Neath Port Talbot
Castell-nedd Port Talbot
County Borough Council Cyngor Bwrdeistref Sirol

Deprivation of Liberty Safeguards to Liberty Protection Safeguards: An overview

<u>Overview</u>

The Deprivation of Liberty Safeguards (DoLS) are part of the Mental Capacity Act 2005. These Safeguards aim to make sure that people in care homes and hospitals are looked after in a way that does not inappropriately restrict their freedom.

The safeguards set out a process that hospitals and care homes must follow if they believe it is in the person's best interests to deprive a person them of their liberty, in order to provide a particular care plan. It is then the role of the DoLS Team to arrange for assessments to ensure the deprivation of liberty is in the person’s best interests.

In summary, the safeguards ensures:

- that the arrangements are in the person’s best interest;
- the person is appointed someone to represent them;
- the person is given a legal right of appeal over the arrangements
- the arrangements are reviewed and continue for no longer than necessary.

The DoLS team forms part of the Safeguarding Team in Neath & Port Talbot (See Appendix 1 for Team structure).

In anticipation of the implementation of Liberty Protection Safeguards (LPS), which replaces DoLS, the Local Authority is currently in the process of reviewing the DoLS team structure (In-house versus Agency), consider where the team sits within the current system (as a separate entity or across the newly formed patch-based teams) and how it responds to the broader implications that LPS will have upon the Local Authority upon implementation (Adults and Children’s Services, including Education).

Legal Context

The Deprivation of Liberty Safeguards (DoLS) came into force in April 2009 (Code of Practice first published in 2008) and forms part of the Mental Capacity Act 2005. The purpose of DoLS is to legally authorise restrictive care plans for adults who lack capacity to consent to them. They were initially introduced to prevent breaches of the European Convention on Human Rights (ECHR) following the case HL v Bournewood Community and Mental Health NHS Trust[1].

In summary, the case related to a regular outpatient to a psychiatric hospital with autism and learning difficulties who was deemed by the hospital, unable to make decisions regarding his place of residence for the purposes of receiving care and treatment. The hospital felt that it was in his best interest to remain in hospital, but his carers disagreed and wanted to care for him at home. Due to the hospital making the decision for him to remain in hospital the ECHR concluded that his detention did not comply with the European Convention on Human Rights and amounted to him being deprived of his liberty.

The MCA 2005 was amended to provide appropriate safeguards for adults who lack capacity to consent to their care or treatment in either a hospital or care home that, in their own best interests, can only be provided in circumstances which amount to a deprivation of liberty, and where detention under the Mental Health Act (MHA) 1983 is not appropriate. This case initiated key safeguards to be developed to ensure that hospital settings or care homes wishing to deprive adults of their liberty must seek permission to do so and ensure that where authorisations are granted that they be reviewed regularly. Individuals were given rights to be provided with a representative and the right to challenge a granted authorisation.

When DoLS was initially introduced its use in care homes and hospitals was limited. Cases were rare and used primarily when an individual or their family were actively contesting the ongoing care plan. To put this into context, NPT, on average made 13 authorisation each year and now post-Cheshire West this figure stands at 600 authorisations a year and the number continues to increase year-on-year[2]. This figure increased significantly following a Supreme Court Judgement of 19th March 2014 in the case of Cheshire West[3]. The court was asked to rule on whether three people in care were being deprived of their liberty. Previously, lower courts had ruled that although the people concerned had restrictions placed on them (for example they needed another adult to escort them outside to keep them safe) they were not deprived of their liberty.

The Supreme Court overruled the previous judgements, which fundamentally set a new and much lower threshold for determining a deprivation of liberty. The new threshold was clarified in the judgement with the “acid test” for what constitutes a deprivation of liberty. The acid test states that an individual is deprived of their liberty for the purposes of Article 5 of the ECHR if they:

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[1] HL v UK 45508/99 [2004] ECHR 471

[2] Deprivation of Liberty Safeguards Annual Monitoring Report for Health and Social Care 2019-20 https://hiw.org.uk/sites/default/files/2021-03/210324dols2019-20en.pdf

[3] Cheshire West and Chester Council v P [2014] UKSC 19

- Lack capacity to consent to their care/ treatment options;
- Are under continuous supervision and control;
- Are not free to leave.

