

Cabinet Committee on Performance Improvement

Meeting to be held on 28th July 2015

Electoral Divisions affected: All

Deprivation of Liberty Safeguards (Dols)

(Appendices 'A' to 'D' refer)

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Executive Summary

The report gives an overview of the situation regarding the Deprivation of Liberty Safeguards (Dols) and the legal requirements of the Local Authority in this process (Appendix 'A' - What are the Deprivation of Liberty Safeguards) and with respect to Court of Protection applications.

It outlines the pressures we are facing since the Supreme Court ruling of March 2014 (known as the Cheshire West ruling) which dramatically increased the number of people who now come within the remit of Deprivation of Liberty legislation. The financial pressures on Lancashire as a result of this ruling are still being assessed but they will be significant and ongoing.

Deprivation of Liberty for those over the age of 18 can only be authorised by the Dols or by the Court of Protection.

We have seen the application rate for Dols rise from around 350 in 2013/14 to over 3,000 in 2014/2015 when the impact of the Supreme Court ruling began to take effect. *(There were 2,400 valid applications for 2014/2015 although we have a duty to also pursue the large number of invalid applications received).* The process for the Dols is complex and specialist knowledge and skills are required.

Nationally the consensus is that local authorities will face a severe financial burden as a result of the increased activity, which is likely to continue to increase over coming years.

Recommendation

The Cabinet Committee on Performance Improvement is recommended to note and comment on the contents of this report.

Background and Advice

The Deprivation of Liberty Safeguards (Dols) was implemented on 1 April 2009. It provides a legal framework for preventing the unlawful detention of anyone over the age of 18, in a care home or hospital, who lacks the capacity to consent to their care

arrangements and residence. Dols is a lengthy and complex process but offers protection of article 5 of the Human Rights Act to all citizens. Article 5 is the right to Freedom, Liberty and Security. The Dols process has legally set deadlines for completion of the assessment process. Lancashire has had a dedicated Dols team since February 2009 and the team has built up a degree of skill and expertise that is used as a resource for County Council staff, providers of services we commission and Health colleagues as well as service users and their families.

Recent changes and developments

Since March 2013, the County Council has the responsibility for assessment of people who meet Dols criteria in hospitals as well as residential care homes.

In March 2014 the Supreme Court gave a ruling in the cases of P v Surrey and Cheshire West Councils that changed the landscape for Dols significantly. The ruling has resulted in thousands more of people now being identified as being deprived of their liberty by their care arrangements. Care home residents and hospital patients who lack the capacity to agree to their care arrangements and are subject to continuous supervision and control and who are not free to leave are deemed to be deprived of liberty.

The ruling has resulted in additional work for the Coroners services; a death of someone whilst subject to a Dols authorisation is deemed to be a Death in Custody. Given that the majority of 'new' Dols authorisations will be for people in very frail states of health it is extremely likely that there will be significantly more deaths in custody and Coroner inquests.

The paperwork associated with Dols is weighty. New forms were introduced in April 2015 but even with these streamlined forms there is still a very complicated administration process that underpins Dols. The Supervisory Body has legal responsibilities to ensure that certain people have copies of assessments and authorisation documentation.

An authorisation can only last a maximum of 12 months. If deprivation of liberty needs to continue beyond this time then the whole process has to be undertaken again for the 'renewal' of the authorisation. Reviews of the authorisations are frequently requested by Independent Mental Capacity Advocates (IMCAs) and Managing Authorities (Hospitals and Care homes), thus increasing the workload per case.

Application increases

Since April 2014 the rate of Dols applications nationally has risen dramatically (see figure 1 below)

Figure 1: Number of applications per month for 116 councils that submitted data for all four quarters



Data Source: DoLS Quarterly collection 2014-15

Numbers are rounded to the nearest 100.

In Lancashire Dols applications have risen from an average of 22 per month in the fourth quarter of 2013/14 to 312 per month in the fourth quarter of 2014/15 (See Figure 2 below). This represents a **14 fold** increase in applications. These figures exclude review requests and invalid applications, of which there are significant numbers (most of which will lead to full assessment being required)

Figure 2: Number of valid Dols applications made to LCC (excludes Review requests)

	2013/14 Q4					2014/15 Q4				
Applications	Jan	Feb	Mar	Tot	Avg	Jan	Feb	Mar	Tot	Avg
Applications	27	16	24	67	22	311	286	339	936	312

This increase has continued into 2015/16: the average application rate for April, May and June 2015 is 390 per month.

