

Division(s):

CABINET 16 SEPTEMBER 2014

THE DEPRIVATION OF LIBERTY SAFEGUARDS - RESOURCE IMPLICATIONS FOLLOWING A SUPREME COURT JUDGMENT IN MARCH 2014

Report by John Jackson, Director of Adult Social Services

Introduction

National Context

1. The Mental Capacity Act 2005 (MCA) came into force on 1st October 2007 and provides the statutory framework for people who cannot make decisions for themselves, or who have capacity and want to make preparations for a time when they may lack capacity in the future, to make critical decisions about their lives. It contains provisions for assessing whether people have the mental capacity to make decisions for themselves, and provides a legal framework for acting or making decisions on behalf of individuals who lack capacity, and ensures a right for the individual to be protected from harm where they lack the capacity to make decisions themselves.
2. The underlying philosophy of the Mental Capacity Act is that any decision made or action taken, on behalf of someone who lacks capacity to make the decision or act for themselves, must be made in their "Best Interests" This applies to any person acting on the individuals behalf, whether they are a family carer, a paid care worker, an attorney, a court appointed deputy, a health or social care professional. As long as these acts or decisions are in the "Best Interests" of the person who lacks capacity to make the decision themselves, or consent to acts concerned with their care or treatment, then the decision maker or carer will be protected from liability. The Act requires people to follow certain steps to help them work out whether a particular act or decision is in the persons "Best Interests" including following the "Best Interests" checklist.
3. The MCA is supported by a Code of Practice which is an official document that places certain legal duties on social care professionals. It also offers more general guidance and information to anyone caring for someone who may lack capacity to make a decision.
4. The MCA allows restraint and restrictions to be used - but only if it is in a person's best interests and that no other measure can be used to protect them.
5. In April 2009, the Government amended the provisions to of the MCA to incorporate Deprivation of Liberty Safeguards (MCA DOLS) which applies to England and Wales only. This was introduced to prevent deprivations of

liberty without the proper safeguards being in place and ensure that the care or treatment of individuals without capacity receive, is in their “Best Interests”

6. Deprivation of Liberty Safeguards is only applicable to people who reside within a care home or hospital. In other settings, for example supported living, the Court of Protection can be asked if a person can be deprived of their liberty.
7. Care Homes or Hospitals must ask the Local Authority if they can deprive a person in their care of their liberty. This is called a Standard Authorisation.
8. There is a process of six different assessments which have to take place before a Standard Authorisation can be granted. These are to determine whether the person meets the qualifying requirements for Deprivation of Liberty Safeguards regarding age; mental health; mental capacity; no refusals (would a DOLS conflict with any other decisions eg Lasting Power of Attorney), eligibility and best interests.
9. If a Standard Authorisation is granted, one of the most important safeguards is that the person has someone appointed with legal powers to represent them. This is called the relevant persons representative and this will usually be a family member or a friend and where this is not in place independent advocacy will be provided.
10. Other safeguarding of the legislation include rights to challenge authorisations in the Court of Protection without incurring costs for the service user and access to independent advocates called Independent Mental Capacity Advocates. (IMCA's)
11. On 19th March 2014 the application of DOLS was brought into question and resulted in the decision of the Supreme Court, “The Cheshire West judgment” (P –v- Cheshire West and Chester Council and another; P and Q –v- Surrey County Council 2014 UKSC 19). This judgment was a result of appeals in two situations about the application of the criteria for judging the living arrangements made for individuals who lacked capacity, and whether this amounted to a deprivation of liberty. The Court found that it did, and the 'acid test' that was set out in that judgment broadens the number of individuals who would now come under the jurisdiction of DOLS

Local Context

12. In 2007 Oxfordshire County Council established a team and prepared the Local Authority to become a Supervisory Body. A requirement was to ensure that staff were equipped to act under the legislative powers. Training for medical assessors, Best Interest assessors and authorisers was completed. The team also delivered training to Residential, Nursing Homes and Hospitals about the implications of this Act and worked closely with the Primary Care Trust (replaced by the Clinical Commissioning Group in 2013).

13. Oxfordshire County Council was in the fortunate position to have Rachel Griffiths managing the team and who left us to join the Social Care Institute for Excellence (SCIE) a national organisation on MCA and DOLS.
14. The Team has continued to develop and manage the workload effectively. A rota system of Best Interest Assessors, who have completed the Post Qualification training to undertake the role, is in place..
15. Following the Cheshire West judgment handed down by the Supreme Court on 19th March 2014 the impact has been significant for all Local Authorities including Oxfordshire County Council. This is due to the increased scope of the definition of "deprivation of liberty" and consequently the number of individuals that now fall within the remit of DOLS and are residents in care homes or are in a hospitals environment.
16. It is important to note that the issue about whether DOLS applies to Supported Living environments (whereby individuals receive personal care, sometimes over a 24 hour period) is still at this stage not resolved. The current situation is that deprivations of liberty in supported living settings must be authorised by the Court of Protection. However, it is anticipated that the legislation will be amended to include supported living settings within the next few years. In the meantime, this means there are approximately 650 service users who would need to be reviewed to ascertain whether they lack capacity to make decisions in regard to their care and accommodation needs and meet the criteria for deprivation of liberty as set out in the Cheshire West judgment.
17. Of these service users, Court applications would be needed to the Court of Protection for any of the individuals who meet the deprivation of liberty "acid test" in order for proper authorisation to be provided.

