

REPORT TITLE	<i>Deprivations of Liberty</i>
REPORT OF	Director of Care and Health

REPORT SUMMARY

This report provides information relating to the deprivation of liberty for people deemed unable to make decisions relating to their care and support needs. It will discuss the protections afforded by Article 5, European Convention of Human Rights (ECHR), the determination of capacity and best interests under the Mental Capacity Act 2005 (MCA), the Deprivation of Liberty Safeguards (DoLS) (Schedule A1 MCA) and applications to the Court of Protection under section 16 MCA.

It also highlights issues relating to end-of-life care with requirements to deprive a person of their liberty. In addition, the report will consider current government guidance relating to best interest decision making relating to testing and other issues relating to COVID 19.

The report provides further information on the Mental Capacity (Amendment) Act 2019 (MCA(A)) that will, in April 2022, replace DoLS and applications to the Court of Protection for deprivation of liberty authorisations.

This work supports the Wirral Plan 2025 Active and Healthy Lives theme: “Working for happy, active and healthy lives where people are supported, protected and inspired to live independently”.

This is not a key decision.

RECOMMENDATION/S

The Adult Social Care and Public Health Committee are requested to note the report and the ongoing work to support vulnerable people within the borough.

SUPPORTING INFORMATION

1.0 REASON/S FOR RECOMMENDATION/S

- 1.1 For Committee to have an awareness of the ongoing work in this area.

2.0 OTHER OPTIONS CONSIDERED

- 2.1 The Council is required to comply with the current legal requirements under Article 5 of the European Convention of Human Rights (ECHR). There is a recognition nationally of the significant workload arising from the requirements and this report will provide how requests are prioritised.

3.0 BACKGROUND INFORMATION

Introduction

- 3.1 For those people accommodated in a care home or hospital, the Council has powers to deprive the person of their liberty if certain statutory criteria are met. These duties are found in schedule A1 of the Mental Capacity Act 2005 (MCA). For those people who live elsewhere such as their own home or in supported living accommodation, then the Council or the NHS must apply to the Court of Protection to seek an authorisation to deprive the person of their liberty.
- 3.2 The ethos of the MCA is to assume the person (P) can make their own decision and, where required, to support them to make the relevant decision. Further details relating to capacity assessments and best interest decisions can be found in Appendix 1 to this report.

Deprivation of Liberty

- 3.3 Article 5 ECHR states that “everyone has the right to liberty and security of person”. The state is unable to deprive a person of their liberty without complying with a lawful process. The law currently allows two main routes to deprive P of their liberty where they are unable, by virtue of a lack of capacity, to make decisions relating to their care and support needs.
- 3.4 The two routes are the Deprivation of Liberty Safeguards (DoLS) or an application to the Court of Protection. Both routes are discussed below. This will change in April 2022 when the Mental Capacity (Amendment) Act 2019 MC(A) introduces the Liberty Protection Safeguards (LPS). To support this work, the Council works closely at a regional level with other local authorities to share experiences and good practice. Further information about deprivation of liberty and its processes can be found in Appendix 1. It is important to note that an order authorising a deprivation of liberty does not increase the restrictions on a person per se but simply authorises the current restrictions that are or will be in place. The DoLS and an application to the Court provides an independent oversight to ensure the person’s welfare is protected and there are no arbitrary

decisions. Standard authorisations and Court orders are subject to review on a regular basis.

Life-saving Treatment

- 3.5 For those people receiving life-saving treatment there is not a requirement for DoLS or for an application to be made to the Court of Protection. This followed a ruling in *R (Ferreira) v HM Senior Coroner for Inner South London and others* [2017] EWCA Civ 31. The government has given guidance that during the pandemic this ruling is to include people who are being treated for COVID-19. It now also applies to care homes as well as hospitals.

Deprivation of Liberty Safeguards (DoLS)

