



Adult Social Care Scrutiny Commission Report

Deprivation of Liberty Safeguards and Liberty
Protection Safeguards

Lead Member: Cllr Sarah Russell
Lead Strategic Director: Martin Samuels
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Wards Affected: All
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1. Purpose

- 1.1 This report describes the existing requirement to implement Deprivation of Liberty Safeguards (DoLS) and the planned implementation of a replacement process called Liberty Protection Safeguards (LPS).
- 1.2 The report is for information.

2. Summary

- 2.1 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).
- 2.2 DoLS is the statutory process within the Mental Capacity Act 2005, that should be followed when it is in people’s best interests to be deprived of their liberty in care homes or hospitals. This only applies where the person lacks the mental capacity to consent to be there and they are aged 18 years and above.
- 2.3 Due to the challenges described in this report, and following a consultation, the Mental Capacity Amendment Act 2019 will replace the DoLS process with a new process referred to as the Liberty Protection Safeguards (LPS). The implementation date has been twice deferred due to ongoing work to create the statutory guidance and code of practice required to make this change in practice. No further date has been set, following the deferment from 1st April 2022.

3. Recommendations

- 3.1 The Adult Social Care Scrutiny Commission is recommended to:
 - a) Note this report and provide any comments
 - b) Receive a future report when an implementation date and accompanying statutory guidance are confirmed.

4. Report

4.1 Legal Framework (DoLS)

4.1.1 DoLS came into force in 2009 as an amendment to the Mental Capacity Act 2005. Statutory responsibility for delivering DoLS rests with Local Authority Adult Social Care departments.

4.1.2 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 - 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).

4.1.3 A manager (Authoriser/Signatory) 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.

4.1.4 What constitutes deprivations of liberty in care settings is defined by case law, not legislation. From 2009 to 2014, 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.

4.1.4 A Supreme Court judgment in 2014 (the Cheshire West judgment) led to a widening of the cohort of people falling into this category. It was recognised that it was an infringement of an individual's Article 5 Human Right, where they lacked capacity to be deprived of their liberty, regardless as to whether they objected, or not. As a result, all Local Authorities have seen a minimum of a fivefold increase in the referrals being received. This has led to Local Authorities being unable to meet their statutory responsibilities to assess people within the legal timescales.

4.2 Service structure

4.2.1 Due to the fivefold increase in requests for DoLS since 2014, Leicester City Council has not been in a position to match the level of requests with resources. The size of the team was doubled in 2016 but the demand for the service was and continues to be greater than the resources available.

4.2.2 The DoLS service sits within Adult Social Care and comprises of 1 Team Leader, 6 BIA and 2.6 administrator posts. However, since the Covid-19 pandemic began in March 2020 the DoLS Team has been under resourced and currently has 3.5 BIAs and 1.6 Administrators in post.

4.2.3 Several recruitment initiatives have been undertaken during 2021 but were unsuccessful in attracting appropriate candidates. Upon further enquiry with several other local authorities there appears to be a void in available candidates, with a belief that this is due to a mixture of the current employment climate following Covid-19 and the limited future for DoLS.

4.2.4 Currently, we are managing a waiting list of approximately 550 persons requiring the statutory process of DoLS to be applied. To mitigate risks, the national triage criteria is applied to ensure that people on the list are triaged in order of priority and reviewed, to ensure those who wish to appeal placement or for whom greater concern has been expressed, receive the safeguards afforded by DoLS such as advocacy and a route of appeal. Best Interest Assessors external to Leicester City Council are also contracted to support the delivery of the service.

4.3 Key risks

4.3.1 The described risks are included in the Departmental and Corporate risk registers. Eligible people not having the DoLS process applied are left without their Article 5 human right being maintained, as they have no lawful mechanism for which to appeal. This can result in litigation and lead to both financial and reputational consequences. There are case law examples where this has been established.

4.3.2 If all eligible persons for DoLS had the process applied, there is a likelihood there would be an increase in Court of Protection appeals resulting in both additional work and costs being met by Adult Social Care and thus increased risk in not being able to meet the demand.

4.3.3 For an eligible person not receiving a DoLS assessment, there is the risk that they might not be receiving an appropriate level of support in a manner that meets their best interests.

