

DEPRIVATION OF LIBERTY SAFEGUARDS - UPDATE SEPTEMBER 2017

Joint Report of County Solicitor and Head of Adult Commissioning and Health

1. Purpose

To provide an update to Scrutiny Committee regarding:

- Applications and authorisations for deprivation of liberty under Deprivation of Liberty Safeguard provisions;
- Applications to the Court of Protection for authorisation where people are subject to deprivation of liberty while living in the community

This paper is for information and discussion.

Background:

The Supreme Court Ruling re P v Cheshire West and Chester & P&Q v Surrey County Council [2014] introduced the 'Acid test' which lowered the threshold for determining whether an individual is deprived of their liberty. As a result Devon County Council along with other local authorities continues to receive high levels of applications.

From April 2014 to date 8805 applications have been received, 1468 since January this year. This is in stark contrast to the 725 applications received between April 2009 and March 2014 prior to the Supreme Court ruling.

This has had significant risk and resource implications for the Council, including that the Deprivation of Liberty Safeguarding Service (DoLS service) within Adult Care Operations and Health now has 3034 applications waiting assessment.

In the majority of cases, Devon County Council as supervisory body will determine whether the deprivation of liberty is authorised. More recent case law (AJ v a Local Authority 2015) has highlighted the requirement to also make application to the Court of Protection where the person is objecting to the deprivation. Within the last year the DoLS service has proceeded with 44 cases with 26 cases currently at various stages of the court process.

The "acid test" also applies in situations where a person living in their own home in the community. The process for authorisation in such situations is through application to the Court of Protection. The Local Authority is responsible for making such applications where it is the agency leading support planning.

2.1 Deprivations of Liberty in Residential/Nursing care and Hospitals.

Applications to DCC continue to outstrip capacity to complete assessment and authorisation. It was envisaged that the application rate would plateau. However, we continue to see a small rise in request rates. The service receives an average of 46 new applications requests each week with a closure / completion rate of 43.

The DOLS Team provides a service which includes screening/prioritising incoming work; completing Best Interest Assessments; administration, commissioning and quality assurance for medical assessment; and offering a duty service supporting Managing Authorities, partner agencies and DCC staff.

Where there is an objection to the placement either by the person or their representative, application to the Court brings resource implications for Legal Services; as indicated above there are 26 such applications in process before the Court of Protection with a number still awaited.

ADASS (Association of Directors of Adult Social Services) guidance suggests a paper-based desktop assessment process for renewal and low priority cases to reduce backlogs. Consideration is being given to cost, resource implications and the potential impact on the service's ability to manage complex cases.

2.2 Deprivations of Liberty in the community

The Care Management team will identify situations where authorisation is required and will support Legal Services to make application to the Court of Protection. During 2015, the Court has developed a streamlined application process, and Devon County Council has developed guidance for operational teams.

Situations where application to the Court is required are being identified during initial assessment and/or review, and the application is then progressed. So far, 9 Orders have been granted by the Court, and a further 40 are at various stages of the process. Notwithstanding the "streamlined process", this can be a resource-intensive process both for Care Management Teams and Legal Services, and it has been difficult for Care Management Teams to release capacity within existing resources to be able to address what is an additional demand upon their time.

A prioritisation tool, based upon the ADASS guidance, has been developed to ensure that high risk cases are quickly progressed.

3 Risks

The risks to Devon County Council are as follows:

Issue	Impact	Mitigation
Sustained increase in DoLS applications	Waiting time before authorisation	Prioritisation process (ADASS) adopted by DCC
Increased activity and cost	IMCA ¹ contract capacity	Contract re-negotiation + prioritisation
	Medical assessment/charge	Fee increase refused
	Care Management capacity	
	Legal Services capacity	

¹ Independent Mental Capacity Advocate – required where the person is otherwise un-befriended in the process.

Legal challenge	Cost Reputation damage	Prioritisation seeks to address cases most at risk and where objections to care arrangements apply
Best Interest Assessor availability (staff skill mix and capacity)	Training cost Care management capacity	Training plan over 4 year period seeks to ensure in-house resource – limited mitigation with regard to cost.

The risks to people who are deprived of their liberty are:

Issue	Impact	Mitigation
Deprivation of liberty is unauthorised	Restriction on right to - contact with family and community - freedom of movement - choice - Actions may be being undertaken that are not in the individual's best interest.	Local Authority prioritisation seeks to address those cases where objections have been made
The authorisation process applies insufficient rigour (owing to high levels of demand)	Alternative options with less restriction are not made available	Staff training and investment by Devon County Council

4 Proposed Changes

Changes to legislation are proposed following a Law Commission report. There is yet no indication of timescales. However, Recommendation one states: - '*The DoLS should be replaced as a matter of pressing urgency*'.

The Law Commission proposal includes a number of significant changes:

The procedure would be more streamlined than the current legal framework, and provide one process for all individuals experiencing a deprivation of liberty regardless of where they reside.

The scheme would be extended to include individuals 16 years of age and above and those who experience a deprivation of their liberty mainly for the protection of others.

Health Trusts and Clinical Commissioning Groups (CCGs) will be responsible for individuals who come within the scheme and are in hospital or receiving Continuing Health Care funding. Local Authorities will be responsible for all other cases including those funding their own care and support.

Some new roles for which DCC will have responsibility are proposed to provide a greater degree of oversight for the most vulnerable individuals.

Some of the processes in place currently would be transferable to the proposed scheme.

At this time a scoping exercise is being undertaken to better understand the impact of the proposal both for the individuals concerned and DCC.

5 Input from Legal Services to Minimise Risk to the Authority

In respect of deprivations of liberty that arise in care homes and hospitals (2.1 above), Legal Services will assist the DoLS Team with identifying those cases that are potentially of high risk to the authority, particularly where a breach of the person's right to liberty may result in a compensation award being made.

Where a Standard Authorisation is authorising a person's deprivation of liberty but concerns remain that the person or a family member is significantly objecting to that deprivation, Legal Services will prepare the necessary paperwork to refer the matter to the Court of Protection in circumstances where the non-availability of an appropriate representative will cause undue delay in allowing the person to have the matter heard by the Court.

Legal Services will respond promptly, efficiently and robustly to Court of Protection proceedings that are brought against the authority where a deprivation of liberty authorisation is being challenged. Appropriate mitigation will be put forward in circumstances where an unauthorised deprivation of liberty has been identified by the representatives for the protected party.

In respect of community based deprivations (2.2 above), Legal Services will promptly respond to enquiries from Care Management Teams regarding potential deprivations of liberty. Where a deprivation of liberty is identified support will be provided to prepare the necessary paperwork to refer the matter to the Court and address any queries that arise thereafter.

6 Summary and conclusion

Draft legislation is anticipated which will impact significantly in the future. The timescale for implementation is still unclear. At this point, the position agreed by the Adult Care Operations and Health Senior Leadership Team is to:

- a. Continue current staffing level in DCC DoLS Service.
- b. Assess potential and impact of desktop process in light of ADASS guidance.
- c. Continue planned training programme to increase the qualified Best Interest Assessor resource.
- d. Ensure further report to Scrutiny Committee once timescale for implementation of new legislation is confirmed.

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LOCAL GOVERNMENT ACT 1972: LIST OF BACKGROUND PAPERS

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BACKGROUND PAPER DATE FILE REFERENCE

Nil