OXFORDSHIRE COUNTY COUNCIL

People Overview & Scrutiny Committee
Thursday, 19 September 2024

ADDENDA

6. Deprivation of Liberty Safeguards (Pages 1 - 10)

Cllr Tim Bearder, Cabinet Member for Adult Social Care, Karen Fuller, Director of Adult Social Services, Victoria Baran, Deputy Director Adult Social Care, and Lorraine Henry, Safeguarding Mental Health Service Manager, have been invited to present a report on the Deprivation of Liberty Safeguards (DoLS) and to answer the Committee's questions.

The Committee is asked to consider the report and raise any questions, and to **AGREE** any recommendations it wishes to make to Cabinet arising therefrom.

Report to follow.

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Divisions Affected - All

PEOPLE OVERVIEW AND SCRUTINY COMMITTEE
– 20 September 2024

DEPRIVATION OF LIBERTY SAFEGUARDS SERVICE

Report by Karen Fuller,
Director of Adult Social Care

1. The Committee is RECOMMENDED to

- Note the update provided on the risk management actions on Deprivation of Liberty Safeguards (DoLS).
- Note the update provided on the progress of building a sustainable DoLS service.

• Executive Summary

2. This report provides an update on the progress on the risk management actions undertaken within the DoLS service. It updates the committee on the developments within the service and progress made in Oxfordshire towards meeting its statutory duty in ensuring that residents who have been assessed as lacking the requisite capacity to make decisions as to their care and support in specific settings are lawfully deprived of their liberty.

3 Background.

3.1 By way of amendments to the Mental Capacity Act 2005 (the MCA), the DoLS were brought into force in April 2009 in response to concerns about the protection of individuals who lacked the requisite capacity to make decisions as to their care and treatment. The DoLS regime created a new duty on Local Authorities and relevant professionals to ensure that appropriate checks and balances were applied when they had to deprive people lacking capacity of the liberty.

3.2 The landmark Supreme Court ruling in *P v Cheshire West and Chester Council and P & Q Surrey County Council* [2014] UKSC 19*)* refined the definition of a deprivation of liberty to a much broader one than originally applied in 2009. This led to a significant increase in the number of DoLS applications being received by Local Authorities. The 2014 decision introduced what is now referred to as the 'acid test' which states that for those people with an impairment of mind or brain who lack the capacity to consent to their care arrangements in a 24 hour setting are under continuous supervision and

control and are not free to leave of their own volition, will be in law deprived of their liberty. A formal authorisation must therefore be in place in order to ensure that the individual is lawfully deprived and there is no breach of Human Rights.

3.3 The highest number of applications for authorisations under the DoLs are made by care homes. In Oxfordshire this predominantly applies to older people with dementia or other cognitive impairments

3.4 The DoLS assessments are crucial in ensuring that any potential deprivation of liberty is in a person's best interests and that they receive appropriate care and treatment. There are six key assessments involved in the DoLS process:

Age Assessment: Confirms that the person is aged 18 or over, as DoLS only apply to adults.

Mental Health Assessment: Determines whether the person has a mental disorder as defined by the Mental Health Act 1983.

Mental Capacity Assessment: Assesses whether the individual lacks the capacity to make decisions about their care or treatment.

Best Interests Assessment: Ensures that any deprivation of liberty is in the best interests of the person concerned, considering their past and present wishes, feelings, beliefs, and values.

Eligibility Assessment: Checks whether the person is eligible for DoLS or for detention and treatment under the Mental Health Act 1983.

No Refusals Assessment: Ensures there are no advance directives or court rulings that would override a deprivation of liberty.

These assessments collectively ensure that any deprivation of liberty is justified, necessary, and in the person's best interests and must be undertaken by appropriately qualified professionals namely a Doctor registered under section 12 of Mental Health Act 1983 and a Best Interest Assessor (a specifically qualified Social Worker, Nurse or Occupational Therapist).

3.5 The U.K Government asked the Law Commission to undertake a review of the DoLS scheme following a critical report from the House of Lords in 2014. The Law Commission's report concluded that DoLS: *'are overly technical and legalised'* and *'are not meaningful for disabled people and their families or carers'.*

3.6 As a consequence, work began on creating a more practicable system and Liberty Protection Safeguards (LPS) were conceived, a new system designed to simplify and streamline the process, extending protections to 16 and 17-year-olds and covering all settings, including supported accommodation and private homes. Nationally waiting lists continued to rise as authorities awaited the introduction of LPS however, last year the government announced that this would now be delayed to an unspecified date. The resultant effect is that Local Authorities are now having to adopt plans to address waiting lists that exist under the current complex DoLS system.

