

SOCIAL CARE & HEALTH SCRUTINY COMMITTEE

6TH MARCH, 2017

DEPRIVATION OF LIBERTY SAFEGUARDS

1. Purpose

To advise Members of the significant impact of the Deprivation of Liberty Safeguards (DoLS) legislation and developing case law, and the action being taken to mitigate the associated risks.

2. Interface with key council strategies and partnership plans

The report supports key council plans such as the Corporate Strategy 2015-2020 and the Local Service Board's Integrated Community Strategy 2011-2016 specifically in relation to the objectives concerning people feeling safer and healthier. The Mental Health and Learning Disabilities Business Plan also includes priorities to respond to the DoLS requirements.

3. Strategic context

3.1 The Deprivation of Liberty Safeguards (DoLS) form part of the Mental Capacity Act 2005 and were introduced in England and Wales in April 2009. They were introduced to give a legal framework to vulnerable people who lack mental capacity in care homes and hospitals. The safeguards exist to provide a proper legal process and suitable protection in those circumstances where deprivation of liberty appears to be unavoidable, in a person's own best interest. The responsibility for DoLS is held within the Safeguarding Team and a data base is held of all applications and authorisations. A statistical return is provided to Welsh Government on an annual basis.

3.2 The Deprivation of Liberty Safeguards has without doubt brought human rights to the fore. The spotlight has been focused on some of the most vulnerable people in our society. Because of this significant legislation, a light has been shone on the conditions of care, maximising empowerment and upholding the rights of the individual.

3.3 In March 2014 a Supreme Court judgment [P v Cheshire West and Chester Council; P & Q v Surrey County Council] effectively lowered the threshold for DoLS referrals. The Supreme Court confirmed that to determine whether a person is objectively deprived of their liberty there are two key questions to ask, which is described as the 'acid test':

- Is the person subject to **continuous supervision and control** (all three aspects are necessary).
- Is the **person free to leave** (The person may not be asking to leave or making an attempt to leave but the issue is about how staff would react if the person did try to leave)
- This now means that if a person is subject to both continuous supervision **and** control **and** is not free to leave, they are deprived of their liberty.

3.4 The Supreme Court also held that a Deprivation of Liberty can occur in a domestic setting where the State is responsible for meeting care arrangements. This will include a placement in supported living accommodation, foster placement, shared living accommodation (formerly known as adult placement schemes) and extra care housing. Recent case law, which is currently subject to an application for permission to appeal, has also indicated that where it is brought to the local authority's attention that there is a potential deprivation of liberty in the community, the local authority has a responsibility for ensuring the deprivation is appropriately authorised even if they are not providing or funding the care. If there is or likely to be a deprivation of liberty in these situations it must be authorised by the Court of Protection.

3.5 Under the DoLS procedures referred to in 3.1 above, a duty has been placed on Local Authorities and Health Boards to act as Supervisory Bodies (SB) for the Deprivation of Liberty Safeguarding scheme. The Council is responsible for considering requests from Residential/Nursing Homes (who are known as Managing Authorities) for people they believe lack mental capacity and are deprived of their liberty. The Supervisory Body (Carmarthenshire County Council) is responsible for managing the process and commissioning the assessments. The assessment consists of six individual assessments which are undertaken by a Best Interest Assessor and a Doctor and must meet all the legal criteria for the authorisation to be granted. If all the assessments meet the qualifying requirements then the Supervisory Body is obliged to authorise a deprivation of liberty. The assessments must be completed and authorised within 21 days or 7 days if it has been submitted as urgent.

3.6 The Best Interest Assessor role is a statutory responsibility under the Mental Capacity Act 2005 and forms an integral part of the assessment process alongside the Medical Assessor. Best interest Assessors are the lynchpin on which the entire edifice of DoLS rests and they have a range of duties that fall to them within the operation of the safeguards.

3.7 Fundamental to the process is the appointment of a representative who can advocate for the person subject to the deprivation. This is usually an appropriate family member however in some instances an independent advocate will need to be appointed.

