

# Adult Social Care Committee

Item No:

<b>Report title:</b>	<b>Deprivation of Liberty Safeguards (DoLS) – the Council's responsibilities</b>
<b>Date of meeting:</b>	<b>16 May 2016</b>
<b>Responsible Chief Officer:</b>	<b>Harold Bodmer, Executive Director of Adult Social Services</b>
<b>Summary</b> This paper lays out the pressures facing the Adult Social Services department in meeting its Deprivation of Liberty Safeguards (DoLS) responsibilities arising from the 2014 Supreme Court “Cheshire West” judgement, the actions Norfolk County Council (the Council) is taking to manage this work and a brief review of the national picture.	
<b>Recommendations: The Committee is asked to note the content of the report.</b>	

## 1 Background

- 1.1 In March 2014 the Supreme Court made a case law judgement in respect of a case known as “Cheshire West” that made far-reaching changes to the definition of deprivation of liberty. The effect of this broader definition has significantly increased the number of referrals the Council has received for people lacking capacity who are considered deprived of their liberty.
- 1.2 A person is considered to be deprived of their liberty if they are unable to consent to their care and treatment arrangements, are under continuous supervision and control and are not free to leave the place in which they are currently residing.
  - 1.2.1 Below is a real life example outlining how DoLS is used to authorise care and support arrangements in a care home:
    - Mrs AB has a diagnosis of Dementia and was admitted to residential care following a hospital admission for a chest infection. Whilst in hospital it became clear that Mrs AB was not looking after herself and putting herself at risk in her home. She had been found wandering by the police in the local community. Her home was in a state of disrepair
    - A request for a Standard Authorisation by the care home was received for Mrs AB in October 2015. The purpose of the authorisation was to approve care and treatment arrangements that the care home had put in place around personal care, medication administration and 1:1 support when necessary. Mrs AB was not allowed to leave the care home unaccompanied
    - A Standard Authorisation was granted with conditions to monitor and review Mrs AB's situation
    - During the Best Interest Assessor (BIA) enquiries, a close friend of Mrs AB was identified. The friend had known Mrs AB for many years and was visiting regularly. It became clear that Mrs AB had not been managing well at home for a long time and her friends had been extremely worried about her. Her friend informed the BIA that since being in residential care Mrs AB was eating well and

taking pride in her personal appearance, she was now able to go out into the community weekly and visit familiar places

- 1.3 The Supreme Court also held that in addition to care homes and hospitals, a deprivation of liberty can occur in domestic settings where the state is responsible for imposing such arrangements. This includes placements in supported living in the community as well as domiciliary arrangements which may amount to a deprivation of liberty. Such placements must be authorised by the Court of Protection.
- 1.4 Local authorities have primary responsibility as the Supervisory Body under the DoLS. In operational terms, this means that local authorities receive requests from Managing Authorities (residential/nursing homes and hospitals) and are required to organise, complete and respond to requests for authorisations within the mandated deadlines under the DoLS regulations.
- 1.5 Nationally, in 2013/14 (the year prior to the Cheshire West judgement), there were approximately 13,700 applications. In 2014/15 there were 137,540 DoLS applications received by councils, of which 62,645 applications were completed. This has resulted in a national backlog of 74,895 applications.
- 1.6 At the end of the financial year each local authority must submit a statutory return to the Department of Health (DoH) for DoLS activity. Comparator information for other local authorities will therefore be available in June this year. From our own local benchmarking, the Council is aware that neighbouring authorities have 1953, 1781 and 4545 outstanding referrals.

