

Norman Lamb MP  
Minister of State for Care and Support  
Department of Health  
Richmond House  
79 Whitehall  
London  
SW1A 2NS

17 October 2014

Dear Minister

Thank you for your letter of 2 September. We are glad you recognise that the clarification in the law following the Supreme Court judgment has resulted in significantly increased activity on Deprivation of Liberty Safeguards (DoLS) across the system. We very much appreciate the offer to meet you to discuss this. Our offices are in touch with yours and we hope to agree a date with you very soon, given the urgency.

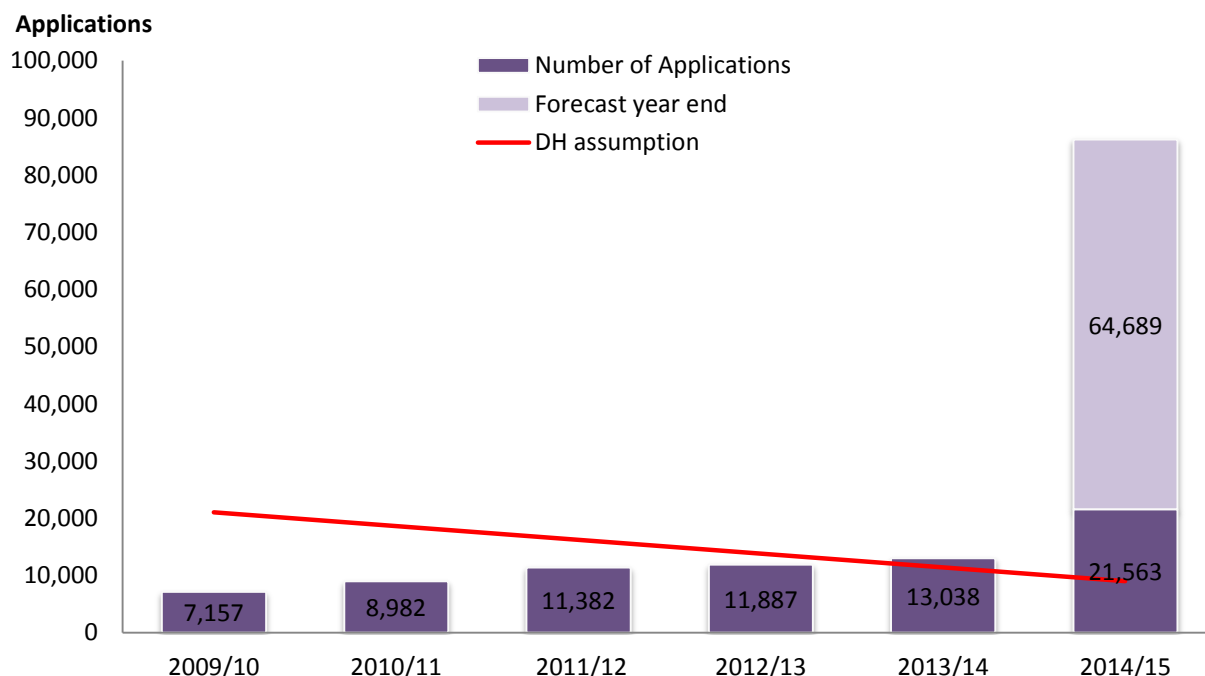
We are looking to the Government to provide a swift solution to the significant impact being felt on very vulnerable individuals and across the health and social care system.

We absolutely support the principles behind and collective ambition to implement the Mental Capacity Act 2005 (MCA) and DoLS, as our previous letter explained. We wish to ensure that people have their needs met in a timely way via a proportionate and outcome-based process that safeguards individual rights.

As we also said before, there is a real concern that vulnerable people are already being unlawfully deprived of their liberty, are not having their best interests assured, and are being denied the opportunity to have independent scrutiny of their care arrangements that the process can provide.

The recent data allows for fuller assessment of the scale of the impact of the Judgement. In Quarter One of 2014/15 alone applications are running at more than double the annual level predicted in the original DH impact assessment and by year end levels, we forecast, it will be nearly ten times this.

## Number of Deprivation of Liberty Safeguards applications by year, England 2009/10 - 2014/15<sup>1</sup>



As well as raising concerns on the significant impact on vulnerable individuals, many councils have already expressed very serious concerns to us about this unsustainable pressure. Its impact is also being felt across the system. There is also significantly increased activity within the NHS, which is falling to local authorities to authorise.