3.7 Nationally there has been a 22% increase in the number of DoLS referrals made between 21/22 to 23/24. In Oxfordshire however, the increase over the same time period was

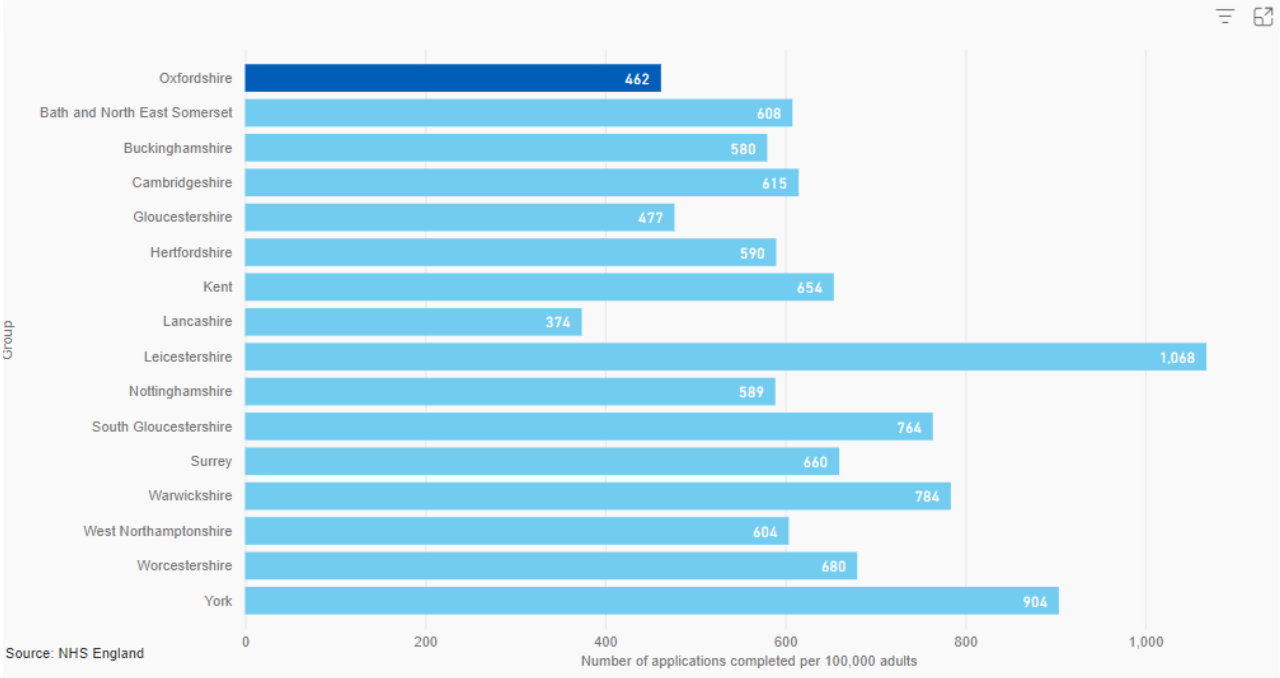
43% accounted for by increased understanding across care homes and recovery post the covid pandemic.

3.8 The Association for the Directors of Adult Social Services (ADASS) recognises the problem currently being faced by all Local Authorities and as a consequence have endorsed the use of a risk prioritisation tool developed by West Midlands ADASS to support Local Authorities. The tool supports Local Authorities to review cases and respond in a timely manner to those requests which have the highest priority. The tool sets out the criteria which indicates that an urgent response may be needed in order to safeguard individuals rights. ADASS have endorsed the use of this tool which can be found here ADASS-2024-DoLS-Priority-Tool.pdf (See Appendix 1). This prioritisation tool has been adopted in Oxfordshire and adapted to ensure that the cases of the highest urgency are coded and acted upon.

