

Deprivation of liberty safeguards

Outline of a research project
funded by the NIHR School
for Social Care Research

Are the new safeguards effective in protecting the human rights of people who have been deprived of their liberty but who lack the capacity to consent?

Protecting people who lack capacity from harm is sometimes done in a way that deprives them of their liberty. This may, for example include staff effectively being in control of most of a person's life. Until recently there were no procedures in place to protect individuals subject to such constraints on their autonomy. Professionals did not have to justify why they were depriving someone of their liberty and there was no means of appeal. This changed in April 2009 with the introduction of the Deprivation of Liberty Safeguards (DoLS). The safeguards provide formal procedures to protect people who 'for their own safety and in their own best interests' need care and treatment that may deprive them of their liberty but who lack the capacity to consent and where detention under the Mental Health Act 1983 is not appropriate for the person at that time.

To date, there has been little research on the impact that DoLS are having on individuals' lives and on adult social care practice. It is important to understand if, and how, DoLS protect vulnerable individuals who lack capacity from harm and unnecessary interference with their liberty and support them to make decisions, wherever possible.

This project

- will examine the implementation of the Deprivation of Liberty Safeguards (DoLS) and the extent to which they protect the human rights of people who lack mental capacity.

It aims to

- investigate the impact of DoLS on practitioners' and carers' practice and on their awareness of human rights principles,
- examine the factors that lead to applications for DoLS being authorised or rejected,
- analyse the rationale for the infringements to individual liberty and autonomy permitted by DoLS,
- assess the use of ethical reasoning in decision-making among those applying for or authorising DoLS,
- explore key elements of good practice.



Improving the evidence base for
adult social care practice

Research project outline

WHAT IS THE CONTEXT?

The number of people in the population who lack mental capacity is rising, and this poses challenges to practitioners and carers in terms of balancing risk and rights. Historically, a longstanding cause for concern in England has been the absence of an adequate legal framework to ensure that decision-making promotes the autonomy and safeguards the interests of individuals who lack mental capacity. Instances of abusive practices and disregard for individuals' human rights had served to highlight the system's shortcomings.

Against this background, DoLS were retrospectively inserted into the Mental Capacity Act (MCA) 2005 to provide a legal framework to permit the lawful deprivation of liberty and to ensure compliance with Article 5 of the European Convention on Human Rights. The MCA had previously permitted the restriction but not the deprivation of liberty.

DoLS aspire to promote enhanced standards of care within a rights-based framework. However, the legal and practice context remains unclear and the Government, in line with the European Court of Human Rights, has not defined deprivation of liberty, saying that it is a matter of 'degree or intensity not one of nature or

substance'. As a result, incremental changes may shift care practices from a restriction to a deprivation of liberty and vice versa. Safeguarding individuals, while also promoting their autonomy, is therefore likely to pose considerable ethical dilemmas for all concerned, particularly care providers and DoLS assessors.

In practice, DoLS applications and authorisations in the first six months since introduction (April to October 2009) were significantly lower than Department of Health predictions, despite evidence of the need for improvements to the care and treatment of people with impaired decision-making capacity.

Whilst the reasons for this are unclear, the following factors may be significant:

- the original estimates from the Department of Health were inaccurate,
- practitioners' ignorance of DoLS or lack of understanding that their practice may be depriving individuals of their liberty,
- changes to practice so that the threshold for a deprivation of liberty is not reached,
- deprivation of liberty is in fact rare,
- fear on the part of provider that a DoLS application will damage their reputation,
- the threshold for what is considered to be a deprivation of liberty has been set at a high level.

Given how recently DoLS were introduced, there is little existing research concerning their operation. This study will closely examine real life decision-making and undertake a national survey of DoLS assessors to assess their impact. It will provide information about DoLS's contribution to promoting good quality care and maximising the empowerment of people with lack capacity. It will provide also insight into social care practices at a time when a key principle of care is that all service users should be supported to exercise choice and control to the fullest extent possible. Lastly, the research will increase knowledge of the extent to which practitioners use ethical reasoning in decision-making and how human rights and concepts of liberty and autonomy are upheld in respect of people who may lack capacity.

Deprivation of Liberty Safeguards

To implement a DoLS:

- care providers apply to a 'supervisory body' for a DoLS
- an application triggers six assessments to determine whether deprivation of liberty is occurring and, if so, whether it is in the individual's best interests; whether care can be provided in a less restrictive manner or whether it would be more appropriate to invoke the Mental Health Act 1983
- consultations with all relevant people take place during the assessment period
- if the qualifying requirements are met, the supervisory body gives an authorisation, sets the time period and any conditions.

Research project outline

HOW WILL THE PROJECT WORK?

