Name of Meeting: CABINET

Dates: TUESDAY 30 JUNE 2015

Title of report: **IMPLICATIONS OF THE SUPREME COURT RULING ON DEPRIVATION OF LIBERTY SAFEGUARDS (DOLS)**

Is it likely to result in spending or a saving of £250k or more, or to have a significant effect on two or more electoral wards?	No
Is it in the Council's Forward Plan?	N/A
Is it eligible for "call in" by Scrutiny?	Yes
Date signed off by Director and name **Is it signed off by the Director of Resources?** **Is it signed off by the Assistant Director, Legal, Governance and Monitoring?**	Richard Parry, 1 June 2015 David Smith, 1 June 2015 Julie Muscroft , 1 June 2015
Cabinet member portfolio	Health, Wellbeing and Communities

Electoral wards affected: All

Ward Councillors consulted: Consultation with Ward Councillors is not applicable to this report

Public or private: Public

1. PURPOSE OF REPORT

1.1 This report informs Members about the implications and impact of the continuing increase in the number of Deprivation of Liberty Safeguards (DoLS) applications, arising as a result of a Supreme Court judgement, being received by the Council and the risks associated with this increase.

1.2 The Government has made £25m available nationally in 2015/16 as a contribution towards the cost of DoLS. The Kirklees allocation from this funding is £198,387. In order to secure the funding Local Authorities are required to submit details of the work planned/undertaken to increase the efficiency of the DoLs system and to improve staff and partner understanding of DoLS and the wider Mental Capacity Act and evidence of where use of DoLS has improved service user wellbeing. The Kirklees submission has been made to the DoH, if this submission is acceptable it is requested that the funding be allocated towards alleviating the DoLS pressures described in this report.

2. KEY POINTS

Background

2.1 DoLS are part of the Mental Capacity Act 2005. They were introduced in 2009 to offer protection to anyone over the age of 18 receiving care in a registered home or hospital who lacks the mental capacity to consent to those arrangement and is therefore being deprived of their liberty. The aim of DoLS is to ensure that if a person's life is being so restricted that their liberty is taken from them there should be an independent assessment and authorisation process for the deprivation. (Information about the DoLS process is attached at Appendix 1.)

2.2 DoLs is a lengthy and complex process which if not followed precisely can lead to individuals being unlawfully deprived of their liberty which is a breach of article 5 of the Human Rights Act, giving the individual or their representative the right to seek damages against the supervisory authority (the Local Authority) responsible for assessment and authorisation of the deprivation.

Supreme Court Judgement

2.3 A Supreme Court judgement handed down in March 2014 (here) changed the legal definition of and the test for deprivation of liberty. There are now two key questions that need to be considered when authorising a Deprivation of Liberty (DoL) (known as the 'acid test'):

i. Is the person subject to continuous supervision and control?
ii. Is the person free to leave?

For a person to be deprived of their liberty they must be subject both to continuous supervision and control and not free to leave.

2.4 The implication of the judgement is that every person who lacks capacity to agree to being accommodated in a residential care home and /or to their care plan and is not free to leave could be considered as being deprived of their liberty; therefore the process for authorising a DoL must be followed. This has now meant the threshold for when someone is being deprived of their Liberty is lower. Potentially anyone who lacks capacity and is in a care home or hospital may meet the acid test, 24 hour care may meet the continuous supervision and control aspect, although this is for the BIA to assess and determine (see Appendix 1).

2.5 In addition, the judgement has broadened the scope of DoLS for people living in the community (ie outside of care home and hospitals), which now includes people living in supported living, shared lives, post 18 residential college provisions and hospices as well as in their own homes. In these settings the Local Authority is not able to authorise a deprivation, it has to be done by application to the Court of Protection. (The Court of Protection makes decisions and appoints deputies to act on behalf of people who are unable to make decisions about their personal health, finance or welfare - see here.) If the care the person is receiving is funded by the Local Authority then the Local Authority will be the applicant and will bear the majority of the court costs. If the person is funded by Health then Health will be the applicant but if the Local Authority has had any involvement in the person's care assessment the Local Authority is likely to be involved in the application.

2.6 The ruling has also resulted in increased work for the Coroners Service as death of a person whilst subject to a DoLS authorisation is deemed to be a death in state detention.

