 bedded private psychiatric hospital in Exeter, will impact on the number of AMCP's needed in the locality.

- Advocacy resource. Under LPS all individuals subject to an Authorisation must have either a relative or friend to represent them or an Independent Mental capacity Act Advocate (IMCA) unless it is deemed not in their best interests to have the latter. We envisage that this will require uplift in our current advocacy provision/contracts.
- Training and staff guidance resources. Devon County Council will need to ensure that all frontline staff are aware of the requirements of the new legal framework and that staff guidance and assessment tools are readily available at the point of implementation. This has implications for our current workforce development provision.
- Support to the Private and Voluntary care sector. Devon County Council as a Responsible Body has a statutory obligation to provide training and support to the care provider sector in relation to the implementation and implications of LPS. Ensuring our partners are equipped to manage the change is a must.

10.8 Given that LPS is a replacement for DoLS and aims to ensure that individuals who lack capacity and experience a deprivation of their liberty are provided with protection against a breach of their human rights, the risks posed from non-compliance with the statutory requirements of LPS are assumed to align with those posed with non-compliance with DoLS.

## **11. Summary/Conclusions/Reasons for Recommendations**

11.1 In relation to the DoLS Investment project the service rose to the challenges posed by the project aims and the outcome was highly successful.

11.2 In relation to The Liberty Protection Safeguards, Devon County Council will be required to implement the new legal framework. Further updates will be provided closer to implementation when the landscape is clearer, and all statutory requirements are clarified with the publication of the Code of Practice and Regulations.

### **Keri Storey**

**Electoral Divisions:** All

Cabinet Member for Adult Social Care and Health Services: Councillor Andrew Leadbetter

Chief Officer for Adult Care and Health: Jennie Stephens

**LOCAL GOVERNMENT ACT 1972: LIST OF BACKGROUND PAPERS**

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<u>BACKGROUND PAPER</u>	<u>DATE</u>	<u>FILE REFERENCE</u>
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*Nil*

## Appendix 1 – Comparative Summary - DoLS verses LPS

DoLS (Deprivation of Liberty Safeguards)	LPS (Liberty Protection Safeguards)
DoLS Applies only to people accommodated in Hospitals, Residential or Nursing Homes.	LPS will apply to people who meet the criteria accommodated in any setting, which may include their own home.
DoLS only applies to people aged 18 or over.	LPS will apply to people aged 16 and over, in line with the Mental Capacity Act.
Under DoLS the Local Authority (LA) is the <b>Supervisory Body</b> responsible for assessing and granting authorisations.	A significant departure is being introduced whereby CCG's and Hospitals, as well as Local Authorities, will become the <b>Responsible Body</b> .
Homes or Hospitals would notify the LA when there was a DoL, who would then be responsible for the series of Assessments.	Care Homes can be asked by the LA to do some assessments as part of a 'Pre-Authorisation Review', these assessments could be done by other assessors too, if the person is 18+. *This is unlikely to be practical, due to conflicts of interest*
The BIA is a specialist assessor role, created for the principle purpose of assessing individuals under the auspices of DoLS.	A new role is to be introduced, Approved Mental Capacity Professional ( <b>AMCP</b> ) for cases where there is an objection or dispute, and some other circumstances.
Reviews of an Authorisation can be requested during the period of Authorisation.	Reviews must be 'built-in' to the Authorisation period.
A DoLS Authorisation can only be in place for a maximum period of 12 months, guidance is that it should be for the shortest period possible.	An LPS Authorisation can be in place for 12 months, then a further 12 months, then for up to 3 years.
A DoLS Authorisation can only be for one place, it will end if the person goes into hospital for more than 24 hours or to another home.	An LPS has the scope to 'travel' with the person, so it could cover multiple settings, such as; a care home, family home, residential school, and day care. ALSO: Transport and/or conveying ( <i>not covered by DoLS</i> )
Anybody under a DoLS Authorisation <b>must</b> have a Representative, this can be a family member or IMCA/Paid Representative.	LPS will have a similar need for representation which will be referred to as an Appropriate Person (AP), if there is no AP an IMCA can be appointed if in the person's best interests.
The number of cases and various statistical categories needed to be returned to the DoH (NHS Digital) annually.	There is no guidance (yet) as to what will be expected from the LA, but something similar is anticipated.