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ADVICE NOTE FOR MANAGING AND PROCESSING CASES GENERATED BY THE SUPREME COURT DECISION IN 2014 IN RELATION TO DEPRIVATION OF LIBERTY SAFEGAURDS

Additional emergency interim measures and safeguards

This advice note has been developed in response to unprecedented levels of requests for Deprivation of Liberty Safeguards (DoLS) authorisations beginning in April 2014 at the point of the Supreme Court judgement and continuing thereafter. ADASS leads and Regional DoLS leads have contributed to its development along with the development of other initiatives to respond to the current crisis. The situation now is of serious concern with councils and providers effectively being put in the position whereby, because of resourcing issues, large numbers of people are being unlawfully detained in care homes and hospital without the protection of Article 5 of the Human Rights Act and awaiting DoLS.

ADASS continues to advise local authorities that they have a duty to meet their statutory responsibilities and make an assessment of what this requires in terms of financial resources and staffing and seek to put this in place as quickly as possible. The evidence from the courts is that a failure to meet the law as it now stands leads to local authorities being required to pay damages and of receiving public criticism by the courts and others.

We believe however that the government has failed to meet its obligations to fund what ADASS believe to be a new burden. This has placed local authorities in a very difficult position whereby it is extremely difficult to meet their statutory obligations. Whilst advising local authorities to continue to make every effort to meet these requirements as soon as practically possible, the shortage of financial resources and of suitably qualified BIAs means that in the interim we are providing further advice about how best prioritise in all the circumstances based on the principles of

a) Meeting the legal requirements as far as possible
b) Protecting those who face the greatest risk
c) Proportionality

Background

The Mental Capacity Act 2005 (MCA) was introduced in 2007. The Deprivation of Liberty Safeguards followed as an amendment to The Mental Health Act 2007 - from 1st April 2009.

The Deprivation of Liberty Safeguards provide additional protection for vulnerable people living in residential homes, nursing homes or hospital environments. There is a requirement in law that those situations which amount to a deprivation of liberty must have independent scrutiny and must be authorised by a prescribed procedure which aims to ensure

Local Authorities have primary responsibility as the Supervisory Body under the DoLS. In operational terms this means that Local Authorities receive requests from Managing Authorities (residential/nursing homes and hospitals) and are required to organise, complete and respond to requests for authorisations within the mandated deadlines under the DoLS regulations.

The Supreme Court issued a decision in March 2014 which changed the face of Deprivation of Liberty Safeguards (DoLS) and had significant implications for local authorities as supervisory bodies. They gave clarity to the meaning of deprivation of liberty (which they described as the acid test) which is that a person is deprived of liberty if –

They are under continuous (complete) supervision and control and not free to leave.

Since the judgement the implications have been enormous for Local Authorities , applications have increased by tenfold and more in some Councils and most Councils have been unable to meet the demand in a timely way, if at all. Managing authorities are however expected to make appropriate referrals to the supervisory body and the Care Quality Commission continue to emphasise that compliance with the MCA is expected.

The Supreme Court also held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This includes placements in supported living in the community as well as domiciliary arrangements which may amount to a deprivation of liberty. Such placements must be authorised by the Court of Protection.

In 2014/15 there were 137,540 DoLS applications received by councils of which 62,645 applications were completed. This resulted in a backlog of **74,895.** These are people who have not been assessed and therefore where their placement amounts to a deprivation of liberty this remains unlawful. This poses a challenge for the provider but also means there has been no independent scrutiny of the arrangements and therefore no protection for the person.

Despite measures developed by the sector and promoted by ADASS the situation shows no sign of changing. Councils are using the ADASS priority tool but numbers are too large and in many instances simply cannot be managed. It is true for most Councils now that priority cases are being assessed and low priority cases are not receiving any protection at all.

The Law Commission are developing proposals for a replacement for the DoLS scheme. This will be produced in draft by summer 2016. However there is no clear date when any new scheme will be in force.