4 National and local performance

Nationally the number of authorisations completed each year are reported by NHS digital. The full interactive dashboard is publicly available and can be found here at Deprivation of Liberty Safeguards (DoLS) - NHS England Digital. In England the average number of authorisations completed in 23/24 was 716 per 100,000 of the population compared to a completion rate of 462 per 100,000 in Oxfordshire. Whilst this is an improvement on 22/23 where 352 were completed, it is accepted that the performance is still lower than required for a sustainable service. The data also positions Oxfordshire as having a lower completion rate than our statistical peers as outlined in the table below

Table 2 DoLS per 100,000 residents in Oxfordshire compared to our statistical peers.



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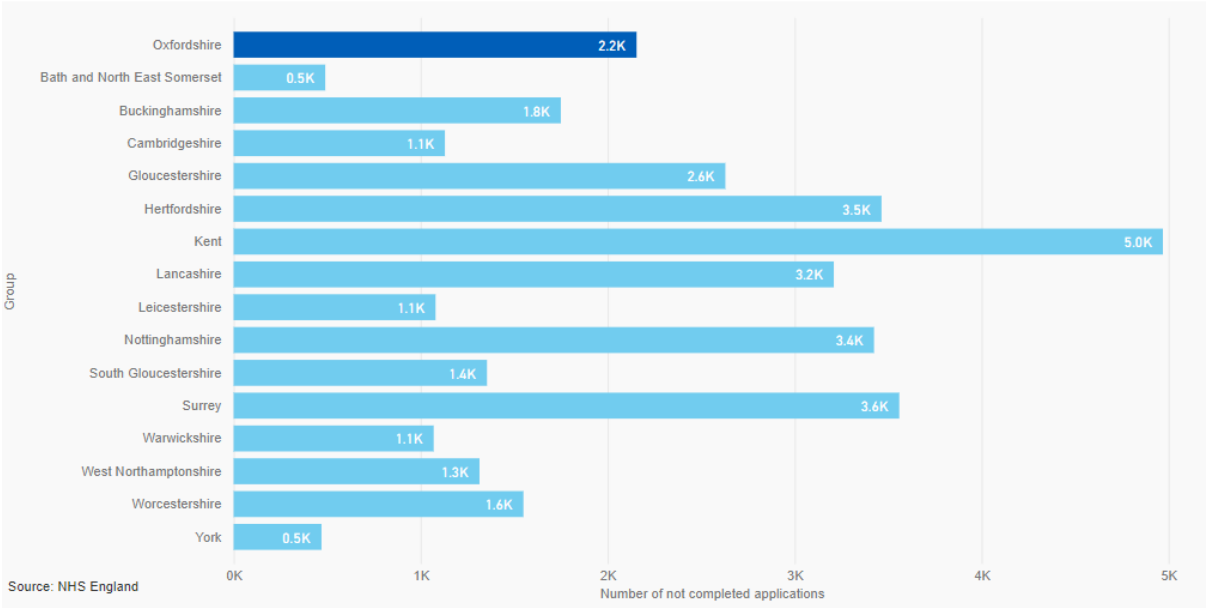
5 Meeting the DoLS Demand

5.7 At the end of 23/24 the number of applications not completed and remaining on the waiting list for Oxfordshire was stood at 2.2k. Compared to 15 statistical peers this placed Oxfordshire approximately in the middle of the group, with some authorities further ahead with their plans to reduce waiting lists as evidenced in the table below

Figure 9: Number of applications not completed as at 31 March 2024 for the select local authority and its regional or peer groups



5.8 The approach historically adopted by Oxfordshire to manage demand was to have a small specialist team of 7.91 Full Time Equivalent staff to complete Best Interest Assessments complemented by a rota of Assessors across the wider adult social care service. This has not produced sustainable results due to increasing demand and staff movement.

5.9 In recognition of the increasing demand and requirement to realign the model the service has budgeted for and additional £400K per annum to improve performance. This funding has been used to source external expertise from specialist agencies to undertake 500 assessments as a one off intervention followed by recruitment of additional substantive Best Interest Assessors to sustain improvements to the waiting list.

At the time of writing the waiting list for authorisations has reduced to 1500 and substantive staff have been recruited and will be in post by the end of October 2024. Of the 1500 people awaiting an authorisation 1360 are older people in care homes or hospital.

5.10 In addition to these interventions the Service Manager for DoLS has initiated a weekly “Meaningful Measures Meeting”. This brings together senior practitioners from the service to review the DoLS data and review individual completion rates of

assessment to understand any barriers to achieving the prescribed number of assessments per week including those from BIA's in the wider service who remain on the rota. The Service Manager has also reviewed current processes to ensure that efficiencies are achieved through the use of legally compliant shorter assessment forms in order to reduce the administrative burden and align staffing resource to specific geographical areas.