Impact of Cheshire West judgment in Oxfordshire

18. Following the Cheshire West judgment the DOLS team has seen a significant increase in the number of requests for DOLS authorisations. The numbers have increased six fold in Oxfordshire, in comparison to the national estimate, which is a tenfold increase.
19. The number of requests received from April to August 2013 was 82. Following the Cheshire West Judgement for the same period in 2014, 486 requests have been received.
20. See Appendix 1 for monthly request data from April 2009 to date.
21. There are currently 250 requests waiting to be assessed. 52 of these are deemed as urgent authorisations, 25 have a Best Interest Assessor allocated to undertake the work and are all at various stages of completion. 19 of the 52 are Out of County placements which results in increased resources due to the need to travel and negotiate with other local authority supervisory bodies. The previous reciprocal arrangements in place to undertake DOLS for other Local Authorities are under great strain due to the necessity to meet home

demands and pressures across the country of the increases in workloads and challenges for meeting the legislative requirements. As cases are completed further requests are allocated to endeavour to manage the high volume of cases.

22. It is difficult to equate the average number of hours required to undertake a request as some are fairly complex and involve a number of visits to complete the necessary work.
23. Authorisers, who are Area Service Managers and Deputy Directors in Oxfordshire, are required to scrutinise the Standard Authorisation and only authorise if they are satisfied that the requirements of the legislation have been met and that deprivation of liberty is the least restrictive measure that can be used. This system works effectively but the demand for the task places additional resources on managers to work as authorisers to tight legislative timescales.
24. Oxfordshire currently have 30 cases termed urgent authorisations which are outside of the 14 day deadline for completion and are dealing with these as soon as capacity is available but it of concern that we are not able to meet the statutory requirements. The DOLS Manager reviews these applications daily to ensure that individuals are as safe as possible and that homes/hospitals are ensuring there are no safeguarding issues as a result of this delay.
25. The wellbeing of the individual concerned is not affected by a delay in the DOLS authorisation being granted, because the DOLS regime is confirming the legality of a situation currently in place or planned to be implemented. The individual's wellbeing would come into consideration if the DOLS authorisation could not be granted because the situation was found not to be in the individual's best interests. These situations are rare. In these circumstances a safeguarding alert is raised and relevant procedures followed to ensure that the unauthorised deprivation of liberty ceases, the DOLS are a human right protection for individuals.
26. The DOLS team are currently granting between 12-18 authorisations per week. This means on the current activity we will not clear the workload today until February 2015.
27. Oxfordshire is identifying Social Workers and Occupational Therapists who are able to train to complete the DOLS applications however this is not a quick resolution but will set us up to respond in the longer term. We are looking to explore sessional workers qualified to undertake the task and free up more time for those who are trained however this is being balanced with the work within the Areas to meet Assessment requirements.
28. Legal Services is seeking to ensure that it can deal with the various applications required to the Court. As much as possible a standard application pack is being put together to ensure that Legal Services can expedite the process as much as possible. There is the potential that legal challenges could be made against all relevant councils for failure to obtain the

necessary Court authorisations with claims for compensation for unlawful detention, hence the need to expedite the applications where possible. Similarly if deadlines are missed by relevant councils as Supervisory Bodies then this could result in challenges or complaints to the Ombudsman.

Risk Management

29. The main risks are Oxfordshire County Councils ability to meet its statutory requirements under the Act given the increase in workload since the Cheshire West Judgement and ensuring that any individuals awaiting an assessment are safe and cared for in accordance with best practice and high standards of care.
30. The referrals are continuing to be prioritised in line with current Association of Directors of Adults Services (ADASS) guidance which provides a framework for us to manage the increase in requests. We are prioritising our workload as follows:
- Urgent authorisations with longest period of unauthorised deprivation of liberty
 - Hospital requests
 - Requests which pose greatest risk to the individuals and/or OCC based on:
 - Nature of mental health disorder
 - Complex cases known to supervisory body
 - Known objection by the client
 - Family dispute or objection
 - Safeguarding concerns
 - Independent Mental Capacity Advocate required
31. The DOLS Manager has been working with Oxfordshire County Council's Head of Law and Governance, County Solicitor and Monitoring Officer to identify and mitigate the risks of the increased workload and the risk to the authority of not meeting authorisation deadlines.
32. The Adult Social Care Leadership Team approved a proposal on 6 August 2014 to ensure that those on the current assessor rota are meeting the increase in demands on their time. The DOLS team now have additional administrative support and have had agreement for some temporary additional staffing.

Financial implications

33. The current budget for the DOLS service is £258k. This includes staffing, medical assessments and training.
34. The Department is currently estimating an overspend on the DOLS budget of £120k. This is based on the significant increase in requests, payment for medical assessors, increased numbers of staff that are completing the best

interest training and additional staffing costs, such as overtime. This overspend will not impact on the delivery of any other services.

35. An application to the Court of Protection is currently £400 for each application. If there are 650 applications required, this would be an extra cost of £260k. Legal Services has a budget for ordinary expenditure for Court fees but this would be an exceptional call on that budget and not sustainable by Legal Services.
36. The Directorate is seeking to manage the pressure and is not at this stage seeking a supplementary estimate.

Equalities Implications

37. An Equality Impact Assessment was completed on 3 September 2014
38. Each individual's rights are upheld through the DOLS process. Each individual is assessed on a case by case basis based on the level of presenting risk.

RECOMMENDATION

39. **The Cabinet is RECOMMENDED to note the impact of the Cheshire West judgement on the Authority due to the significant increase in requests in order to meet our statutory requirements, through increased staffing and financial resources and note the actions taken to manage these impacts**

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August 2014