- 3.6 The first of those routes is to be found in schedule A1 MCA and is known as DoLS. DoLS apply to people who are in a care home or hospital who have a mental disorder and are unable to decide to be there. In all DoLS cases the Council is the supervisory body. This means it is responsible for commissioning the assessments and undertaking the authorisations for a standard authorisation. The supervisory body will issue a standard authorisation if the criteria for DoLS are met. Further information relating to the DoLS can be found in Appendix 1.
- 3.7 Since the Supreme Court in *P v Cheshire West & Chester Council; P & Q v Surrey County Council* [2014] UKSC 19 laid down the definition of what amounts to a Deprivation of Liberty, Wirral Council, like all Local Authorities in England and Wales has been subject to massively increased referrals for DoLS. In 2013/14 Wirral received circa 70 DoLS referrals per year.
- 3.8 The latest figures from the Department for Health and Social Care for 2019/20 indicate Wirral received 3705 referrals. 1508 of the referrals were from acute hospitals, 10 from mental health hospitals and 1380 were from care homes. 727 referrals did not have the source of referral identified. The Council is in the process of exploring this. For the majority of people, there was one application but in 90 cases there were four applications made over this period. This could indicate a number of hospital admissions and a subsequent return to a care home. Standard authorisations are not portable from setting to setting. At the time of writing this report, Wirral Council is the supervisory body for 577 people.
- 3.9 During 2019/20 1040 assessments were completed, the vast majority of which occurred in care homes. Applications from acute trusts pose a challenge because of the very quick through flow of patients being admitted and discharged. People subject to a standard authorisation can challenge it by either themselves or their representative making an application to the Court of Protection. They will receive non-means tested legal aid.
- 3.10 The Council uses a triage tool to screen DoLS assessments that was originally based on the one issued by the Association of Directors of Adult Social Services (ADASS) in 2014. Wirral are a member of the North West region ADASS DoLS group, sharing best practice and preparing for new guidance and legislation.

Similar to other authorities, Wirral have adapted it over the years to reflect local needs and priorities. In line with government guidance, it was amended in March 2020 to reflect the anticipated demands as a result of the pandemic. Our resources are concentrated on high priority cases and assessing other cases when resources allow. The government guidance issued on 11 November stated:

“supervisory bodies who consider DoLS applications and arrange assessments should continue to prioritise DoLS cases using standard prioritisation processes first”.

Deprivation of Liberty Safeguards during the pandemic

3. 11 Following the issuing of the first lockdown in March 2020 the Council responded promptly by ensuring all assessments for DoLS were conducted remotely. At the time of writing this report that method of working is still on-going. This complies with government guidance that only in exceptional circumstances should face to face visits be conducted. The link to the updated guidance can be found below. Exceptional circumstances could be where there are communication difficulties. Independent BIAs and medical assessors have been requested to consult the supervisory body before undertaking a face-to-face visit.
- 3.12 The Council requires that each assessor and authoriser records on the DoLS documentation the method of the assessment and the reasons for it. Assessors use a mixture of telephone and video technology. This has presented challenges as some people being assessed can struggle with this method of assessment. The Council have been very clear with assessors that where they are unable to consult with the person, the reasons and rationale has to be clearly recorded. Examples we have had include where it would cause considerable distress for the person to be asked to undertake a remote assessment. The advice we have given is in line with the requirements under sub-sections 4 (4), (6) and (7) MCA.
- 3.13 There are clearly risks to this method of assessment as by not visiting the care home, assessors are missing out on potentially vital clues to support their assessment. This lack of face-to-face contact of course has impacted on care home residents in a number of ways including lack of contact with families and friends. In some cases, the lack of a face-to-face interview will be reflected in the duration of the standard authorisation which will be shorter than normal. The mechanisms for review and appeal are still in operation and the Council will respond to each request appropriately. The Council still receive contact from representatives and others where issues relating to the DoLS are raised. Where there are issues of concern the Council's NHS adult social care partners will work with service-users and their families to reassess support plans and placements.

- 3.14 As mentioned above the Council at the start of the pandemic amended its triage tool in line with government guidance to direct its resources to those deemed most at risk. That tool is still in operation. We have assessed every high priority case within the timescales laid out. Assessors have adapted remarkably well to this method of working and they have accepted the guidance we have issued. Assessments continue to be subject to high levels of scrutiny during the authorisation stage. Authorisations are completed by senior staff and senior registered social workers in the Professional Standards Team. There are occasions when assessments are returned by authorisers because they do not meet the standards required.

Court of Protection Applications

- 3.15 For those people not accommodated in a care home or hospital but who meet the criteria for a deprivation of liberty then an application to the Court of Protection will need to be made.
- 3.16 The application would have to demonstrate the person was subject to continuous supervision and control, not free to leave and the state was in some way responsible for the deprivation of liberty. The Court would require evidence that the person had a mental disorder, lacked capacity to decide about their care arrangements, that such arrangements were in their best interests and were a proportionate response to prevent harm to the person. The Court would also require evidence that less restrictive alternatives had been considered and were not deemed to be appropriate. Current demands on services mean court applications will only be made where there is an objection from either the person or someone interested in their welfare or where a significant risk is evident. If there is a contested hearing, currently P would be means tested to access legal representation through the legal aid scheme. Further details about such applications can be found in Appendix 1.

Deprivations of Liberty in a person's own home.