4.3.4 Due to the recognised risks faced by all local authorities, in 2016 The Law Commission led on a consultation. This was seeking a change that ensured individual's Article 5 human rights were maintained, but with a focus on streamlining the statutory process in an attempt to reduce the bureaucracy. This has resulted in the development of the Liberty Protection Safeguards (LPS).

4.4 Liberty Protection Safeguards (LPS)

4.4. 1 The LPS objective will be the same as that of DoLS in maintaining a person's Article 5 human right but the key differences are:

- a) LPS will lower the age of eligibility and apply to all individuals aged 16 years old or above, who lack the capacity to consent to the care arrangements.

- b) The care arrangements can apply in any community setting including shared lives, supported living, own home and not just in care homes and hospitals.
- c) Whereas DoLS consists of 6 assessments, LPS will consist of three – capacity, mental disorder, and ‘necessary and proportionate’. Consideration to other existing DoLS criteria must be incorporated.
- d) Whereas the local authority is the sole responsible body for delivering DoLS, both hospital trusts and Clinical Commissioning Groups (CCG) (which, in due course will become Integrated Care Systems ICS), will become ‘responsible bodies’ in delivering LPS to those individuals who are either in hospital who meet the qualifying criteria, or those within a community-based setting where the care arrangements are 100% funded by the CCG.
- e) LPS will be delivered at the point of becoming known to Education or Adult Social Care, where it is recognised that the person meets the qualifying criteria. This is different to DoLS, which is applied when a person is considered for a move into a care home or admitted to hospital.
- f) All professionals within the Local Authority (e.g. social workers and occupational therapists) will be responsible for delivery of LPS, whereas DoLS is delivered by Best Interest Assessors.
- g) Best Interest Assessors will be replaced by a new role, Approved Mental Capacity Professional, who will be employed by Local Authorities, hospital trusts and CCGs. These new roles will apply additional scrutiny to those situations where the individual is objecting to their care or treatment arrangements that amount to a deprivation of liberty or, where the case is considered complex.
- h) Where the person is in an independent hospital, the local authority will be responsible for delivering LPS, for which an Approved Mental Capacity Professional will be required.
- i) Local Authorities will be responsible for delivering the training for relevant professionals within hospital trusts, CCGs and Local Authorities to become qualified Approved Mental Capacity Professionals and be responsible to ensure there are enough Approved Mental Capacity Professionals to meet the requirements.

4.5 Potential positive outcomes of the new scheme

4.5.1 It is hoped this change will create a simplified legal framework that is accessible to all parties. It should deliver improved outcomes for people deprived of their liberty and for their family/unpaid carers.

4.5.2 LPS should provide a simplified authorisation process capable of operating effectively in all settings. Also, provide a comprehensive, proportionate and lawful mechanism by which deprivations of liberty for young people (aged 16 and 17 years of age) can be authorised, reducing the need for time critical and expensive Orders to be obtained from the Court of Protection.

4.5.3 LPS should ensure increased compliance with the law, improve care and treatment for people lacking mental capacity and provide a system of authorisation in a cost-effective manner. The new scheme can apply across multiple community settings unlike DoLS, reducing the frequency of further assessment being required.

4.5.4 LPS includes the lawful conveyance of individuals subject to the new scheme who might abscond or need to be relocated, where currently DoLS does not provide this.

4.5.5 LPS gives an opportunity to raise the quality of work across all organisations in supporting and promoting individual's autonomy to make decisions and promote their best interests in meeting their needs.

4.6 Potential risks for implementing and delivery of LPS

4.6.1 The key risk is the lack of guidance in support of the legislation. Local Authorities have not been able to accurately scope the potential number of people who will be eligible for LPS to be applied or plan for the detail of the changes that will be needed.

4.6.2 With lack of ability to scope and plan, there are concerns about a lack of sufficient funding to resource the new LPS service / approach.

4.6.3 There is a risk of an increase in numbers of people known to Adult Social Care, because people who currently fund their own private care that amounts to a deprivation of the person's liberty (and where they may lack capacity to decide upon that care), will require LPS to be applied.

