

Cabinet Committee on Performance Improvement

Meeting to be held on 4 February 2015

Electoral Division 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 Deprivation of Liberty and the legal requirements of the Local Authority in this process (Appendix 'A' - What are the Deprivation of Liberty Safeguards (Dols)). It outlines the pressures we are facing since the Supreme Court ruling of March 2014 which 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 Deprivation of Liberty Safeguards (Dols) or by the Court of Protection.

We have seen application rate for Dols rise from around 350 in 2013/14 to over 1,700 since April 2014 when the impact of the Supreme Court ruling began to take effect.

The process is complex and specialist knowledge and skills are required. The Dols process can be seen at appendix A.

Nationally the impact of the increase in Deprivation of Liberty activity is still being assessed but the consensus is that local authorities will face a severe financial burden which will 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

Deprivation of Liberty Safeguards (Dols) is a legal framework for preventing the unlawful detention of anyone over the age of 18 who lacks capacity to make decisions on their residence if they are in a care home or hospital, and was implemented on 1 April 2009. 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. Dols process has legally set deadlines for completion of 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 Lancashire 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 (referred to as the 'Acid Test') means that many more thousands of people will now be identified as being deprived of their liberty by their care arrangements, the key to which is someone not having mental capacity to agree and being subject to continuous supervision and control and not free to leave they are 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: even with the new forms there is still a complicated administration process that underpins Dols. The Supervisory Body has legal responsibilities re: ensuring certain people have copies of assessment 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.

Application increases

Since April 2014 the rate of Dols applications nationally has risen dramatically. DoLS applications have risen from a Q3 average of 31 per month in 2013/14 to 279 per month in Q3 2014/15.

	2013/14 Q3					2014/15 Q3				
DoLS Applications	Oct	Nov	Dec	Tot	Avg	Oct	Nov	Dec	Tot	Avg
Valid Applications	24	27	26	77	26	160	200	223	583	194
Invalid Applications	5	6	5	16	5	76	84	94	254	85
Total Applications	29	33	31	93	31	236	284	317	837	279

Invalid forms still need the same amount of time to check and to contact the care home or hospital to determine if they are not as valid as all other applications. Applications can be invalid for a number of reasons:

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

- trained additional BIAs (training has to be accredited by the DoH and is to post graduate standard) and:
- increased our resource of independent BIAs and Mental Health Assessors.

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 Dols process – it is a legal requirement of all local authorities.

Deprivation of Liberty in the person's own home:

The Dols legal process only applies to care homes and hospitals but a person can be deprived of liberty in their own home (supported living, Shared Lives, family home). Deprivation of liberty in these situations can only be authorised by direct application to the Court of Protection. If the County Council is funding the care, then the County Council will be the Applicant and will bear the majority of court costs. If the person is funded by Health, they will be the Applicant, but the County Council will still likely be joined as a Party if we have had any involvement in the person's care assessment. 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.

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.

Consultations

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

Implications:

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 should be minimised but this is not guaranteed (Appendix 'B' - DH letter from Niall Fry January 2015). 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 Appendix 'C' - ADASS Advice Note November 2014.

Financial

The costs for 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 (Appendix 'D' - ADASS/LGA letter to Norman Lamb).

The cost of Dols thus far is £128,623.86 up to December 2014: this includes costs of Mental Health Assessors (£175 per case) and independent BIAs (average cost £360 per case). This does not include the running costs of the Dols team. As of 31st December 2014 there were 1,093 unassessed cases that will all require at least the cost of a Mental Health Assessor: this alone equates to £191,275.

These costs do not include those cases of supported living that need to go direct to Court of Protection: on a recent FOI request (6 months ago) the average cost of a Court of Protection 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 Court of Protection 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 council being sued for unlawful deprivation of liberty increase as times goes on. Although we have taken action to mitigate this risk we still have a long way to go before we can make sure we fulfil our legal responsibilities in the timescales demanded. The letter from DoH (set out at Appendix 'B') 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.

Actions taken thus far to comply with the ruling include:

- training another 13 Best Interests Assessors since summer 2014:
- increasing our pool of independent BIAs and Mental Health Assessors:
- increasing funding for Independent Mental Capacity Advocates:
- recruiting additional staffing to undertake management of supported living applications to Court of Protection:
- introduction of a priority rating tool (approved 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:
- continuous review of our processes to keep them as efficient as possible.

Despite the above we are not compliant with the ruling, but we can demonstrate that we are working hard to do so within our limited resources.

List of Background Papers

Paper	Date	Contact/Directorate/Tel
N/A		
Reason for inclusion in Part II, if appropriate		
N/A		