This advice note contains measures to alleviate the pressures on Councils and provide necessary additional safeguards for vulnerable people in a proportionate way. In the absence of any legislative changes ahead of the Law Commissions work this is an attempt to work pragmatically, within the existing framework and is based on the following assumptions

1. Local Authorities s do not have the resources to implement the change in the law as a result of the Supreme Court judgement
2. The law is disproportionate in that it doesn't enable any calibration of the process. Schedule A1 is very prescriptive
3. The Law Commission work will lead to a different scheme in 2 years

Definitions

This advice note will apply the following definitions.

'Supervisory Body' – The Local Authority which has statutory responsibility for conducting assessments and reviews under this legislation.

'Relevant Person' – The person who is, or may become, deprived of their liberty in a hospital or care home.

'Registered Care Homes' - subsequently referred to as care homes in this document and includes what may be called residential and/or nursing homes.

"Best Interest Assessor" – a social worker, registered nurse, psychologist or occupational therapist who has also completed a course of study to become a BIA and works independently of any Council or Agency. This may include Independent and Agency assessors.

"Renewal assessment" – Whilst the law does not use this phrase it has become commonly used in practice. This means a further request for an authorisation which has been previously granted and is about to come to an end.

Scope and Aims of the proposed additional interim safeguarding measures

This advice note is to be seen as an emergency interim measure to provide additional safeguards in response to the situation whereby most councils do not have the resources to ensure that DoLS are completed within the required timescales. Nothing in it should be applied more widely than the situations for which it is specified.

ADASS accepts research which suggests a full best interests assessment takes on average 12 hours (see https://www.cornwall.gov.uk/media/16223032/bia-time-survey-cornwall-final-pdf-november-2015.pdf). However it is clear that a more proportionate approach is required in order to ensure that large numbers of people who are considered to be lower priority do not simply fail to get any protection that they need whatsoever.

ADASS continues to support and promote best practice in relation to the Mental Capacity Act and to full best interests' assessments.

ADASS considers the measures proposed to be necessary due to inadequate funding leaving already vulnerable people in a more vulnerable situation. These measures could perhaps best be described as a set of emergency interim additional safeguards.

The model proposed within this advice note encompasses arrangements and processes for:

1. **Renewal authorisations** – further requests to assess in relation to an existing authorisation which is due to expire.
2. **'Low priority' backlog cases** – these cases will have been screened by use of the ADASS priority tool and determined to be low priority.

This advice note does not restrict the ability of any Local Authority to come to local, individual arrangements for processing DoLS requests but seeks to ensure consistency of practice across its members and to manage the budget crisis incurred by an exponential rise in the need for DoLS authorisations.

Where Local Authorities do not need to or do not choose to follow this advice note, they will not be able to rely on any provisions within this guidance that are inconsistent with the individual arrangements they have agreed.

This advice is based on the following key arguments:

- The DoLS are an essential safeguard against arbitrary detention for vulnerable individuals aged 18 and over.
- The decision of the Supreme Court in March 2014 led to a much wider interpretation of deprivation of liberty, resulting in at least a tenfold increase in referrals
- The scheme was designed for a maximum of twenty thousand people and is now applicable to over a hundred thousand individuals
- The scheme does not allow for a proportionate response to different types of settings or care plans- it is a one size fits all scheme although elements of the law suggest this may not have been the intention of the drafters.

- DoLS is an Article 5 protection and it is predicated on MCA principles, it does not provide protection for Article 8 issues which mostly need the attention of the Court of Protection.
- There are occasions when face to face assessment is not in the persons best interests
- The new burden created for Councils by the increased number of applications has not been funded appropriately to allow Councils to process all applications
- Over half of all applications are not yet assessed and are forming a significant backlog with associated risks to vulnerable people and to councils.
- There are no short term plans to either fully fund this burden or amend legislation to ease the pressures.
- The concern of ADASS is for those people who are forming the backlog and may never become high priority and could never be assessed without these additional proposals
- Everyone needs the procedural protection of DoLS but not everyone benefits from the substantive protection.

Proposals

The proposals fall into two categories: those for people who are at the end of an authorisation period and who need another assessment and those people who have been prioritised as 'low priority'.

Renewal assessments

Managing authorities must decide before the end of an authorisation period, whether a further DoLS authorisation will be needed. If the person still needs to be deprived of liberty in order to provide necessary care or treatment then they must apply again for a further authorisation. Within the DoLS there is no differentiation between this request and a completely new request for a person who has never had an authorisation.