The research aims to find out if, and how, DoLS work, and seeks to answer key questions:

- What is the practice of care providers (in care homes or hospitals) when thinking about depriving someone of their liberty?
- Are they reviewing or changing their own practices or the individual's care plan?
- Are people's human rights being protected?
- When are DoLS being used?
- What are the factors that DoLS assessors consider important when deciding that a person is being deprived of their liberty?
- When is this considered to be proportionate and justifiable?

STAGE 1: Initial phase

Initial research will provide the context for the later stages of the study. This will include:

- a literature review of the practice, theoretical and policy context for the development of DoLS; practice issues concerning restriction versus deprivation of liberty; views of 'best interests' and ethical reasoning in decision-making,
- a 'map' of DoLS processes, procedures and support to care providers across two regions in England,
- interviews with DoLS coordinators in four selected areas (two from each region) to derive detailed information about local circumstances and issues. Anonymised records of queries from care providers about DoLS will be used to identify key issues and themes.

STAGE 2: Case studies

In the case study phase, 16 people (four from each of the selected areas) who are subject to a DoLS application will be recruited. Where possible, individuals themselves will be asked for their views and experiences of the DoLS process. Family members, healthcare and social care staff caring for the individual, or assessing them under DoLS will also be interviewed. This

is so that we can obtain as many perspectives as possible on whether or not an individual should be deprived of their liberty, whether this in their best interests or whether care could be provided in a way that would not lead to a deprivation of liberty.

Data will be analysed to identify common themes across the case studies, in addition to focusing on the specific context and features of each individual DoLS application process.

STAGE 3: Online questionnaire

The third stage of the study will provide objective data about the range of factors that DoLS assessors take into account in decision-making. This will be achieved through a national online survey of all DoLS assessors in England. This will generate information about the factors they consider significant in terms whether or not care amounts to a deprivation of liberty and whether or not any deprivation of liberty is justifiable and proportionate.

The survey will provide respondents with a number of randomly varied case vignettes containing 5 to 8 factors considered significant in respect of professional decision-making and DoLS. Respondents will have the opportunity to briefly explain the reasons for their decisions. In addition, they will be asked some open questions about their experience of DoLS.

The relationship between the data from all three stages will also be examined.

Project publications

The study's findings and a 'pointers towards good practice guide', which will be developed in collaboration with research participants, will be made widely available across the adult social care, private and voluntary sectors. Electronic copies of all written outputs will be made available and information about them will be circulated via relevant web-sites, via policy, practitioner, care provider, DoLS, service user and carers' networks, via email discussion groups and via the journals/newsletters of the different target audiences. An accessible version of the findings will also be produced. The research team will also write articles for academic journals and practitioner magazines.

Research project outline

HOW DOES THE PROJECT FIT THE AIMS OF THE SCHOOL FOR SOCIAL CARE RESEARCH?

The research will identify elements of good practice and, through collaboration with service users, carer and practitioners, will ensure that the findings are disseminated in a variety of formats appropriate to a wide range of audiences. The study will thereby help empower and safeguard some of the most vulnerable people who use social care services by identifying any early problems and issues surrounding the implementation of DoLS. It will equip and support practitioners, people who lack capacity, and their carers and families, to ensure that the DoLS are invoked when appropriate and implemented correctly.

Given the short period during which the DoLS have been in use, the study will help commissioners of adult social care services to identify any shortcomings in their delivery arrangements for the DoLS process, including the need for increased staff awareness and/or further skills training.

The NIHR School for Social Care Research

The School for Social Care Research was set up by the National Institute for Health Research to develop and improve the evidence base for adult social care practice in England. It officially launched on 1 May 2009 with funding of £15 million over five years.

The School conducts and commissions high-quality research across five overlapping programme areas:

Prevention and reduction – How can we best prevent or reduce the development or exacerbation of the circumstances that lead to the need for social care?

Empowerment and safeguarding – How can we best empower and safeguard people who use social care services?

Care and work – How can we best equip and support people – practitioners, volunteers, informal carers – to provide optimum social care? How can we ensure that people who use social care and their carers are enabled and supported in paid work and other types of meaningful activity?

Service interventions, commissioning and change – What interventions, commissioning and delivery arrangements best achieve social care outcomes?

Resources and interfaces – How can social care and other public resources best be deployed and combined to achieve social care outcomes?

Further information about the NIHR School for Social Care Research is available at www.sscr.nihr.ac.uk

Project title:
Liberty, equality, capacity:
The impact of the
Deprivation of Liberty
Safeguards on social care
practice and human rights

Timescale:
May 2010
to October 2012

Budget:
£249,845

Contact:
Joan Langan
Senior Lecturer
School for Policy Studies
University of Bristol
8 Priory Road
Clifton
Bristol
BS8 1TZ

Telephone:
0117 954 6768

Email:
j.langan@bris.ac.uk

