



Social Care Services Board

26 October 2016

Deprivation of Liberty Safeguards

Purpose of report: To update the members of the Social Care Services Board on the position and impact of the significant increase in Deprivation of Liberty Safeguards (DOLS) requests.

Introduction:

1. On 9 July 2015 the Board received a report explaining the reason for, and impact of, the increase in requests for DOLS authorisations that Surrey County Council, as the 'Supervisory Body', has received. It also detailed the approach that the Council had implemented in response to this.
2. The increase in requests originates from a Supreme Court Ruling in March 2014 which effectively lowered the legal threshold set for what constitutes a deprivation of liberty. Consequently the dramatic rise in requests for DOLS authorisations experienced by Surrey County Council has also been replicated across the country.
3. The Board received a further, verbal, update from the Strategic Director of Adult Social Care and Public Health at its June meeting this year.

The Impact for Surrey County Council of the Supreme Court Judgement

4. The table below shows the number of requests Surrey County Council has received from 2012 to September 2016. It highlights the significant spike in applications following the Supreme Court case in 2014, and the number of requests waiting for assessment.

Year	No. of requests
2011-2012	57
2012-2013	60
2013-2014	113
Supreme Court Judgment handed down 19th March 2014	
2014 -2015	3,045
2015- 2016	3,852
1 Apr 2016 – 31 Aug 2016	2,908
Number of requests waiting for assessment	
31 Aug 2016	6149
Number of active DOLS authorisations in place	
31 August 2016	267

5. The number of requests awaiting assessment is very high. However this unprecedented demand has been acknowledged by the Department of Health and Association of Directors of Adult Social Services (ADASS). This level of demand and delay is similar in neighbouring authorities with, for example, Hampshire County Council and West Sussex County Council reporting waiting lists of over 4500 and approx 3900 respectively (May 2016).
6. On 28 September National Data was published regarding DOLS. A summary is attached to this report as 'appendix one'.

Responding to the increase in demand

7. To respond to the increase in demand to following actions have been taken to date:

The frontline Mental Capacity Act (MCA) / DOLS team, based in Quadrant Court, has been significantly expanded to include:

- 2.5 full time equivalent (fte) Senior Practitioners – (MCA & DOLS) who are also Best Interest Assessors (BIA)
 - 5 permanent frontline BIAs (3.8 fte)
 - 1 part time BIA (0.6 fte) started in September 2016 on a one year secondment.
 - 3 full time Administration Assistants
 - 1 full time Acting Assistant Team Manager (six month post started September 2016) (also a BIA)
 - 1 Senior Manager for MCA & DOLS (also a BIA)
8. We continue to use a trusted pool of independent BIAs, and commission a number of assessments directly with them, subject to their availability and quality of their assessments.
 9. We are now working with two Social Work Agencies (Action First, and Mental Health First) and are currently commissioning 15 assessments per month from each of these, with a view to possibly increasing this, subject to our ability to authorise the assessments once completed.
 10. Since July 2015 we have sponsored 10 Social Workers / Occupational Therapists on the BIA professional training course at Brighton University (from Locality and Hospital teams) who will be contributing to the pool BIA rota, (completing 2 assessments every 6 weeks). Currently we have a pool of approximately 27 'team based' BIAs. There is a further course in November of this year, where we will be sponsoring four staff to complete the training.
 11. We have worked with our colleagues in Surrey and Borders Partnership NHS Foundation Trust to support 4 nurses to complete their BIA training, which we anticipate will give us a greater number of local BIA's that we can commission.

12. In April 2016, we trained a further 20 Senior Managers as authorisers to increase our ability to authorise more assessments in a timely way following BIA assessment.

Funding implications

13. In response to the Supreme Court Judgement the Council calculated the additional amount it may need to spend each year to complete DOLS assessments. It was initially estimated that an extra £3.2m of funding would be required annually. As a result, £1.1m was added to Adult Social Care's budget in 2015/16 and a further £2.1m in 2016/17.

However a review of the likely SCC spend on DOLS assessments has recently been undertaken, covering both the total number of assessments that are likely to be requested across Surrey, the availability of assessors to carry out these assessments and the Council's capacity to authorise and process assessments. This has shown that although the potential costs of DOLS assessments are similar to the original modelling over the long term, the annual actual cost is considerably lower based on the realistic capacity to both recruit and utilise quality assessors and process completed assessments. The additional cost linked to the Supreme Court Judgement in 2016/17 is now expected to be £1m. As such £2.2m of the £3.2m previously set aside to fund additional DOLS costs is being redirected to fund increased demand for support packages within the service. The Council will continue to meet its obligations to complete DOLS assessments within its capacity to do so. The reallocation of funding merely recognises the realistic annual cost of assessments, and does not prevent assessments from being progressed.