Lancashire actions thus far have proved to be in line with recommendations from the Association of Directors of Adult Social Services (ADASS), the Local Government Association (LGA), Department of Health (DoH) and Care Quality Commission (CQC). Lancashire has:

- Trained additional Best Interests Assessors (BIAs). Training has to be accredited by the Department of Health (DoH) and is to post graduate

standard. The County Council has trained 16 BIAs since July 2014; is due to train a further four in July 2015 and intends to train more before the end of 2015 and:

- Significantly increased our resource of independent BIAs and Mental Health Assessors.
- Supplemented our admin support significantly, drawing on resources from other teams.
- Significantly increased our IMCA resource. Lancashire commissions an IMCA, whenever a Dol is authorised, in order to support the Relevant Person (person deprived of their liberty) and their Representative (often a family member) through the Dols process.
- Established a Mental Capacity Act (MCA)/Dols forum with health and other partners that meets regularly to review Dols implementation. This group links to NHS England.
- Provided presentations to care home providers regarding the implementation of MCA/Dols and interpretation of the Supreme Court ruling.
- Agreed a protocol with the four Lancashire Coroners for those people who die whilst subject to Dol authorisation. This is to both lessen the burden on the Coroner service and to offer a compassionate but legal response to grieving families.
- Worked in partnership with Browne Jacobson law firm to provide practice sessions to BIAs and other partners.

It is proving challenging to keep up with the volume of applications received. We currently have in the region of 11,000 care home places in Lancashire. If only 80% of those places are resulting in deprivation of liberty that equates to 8,800 people indicating a significant gap between those applications received to date and those yet to come.

There is no alternative to the Dols process – it is a legal requirement of all local authorities.

Deprivation of Liberty outside of the Dols process:

Whilst the focus of this report centres around the impact of recent caselaw on the work undertaken by the County Council's Dols team, it cannot be underestimated that applications made to the Court of Protection (CoP) outside of the Dols process have seen an equally dramatic surge creating an inevitable increase in the work of social workers in this area as well as lawyers.

The Dols legal process only applies to care homes and hospitals but a person can be deprived of liberty in a community setting (i.e Supported Living, Shared Lives, family home, as well as some residential school settings). Deprivation of liberty in these situations can only be authorised by direct application to the CoP. Where the County Council is responsible for funding the care of these individuals, and/or developing and implementing the care plan that constitutes a deprivation, then the County Council would ordinarily lead on such an application and become the Applicant, thus bearing the majority of court costs, as well as being potentially responsible for a proportion of independent consultants costs in certain situations. Where an individual's care and support is funded by Health, they will be the Applicant, however the County Council is still likely to be joined as a Party to the

Court proceedings where we play any role in developing and implementing the person's care assessment and/or support plan. Whichever circumstance, the costs to the County Council are significant. There is no automatic entitlement to legal aid for the service user or their family.

Soon after the decision in the Cheshire West case, work was undertaken by the CoP to create a 'streamlined process' with a view to reducing the administrative burden on all parties when making applications for authorisations of deprivations of liberty. Prior to the streamlined process being implemented, it was expected that 'P' (the service user), would have to be a party to the Court proceedings, thus creating a requirement for him to have representation by way of a Litigation Friend.

Such a role could be undertaken by family/friend, an IMCA, or as a last resort, the Official Solicitor. However, the introduction of the streamlined process abandoned this requirement and replaced it with an obligation on the Applicant to show that 'P' had been consulted on the proceedings and only where P had indicated a desire to be involved in the proceedings would they be expected to be made a party. This approach has been challenged and very recently (June 2015), the Court of Appeal handed down a judgement in the case of Re: X in which it was held that "both fundamental principles of domestic law and the requirements of the European Convention on Human Rights (ECHR) demand that 'P' be a party to proceedings for authorisation of deprivation of liberty".