This had a significant impact on those requiring assessment and placed pressure on Local Authorities across the UK, resulting in backlogs of referrals requiring assessment and subsequent authorisation. In reality, this change led to the Local Authority having to complete assessments for any adult aged 18 and over who has a mental disorder and lacks capacity to make decisions regarding care and treatment.

The Supervisory Body is responsible for authorising DoLS where the individual resides in a care home setting. The Local Authority also holds responsibility for DoLS in community settings which primarily includes supported living. Currently, the systems for completing DoLS within care home settings and community-based settings are different. The latter being convoluted and neglected by Local Authorities across the UK, owing to the preoccupation with DoLS brought about through the high profile legislative changes noted. A flow chart has been included to illustrate the current DoLS processes (Appendix 2).

It is widely accepted that DoLS plays an integral role to safeguard and uphold the rights of vulnerable adults. However, in March 2014, a House of Lords Select Committee published a report which concluded that DoLS were "not fit for purpose"[4] and recommended that it be replaced. It was determined that under the Mental Capacity (Amendment) Act 2019, DoLS would be replaced by Liberty Protection Safeguards (LPS). It was anticipated that LPS would come into force in April 2022, however the implementation date has been delayed due to the impact of COVID-19 on Health and Social Care. There is currently no new implementation date at this time.

Liberty Protection Safeguards (LPS)

It is envisaged, and indeed hoped, that LPS will deliver improved outcomes for people who are or who need to be deprived of their liberty and has been designed to put the rights and wishes of those people front and centre of all decision-making to ensure liberty is protected.

The key changes of LPS are:

- LPS will apply in private and community-based settings which include care homes, hospitals, supported living, people's own homes, day services and shared care. Under current legislation, the Supervisory Body can only authorise DoLS in care homes or hospital settings. For people in community settings, a deprivation of liberty currently needs to be authorised by the Court of Protection rather than the Supervisory Body. Essentially, this will increase the number of assessments to be completed and authorised by the Local Authority.

[4] House of Lords Select Committee on the Mental Capacity Act: Report of Session 2013-14: Mental Capacity Act 2005: Post-legislative Scrutiny (2014) HL 139, para 32.

- Applications under LPS can be made for people aged 16 and above. Under current legislation, DoLS can only be used for adults aged 18 and above with cases for people outside of this age range needing to be referred to the Court of Protection (CoP). This will allow for a more streamlined approach to the referral and assessment process and reduce the pressures placed on the CoP.
- Under LPS, the role of Supervisory Body will be abolished and will be replaced by the "Responsible Body". The Responsible Body will authorise arrangements that amount to a deprivation of liberty.
- There will be three assessments, which will include the capacity assessment, the medical assessment and the necessary and proportionate assessment. Under DoLS the maximum timescale allowed for authorisation is 12 months. LPS will change this so that authorisations can be granted for a period of up to 12 months on the first renewal, or up to 3 years on any subsequent renewal. This approach is thought to be a proportionate and least intrusive approach for people who have a long-term condition and who are in settled and long-term placements.
- There will be a brand new role of Approved Mental Capacity Professional to deal with more complex cases[5].

Implications for Neath & Port Talbot (NPT)

Practitioners across NPT are working closely with colleagues in Swansea CC and the Health Board to prepare for the introduction of LPS. This work stream sits under the West Glamorgan Safeguarding Board. However, preparatory work is currently impeded by the absence of Regulations and a new Code of Practice and the implementation of LPS, due in April 2022, has now been put off with no future implementation date set.

Training – All staff will require training on LPS. Funding has been received and training is currently being rolled out across Adult and Children's Services: January through March 2022. Further specialist training will need to be commissioned for pre-authorisation reviewers; BIA to Approved Mental Capacity Professionals (AMCP) conversion; AMCP training; Responsible Bodies; and LPS for Care Providers.