## **2 NCC Deprivation of Liberty Safeguards Team**

- 2.1 For people in hospital and care homes, requests for assessments are currently received by the Council's Deprivation of Liberty Safeguards team (DoLS). The substantive team, which is based at Vantage House in Norwich and managed as part of the Mental Health Social Work service, is comprised of one FTE team manager, one FTE practice consultant, 1.6 FTE best interest assessors (BIAs), 0.8 FTE assistant practitioner and one business support officer. Assessments are also undertaken by 14 sessional NCC BIA's and other freelance BIA's. Temporary business support is also currently supporting the team with administrative tasks.
- 2.2 Assessments for people deprived of their liberty in care homes and hospitals must be undertaken by trained BIAs. Assessments for people deprived of their liberty in domestic settings do not require the involvement of a BIA and can be undertaken by social work staff in locality-based social work teams.
- 2.3 In early 2015, the Adult Social Services Senior Management Team (SMT) agreed an additional £137k for the DoLS staffing budget for one year to employ an additional practice consultant, an additional assistant practitioner and business support staff. The posts have been recruited to and run to the end of June 2016.
- 2.4 In April 2015, NCC was notified of an award of £446k one-off funding from the DoH. The Adult Social Services SMT considered options for the best use of the grant and noted that it was inadequate to fully address the incoming work and backlog arising from the DoLS Supreme Court judgement. Approval was given to fund five additional BIA posts on a temporary basis. Unfortunately it has not been possible to recruit into all of these posts due to the temporary nature of the roles, lack of suitably qualified staff or team capacity to release staff from locality social care teams. NCC has subsequently been informed that there is no further allocation of DoH grant funding.

- 2.5 The DoH grant funding has been carried forward to 2016/17. It is planned that this budget will enable the posts originally funded by the one year SMT funding to continue.
- 2.6 In 2015/16 NCC supported eight staff to undertake BIA training. They are all now qualified and contributing to the rota. A further course in conjunction with Suffolk County Council and Cambridgeshire County Council is planned for the autumn of 2016.

### 3 DoLS referrals

- 3.1 The DoLS team use the Association of Directors of Adult Social Services (ADASS) task force screening tool to prioritise the allocation of requests to authorise a deprivation of liberty. The tool assists local authorities to respond in a timely manner to requests that are deemed the highest priority. Further priority is given to a referral where it meets more than one of the priority 1 criteria, such as hospital admission, family objection to the care of their relative, service user objection to their care, or legal challenge. The DoLS team do not have the capacity to assess all priority 1 cases and work hard to liaise with care providers to ensure they have relevant and up-to-date information to allow them to prioritise the most urgent cases. Priority 2 and 3 cases cannot currently be assessed due to lack of capacity in the DoLS team unless the individual's circumstances change and they are re-prioritised as a priority 1 case. An example of this would be a person being admitted to hospital from a care home.
- 3.2 In Norfolk, the Council's DoLS team received just over 100 referrals each year prior to the Cheshire West judgement.
- 3.3 The following table details the referrals that have been received since the Cheshire West decision in March 2014:

Total number of referrals received in the year	Priority	2014/15	2015/16	Total
	Priority 1	973	1305	2278
	Priority 2	157	282	439
	Priority 3	820	1181	2001
	Total	1950	2768	4718

- 3.4 The following table details the outcome of referrals which were assessed in each priority for 2014/15 and 2015/16:

Priority	2014/15	2015/16	Total
Priority 1	Granted - 419 Not granted - 310	Granted - 182 Not granted - 403	1314
Priority 2	Granted - 6 Not granted - 42	Granted - 2 Not granted - 68	118
Priority 3	Granted - 6 Not granted - 231	Granted - 4 Not granted - 244	585
Total	1014	903	

- 3.5 The majority of 'not granted' cases arise from the death of the person in the care home or hospital and the move of a person from a care home to a hospital or another care home. The Managing Authority (care home or hospital) will notify the DoLS team of this change. Any such change in a person's circumstances involves an administrative process to close down the existing referral which is hospital and care home specific.

The new care home or hospital will submit a new referral for an assessment if they feel the new care arrangements constitute a deprivation of liberty.

- 3.6 The reduction in the number of referrals dealt with in 2015/16 was due to BIA staff dealing with more complex cases that can make the assessment and consultation process more difficult and lengthy. Other factors impacting on the number of assessments undertaken were staff turnover in the DoLS team, staff training and gaining confidence in the new system for receiving referrals and recording assessments on CareFirst.
- 3.7 The DoLS team has a current backlog of 2752 cases – 939 priority 1, 322 priority 2 and 1496 priority 3.

