

# SOCIAL CARE & HEALTH SCRUTINY COMMITTEE

24<sup>TH</sup> JANUARY, 2018

## SUBJECT: DEPRIVATION OF LIBERTY SAFEGUARDS

### Purpose:

To update Members regarding the implementation of the Deprivation of Liberty Safeguards (DoLS) legislation, the effect of developing case law and the action being taken to mitigate the associated risks.

### To consider and comment on the following issues:

Members are asked to consider the report and note the impact of the legislation.

### Reasons:

To inform members of the current situation and future strategy to respond to the requirements of the DoLS legislation.

To be referred to the Executive Board / Council for decision: NO

### EXECUTIVE BOARD MEMBER PORTFOLIO HOLDER:-

Cllr. J. Tremlett (Social Care & Health portfolio holder)

Directorate

Communities

Name of Head of Service:

Avril Bracey

Designations:

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Disabilities

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**EXECUTIVE SUMMARY**  
**SOCIAL CARE & HEALTH SCRUTINY COMMITTEE**  
**24<sup>TH</sup> JANUARY, 2018**

**SUBJECT:**  
**DEPRIVATION OF LIBERTY SAFEGUARDS**

**1. Purpose**

To advise Members of the ongoing 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. 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. These cases must be presented and 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.
- 3.6** The Supervisory Body (Carmarthenshire County Council) is responsible for managing the process and commissioning the assessments. Six individual assessments are required, three of which are undertaken by a Best Interest Assessor and three by an approved Doctor. All six must meet the legal criteria for the authorisation to be granted. If the assessments meet the requirements then the Supervisory Body is obliged to authorise the deprivation of liberty. The assessments must be completed and authorised within 21 days or 7 days if it has been submitted as urgent.
- 3.7** 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.
- 3.8** 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 undertake this role.

## 4 Risks

- 4.1** 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).
- 4.2** 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 a 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.
- 4.3** A number of legal firms locally and nationally have identified delays in processing and authorising a DoLS application as a potential opportunity for challenge. The number of challenges is steadily increasing with neighbouring authorities also reporting 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, historical delays and gaps in authorisations can still be challenged.

## 5 Current Situation

- 5.1** Carmarthenshire continues to receive an average of 30 to 40 appropriate DoLS applications each month. The backlog list has reduced from **650** in November 2016 to **574** in November 2017 and continues to reduce on a monthly basis.
- 5.2** In April 2017 the local authority commissioned re-training for 15 Social Workers as Best Interest Assessors (BIA's) to meet its statutory obligations. This has also reduced our reliance on external, costly Best Interest assessors.
- 5.3** In November 2017 the local authority commissioned further Best Interest Assessor training for an additional 7 social workers. This cohort of trainees will commence assessment work in February 2018 after completing their shadowing work.
- 5.4** The 15 re-trained assessors are now regularly undertaking assessments on a two monthly rota basis which is having a positive impact on the completion of assessments within timescale. This approach has enabled the social work teams to effectively manage competing demands. The additional 7 Social workers will be added to the rota in February 2018.

- 5.5** As a result of the training investment, Carmarthenshire Council are able to report that over 95% of DoLS applications received since mid-September 2017 have been allocated and assessed within the 7 or 21 day timescale. The remaining 5% have not met timescale due to circumstances outside of our control e.g. family members unavailable for consultation.
- 5.6** In October 2017 a line was drawn under the assessment backlog and this is being addressed as a separate piece of work. As mentioned in 5.1 above, this list is steadily reducing and plans are being implemented to make further progress in this area.
- 5.7** Carmarthenshire council has secured commitment from a number of external Best Interest Assessors to undertake urgent and out of county assessments when necessary. This again has significantly improved our ability to undertake assessments within timescale.
- 5.8** Two full time temporary BIA's continue to be seconded to work solely on the DoLS assessments and again this is making a significant difference to managing the demand. Consideration will now be given to continuing these posts on a more permanent basis.
- 5.9** Regular forums have been established for Best Interest Assessors and Managing Authorities to ensure ongoing dialogue and understanding of legislation. These have proved to be a useful opportunity to share knowledge and identify improvement opportunities.
- 5.10** The Safeguarding and DoLS manager is currently leading a regional DoLS forum which reports to the Regional Safeguarding Board. This group are considering to make best use of shared resources and work more collaboratively.
- 5.11** The vacant post for DoLS Manager has recently been advertised however, due to lack of suitable applicants this will be readvertised. In the interim, senior managers have been trained as Supervisory body signatories and are undertaking this work alongside their existing roles. Due to this, the authorisation element of the process is experiencing delays, i.e. whilst the assessments are being completed within timescale, the authorisations are not.
- 5.12** The DoLS process is significantly bureaucratic and requires a large element of administrative work. As a result the DoLS team now has two full time administrative staff in post with an additional part time post currently advertised.
- 5.13** The Deprivation of Liberty Safeguards Annual Monitoring Report for Health and Social Care (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 high number of residential/nursing establishments within the boundaries of the Council and the proactive work done with Managing Authorities to ensure they actively apply for authorisations. We anticipate receipt of the 2017/18 report in the spring of this year.
- 5.14** Local authorities have previously received small grants from Welsh Government to help manage the volume of DoLS referrals. During the 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. A decision on funding for 2017/18 and 2018/19 is still awaited from Welsh Government.

## 6 Costs

- 6.1 The current cost of appointing Section 12 Doctors to undertake the medical assessments is £174.00 per client together with mileage at 45p per mile.
- 6.2 The cost of using an Independent BIA is £126.00 (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 £300.00 per authorisation.

## 7 Future Strategy

- 7.1 To continue a programme of training for Social workers to ensure ongoing compliance and to assist teams to allocate resources equitably.
- 7.2 To train additional Senior Managers and Team Managers as Supervisory Body signatories who are able to scrutinise and authorise assessments.
- 7.3 To introduce robust quality monitoring systems to ensure consistent and lawful practice.
- 7.4 To continue to provide regular updates to Managing Authorities and BIA's to ensure ongoing compliance.
- 7.5 The Law Commission review of the current DoLS system has described it as "unsustainable and not fit for purpose." Although recommendations have been made to National Government, these are not expected to be implemented for some time. 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
<b>NONE</b>	<b>YES</b>	<b>YES</b>	<b>NONE</b>	<b>YES</b>	<b>YES</b>	<b>NONE</b>

## 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		<a href="https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/485122/DH_Consolidated_Guidance.pdf">https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/485122/DH_Consolidated_Guidance.pdf</a>
CSSIW National Review of the use of Deprivation of Liberty Safeguards		<a href="http://cssiw.org.uk/our-reports/national-thematic-report/2014/review-of-the-use-of-deprivation-of-liberty-safeguards-in-wales/?lang=en">http://cssiw.org.uk/our-reports/national-thematic-report/2014/review-of-the-use-of-deprivation-of-liberty-safeguards-in-wales/?lang=en</a>
Law Commission Consultation on Deprivation of Liberty Safeguards		<a href="http://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/">http://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/</a>