- 3.17 The adage "an Englishman's home is his castle" is clearly challenged by the notion of a court ordering the deprivation of liberty for someone in their own home. The court will need to be satisfied that the restrictions in place are to support the person and do not contravene their rights under article 8 ECHR. This article supports a person's right to a private and family life. Where the restrictions do interfere in that right the court will have to authorise them and, in the process, ensure they are proportionate and are the least restrictive interference in the person's rights. The court will continue to review such arrangements on a regular basis.
- 3.18 Due to the criteria being used to prioritise court applications, such applications made by the council are currently very rare. However, with the introduction of LPS in April 2022 it is expected that the number of people subject to a formal order depriving them of their liberty in their own home will increase. The Council will, with NHS our partners, be scoping the number of people we believe will fall within the legislation.

End of Life Care

- 3.19 DoLS do apply to people who meet the criteria for a standard authorisation and are nearing the end of their life. The managing authority (hospitals and care homes) have no discretion but to make referrals where the legal criteria are met. However, in the latest government guidance issued on 11 November 2020 it states:

“Where the person is receiving end-of-life care, supervisory bodies should use their professional judgement as to whether an authorisation is necessary and can add any value to the person’s care.”

- 3.20 Those receiving end of life care are triaged as a low priority in respect of requiring DoLS assessments.
- 3.21 There is no provision in schedule A1, once someone is subject to a standard authorisation, to discharge it unless one of the qualifying requirements are no longer met or the person moves somewhere else on a permanent basis. This includes people who are receiving end of life care. The requirement to notify the coroner of the death of someone on a standard authorisation has been removed.

Liberty Protection Safeguards

- 3.22 As has been mentioned above the MC(A)A will introduce the Liberty Protection Safeguards (LPS) in April 2022. This is in response to the widespread concerns that DoLS is an overly bureaucratic and complex process that was never designed to deal with the high volumes of referrals the Council and other local authorities have received. There will be significant changes from DoLS. These will include the Council no longer having responsibility for cases in hospitals or those people funded under NHS continuing health care. There will no longer be specialist assessors, with registered professionals expected to undertake the assessments.
- 3.23 The LPS process will offer safeguards to vulnerable people who are subject to restrictions because of their care and support needs. They will have a right of appeal either directly or via their advocate or representative to the Court of Protection. Unlike the current arrangements, this will be automatically funded by legal aid.
- 3.24 The Council is engaged in planning for the new legislation and awaits the draft Code of Practice and draft regulations. The Council will work in partnership with the ADASS Sector Led improvement Board to deliver this legislation.

Best Interests decisions and testing for COVID-19

- 3.25 In their guidance issued on 11 November 2020 the government states its belief that a person who is unable to decide about a COVID-19 test, would consent to be tested if they had capacity and that it would be in their best interests to be tested as a positive test would lead to the person receiving the treatment they need. The link to this guidance is found below.

- 3.26 The guidance states that if the person cannot decide themselves within the context of COVID-19 even with support then the MCA must be complied with to make a best interests decision. For those people lacking capacity and who have symptoms again the advice is to use the MCA and where appropriate seek advice from Public Health England if the emergency powers under the Coronavirus Act 2019 are being considered. There is no knowledge of a case that has led to such advice being sought locally.

4.0 FINANCIAL IMPLICATIONS

- 4.1 The government, following the Supreme Court judgement in 2014 did not make additional resources available to councils to meet the increased demand of DoLS applications. This was despite a number of local authorities going to court to compel them to do so. The costs for commissioning doctors and commissioning independent best interest assessors for 2019/20 were £443,000. Independent assessors are used because the current capacity in adult social care commissioned services is insufficient to meet the demand.
- 4.2 In 2020/21, the Council has allocated a budget of £177,000 to cover costs for doctors undertaking DoLS assessments. There is no specific or dedicated budget for independent best interest assessors. Considerable investment would be required to meet all the demands for DoLS in Wirral

5.0 LEGAL IMPLICATIONS

- 5.2 Article 5 and the current legal regimes identified above seek to protect vulnerable people and ensure there are protections in place to afford them safe care. Where they are required to remain in a particular place and be subject to additional restrictions the law requires that a thorough process must be gone through to avoid arbitrary decisions.

6.0 RESOURCE IMPLICATIONS: STAFFING, ICT AND ASSETS

- 6.1 DoLS and applications to the Court of Protection are part of the normal delivery of services. The process can take a significant amount of time and requires training for staff.

7.0 RELEVANT RISKS

- 7.1 If service-users are not afforded the legal protections this could increase their vulnerability.
- 7.2 The Courts have publicly named local authorities and other public bodies that have not complied with their obligations under these requirements. Costs and damages have also been awarded against councils and other public bodies.

Such cases tend to be when the person has suffered a substantial harm as a result of the actions of the council or other public body.

8.0 ENGAGEMENT/CONSULTATION

- 8.1 The process of completing a DoLS and an application to the Court of Protection includes consultation with the person themselves, anyone interested in their welfare, providers of care, social workers and medical professionals. The ethos of the MCA is to support the person to make any decision that will impact on them. Before determining whether a person cannot make a particular decision there must be evidence to demonstrate that engagement and consultation has taken place.