Service Structure – LPS will undoubtedly lead to an increase in the demands placed upon the Local Authority (noted below). This will require a review of the existing DoLS team structure, size and location. The Independent nature of the role of the Responsible Body, may for example, see an LPS team more aligned with the Conference and Reviewing Service.

Legal support – An increase in demand may have implications for the Local Authority's legal department. A potential increase in applications needing to be made to the Court of Protection where individuals or their families disagree with a deprivation.

[5] Liberty Protection Safeguards (LPS) – Overview
https://www.edgetraining.org.uk/_files/ugd/b99741_12775f9687ab422bac6066781f9c378c.pdf

Information Technology – The system will need to be redesigned to accommodate the changes that will come into effect when LPS is made live. NPT, Swansea and Health are currently looking at a joint software solution. The software currently being considered covers over referrals through to authorisation and should ensure efficiencies across all LPS work.

Financial

The following figures are estimated based on DoLS demand - requests received by NPT DoLS Team - over the past three years. The data has been taken from the *'Deprivation of Liberty Safeguards Annual Monitoring Report for Health and Social Care 2019 – 20*':

- 2018/19 **742**
- 2019/20 **792**
- 2020/21 Anticipated **850** based on current figures and past trends.

N.B. Data will need to be cleansed re. Continuing Health Care (CHC), but it would appear the CHC cases have been removed from this number and if included remain small enough not to skew the figures significantly.

Community Team demand re. LPS likely to be 720, rounded up to 800 to allow for some latitude given the figures are an approximation. This number is based on a very broad review of those cases currently open and known (on review) across Adult Services (Network Teams, Complex Disability and CMHT) and based on the following criteria:

- *Lack capacity to make decisions in respect of their care and treatment,*
- *Reside at home/in community,*
- *Have a care plan, which includes restrictions.*

For Children's Services we project, drawing on the similar broad criteria noted above, approximately **25** cases.

Therefore, DoLS demand (850) coupled with approximated Community DoLS demand (800) and Children's Services (25) is likely to see the LPS figure sit at an estimated, likely conservative figure of, **1,675**. Double the current demand, which clearly will have a significant impact on service delivery, for example, budget growth for this area of practice is predicted to see 400K increase based solely on cost of BIA assessments and S12 Doctor Assessments. This figure does not capture cost for training or IT or other externalities.

Chris Frey-Davies (Principal Officer for Safeguarding & Quality Assurance)
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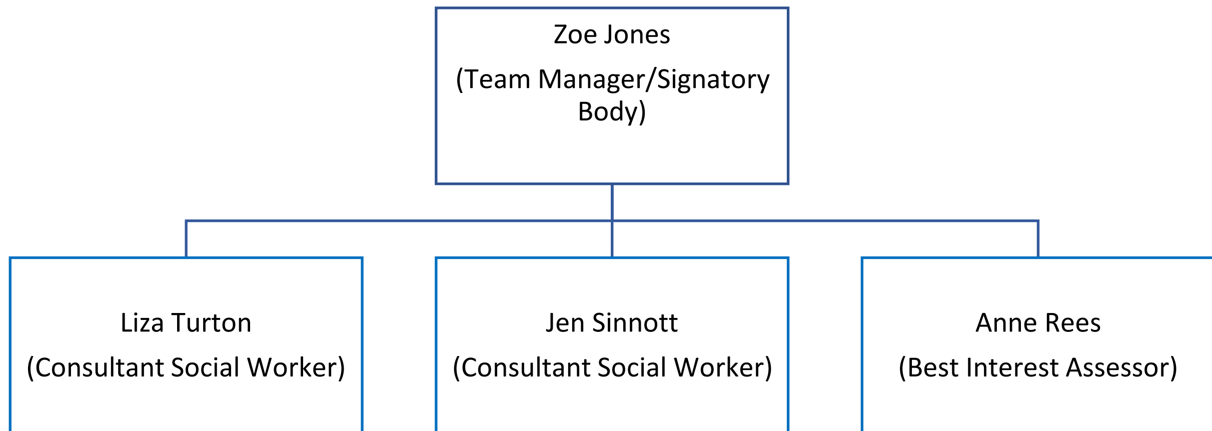
Appendix 1



Appendix 2