Prior to the ADASS/DH Forms being developed in 2015 the request for a standard authorisation form was the same as the one used for a first application. However the law is very clear that the same information is not required to be provided with a subsequent request and so a much shorter form was developed which has speeded up and simplified these requests for managing authorities.

ADASS believes that a similar approach now needs to be taken in relation to renewal *assessments*.

Prior to 2014 it was rare for authorisations to be granted for 12 months and most assessors worked towards reducing restrictions in order for the person to no longer be deprived of liberty. Since the wider definition this is no longer possible. Although ADASS strongly advise practitioners to promote and recommend least restrictive options for many people they may still need to be deprived of liberty.

The wider interpretation of the definition has also resulted in many more authorisations being given for 12 months. These will on the whole be seen as settled placements if a BIA is willing to recommend this length of authorisation. Many authorisations of six months or more are equally settled.

These will now need to be repeated throughout a person's life, year on year.

Therefore ADASS propose a more proportionate assessment is appropriate in these types of cases.

ADASS feel that this is in keeping with the approach proposed by Lady Hale in the Supreme Court judgement

> "*They need a periodic independent check on whether the arrangements made for them are in their best interests. Such checks need not be as elaborate as those currently provided for in the Court of Protection or in the Deprivation of Liberty safeguards (which could in due course be simplified and extended to placements outside hospitals and care homes). Nor should we regard the need for such checks as in any way stigmatising of them or of their carers. Rather, they are a recognition of their equal dignity and status as human beings like the rest of us.*"

ADASS consider that this approach will maintain focus on best practice in a proportionate way enabling resources to be targeted towards greatest need. This approach recognises and values the skills of BIA's and the proposed direction of travel of the future scheme described by the Law Commission in their consultation paper. It incorporates some of the Re X principles adopted by the Court of Protection in relation to judicial hearings for those deprived of liberty in community settings and it incorporates some of the principles put forward in the Law Commission consultation paper on a new "Protective Care" scheme.

The law in relation to carrying out best interests assessments requires that the assessor does the following:

> The assessor must consult the managing authority of the relevant hospital or care home.
>
> The assessor must have regard to all of the following—
>
> 1. the conclusions which the mental health assessor has notified to the best interests assessor in accordance with paragraph 36(b);
> 2. any relevant needs assessment;
> 3. any relevant care plan.

It is of note that these regulations did not contain a requirement to interview the person. It is however implicit in applying the MCA that the person's views are of great importance. In the DoLS scheme this is achieved through the mental capacity assessment and through a full best interest's assessment.

Where a renewal request is received (which follows an authorisation of at least six months) it is suggested that it is first screened for the existence of any of the following factors

1. Any significant change highlighted on the request
2. Objection by or distress evidenced by the person
3. Objection or distress evidenced by the family
4. Lack of agreement regarding the care plan by one or more family member
5. Incompatibility issues with other residents
6. Challenging behaviour requiring significant restrictions
7. Unclear diagnosis or possibility of change
8. Variable mental capacity
9. Adult safeguarding concerns

A case is suitable for the more proportionate approach if none of the above are present.

These renewals need to be screened for suitability for the Interim Safeguards arrangements. It should be clear from the rationale provided when the authorisation was granted following a full best interest's assessment why this time period was chosen. It is likely to be clear from that description whether the BIA envisaged anything would change in relation to the placement.

These cases should then be allocated on the basis that they can proceed in accordance with the proposals below. However once they are referred to the BIA (it may be beneficial to use the same BIA as the previous assessment but this is not always possible) the BIA will determine fully if they are suitable for this proposed, more proportionate renewal approach. BIAs have great expertise in this area and any decision of a BIA that a case is not suitable for such an approach, if it is supported by sound reasons should be accepted.

For these types of cases it is then suggested that the DoLS Mental Health assessor is asked to complete the Mental Health, Eligibility and **Capacity** assessment. For those Councils who usually ask BIAs to complete the capacity assessment this will be a departure and may require some initial advice and guidance to be given but the doctors will be expected to deliver this for the same fee. Doctors can be provided with the Guidance which currently accompanies completion of Form 3. They should be provided with the previous capacity assessment by the BIA for information.

