

SOCIAL CARE & HEALTH SCRUTINY COMMITTEE

20TH SEPTEMBER, 2016

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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20TH SEPTEMBER, 2016

SUBJECT: 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 furnished to the 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. This situation could arise where an individual receives a substantial payment of compensation and all of their care is funded privately by these means. 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** The Council has not made an application to the Court of Protection for authorisation of a deprivation of liberty to date. However, the Council is currently involved in **3** cases relating to welfare or Deputyship applications which have been brought by relatives and the Hywel Dda University Health Board. There are **7** cases which the DoLS Manager and the Legal Department expect to bring before the Court of Protection within the next couple of months.
- 3.6** 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 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.
- 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. They are also required to undertake specialist training to undertake this role.

4. Current Situation

- 4.1** 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. In Wales in 2014/15 after the judgment there was over a tenfold increase in referrals.
- 4.2** In 2013/14 Carmarthenshire received 57 referrals. In 2014/15 we received **856** applications which exceeded the Welsh average and we authorised **165**. In 2015/16 we received **629** applications and authorised **173**. In the current year **259** applications have been received with **48** authorised. Of the ones not authorised the vast majority were because we have not been able to assess them and a small number because they were either not deprived or their care plan was changed to a less restrictive one. We continue to receive 30 to 40 referrals a month together with requests for renewals of authorisation, our current waiting list is **685** but this does reflect the position across Wales with Councils finding it difficult to meet the demand and respond to the financial impact.
- 4.3** The Deprivation of Liberty Safeguards-Annual Monitoring Report for Health and Social Care 2014/2015 (CSSIW &HIW) records that Carmarthenshire County Council had the highest rate of referral per 100,000 population in Wales. This can be explained by the very high number of residential/nursing establishments within the boundaries of the Council and the very proactive approach taken to working with Managing Authorities to ensure that they refer all those residents that meet the 'acid test'.
- 4.4** 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 in the prioritisation of referrals to the Supervisory Body (Carmarthenshire County Council) and to manage demand. The Council currently has **483** referrals in the red category.

5. Future Strategy

- 5.1** A Mental Capacity & DoLS Manager was appointed in late 2014 to manage the DoLS pressures and to develop the service. The council has trained 45 social Workers as Best Interest Assessors (BIA) to meet its statutory obligations but they have struggled to undertake the role due to increasing demands in the community social work teams. A part-time BIA (0.5 FTE) was seconded to work on the DoLS assessments and independent assessors were also utilised.
- 5.2** Grants were made to local authorities in 2015/2016 by the Welsh Government to help with the backlog of DoLS referrals. The Council received £11,000 which is recurring funding and this allowed us to continue with the secondment of the part-time BIA. They have also provided an additional grant of £17,000 for this financial year. An application was submitted to Corporate Risk in 2015 for funds to appoint additional Best Interest Assessors to undertake DoLS assessments. This bid was successful and has provided funds to appoint 2 dedicated Best Interest Assessors on a temporary secondment for a period of one year.

5.3 We have recently appointed a Senior Safeguarding Manager. The responsibilities of this post will include 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 5.2.

5.4 The UK Government recognising the difficulties Councils faced with increasing demand post Cheshire West, asked the Law Commission to review the Deprivation of Liberty Safeguards recognising they were deeply flawed. The Law Commission produced a Consultation Paper in July 2015 which outlined plans to cut bureaucracy and introduce a more human rights based approach into care management. The Law Commission provided an Interim Statement in May 2016 in which they outlined a much diluted approach to their original scheme. The Law Commission will now finalise their recommendations to place before the UK Government by December 2016. Any new legislation will probably not be enacted before 2018 at the earliest. The unprecedented challenges and the risks that the Authority faces to respond to the DoLS requirements 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
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<p>Supreme Court Judgement / Deprivation of Liberty Safeguards</p>		<p>https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/485122/DH_Consolidated_Guidance.pdf</p>
<p>CSSIW National Review of the use of Deprivation of Liberty Safeguards</p>		<p>http://cssiw.org.uk/our-reports/national-thematic-report/2014/review-of-the-use-of-deprivation-of-liberty-safeguards-in-wales/?lang=en</p>
<p>Law Commission Consultation on Deprivation of Liberty Safeguards</p>		<p>http://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/</p>