4.6.4 Ensuring both Education and Adult Social Care staff receive appropriate and timely training to deliver LPS when it is implemented (date yet to be confirmed) is a concern. Equally, ensuring we have sufficient qualified Approved Mental Capacity Professionals to deliver LPS.

4.6.5 When the date for implementation is confirmed, there is a risk of not having the appropriate time and funding to develop existing workforce and IT systems, as well as assist Health partners in ensuring that a robust and efficient and effective service is in place.

4.6.6 When LPS is implemented, the DoLS Service will continue to run alongside for the first 12 months to support an effective transition between the old and new schemes. This will provide a challenge by way of dual systems and roles being required with Approved Mental Capacity Professionals being required to also continue to engage as Best Interest Assessors (where required).

4.6.7 Clearing the existing backlog of persons waiting for DoLS before LPS (currently approximately 550 people) is at planning stage but cannot progress until an implementation date is known.

4.6.8 Scoping is needed of required advocacy referred to as Independent Mental Capacity Advocates, as this need will increase under LPS. Responsibility to ensure enough Independent Mental Capacity Advocates are available to meet statutory requirements rests with the Local Authority.

4.7 Planning and next steps

4.7.1 A local action plan has been agreed as far as it can be given the unknowns, outlining requirements for the new scheme. A planning group is chaired by the Director, ASC and Safeguarding. Key individuals have been identified to assist in meeting the requirements of the proposed action plan. Leads are engaging both regionally and locally with other DoLS/LPS leads, sharing knowledge and best practice in planning for the new scheme.

4.7.2 Liaison is taking place with Health partners to ensure a common understanding of the requirement and to establish training requirements for LPS. To date, Adult Social Care staff have received updated training on how to assess mental capacity in accordance with the Mental Capacity Act 2005. Further training is planned on how to assess a person's needs (the necessary and proportionate element) under LPS. We are awaiting training requirements to be established nationally, for both conversion of Best Interest Assessors to the new Approved Mental Capacity Professional qualification and also the training programme for other professionals to become Approved Mental Capacity Professionals.

4.7.3 Scoping the numbers of people within Leicester City who may be eligible for LPS is in progress, as best as we are able, which will help determine the shape and size of the LPS Service.

4.7.4 Corporate IT solutions are being addressed to meet the requirements.

4.7.5 Much of what has been outlined above, including the process for delivering the LPS scheme, is yet to be determined in the Regulations and the draft Codes of Practice, for which we are awaiting release. Upon release, there will be a three-month consultation period. A future date for implementation of LPS is expected, following conclusion of the consultation period.

5.1 Finance

The financial implications of the changes outlined in this report are unknown at this stage. Once the estimated demand is clearer and the resource requirements more certain, then the budget implications can be quantified.

Martin Judson, Head of Finance

5.2 Legal

This report clearly sets out the changes that will be brought about by the Liberty Protection Safeguards scheme and highlights the risks and mitigations that are being considered in anticipation of the changes. Legal advice should continue to be sought regarding the implications of the scheme.

Pretty Patel- Head of Law, Social Care & Safeguarding Tel: 0116 454 1457

5.3 Equalities Implications

When making decisions, the Council must comply with the Public Sector Equality Duty (PSED) (Equality Act 2010) by paying due regard, when carrying out their functions, to the need to eliminate unlawful discrimination, harassment, victimisation and any other conduct prohibited by the Act, to advance equality of opportunity and foster good relations between people who share a 'protected characteristic' and those who do not.

In doing so, the council must consider the possible impact on those who are likely to be affected by the recommendation and their protected characteristics.

Protected Characteristics under the Equality Act 2010 are age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The report provides an update on the existing requirement to implement Deprivation of Liberty Safeguards (DoLS) and the planned implementation of a replacement process called Liberty Protection Safeguards (LPS), both of which will have an impact on people from across a range of protected characteristics. Going forward need to ensure equality considerations continue to be taken into account once an implementation date and accompanying statutory guidance are confirmed.

Sukhi Biring
Equalities Officer
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5.4 Climate Change Implications

There are no significant climate emergency implications directly associated with this report.

Aidan Davis, Sustainability Officer, Ext 37 2284

6. Appendices
None

7. Background Papers
None

8. Is this a Key Decision Y/N = N