Impact of the Supreme Court Judgement Nationally

2.7 In a letter dated 14 January 2015 to DoLS leads the Department of Health (DoH) (here) state that "*the official statistics from the Health and Social Care Information Centre paint a clear picture of the very significant increase in DoLS applications since the Supreme Court judgement*. *Over 55,000 applications in the six months following the judgement points to a more than 8 fold-plus increase on 2013/14 figures".*

2.8 The latest figures for 2014/15 now show a total of over 113,000 applications and these figures do not include some Local Authorities. The figures show that over 50% of applications have not been dealt with as yet. When DoLS were first implemented in 2009 Government analysts predicted that 17,000 people potentially would be deprived of their liberty and funding was given to Local Authorities based on this figure.

(The latest national figures are available here).

	Number of Applications	Number Granted	% Granted	Number Not Granted	% Not Granted	Number Not Signed Off or Withdrawn	% Not Signed Off or Withdrawn
Q1	19,100	11,000	58	2,700	14	5,400	28
Q2	26,900	10,800	40	2,800	10	13,300	50
Q3	31,700	10,400	33	3,000	9	18,400	58
Q4	35,600	8,400	23	2,800	8	24,500	59
Total	**113,300**	**40,500**	**36**	**11,200**	**10**	**61,600**	**54**

Data source: DoLS Quarterly collection 2014/15

Impact of the Supreme Court Judgement Locally

2.9 We have seen a marked increase in applications. However the figures are low (see the table below) in comparison to what we potentially should be receiving, based on the low threshold. We have 3,989 residential bed in care homes of which 1,181 are for people with dementia and learning disabilities. There are also 283 out of area placements and an estimated 150 supported living placements that may require Court of Protection applications.

Month/Year	No Applications	Month/Year	No Applications
April 2013	6	April 2014	16
May 2013	0	May 2014	31
June 2013	2	June 2014	31
July 2013	7	July 2014	28
August 2013	4	August 2014	21
September 2013	2	September 2014	23
October 2013	4	October 2014	35
November 2013	7	November 2014	27
December 2013	3	December 2014	30
January 2014	0	January 2015	33
February 2014	1	February 2015	51
March 2014	6	March 2015	42
Total	**42**	**Total**	**368**

The figure for April 2015 is 80.

National Action

2.10 There have been some actions taken nationally to mitigate the effects, eg:

a) A revised set of standard forms supporting the DoLS process has been published (reducing the total number from 32 to 13). However the accompanying guidance has only recently been published and there are issues with digitally signing these forms.

b) A more streamlined Court of Protection process has been implemented for DoLs cases in the community.

c) New guidance from the Law Society to assist practitioners in understanding what may constitute a DoL has been published here. The guidance includes a range of scenarios three of which have been reproduced at Appendix 2.

d) The Chief Coroner has issued guidance to coroners which states that, subject to any judicial decisions, any person who dies while subject to a DoLS authorisation amounts to a death in state detention that must be reported to the coroner. There must be an inquest, although there is no requirement for a jury where the death was from natural causes, and uncontroversial cases may be considered on the papers (although in open court) rather than by calling witnesses.

e) In November 2014 ADASS published guidance here for Local Authorities that included a screening tool to prioritise the allocation of requests for to authorise a DoL.

f) For palliative care, if the person has capacity to consent to the arrangements for their care at the time of their admission or at a time before losing capacity and does consent, the DoH considers this consent to cover the period until death and that hence there is no deprivation of liberty. Unless the care package to which the individual consented were to change in a manner that imposed significant extra restrictions or which included care contrary to the previously expressed wishes and preferences of the individual then this should lead to an application for deprivation.

g) The DoH does not consider a state of unconsciousness in itself as being a mental disorder. An unconscious person would therefore need to have been assessed as not having mental capacity before they became unconscious in order to be eligible for an application for deprivation of liberty.

h) The Law Commission have been tasked to re look at the DOLs legislation. They are to consult during summer 2015 therefore any changes will not be implemented until late 2017.

i) On 17 October 2014, ADASS and the LGA wrote to Norman Lamb, Minister of State for Care and Support, highlighting the issue and resource implications (here)**.** On 16 March 2015 ADASS and LGA published a briefing here calling for the Government to fully fund the costs of the changes to DOLS. In response, on 30 March 2015, the Government announced here that a one-off contribution of £25m nationally would be made in 2015/16 towards the cost of DoLS (see 3.5 below).

Despite these actions the indications are that the number of applications is continuing to grow week by week, and will do so for the foreseeable future; estimated at over 120,000 applications nationally by March 2015. Also, even with the new forms, the paperwork associated with DoLS is weighty and there is still a complicated administration process that underpins the system.