5.11 The DoLS manager continues to develop the Best Interest Assessor workforce with 10 members of staff due to receive training over the next year to undertake additional assessments on a rota basis. It is anticipated that these measures will increase productivity and over the coming year, reduce the waiting list further.

6. Risk Management

6.1 All referrals that come into the service are initially screened for risk using the ADASS prioritisation tool, as detailed above. The tool assesses risks across 14 domains and enables a code to be applied to indicate the level of urgency. Examples of high risk or high priority cases might include

Severe Dementia: An elderly person with severe dementia who frequently attempts to leave a care home, putting themselves at risk of harm. This individual may also exhibit aggressive behaviour that requires frequent physical restraint beyond what is allowed under the Mental Capacity Act.

Objections to Care: An individual with a learning disability who strongly objects to their placement in a care facility and makes repeated, meaningful attempts to leave. This situation may also involve disputes between family members and care providers about the appropriateness of the care setting.

Hospital Settings: A patient in an acute hospital who does not meet the criteria for detention under the Mental Health Act but whose situation is complex and cannot be managed in the short term. This might include cases where there is disagreement about the patient's capacity to make decisions about their care.

6.2 Due to the high volume of referrals those rated by the ADASS tool as high priority are screened for urgency. Where the regular use of restraint is being used as part of an individual's care plan their case will be allocated to an assessor immediately. Those objecting to their placement are screened to ascertain the distress experienced and prioritised accordingly to ensure that the deprivation is proportionate and in the persons best interests.

6.3 People subject to a DoLS authorisation are able to challenge their deprivation of liberty through the Court of Protection under section 21A of the Mental Capacity Act 2005. Currently in Oxfordshire there are 15 challenges that are being undertaken through the court process. Adult Social Care work closely with legal services to ensure that all due process is followed in responding to these challenges and ensuring best interest considerations have taken place. Whilst it is the statutory right of the individual to challenge their DoLS via section 21A of the MCA, it must be noted that the threshold for brining such a challenge is low and does not automatically mean that the deprivation is not in a persons best interests.

6.4 Risks to individuals is further mitigated by routine Care Act Assessment reviews. Of those people currently awaiting a deprivation of liberty authorisation 508 have received a Care Act Review in the last 12 months. This means that any issues or dissatisfaction with care arrangements will have been addressed through those reviews whilst awaiting the authorisation. It must be noted that circa 55% of people in receipt of care and support in Oxfordshire fund their own care and will have made private arrangements to enter a care home. Care homes then refer to the Local Authority where those private admissions amount to a deprivation of liberty. Therefore, not all people on the waiting list will be known to Adult Social Care and a Care Act Review duty will not be applicable.

Corporate Policies and Priorities

7. The DoLS Team priorities are shaped by our corporate vision and priorities, with particular focus on:

- Tackling inequalities: working with partners and agencies to address inequalities focussing supporting on those in greatest need.

Financial Implications

8. This report outlines the additional funding that has been awarded to the DoLS team to develop a sustainable service.

9. Legal Implications

9.1 Delays in processing DoLS applications can result in individuals being unlawfully deprived of their liberty. Local authorities may face legal challenges and judicial reviews if individuals or their representatives believe that their Human Rights (article 4 and 8) have been infringed due to delays in DoLS assessments and authorisations.

9.3 Addressing these issues requires robust management strategies, adequate resource allocation, and ongoing training for staff to ensure timely and effective processing of DoLS applications. Adult Social Care have addressed some immediate challenges with an improvement plan in train but clarity on the future of LPS is necessary to enable authorities to sustainably address the demand.

Staff Implications

10. If the LPS were to come into force it currently remains unclear as to the financial and staffing resource required to deliver a transition to the new model. As no date has been set for LPS the demand management approach will remain as outlined above.

Equality and Inclusion Implications

11.1 Equity in experiences and outcomes is a key theme of the work undertaken in the DoLS Team.

11.2 Equality and inclusion is identified as a key priority within this report and the work undertaken in the team considers the way in which we are meeting our duties and responsibilities in this area.