However some Councils may prefer to remain with the practice of BIAs completing the capacity assessment. For this reason it has been retained in the Form 3B.

The BIA can then carry out a desktop assessment. This will involve a review of all paperwork such as recent care reviews, care plans and the Councils electronic records. Managing Authorities will already have indicated on the Form 2 (Further Authorisation Request) that the care plan remains the same. If they have highlighted a significant change, this approach will not be suitable. The BIA will then speak to the Care Home to determine that the persons needs remain the same as before and that the care is delivered the same as before with no additional restrictions (or indeed reduced restrictions) which would impact on the decision as the whether the person meets the acid test. They will also determine whether there have been any changes in the person or their behaviour which would indicate the placement is no longer in their best interests.

An alternative approach is for the BIA to carry out a shorter visit for the purposes of the capacity assessment and verification that all facts remain the same. Some Councils will prefer this approach and time is still greatly reduced by the use of Form 3B.

The BIA will also consult the relevant persons Representative as this is the key method of determining the relevant person's views. They will complete a short Form (**a new Form 3B**) which confirms all details remain unchanged, the Form also offers an opportunity to determine whether conditions have been met.

If any of these consultation raise issues of concern or objections by the relevant person or their representative this will revert to a full Form 3 assessment. The estimated time taken for this is 2 hours. Feedback to ADASS following a short pilot sample indicates that families have welcomed this less intrusive approach.

This approach is also suitable for those cases where the deprivation of liberty has been authorised by the Court of Protection but requires review by the local DoLS team.

BACKLOG CASES

In order to deal with the vast numbers of people who are forming the backlog ADASS believes an interim additional safeguard response is now necessary. Removing the backlog will also be a critical

factor prior to the implementation of any new scheme. For this reason ADASS describes and recommends these proposals as emergency interim proposals necessitated by the tenfold increase in unfunded work and the probability of a new scheme within 2-4 years. These people will always be 'low priority' cases and will best describe the kinds of situations not previously considered to amount to a deprivation of liberty but which now meet the acid test. The ADASS view is that this will take more resource than doing nothing, but better some safeguards are necessary. Councils will need to keep under review the numbers of people receiving full DoLS, those receiving the additional emergency safeguards and those waiting, with no safeguards.

BACKLOG CASES INTERIM PROCESS

First it is essential that all referrals are screened and have been prioritised according to the ADASS tool.

Those which remain will be in the back log because they are low priority and will often be those types of cases which would never have been referred prior to the Supreme Court judgement.

They may be the "gilded cage" scenarios or people at the end of life predominantly deprived of liberty due to their medical needs. They will often be settled long standing placements where the person can be described as "happy" or those with very advanced dementia or similar conditions whose medical needs determine the restrictions to which they are subject, are nursed in bed and could not be cared for in any less restrictive way. Their wishes and feelings will generally not be ascertainable from them by direct interview.

ADASS intends to develop a matrix to assist with identifying cases.

The first recommendation at this stage is to utilise a pre-assessment checklist with managing authorities which will begin to gather in further essential detail to evidence the deprivation of liberty.

Once this information is forthcoming it may highlight issues which raise the priority of the person.

If not then at this stage it is useful to consider utilising the skills of wider possibly qualified and unqualified staff to gather further detail and information (this may include for example social work assistants or social workers who are not BIAs) These resources can be used to

- Gather all relevant details from the Council's electronic system
- Find out more information from the Care Home
- Determine if there is a Best Interests decision in place
- Determine if there is a capacity assessment
- Carry out a decision specific capacity assessment
- Source the up to date needs assessment and care/support plan

From this evidence some cases will jump to high priority and will await a full assessment.

Those which remain will indicate they may be suitable for a desk top assessment, these may include but are not limited to e.g.