Local Action

2.11 When the judgement was first handed down the Assistant Director for Commissioning and Health Partnerships held a series of meetings with all affected providers to brief them on the implications. He also met with the Council's Best Interest Assessors (BIAs) and the Principal Legal Officer (Adults) to assess the situation and develop a plan of action for the short, medium and long term:

a) The Safeguarding Partnership Team has looked at the process and has made practical adjustments to streamline it plus continuing vigilance to make improvements.

b) The service has increased capacity in business support for the DoLS process.

c) There are currently three Pathway and Portfolio Managers now working on DOLS in amongst their usual duties and hours have been increased.

d) A rota of DoLS Panel members has been set up to ensure availability to deal with DoLS authorisations.

e) Independent BIAs are being utilised wherever available to carry out assessments where internal BIA resource has already been allocated.

f) Work is continuing to increase the pool of Mental Health Assessors; additional short term funding was allocated to backfill BIAs being pulled from teams to address the impact of this on the Care Management Teams where those BIAs are located.

g) Legal advice has been sought about the extension of the 7 day timescale for urgent cases where BIAs are unable to meet the deadline (eg unable to contact the family as needed within that period of time). Confirmation has been given that only one extension to an urgent authorisation can be made.

h) The service is continuing to look at where and how administrative support is provided to safeguarding operational leads.

i) Continuing to improve the systematic review of learning from panels to see where DoLS applications may have been prevented in the first place.

j) Panel signatories have been provided with additional training.

k) Work is being done to increase the number of training places for BIAs.

l) BIAs are participating in regional conferences which act as refresher training for them.

m) The contract for IMCAs and paid RPRs (both of whom support the person being deprived of their liberty either where there is no suitable family member to support them or where support is required for the family member) has been reviewed to try and increase capacity.

n) Scoping and planning on dealing with DoLS in the community is taking place in conjunction with the Clinical Commissioning Group lead.

o) Training for managing authorities (eg care homes) is being increased.

p) Including DoLS in the Corporate Risk Register.

q) We have reviewed the threshold for DOLS applications and potentially anyone who lacks capacity and is in a care home or hospital may meet the acid test. This will see a further increase in applications.

r) We are scoping the use of the ADASS screening tool referred to in 2.10 (e) above.

3. IMPLICATIONS FOR THE COUNCIL

Cost

3.1 The costs incurred by Local Authority supervisory bodies are highly variable depending on the complexity of the application. Research published in the British Journal of Psychiatry in 2011[1] found that the average cost of a DoLS assessment was £1,277, based on 2008 figures. However, the actual cost of a DoLS application can be far in excess of this figure, depending on whether legal advice / action is required and whether the application has come from outside the Kirklees area. DoLS reviews also incur a cost to the supervisory body; again the actual amount depends on the complexity of the case.

3.2 The average costs in Kirklees are continuing to run at approximately £1,200 per case, although a single non-complex case can incur £4,000 costs if it needs to be considered by the Court of Protection.

3.3 During the past year the Safeguarding Adults Partnership Team has incurred additional expenditure in excess of its budgeted allocation to the tune of £91,000. Also the cost of approximately 300 Best Interest Assessments is reflected within the budgets for assessment within operational services (Social Care and Wellbeing for Adults). The real cost impact is therefore not apparent but is covered by the estimates elsewhere in this report.

3.4 The number of applications is continuing to increase rapidly. In the current year it is estimated that in excess of 800 referrals for consideration will be received, considerably more than the 368 received last year (see Section 2.9) which will place even more pressure on management and assessment resources, business support, external advocacy, Section 12 Doctors (doctors who have specific expertise in mental disorder and have additionally received training in the application of the Mental Health Act) and BIAs. The additional cost pressure for the current financial year is estimated at approximately £500,000 which will require the Council to utilise one-off reserves to ensure that it meets its statutory obligations.

3.5 The DoH is providing Local Authorities with a one-off non-recurrent contribution to the cost of DoLs of £25m for 2015/16 which is being made available through the relative needs formula and is not, therefore, ring-fenced. In order to secure this funding Local Authorities are required to submit details of the work planned/undertaken to increase the efficiency of the DoLs system and to improve staff and partner understanding of DoLS and the wider Mental Capacity Act and evidence of where use of DoLS has improved service user wellbeing.

3.6 The Kirklees allocation from this funding is £198,387. Submission has been made to the DoH, if this submission is acceptable it is requested that the funding be allocated towards alleviating the 2015/16 DoLS pressures described above.

Risk

3.7 In line with the national picture, the number of applications being received by the Council is continuing to increase and will do so for the foreseeable future. Despite the actions listed in 2.11 above, there is still a significant risk that the Council will not have enough Mental Health Assessors, BIAs, IMCAs and RPRs to be able to comply with the DoLS process within the statutory timescales in all cases.