## **4 Risks to NCC**

- 4.1 Norfolk is the fifth largest local authority in England and has a high elderly population. In addition, the lower than average price of property has resulted in a large number of residential and nursing homes in the county and several private hospitals for mental health and learning disability.
- 4.2 Where a person has been referred but not assessed and where their placement amounts to a deprivation of liberty, this is unlawful. In a number of cases, the care arrangements for the person will have been sanctioned through a Mental Capacity Act best interest decision process. This provides a degree of protection for both the care provider and the department. However the care arrangements have not been subject to the independent scrutiny of the DoLS process.
- 4.3 Therefore there is a potential risk of litigation against the Council associated with unlawful deprivation and the failure to complete assessments within the prescribed timescales. The Council has received a number of complaints relating to DoLS requests. These have related to delayed assessments and death of the person subject to DoLS. However, to date, these have been resolved by the DoLS team.
- 4.4 There have been three cases where the Council has received a legal challenge regarding its implementation of the DoLS process. These have been resolved through due legal process and have not resulted in any payment of damages.
- 4.5 The DoH lead for DoLS wrote in a letter to the County Council Mental Capacity Act leads in January 2015;  
  
“We do not expect that local authorities who are following national DoH, ADASS and Care Quality Commission (CQC) guidance (and who have a plan in place for responding to the Supreme Court judgment in a way that makes clear that paramount importance of the well-being of vulnerable individuals) should be unfairly penalised”.
- 4.6 However, there is evidence from the courts that a failure to meet the law as it now stands can lead to local authorities being required to pay damages and receiving public criticism by the courts and others.
- 4.7 A recent ruling has transferred aspects of the DoLS responsibility back to the Department of Health. On 10 March 2016, Mr Justice Charles placed responsibility on Health Secretary Jeremy Hunt and Justice Secretary Michael Gove for ensuring that sufficient resources are available to guarantee that all those whose deprivation of liberty is considered by the Court of Protection have appropriate representation. The judgement came about as a result of four test cases where no appropriate representation/advocate could be found for reasons which included lack of resources.

Mr Justice Charles ruled that all future cases should be adjourned until a workable solution was found, meaning that large numbers of cases will be delayed indefinitely

## **5 Improving efficiency and effectiveness**

- 5.1 In March 2015 the DoH letter to confirm grant funding stated “It is clear that those responsible for implementing DoLS must continue to strive to apply best practice and find efficiencies within the current system to ensure we maximise value for taxpayers’ money.”
- 5.2 The Council have undertaken a number of key steps that have improved efficiency and effectiveness. Following the DoH issue of the new suite of DoLS forms, the Council’s managers designed and developed an electronic system to support care homes and hospitals. Working with the Council’s ICT department and existing e-forms software, they produced ‘eDoLS’, a web-based system which validates via secure web browser connection and submits the DoLS applications instantly to the Council. eDoLS enables care homes and hospitals to submit the information online and they can generate a fully-completed ADASS form to print or save for their own records. Meanwhile, the Council can track new applications with ease. Norfolk is the first local authority to achieve this and have shared the learning and process with other councils.
- 5.3 Electronic versions of the DoH DoLS paperwork have been built and implemented within CareFirst, Adult Social Services’ electronic client database. This allows authorisations to be signed off electronically in any location across Norfolk, replacing the earlier requirement for managers with signatory responsibility travelling to sign paperwork.
- 5.4 Other key steps include:
- a) Co-commissioning of BIA courses with neighbouring local authorities
  - b) Membership of the ADASS Eastern Region DoLS network
  - c) Refreshed Norfolk MCA/DoLS subgroup – a partnership group promoting effective working relationships between different organisations and professional groups to promote awareness and good practice in Norfolk. This group reports to the Norfolk Safeguarding Adults Board and is chaired by the Council’s Head of Social Care for Mental Health.

## **6 Next steps**

- 6.1 The Law Commission’s consultation on their proposals for a replacement scheme for DoLS ended in November 2015. The Law Commission will publish a provisional report of the outcomes of the consultation process and any resulting changes to their proposals in spring 2016. A White Paper will be published at the end of 2016.

## **7 Recommendations:**

- 7.1 The Committee is asked to note the content of the report.

### **Officer Contact**

If you have any questions about matters contained in this paper or want to see copies of any assessments, e.g. equality impact assessment, please get in touch with:

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