The impact of this latest decision is already being highlighted by the Official Solicitor (OS), who approached the CoP within days of the Court of Appeal decision with a very open letter expressing his inability to cope with the strain on resources that the Re: X decision was creating. On a more local level, the implications of the Re: X decision will mean that in preparing any application to the CoP, the Applicant will have to liaise with family/friends of P to ascertain if they are willing to act as Litigation Friend for 'P'. Alternatively, an IMCA or the Official Solicitor may be approached, however they are only willing to take on this role once they have received confirmation that their legal fees will be covered by way of legal aid, or from 'P's' own funds. The responsibility for collating 'P's' finances appears to be falling to the Applicant via social workers, and we have recently heard from other local authorities that in circumstances where such financial checks are delayed for whatever reason, the OS is seeking an undertaking from the local authority Applicant that they will meet the OS's legal fees, in order to prevent any delay in proceedings. It is worth noting at this stage that lawyers for the County Council would advise that such undertakings are strongly resisted.

A very rough estimate of the numbers who may meet the above criteria is a minimum of 700 people. Further work is required to complete the scoping of numbers. In 2014/15 the County Council made 18 applications to the CoP between January 2014 and June 2015. The number of unlawful Dol in community settings is a national problem.

A CoP co-ordinator post and assistant is due to be advertised by the County Council in the near future to support the application process.

Dols Reform

The government asked the Law Commission to design a new scheme amid concerns that the current system was not fit for purpose and was failing to cope with a tenfold rise in deprivation of liberty cases.

The Government is bringing forward the deadline for deprivation of liberty reform plans. The Law Commission published its proposals for the replacement of the Dols safeguards on the 7th July 2015. This will be open to consultation with final proposals being presented to the Government at the end of 2016. (See Appendix 'B': Dols Reform Consultation).

The Law Commission's proposals, provisionally entitled 'protective care', extends the present safeguards to cover supported living, shared lives and domestic settings as well as care homes and hospitals. The nature and extent of the safeguards offered by the system vary according to the care setting and level of restrictions proposed.

Consultations

This report is based on practical knowledge of legislation. Keeping up to date with legal developments and requirements; consultation with other local authorities and Health leads for Dols and the Mental Capacity Act.

Implications:

This item has the following implications, as indicated:

Legal

Not discharging our legal duty to comply with the Dols process may result in a costly damages claim and a loss of reputation.

It appears to be widely agreed that if local authorities can show they have plans in place, and are actively engaged in trying to meet their legal obligations, then the risk of legal penalties for procedural breaches of Dol should be minimised but this is not guaranteed. A number of legal firms are actively asking care homes if their requests for Dols assessments are being met in the legal timeframe. We are following ADASS guidance around managing this situation outlined in ADASS Advice Note November 2014.

There are increasing demands on Lancashire's legal service as a result of the Dols and more particularly the rapidly increasing rate of Section 21a challenges. This is the result of both the increase in authorisations and the impact of the **AJ v's a Local Authority** case in March 2015 where a local authority was heavily criticised because the Relevant Person's Representative, IMCA and Supervisory Body had all failed to ensure that an objecting resident was supported to challenge a Dols authorisation.

We are also having to consider the increase in demand for both paid representatives' as a result of the AJ case, and the additional numbers of 39D (of the Mental Capacity Act) IMCAs needed to meet the increasing number of authorisations given. The IMCA service is under significant pressure in Lancashire and has waiting lists for services (see Appendix 'C' for the national picture: IMCA Service post AJ ruling).

Financial

The costs of implementing authorisation for deprivation of liberty (either in own home or care home or hospital) is likely to cost local authorities millions of pounds if we address everyone who meets the criteria, creating an unsustainable pressure on local authorities.

The cost of processing Dols applications in Lancashire in 2014-15 was £446,000. This includes the direct running costs of the Dols team and use of external contractors (mental health assessors and independent BIA's). Mental Health Assessors cost (£175 per case) and independent BIAs (average cost £360 per case).

These costs do not include those cases of supported living that currently need to go directly to the CoP. A Freedom of Information request (12 months ago) indicated that the average cost of a CoP application was £4,000 plus legal costs.

With the new streamlined process it is likely that the cost could be brought down to £1,000 plus legal costs. Long term costs are unknown as we will be going back to the CoP for an annual review every 12 months.

Human Rights

Deprivation of liberty is primarily concerned with Articles 5 and 8 (Right to Privacy and Family Life).

Risk management

The risks to the County Council of being sued for unlawful deprivation of liberty increases as time goes on. Although we have taken some action to mitigate this risk, we still have a very long way to go before we can make sure we fulfil our legal responsibilities in the timescales demanded. The letter from the DoH (set out at Appendix 'D') does indicate that those councils actively engaged in developing services and working to full compliance with the increased demands will have their risk minimised, but we cannot say this will be guaranteed, and the council does run the risk of being sued for allowing unlawful deprivation of liberty to occur.