14. In 2015/16 the Department of Health (DH) allocated £25m of funding nationally to local authorities to fund additional DOLS costs. SCC's allocation was £426,000 and this offset part of the additional costs incurred last year.
15. The DH has not made similar funding available in 2016/17. Therefore the full additional cost has to be met by the Council.

Conclusions:

16. Responding to the increase in demand for DOLS assessments remains very challenging, however we have managed to increase our ability to complete more assessments and to authorise them in a timely manner.
17. The primary risks facing the council as a result of the current situation are:
 - Budget pressures; these are mitigated to a significant degree by our capacity to respond to the high numbers of requests

- Damages claims from people who consider that our delay in assessment / authorisation has resulted in them being deprived of their liberty; these are mitigated by robust objective triaging and prioritising of requests and the fact that in general the courts consider that delays as a direct result of the supreme court judgement in 2014 are 'technical' rather than 'substantive' breaches and therefore do not warrant financial compensation. Although the council has been challenged in court on a number of cases none of these has resulted in successful damages claims.
- Reputational harm to the council; this comes from the potential outcome of court claims (addressed above) and from concerns raised by 'managing authorities' (Care Homes and Hospitals) that they are having to provide support to people in ways that amount to a deprivation of their liberty without proper authority – because of the delay in the council completing assessments. This is managed, primarily, by maintaining open and constructive communication with our partner agencies and responding in a prompt and person centred way to changes in people's circumstances and re-prioritising requests, when appropriate. The Residents Experience Board has recently scrutinised the impact on the current DOLS situation on the coronial service in Surrey because of the impact on families when someone dies when subject to a DOLS authorisation. The Coroner has to respond to these as a 'death in custody' and carry out enquiries and an inquest, causing potential delays in funeral arrangements and additional distress to grieving families. The Surrey Coroner has mitigated this by amending his guidance regarding DOLS and ensuring an efficient and speedy process when the death was expected or of natural causes.

18. The Law Commission has undertaken a comprehensive review of DOLS and the underpinning legislation. The Consultation relating to this ended on 2 November 2015 and an interim report was published in May 2016 (attached). Whilst the details of any likely changes have yet to be published the initial conclusions indicate that they have the potential to further increase the burden on local authorities. Notwithstanding that the commission states 'the new scheme must demonstrably reduce the administrative burden and associated costs of complying with the DOLS by providing the maximum benefit for the minimum cost' (Para. 1.37) they also state 'we do not accept that we should not consider any reforms that may generate additional costs' and 'there are some reforms that remain fundamental to our new scheme and will need to be properly financed, such as rights to advocacy' (Para. 1.36). In addition it appears clear that their intention of recommending 'a more straightforward, streamlined and flexible scheme for authorising a deprivation of liberty' will be achieved by shifting responsibilities away from the providers (care homes and hospitals) to the commissioners (local authorities and the NHS) (Para.1.38) and also by extending the scope of DOLS 'to apply in any setting where a deprivation of liberty may occur, including hospitals, care homes, supported living* and shared lives accommodation*, and domestic* and private settings*' (Para.1.44) [** these locations are currently the sole responsibility of The Court of Protection*]. This will represent a significant change and challenge for local authorities and will increase rather than reduce the number of assessments that we will have to undertake. Initial indications are that the Law Commission will recommend a

change to the coronial rules meaning that natural deaths whilst subject to DOLS will not have to be reported to the coroner as a 'death in custody' If implemented this would have a positive impact on the coronial service and on grieving families.

19. The Law commission expects to publish their final report, recommendations and draft Bill in December 2016. The Department of Health has indicated that there is unlikely to be any legislative change before 2018.

Recommendations:

20. It is recommended that the Board:
 - a) Note the challenging position of DOLS within the Council, whilst recognising that this is an situation replicated within neighbouring councils and across the country
 - b) Support the Service's approach to responding to the significant increase in demand and the management of risks.
 - c) Receive a further update in 12 months time

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Sources/background papers:

- Social Care Services Board, 9 July 2015, Report – Deprivation of Liberty Safeguards
- Social Care Services Board, 23 June 2016, Strategic Director of Adult Social Care and Public Health Update – Deprivation of Liberty Safeguards
- Interim Statement on Mental Capacity and Deprivation of Liberty; Law Commission May 2016
- Mental Capacity Act 2005, Deprivation of Liberty Safeguards, England 2015-16: NHS Digital publication: 28 September 2016;
<http://content.digital.nhs.uk/catalogue/PUB21814>

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