9.0 EQUALITY IMPLICATIONS

- 9.1 The law as it stands is designed to protect the most vulnerable residents and ensure services provided to them meet their needs and expectations. The procedures and processes confirm to the requirements of the relevant legislation.

10.0 ENVIRONMENT AND CLIMATE IMPLICATIONS

- 10.1 DoLS and applications to the Court of Protection has been utilised within the Council for some years and it is not a new concept or working practice. Therefore, the recommendations of this report are carbon and emissions neutral and do not adversely affect the Council's carbon reductions target. Processes and procedures will not have any additional impact on carbon emissions.

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BACKGROUND PAPERS

<https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments/2019-20>

<https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity/the-mental-capacity-act-2005-mca-and-deprivation-of-liberty-safeguards-dols-during-the-coronavirus-covid-19-pandemic-additional-guidance#a#depriving-a-person-of-their-liberty>

Mental Capacity Act 2005

Mental Capacity (Amendment) Act 2019

Mental Capacity Act Code of Practice

Deprivations of Liberty Code of Practice

SUBJECT HISTORY (last 3 years)

Council Meeting	Date

1.0 Mental Capacity Act 2005 (MCA)

- 1.1 The MCA lays out a statutory process for establishing whether a person can make a particular decision at a particular time. The ethos of the MCA is to assume the person (P) can make their own decision and, where required, to support them to make the relevant decision. Sections 2 and 3 lay out the requirements that must be met to determine if someone is unable to make a particular decision. There is a body of case law that points professionals towards how these capacity assessments should be completed.
- 1.2 Section 4 MCA lays out the process that must be followed to determine what decision is in a person's best interests. This section provides a checklist, and all aspects must be considered. Once again there is case law that points towards how such decisions are arrived at.
- 1.3 The MCA has a Code of Practice that is statutory guidance. This code must be complied with unless there are good reasons to depart from it. These reasons must be recorded.

2.0 Deprivation of Liberty

- 2.1 There is no statutory definition laid down by Parliament for what amounts to a deprivation of liberty. In March 2014, the Supreme Court based on previous European Court rulings defined a deprivation of liberty as applying when P is confined to a particular place for a non-negligible length of time, was unable to consent and the state was in some way responsible for the deprivation of liberty.
- 2.2 With regards to the first of these tests the Court issued what it described as the "acid test". P was to be viewed as confined if they were subject to continuous supervision and control and not free to leave. This was a significant decision, as Wirral, prior to this ruling, received 70 DoLS requests a year. The Council now receive circa 3,700 such requests a year. The government has not made any additional funds available to councils to undertake this role apart from a one-off grant in 2014/15. They refused to accept the Supreme Court judgement amounted to placing additional burdens on local authorities. Wirral is not alone in the challenges it faces in this area.

Deprivation of Liberty Safeguards (DoLS)

- 2.3 Under DoLS, assessors will have to confirm the person has a mental disorder and that they are unable to make decisions relating to their care and treatment needs. There are also four further assessments that must be positive before a standard authorisation under DoLS can be issued. They are the age assessment. P must be 18 or over. The no refusals assessment considers whether an attorney or deputy with powers relating to decisions impacting on P's health and welfare objects to the proposed care arrangements. The best interests assessment considers whether the proposed care arrangements are in P's best interests, are necessary and proportionate and will reduce the risk of harm. The eligibility

assessment considers whether the Mental Health Act 1983 should be used rather than DoLS.

- 2.4 Standard authorisations can be up to 12 months in duration. There is a right of appeal to the Court of Protection under section 21A MCA. The person and their representative are entitled to non-means tested legal aid. The Council is involved in a number of such cases.

Court of Protection Applications

- 2.5 Where P meets the criteria laid out in paragraphs 2.1 et al above and is not in a care home or hospital then an application to the Court of Protection must be made under section 16 MCA. The applicant is usually the commissioner of the services P is receiving. Upon receiving the application, the Court will then follow one of two processes.
- 2.6 If the case is not contested, that is P does not object to the proposed care arrangements and people interested in his/her welfare do not object, the Court will use the Re X process. The Re X process allows the court to decide based on the papers. This process was introduced after the Supreme Court decision in March 2014. The Court will issue an order depriving the person of their liberty for up to 12 months. The Council or other applicant must make a further application prior to the expiry of the original order to ask for it to be extended.
- 2.7 If there is an objection to the arrangements from P or anyone interested in his welfare then the Court will direct there to be an oral hearing. For P this can be expensive because there is no right to non-means tested legal aid. The court will subsequently decide to deprive or not deprive P of their liberty. The court can also make other declarations that fall within its purview that could relate, for example, to tenancy agreements.