We maintain that the cost implications, as outlined in our previous letter, are much larger than those anticipated previously. We believe there was already a shortfall in funding which has been massively exacerbated by the impact of the Supreme Court Judgment upon already over-stretched local authority capacity. This situation cannot be sustained. We have made clear in wider discussions on the cost implications of the Care Act, local authorities need to ensure they have sufficient resources to minimise the impact of any resource reduction on other services and the wider community.

In addition, this is not a one-off adjustment: the impact will be sustained as in-year reviews commence and given changes to the demographic profile in this country, will undoubtedly increase. We also need time to build up capacity, not least to ensure we have sufficient levels of trained and qualified staff to ensure we can protect and uphold the rights of vulnerable people going forward.

<sup>1</sup> Source: [2009/10 - 2013/14 HSCIC Annual DoLS report](#), [Quarter 1 Return](#), [2014-15 HSCIC DoLS report](#).

Forecast year end: the forecast is based on data from 130 (86% of councils) on the assumption that Q1 2014/15 is representative of the number of applications that will be received in any given quarter of 2014/15. For the purpose of this specific letter the assumption is based on reviewing the latest quarterly data published in 2010/11 which shows a uniform volume of applications across each quarter. **However, the number of applications could in practice vary by quarter and will need to reassessed when Q2 data is released.**

We welcome your recognition that the sector has done a great deal to minimise the impact of the judgement and also on promoting its wider principles for the benefit of vulnerable people in our communities. We fully appreciate the support of your staff in working with us to agree some immediate actions.

Even with extensive sector led activity, councils cannot hope to fully mitigate the impact of the judgement without additional funding. We are therefore seeking your agreement that additional funding must be made available as a matter of urgency to cover recurring costs on an ongoing basis.

We are aware that the initial level of increase in individual local authority areas will vary according to the degree to which local practice needs to change. This will, of course, explain the differential impact in certain areas. Local areas are also aware that it will take time to move towards full compliance with the law. We are working across the sector to embed the principles behind the Judgement and the MCA 2005 and to reduce some of the inconsistencies in understanding and application. However, the funding made available to date simply does not reflect the expanded duties resulting from the Judgement. In every area costs are still higher than current funding levels.

This situation is additionally placing councils at significant risk of legal challenge. We strongly support the decision to address the legal framework to ensure the system is fit for purpose, is proportionate and can protect the best interests of individuals. ADASS and the LGA intend to work closely with the Law Commission prior to its first consultation report.

Whilst we note the wish for legislative change not to be rushed, this needs to be balanced with a recognition of the urgency of ensuring that the people's needs are met in the best way possible, as well as reducing lengthy judicial processes and minimising the cost to the public purse.

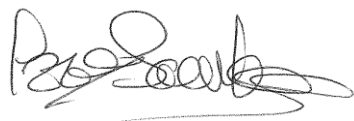
There also must be some very specific circumstances in which the sector and government could work together on identifying a more proportionate response in advance of the Law Commission reporting in three years. There are already some practice anomalies with the current system as a result of the supreme Court judgement – assessing people in hospitals at the end of life or in a coma or an increase in coroners requesting post mortems - that is causing undue stress on families and simply do not promote the person's best interests in line with the MCA 2005.

However, whilst we wait for the longer term and permanent solutions, there is a dire need now for funding to enable Councils to meet their statutory obligations to vulnerable people in our communities and to ensure adherence with the principles clarified by the Supreme Court.

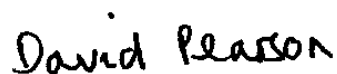
To enable a focused conversation on these issues at our meeting, further information on the impact on individuals and their families and the difference between the original impact assessment, the recent review and the current situation are attached.

We very much hope that the meeting with you can focus on how best to find a joint resolution to the current, very pressing, issue. It is particularly important that this is resolved quickly, to help reassure councils across the country that the commitment to fully fund the new burdens in the Care Act will be honoured, if over time costs turn out to be higher than the Department is currently predicting

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Izzi Seccombe', with a stylized, flowing script.

Cllr Izzi Seccombe  
Chair, LGA Community Well Being Board

A handwritten signature in black ink, reading 'David Pearson', in a clear, slightly cursive script.