4. Risks

- 4.1 As a result of the sudden increase in DoLS since March 2014 and the lack of available BIAs most local authorities throughout the UK have accrued a significant backlog of applications. Without additional resources it has been difficult to meet this demand and fulfil our statutory obligations. This is a significant risk to the local authority in terms of legal challenge and financial penalty.
- 4.2 When an application for a DoLS is received by the Local Authority (Supervisory Body) there is an implied acknowledgement of the Deprivation of Liberty. If the deprivation is not assessed and authorised within the prescribed timescales and the person continues to be deprived of their liberty, then it is a clear breach of human rights (Article 5).
- 4.3 If an unlawful deprivation of Liberty is challenged in the Court of Protection the Local Authority, as Supervisory Body, will be liable to pay between **£3,000 and £4,000** for every month the deprivation has continued without authorisation. The Managing Authority will not be accountable for any breaches in this process. The amount quoted above does not include any other penalties such as damages that the Judge feels it can and should award nor does it include legal fees or court costs. These additional costs could easily double or triple these figures.
- 4.4 A number of legal firms locally and nationally have already identified delays in processing and authorising a DoLS as a potential opportunity for challenge and the number of challenges is steadily increasing. Neighbouring authorities are also reporting the same concerns in relation to this. It is unfortunate that even if the Local Authority gets to a position where it is able to meet all the statutory timescales for DoLS the historical delays and gaps in authorisations can still be challenged.

5. Current Situation

- 5.1 The Supreme Court judgment referred to earlier in this report which effectively lowered the threshold for DoLS had an immediate impact on the referral rate to the Deprivation of Liberty Safeguards scheme. This resulted in a tenfold increase in referrals in Wales in 2014/15.
- 5.2 Prior to the judgement Carmarthenshire Council received an average of **57** referrals each year. In 2014/15 we received **856** applications and authorised **165**. In 2015/16 we received **629** applications and authorised **173**. In the current year to date we have received **506** applications and authorised **104**. Included in these figures are the urgent applications which have to be completed within 7 days and renewal applications.

Carmarthenshire continues to receive between 30 and 40 referrals a month. The current number of applications waiting to be assessed is **630** compared with **685** in September 2016. This figure reflects a similar position across Wales with Councils continuing to find it difficult to meet the unprecedented demand and respond to the financial impact.

- 5.3** The Deprivation of Liberty Safeguard Annual Monitoring Report for Health and Social Care 2014/15 (CSSIW & HIW) records that Carmarthenshire County Council has one of the highest rates of referral per 100,000 population in Wales. This is attributable to the very high number of residential/nursing establishments within the boundaries of the Council and the very proactive working done with Managing Authorities to ensure they refer all residents that meet the 'acid test'.
- 5.4** In 2015 the Welsh Government issued guidance on managing the demand for authorisation under the Deprivation of Liberty Safeguards scheme. The tool based on a traffic light system of red, amber and green was developed to assist the prioritisation of referrals to the Supervisory Body (Carmarthenshire County Council) and to manage demand. The Council currently has **374** referrals in the red category.
- 5.5** Local authorities continue to receive small grants from Welsh Government to help manage the volume of DoLs referrals. During this financial year 2016/17 Carmarthenshire County Council received a total of £29,962.00 which consisted of £12,328.00 annual recurring funding and a one off non-recurring grant of £17,634.00. An application was submitted to Corporate Risk funds in 2015 to appoint additional Best Interest Assessors to undertake DoLs assessments. This bid was successful and 2 dedicated Best Interest Assessors have been appointed on a temporary secondment for a period of one year.
- 5.6** The council has trained 45 Social Workers as Best Interest Assessors (BIA's) {39 continue to work for the LA} to meet its statutory obligations but they continue to struggle to undertake the role due to increasing demands in the community social work teams. 2 Full Time temporary BIA's have been seconded to work solely on the DoLs assessments and they are making some progress in tackling the backlog. The number of independent assessors has diminished during the last twelve months however, this pool is steadily increasing.

6. Costs

- 6.1** The current cost of appointing Section 12 Doctors to undertake the medical assessments is £173.37 per client together with mileage at 45p per mile.
- 6.2** The cost of using an Independent BIA is £125.93 (7.5 hours at £16.79 per hour) together with mileage at 45p per mile.
- 6.3** The total cost of commissioning a Section 12 doctor and external BIA is at least £299.30 per authorisation.

7. Future Strategy

- 7.1** The Senior Safeguarding Manager appointed in October 2016 is currently developing a strategy to ensure we meet our statutory responsibilities more effectively and reduce the risk to the council. The engagement of the BIA's in the community teams will be critical in helping us reduce the backlog significantly over the next year in conjunction with the dedicated posts referred to in 5.5 above.

