



To: Coventry Health and Wellbeing Board

Date: 6th October 2015

From: Kaye Drury (MCA/DoLS/AMHP Development Lead)

Subject: Deprivation of Liberty Safeguards

1 Purpose

- 1.1 To provide Board Members with background information about the current DoLS scheme
- 1.2 To highlight the challenges which DoLS presents to Coventry
- 1.3 To provide an overview of the proposed changes to the DoLS scheme

2 Recommendations

- 2.1 That Board members note the contents of this report

3 Information/Background

- 3.1 DOLS were an amendment to the 2005 Mental Capacity Act which were introduced in 2009. They provide a legal process for authorising a deprivation of liberty for people who lack capacity to make decisions about their care and accommodation arrangements. DOLS up until March 2014 applied only to people residing in **registered care homes** and to those in **hospitals settings**.
- 3.2 The rationale for DOLS was to ensure compliance with Human Rights legislation and Article 5 of the European Convention on Human Rights. Article 5 stipulates that any deprivation of liberty must be authorised by a procedure prescribed in law
- 3.3 Under DOLS legislation local authorities are known as '**Supervisory Bodies**' and have the responsibility for assessing and authorising deprivations. Hospitals and registered care homes are known as '**Managing Authorities**' and are responsible for not depriving someone of their liberty without an authorisation. A Managing Authority should request an authorisation from the Supervisory Body if they think someone in their care is deprived of their liberty. Timescales are set in the legislation for responding to these requests.
- 3.4 The DOLS process involves six separate assessments with the purpose of establishing that any deprivation of liberty is in the person's best interests. If it is not it should be ended. The lengthiest of the assessments are the **Best Interests** and the **Capacity** assessments, both usually undertaken by specially trained social worker (BIA). Local authorities have a responsibility to authorise the BIA's assessment, and this function is carried out by social care managers who have undergone relevant training.

4 The 'Cheshire West' ruling and its impact on Local Authorities

Until March 2014 the number of requests for DOLS authorisations was relatively low: in Coventry around 120 per year. There then followed a landmark Supreme Court ruling which effectively redefined what constituted a deprivation of liberty. A new '**acid test**' for determining deprivations was established, and this considerably lowered the threshold for applying DOLS. A deprivation of liberty of a person lacking capacity was said to exist whenever he or she was:

- Subject to continuous supervision and control
- Not free to leave the care home or hospital.

4.1 Other factors such as the person being compliant with their care, or the purpose of the placement were deemed to be irrelevant. Following the Cheshire West ruling the volume of DOLS applications increased dramatically, both nationally and in Coventry. In Coventry numbers of applications in 2014/15 was 681; an increase of 458%. Nationally the number increased tenfold between 2013/14 and 2014/15.

4.2 The upsurge in DOLS applications has meant that required timescales for assessing and authorising deprivations are not being met. As a result of these delays individuals' Article 5 human rights are being breached. Some Councils are facing litigation and damages have been awarded in a number of cases. Courts are tending to distinguish between 'procedural' and 'substantive' breaches. For substantive breaches the awards have been set at 3.5 to 4.5K per month of unauthorised Deprivation of Liberty plus full refund of any care home costs the person may have incurred.

4.3 The risk to the Council is increased by a further growth in the rate of DOLS applications in 2015/16 so far, and the need to review deprivations within a twelve month period.

5 Risks to Coventry City Council

- Breaches of individuals' Article 5 Human Rights due to delays in assessing/authorising deprivations
- Potential deprivations of self-funders in private homes and hospitals which we do not know about
- Unauthorised community deprivations of liberty.

5.1 The added impact of reviews – the authorisation only lasts maximum one year – so need to be reassessed every year, financial cost to Council of agency staff, training staff – Courses have to be approved by the Secretary of State, process unclear now abolition of TCSW, courses oversubscribed, length of course very variable, quality variable medical assessments, impact on our legal services time and expertise, impact upon other areas of ASC activity such as Safeguarding, Care At, AMHP work.

6 Actions taken or being taken by the Directorate

- Establishment of dedicated BIA team of 5.5 staff. In practice it has been difficult to recruit BIA's
- We have put in place a contract with a specialist company called Liquid – but this has been costly £235K (approx. for 500 cases)
- We are increasing internal capacity by identifying further staff to be trained as assessors

- We are increasing the number of team leaders and managers who can act as authorisers
- Currently in process of identifying deprivation in the community cases for sending to the Court of Protection. Process for the Court remains unclear as are costs.
- Prioritising referrals.
- Improving DOLS administration

7 Summary of the challenges presented by DOLS going forward.

- As referral rates continue to increase so too do the costs incurred by the Council. Each medical assessment alone (required as part of the DOLS process) costs £170.
- Devoting staff time and financial resources to DOLS-related activity detracts from other key areas of social care work.
- Outside the DOLS framework deprivations in 'community settings', such as in one's own home or supported living schemes, now require authorisation by the Court of Protection. Scoping of this work is needed, but legal costs will be a minimum of £400 per case.
- With BIAs in high demand it is difficult for local authorities to recruit them to Council contracts. Many BIAs are operating independently or through social care agencies. This escalates costs.
- There is a shortage of BIA courses in Higher Education establishments. This impedes the Council's ability to speedily train up its social workers as BIAs. Discussions are currently being held with University of Warwick and the University of Bournemouth about delivering a 'fast-track' qualifying course for Coventry and our local authorities in early 2016..
- Although there is a Law Commission led review of DOLS commencing in July 2015 any changes in the law are unlikely to happen before 2017 at the earliest.
- The future, a new proposed scheme called protective care and will encompass all settings for people who lack capacity e.g. hospices, shared lives, own home.
- Estimated National cost £600 million
- Hospital patients will have a separate form of assessment and authorisation
- Amendment to Mental Health Act to cover hospital authorisations and the extension of tribunals to all clients and statutory rights of appeal (This duty will fall on the Local Authority)
- Creation of Approved Mental Capacity Professional, who will authorise care plans involving a deprivation of liberty, oversee appeals and oversee case managers who are creating these care plans
- Greater role for Tribunals in place of Court of Protection for appeals
- Will involve need for more statutory advocates as well as a role for Care Act advocates
- The new protective care scheme will remain complex, challenging and costly to Local Authorities

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Appendices