David Pearson  
President of the Association of Directors of Adult Social Services

## **Appendix**

### **1. Summary of increased costs**

The expanded duties resulting from the Judgement go well beyond anything assumed in the original impact assessment and beyond the revised funding allocation in respect of hospital cases only. The Supreme Court Judgement has led to increased costs for Councils as a result of:

#### **1.1 Immediate cost impacts**

- Increased costs from the totally new burden placed by necessary applications to the Court of Protection to authorise those in settings outside of care homes and hospitals such as supported living, community DoLS, domestic settings.
- A consequential increase in workforce requirements and administrative time for applications for Community DoLS. Submissions are expected to take an additional 10/12 hours of social work time plus local authority solicitor time.
- The need to identify an increased number of Best Interest Assessors (BIAs), Mental Health Assessors and Authorisers to carry out assessments in relation to the statutory scheme.
- As applications for authorisations under the statutory scheme have increased, so the use of Independent Mental Capacity Advocate (IMCAs) and paid person representative has increased, with associated cost implications. This carries with it both a capacity and a commissioning pressure. Perhaps more significant is the increase in s12 approved DoLS assessors at a cost of approximately £175 per assessment to Councils.
- An increase in training costs to ensure a workforce skilled to meet demand.
- The increased cost of court fees both for challenges to the statutory scheme and for applications for Community DoLS.
- Cases authorised will all fall to be reviewed or renewed at the end of the time period; again both incurring additional and recurring costs
- A need to revisit previous decision making in numerous cases assessed as not deprived of liberty based on the earlier interpretation and re-assess
- There appears to be a very high conversion rate so far on referrals to authorisation. As the DH noted in the original impact assessment, each authorisation granted carries with it higher costs, appointment of a representative and more extensive consultation for example.

#### **1.2 Longer term impacts**

- Demand is also likely to grow over time as awareness and understanding of the new interpretation of the law increases and as greater clarity is brought to age related applications.

- Local authorities are also likely to be involved in as yet uncosted legal action. Currently, on average procedural breaches for DoLS failures are being granted damages at the rate of £1,000 per month, such that court declarations are being sought and granted for between £10,000-£15,000 per year per case. More severe cases are achieving higher damages awards of around £35k (i.e in those cases where P should never have been removed). Local authorities are also seeing a rise in the number of frail, elderly people in their 80's and 90's, who will probably not survive their claims.
- In the original impact assessment the number of people using the Court of Protection to challenge DoLS was anticipated as 1:40 applications and at a cost of £9,000. Accepting the ratio as correct, then as figures for authorisations rise, so do the proportion likely to be challenged to the Court of Protection, creating a new burden.

## 2. Differences between original impact assessment, revised DoLS funding and the current situation

### 2.1 Definitions

- At the time of the original impact assessment, the Government rejected the view of some respondents that “every person who lacks capacity to consent to the arrangements for their care or treatment, and who is in a care home from which they are not allowed complete freedom of egress, are inevitably deprived of their liberty within the meaning of Article 5 of the ECHR”. **ADASS and the LGA believe that this must be revisited in the light of the Supreme Court acid test.**

### 2.2 Numbers

- The DH considered that based on the understanding of the meaning of deprivation of liberty at the time the number of people who lack capacity and may need to be deprived of liberty “should be relatively small”. As noted above, **the scope is now significantly expanded.**
- The original impact assessment was entirely based on estimates and, as the DH later accepted, “at the time the impact assessment was carried out, there was no factual evidence on numbers or costs of unlawful detentions on which to base estimates of the cost”. **There is now better information available on which to base revised estimates.**
- DH estimates of numbers were based on 500,000 people in England and Wales who have a mental disorder and lack capacity. DH analysis suggested 1:10 would need additional restrictions which may amount to a deprivation of liberty i.e. 50,000. As noted above, **the acid test introduced by the Supreme Court interpretation has widened the scope and nature of application to potentially many more people.**
- The division of funding between care homes and hospitals was considered to be 80/20. The initial funding for care homes was provided within an overall MCA and DoLS allocation. The MCA was 60% of the whole and the DoLS 40%. The DoLS element was to further reduce by 5% each year until 2015 when it was envisaged that steady state would be achieved. This now incorrect original assumption still underpins the larger element of DoLS funding.