There is still a very significant backlog of applications in Lancashire going back to June 2014 which have yet to be assessed.

The Dols team are currently managing to process renewals, reviews and a small number of urgent applications.

There is a risk that there are un-assessed cases where the relevant person is deprived of their liberty in circumstances that are not justified. In cases such as this where there is a substantive breach of Article 5 (as opposed to a procedural breach) the risk of financial loss to the council is significant.

Actions taken thus far to comply with the ruling include:

- Implementing a rota system for BIAs from community teams (13 BIAs currently) to spend one week in eight doing Dols assessments:
- Increasing our pool of independent BIAs and Mental Health Assessors:
- Increasing funding for Independent Mental Capacity Advocates:
- Plan in place to recruit two additional staff to undertake management of supported living applications to CoP:
- Introduction of a priority rating tool (guided by ADASS) to ensure we continue to prioritise and protect the most vulnerable people:
- Working with providers to ensure they fully understand the Dols process:
- Working with Coroners offices to establish a protocol for managing deaths in custody in a compassionate but lawful way:
- Establishing a forum with health colleagues to share knowledge and skills, ensuring that staff keep up to date with case law developments that may require changes to our practice:
- Continuously reviewing the Dols processes in pursuit of efficiencies.
- Action plan is being finalised regarding DOH MCA grant of £588,603.

Deprivation of Liberty Safeguards (Dols) Grant 2015/16:

On the 27 March 2015, the Minister for Care and Support announced an additional £25m would be made available to local authorities for the Deprivation of Liberty Safeguards. (Appendix 'D': DOH Grant)

The County Council has been awarded £588,603. The grant is designed to help to address the significant increase in Dols applications resulting from the Supreme Court ruling and to improve staff and partner understanding of the Dols and the wider Mental Capacity Act.

The proposed plan to utilise this grant is to:

- Recruit an additional six full time BIAs; Grade 9 posts for 12 months. The team currently comprises one full time Deprivation of Liberty Safeguards Manager, Grade 10 and six full time BIAs (Two of these BIA posts are currently vacant). All 12 BIAs will report to the Dols team manager. There is also a Mental Capacity Act Co-ordinator Grade 10 post which sits within the Dols team.
 - o The additional BIAs will focus on addressing the backlog, leaving the permanent team to focus on renewals and priority cases. The funds will be by no means sufficient to allow us to deal with both the backlog and the rising number of new applications we have to deal with.
- Recruiting an additional eight full time business support officers (BSOs) Grade 4 for 12 months to manage the business of the Dols process. This will take our full time complement of admin staff to 10. These eight BSOs will report to ACS Operational Admin Team Manager (Central) (post number S61184550001).
- A thorough review of all Dols processes to be undertaken by senior admin staff. The aim is to identify what further efficiencies can be made in our systems.
- Audit of increased Coroner activity due to more people dying whilst subject to Dol authorisation.

- Organisation of 2 or 3 conference type events for all partners, including service users and families, to raise awareness of MCA and MCA/Dols.
- Purchase of new MCA (Rights under the Act) leaflets (from HM government via GoH) for distribution to all partners to raise knowledge of MCA and rights of those who may lack capacity for certain decisions.
- We have invited the Law Commission to present at an event for all partners in September so that maximum views and opinions can be presented regarding how Dols should look in future.
- We will have a revised electronic records system by end of January 2016 that should enhance efficiencies of BIA and admin time.
- We plan to train more BIAs – four places secured for July 2015 cohort, and more planned for later in the year.

In terms of **MCA promotion and implementation**, a full time MCA co-ordinator funded for 12 months by NHS England was appointed in May 2015. This post is shared with the six Lancashire CCGs and we are working with our health partners to harmonise MCA and MCA/Dols processes. Awareness sessions are offered, and we have a positive working relationship with our health colleagues with a great deal of joint working taking place.

Personnel Implications

All new posts will be recruited to in accordance with the County Council's Vacancy Management Procedures.

Conclusion

There are clearly very significant demands on the local authority with respects to Dols. A clear plan is in place to start to address the backlog of applications. The actions thus far demonstrate that we are working hard to manage this situation within our limited resources.

List of Background Papers

Paper	Date	Contact/Directorate/Tel
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N/A

Reason for inclusion in Part II, if appropriate

N/A