Risk Management

12. The Adult Social Care Directorate risk register contains DoLS and is overseen by the Directorate Leadership Team. Demand Management is on the Corporate Risk Register

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ADASS DoLS Priority Tool

A Screening tool to prioritise the allocation of new requests to authorise a deprivation of liberty.

Due to the increasing in demand for assessments under the Deprivation of Liberty Safeguards (DoLS) since 2014 WMADASS have reviewed the original ADASS Task Force tool based on current demands and current practice in the region. The aim of the tool is to assist Councils to respond in a timely manner to those requests which have the highest priority. The tool sets out the criteria which indicates that an urgent response may be needed in order to safeguard the individuals concerned. The use of this tool must be balanced against the legal criteria for the DoLS which remains unchanged. ADASS have endorsed the use of this tool with thanks to WMADASS.

This screening tool is an indicative guide only as it will generally be based on information provided by the Managing Authority in the application and each case must be judged on its own facts. In addition, it would be good practice to screen any waiting list for length of wait as well as geographical location. Councils may have further support tools within each of the categories.

HIGHER	MEDIUM	LOWER
A situation which appears to meet the acid test and requires the safeguards to ensure more substantive protection.	A situation which meets the acid test and requires the safeguards but there are some actions which can be taken in the short term, in the persons best interests, to manage the impact of the arrangements.	A situation which meets the acid test and requires the safeguards but there is no evidence to suggest there will be any substantive changes.
Factors to consider in each category		
• Active objections from the person (verbal or physical, e.g repeatedly saying they want to go or packing bags) • Meaningful, successive attempts to leave not simply leaving due to disorientation. • Sedation/medication is used frequently PRN to control behaviour (particularly covert medication), this has not been regularly reviewed and the person is negatively impacted. • Excessive Physical restraint is used regularly which causes distress to the person and goes beyond what staff feel the MCA allows. • Restrictions on family/friend contact (or other significant Article 8 issue)	• Not making any active attempts to leave but may ask to leave or state they are leaving soon, if asked. • Appears to be unsettled some of the time but staff have measures in place to redirect, reassure or to distract which are effective, in the short term. • Restraint or sedative medication is used infrequently, and staff could rely on the protection of the MCA, in the short term. • A Psychiatric setting where the person has been assessed not to meet the criteria for	• Evidence that this is a settled placement with no evidence of objection etc. but may meet the requirements of the acid test. • Evidence that the person chose the care home previously, with mental capacity, and is not distressed there now they have lost capacity. • Minimal impact on the person of continuous supervision and control. • No evidence of specific restraint or restrictions being used but rather a general sense of supervision and control such as expected in the setting.

HIGHER	MEDIUM	LOWER
• Objections from family /friends or family seeking to move the person in an unplanned way. • Anticipated challenge to Court of Protection, or application for Deputyship including a dol. • A Psychiatric setting where the person has been assessed to not meet the criteria for MHA detention but there is disagreement as to whether this decision is appropriate. • Acute hospital referral where there are any of the above factors, which cannot be managed even in the short term.	MHA detention and this is not disputed. • Acute hospital referral expected to last beyond 7-14 days with any of the above present.	• End of life situations, intensive care situations which may meet the acid test but there will be no benefit to the person from the Safeguards. • Acute hospital referral where the person is expected to be discharged within 7 -14 days.

Renewals or further Authorisations

Councils vary in their ability to respond to renewal requests. Sometimes for internal operational reasons and sometimes due to sheer volume. There needs to be an analysis of risk, if renewals are not afforded high priority, as renewals represent a known deprivation of liberty. There are several proportionate methods which can be employed to process renewals, but these rely on robust identification and most importantly rely on receiving a Form 2 in time. For these reasons renewals are not included in the above prioritisation tool but the following principles are recommended as best practice.

- Renewals should be identified at least 28 days in advance so that equivalent or proportionate assessments can be used.
- Renewals must be in place without a gap where cases are the subject of Court of Protection processes.
- Where practicable, renewals where there is evidence of any of the factors in the higher priority category should also be prioritised.

'Unbefriended'

There are some people who might be viewed as high priority because they have no family or friends to support them. However, in the absence of any of the above factors which suggest higher priority the following is recommended as the way forward.

- Identify those needing an IMCA from Forms 1 or 2
- Refer for an IMCA
- When the IMCA report is complete, screen again for any factors suggesting higher priority.

This resource was written by Lorraine Currie in March 2024, commissioned by West Midlands ADASS.