-People in hospices/hospitals at the end of life

-High dependency, advanced dementia or similar in a nursing placement

-Settled placements, where the person has a severe learning disability/ no communication/ such that a face to face interview is unlikely to add any additional detail to that which can be obtained from others

-Settled placements, where the person has a dementia or similar/ no communication/ such that a face to face interview is unlikely to add any additional detail to that which can be obtained from others

Once again these will be screened for

1. Objection or distress by the person
2. Objection or distress by the family
3. Lack of agreement regarding the care plan by one or more family member
4. Incompatibility issues with other residents
5. Challenging behaviour requiring significant restrictions
6. Unclear diagnosis or possibility of change
7. Variable mental capacity
8. Adult safeguarding concerns

Where none of these are present the process will continue and DoLS Mental Health Assessor will be asked to complete the Mental Capacity assessment as well as the Mental Health and Eligibility Assessments, this is in order to achieve a greater number of assessments within limited resources. The BIA will then carry out most of their assessment based on the papers available to them.

It must be noted that this approach is compliant with the requirement within Schedule A1 paragraph 39 (2) and (3)

1) In carrying out a best interest's assessment, the assessor must comply with the duties in sub-paragraphs (2) and (3).

(2)The assessor must consult the managing authority of the relevant hospital or care home.

(3)The assessor must have regard to all of the following—

(a) The conclusions which the mental health assessor has notified to the best interests assessor in accordance with paragraph 36(b);

(b) Any relevant needs assessment;

(c) Any relevant care plan.

The BIA will consult the managing authority of the relevant hospital or care home. The most practical way of doing this is likely to be by telephone. They will have regard to all of the following—

- The conclusions of the mental health assessor – telephone discussion

-any relevant needs assessment – papers provided

-any relevant care plan – papers provided

In the majority of these cases the relevant person will not be able to contribute to the assessment so the BIA will determine as much as is ascertainable of their wishes, feelings, beliefs and values by consultation with others. In many cases it will not be necessary to visit the care home or hospital and carry out a face to face interview with the person.

At any time during this process if the BIA receives conflicting or unreliable information they can choose to carry out a visit.

As an alternative approach they could also choose to visit a number of people in the same care home for the purpose of verifying facts without taking extensive time in carrying out face to face interviews.

ADASS believes that this option has been necessitated by a scheme which was devised for a specific number of people within a narrow definition being widened so significantly that it now contains vast numbers of people which is was never intended to apply to. ADASS accepts that whilst the wider definition of an acid test applies all these people require procedural protection in law but not all of them require the substantive protection which the current DoLS scheme intended. These proportionate recommendations provide people with Article 5 procedural protection who would otherwise be receiving no protection in law.

The BIA will still complete Form 3 making it clear that this is based on a desk top assessment rather than a face to face assessment.

A matrix will be made available to help determine whether a case is suitable for this emergency interim assessment.

ADASS consider the use of these emergency interim measures within the scope of the DoLS scheme offers the following;

PROCEDURAL PROTECTION from a desk top assessment	**SUBSTANTIVE PROTECTION includes the procedural safeguards plus others as necessitated by the persons needs**
Authorises the DoL	Greater focus on the wishes and feelings of P which are ascertainable
Ensures there has been independent scrutiny of the arrangements	Less restrictive options identified
Ensures the care plan is in the person's best interests and the less restrictive option.	There may be options not previously considered
Protects the supervisory bodies risk	Conditions often set
Help MA be compliant	Best Interests may be finely balanced
Appoints RPR	P or another may object to some or all of the measures

Advises of further rights to challenge	Best Interests may be other than DoLS

Those people who currently form the backlog may never be assessed unless Government funding is made available. This measure proposed by ADASS would ensure greater protection of their Article 5 rights, the authorisation of the deprivation of liberty, the appointment of a Representative and the right to access an appeal to the Court of Protection. We believe this offers a significant bundle of protection not currently available to them.

CONCLUSION

ADASS advises that this is not to be seen as the “thin end of the wedge.” ADASS emphasises this is an emergency interim measure to apply some degree of safeguards and applies to renewal and low priority applications **ONLY**. ADASS wholeheartedly supports the DoLS whilst they remain current law and if they were fully funded would not see the need for such emergency measures. High priority cases will continue to benefit significantly from the BIA input producing both procedural and substantive protection.

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