7.2 A draft plan for addressing the current backlog and the ongoing flow of DoLS applications will be presented to Senior Managers in February. The plan will include the following recommendations:

- To train all Adult Services Social Workers as Best Interest Assessors (This will be achieved by providing refresher training to Social Workers already trained on 7th and 13th March and by providing training for Social Workers not already trained during April and July 2017).
- To contain the existing risk to Authority by drawing a line under the existing backlog. This backlog will be managed by the 2 full time BIA's and a small number of additional BIA's over a set period of time.
- To agree a date from which all new applications will be managed within timescale (This mitigates future risk to the Local Authority) utilising all trained BIA's
- To introduce an equitable process for allocating Assessments to Care Management teams on the basis of resources. This will include setting realistic targets for the number of assessments completed by each team.
- To obtain a commitment from external BIA's to regularly undertake Urgent and Out of County assessments.
- To ensure Social Work Teams recognise DoLS assessments as a Statutory Duty and adhere to the legal timescales and requirements of this.
- To enhance the DoLS admin resource to ensure assessments are allocated, monitored and collated within timescales and all paperwork distributed appropriately.
- To train all Senior Managers and Team Managers as Supervisory Body signatories who are able to scrutinise and authorise assessments.
- To introduce robust quality monitoring systems to ensure consistent and lawful practice.
- To provide regular updates to Managing Authorities to ensure ongoing compliance

7.3 The Law Commission has identified that the current system for DoLS is unsustainable and not fit for purpose. A Consultation Paper was produced in July 2015 which outlined recommendations to adopt an enhanced human rights based approach into care management which would minimise the number of individuals needing a DoLS. The Law Commission was due to finalise its recommendations to UK Government by December 2016, however this has now been delayed and we await a new timescale. It is unlikely that any new legislation will be enacted before 2018 at the earliest. The current system together with its challenges and risks will therefore remain until the legislation is revised.

DETAILED REPORT ATTACHED ?

NO

IMPLICATIONS

I confirm that other than those implications which have been agreed with the appropriate Directors / Heads of Service and are referred to in detail below, there are no other implications associated with this report :

Signed: **Avril Bracey**

Head of Mental Health & Learning Disabilities

Policy, Crime & Disorder and Equalities	Legal	Finance	ICT	Risk Management Issues	Staffing Implications	Physical Assets
NONE	YES	YES	NONE	YES	YES	NONE

2. Legal

A failure to meet our legal responsibilities to assess and authorise in the required manner and within the statutory timescales could result in a legal challenge and the potential costs associated with this. In particular, a failure to ensure that a deprivation of liberty is properly authorised is unlawful and could give rise to a claim for compensation for a breach of human rights.

3. Finance

The Local Authority's requirements in relation to the DoLS legislation does present a number of financial challenges:

- Staff resource to undertake the assessments
- Legal costs associated with Court of Protection applications
- Potential costs of legal challenge

5. Risk Management Issues

Failure to meet our obligations in respect of the legislation would mean that vulnerable people lacking mental capacity in care homes may be subject to unlawful deprivation.

7. Staffing Implications

The Authority has trained 45 Social Workers as best interests assessors who are based in community teams. Pressures and demands within the community teams has impacted on their ability to undertake this role and subsequently on the number of outstanding referrals.

CONSULTATIONS

I confirm that the appropriate consultations have taken in place and the outcomes are as detailed below

Signed: Avril Bracey

Head of Mental Health & Learning Disabilities

1. Local Member(s) - N/A

2. Community / Town Council – N/A

3. Relevant Partners - N/A

4. Staff Side Representatives and other Organisations - N/A

Section 100D Local Government Act, 1972 – Access to Information
List of Background Papers used in the preparation of this report:

THESE ARE DETAILED BELOW

Title of Document	File Ref No.	Locations that the papers are available for public inspection
Supreme Court Judgement / Deprivation of Liberty Safeguards		https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/485122/DH_Consolidated_Guidance.pdf
CSSIW National Review of the use of Deprivation of Liberty Safeguards		http://cssiw.org.uk/our-reports/national-thematic-report/2014/review-of-the-use-of-deprivation-of-liberty-safeguards-in-wales/?lang=en
Law Commission Consultation on Deprivation of Liberty Safeguards		http://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/