- It was envisaged more assessments being undertaken in the first year, with progressively fewer made as all parties become familiar with safeguards, and that the number of authorisations would remain constant. It also was assumed that once the safeguards were understood, 10% of the relevant population will be subject to assessment of whom no more than 25% at any one time will be justifiably deprived of liberty.
- The pattern of rising applications as outlined above is contrary to predictions in the Impact Assessment that applications would fall at a constant rate between 2009/10 and 2015/16.”<sup>2</sup> The ADASS Survey and later data illustrates that councils are anticipating that levels of increased activity in 2014/15 will be sustained in 2015/16. Even before the increase in numbers as a result of the Judgement, national data shows that there has been a year-on-year increase in the number of applications completed for deprivation of liberty under (DoLS) since their introduction in 2009/10. the numbers show a steady increase each year from 2009/10-2012/13 with a marked jump in 2013/14.
- This assumption also never took account of the requirement for review and renewal, and the associated cost implications. The original DH impact assessment assumed that 25 per cent of authorisations would be granted and therefore need to be reviewed at least annually. In practice the statistics show the level at twice this and with the recent judgement **the Q1 data shows eight out of ten applications will need to be reviewed at least annually.**
- We are aware that DH revised the figures, prior to April 2013 and agreed £1200 which was a unit cost, taking into account not only the assessments but the overall cost of the DoLS service. However, **it is only the 20% for funding hospital DoLS which was revised in 2013.** As above, the Supreme Court interpretation has widened the scope and nature of application to many more people.

### 2.3 Authorisations

- The impact assessment assumed 5,000 authorisations in first year reducing to 1,700 each year after 2015/16 and from this figure arrived at a cost of 21,000 assessments in first year (25% granted). The cost of this £13.6 m and 7,000 assessments in 2015/16 producing 1,700 authorisations with costs now at £4.3 million.
- It was predicted that there would be a steady state by 2015/16 as after that “costs are assumed to change only in line with demographic change in the relevant population.” In fact, these have shown a year on year increase from 2009/10-2013/14 rather than the decline and stabilisation predicted.
- The proportion of authorisations granted largely remain unchanged over the last three years but is still double the assumptions made. Three-fifths (59% or 7,629) of all applications for deprivation of liberty under DoLS completed in 2013/14 had an authorisation granted. This was higher than each of the preceding years: 2012/13 (55%), 2011/12 (56%), 2010/11 (55%) and significantly higher than 2009/10 (46%). Where authorisations were not granted in 2013/14, this was usually because the supervisory body considered that the ‘best interests’ assessment had not been met (96% of applications where authorisation was not granted).

<sup>2</sup> HSCIC Annual DoLS report, [2012/13](#)

	DH Assumptions		Health and Social Care Information Centre Data					
	2009/10	2015/16	2009/10	2010/11	2011/12	2012/13	2013/14	2014/15
Number of Applications	21,000	6,600	7,157	8,982	11,382	11,887	13,038	21,563
Forecast year end <sup>3</sup>								86,252
Authorisations granted	5,000 (25%)	1,700 (25%)	3,297 (46%)	4,951 (55%)	6,339 (56%)	6,546 (55%)	7,629 (59%)	11,089 (80%)
Authorisations not granted			3,860 (54%)	4,031 (45%)	5,043 (44%)	5,341 (45%)	5,409 (41%)	2,660 (20%)

### Proportion of DoLS applications granted and not granted by year, England 2009/10-2014/15<sup>4</sup>



- Each authorisation granted must be renewed or reviewed at the end of the time period, resulting to a cumulative effect of costs. **This is even more so since the acid test.**

### 3 Impact on individuals and families

As noted above, there also must be some very specific circumstances as a result of the supreme Court judgement that is causing undue stress on families and simply do not promote the person's best interests in line with the MCA 2005.

<sup>3</sup> Forecast year end: the forecast is based on data from 130 (86% of councils) on the assumption that Q1 2014/15 is representative of the number of applications that will be received in any given quarter of 2014/15. The assumption is based on reviewing the latest quarterly data published in 2010/11 which shows a uniform volume of applications across each quarter.

<sup>4</sup> Q1 2014/15: The proportion granted/not granted is based on applications that have already been decided and are subject to future revision and there is no reason to assume that the proportions will change in future quarters. However, HSCIC report that in Q1 2014/15 51 per cent (11,100) were granted, 12 per cent (2,700) not granted and 36 per cent (7,800) were not yet signed off by the Supervisory Body or were withdrawn.

- A further unintended consequence of the Supreme Court judgement is in relation to patients in intensive care. It is another source of great distress to families at a very difficult time to have to be subject to a process such as the deprivation of liberty safeguards. It is anticipated that there may be 20,000 people in intensive care who may need to be subjected to the safeguards process which will be a further burden on Councils to process and a further emotional impact on assessors required to work in very difficult situations.
- Additionally the increase in DoLS authorisations has resulted in an associated increase of deaths in detention which must be notified to the Coroner. In many cases Coroners are insisting on post mortems, with the resultant distress on families and the impact on Coroners work.