[1] http://bjp.rcpsych.org/content/199/3/232.abstract

3.8 The unremitting pressure arising from working to meet the statutory timescales is impacting on all the staff involved, ie Business Support Officers who administer the process; the Safeguarding Operational Team; BIAs and senior managers who attend the panels. Also pressure on the whole system will mean that the ability to support other complex tasks (eg large scale safeguarding investigations, domestic homicide reviews, serious case reviews, care management functions) is compromised. Consideration of the risk to the individual is a key part of how capacity and activity is prioritised.

3.9 The inability of the Council to discharge its legal duty to comply with the DoLS process could result in a costly claim for damages and/or a loss of reputation.

4. CONSULTEES AND THEIR OPINIONS

No consultations were required in relation to the recommendations in this report.

5. NEXT STEPS

The actions described in Section 2.11 will continue. Subject to Member approval the DoH funding will be used to alleviate the DoLS pressures described in this report.

6. OFFICER RECOMMENDATIONS AND REASONS

6.1 That the funding received by the Council from the DoH as a contribution to the cost of DoLs is allocated towards alleviating the pressures described in this report.

6.2 Allocation of the funding will assist the Council in meeting its statutory obligations in respect of DoLS.

6.3 That the contribution of DOLS activity to overall pressure in the system is noted.

7. CABINET PORTFOLIO HOLDER RECOMMENTATION

That the officer recommendations be agreed.

8. CONTACT OFFICER/ASSISTANT DIRECTOR RESPONSIBLE

Keith Smith, Assistant Director for Commissioning and Health Partnerships,

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BACKGROUND PAPERS: As referenced in the report.

APPENDIX 1

DEPRIVATION OF LIBERTY SAFEGUARDS (DOLS) PROCESS

1. The DoLS process involves 6 separate independent professional assessments which are undertaken by a Mental Health Assessor, usually a Consultant Psychiatrist and a Best Interests Assessor (BIA) most likely to be a Social Worker or Mental Health Nurse. The DoLs process must be completed within 21 calendar days for a standard application and 7 calendar days for an urgent application.

2. The BIA's main role involves independently assessing (the Best Interests Assessment) and deciding whether a person is deprived of their liberty, and deciding whether the DoL is in their best interests, necessary to prevent harm to them, and whether it is proportionate to the likelihood of that harm occurring. The Mental Health Assessor and BIA submit their assessments together with the recommendations of the BIA to a Local Authority supervisory body who then scrutinises the assessments and authorises or declines the DoL. In this way the DoL can be made compliant with Article 5 of the Human Rights Act 1998, the Right to Liberty.

3. Local Authorities are the supervisory body in England for all DoLS whether the person is resident in a care home or a hospital and for people who are ordinary residents of that Local Authority.

4. In some cases the Local Authority may need to seek legal advice on cases and / or make application to the Court of Protection. The person, or their representative, has the right to challenge authorisations in the Court of Protection.

5 If there is no appropriate family or friend who can support the person during the assessment procedure, an Independent Mental Capacity Advocate must be appointed by the supervisory body. An IMCA is an independent person with relevant experience and training who can make submissions to the people carrying out the assessments and challenge decisions on behalf of the person they are representing.

6. If authorisation is given, someone must be appointed as the Relevant Person's Representative (RPR) but the IMCA may still have a role in supporting that person. The role of the RPR is to keep in contact with the person and to make sure that decisions are being made in their best interests. The RPR will usually be a relative or friend of the person who is being deprived of their liberty. If there is no appropriate friend or relative, it will be someone appointed by the supervisory body (possibly a paid professional) who can keep in regular contact with the person.

7. A DoLS authorisation can last for a maximum of 12 months, and should remain in force for the shortest time possible. The managing authority (the care home or hospital) and the Local Authority as supervisory body must make regular checks to see if the authorisation is still needed, remove the authorisation when no longer necessary and provide the person's representative with information about their care and treatment. The supervisory body is responsible for review of an authorisation. Review can take place at any time after the authorisation. Review can take place at any time after the authorisation and must take place if the person's circumstances change or they or their representative requests a review.

8. DoLS applications for people living in the community are made direct to the Court of Protection.

APPENDIX 2

DEPRIVATION OF LIBERTY SCENARIOS EXTRACTED FROM LAW SOCIETY GUIDANCE (available here)

1. Hospital Acute Ward

1.1 Mrs Jones is an 80 year old lady, who lives on her own in a semi-detached house. One evening her neighbours notice the smell of burning. Not finding anything in their house, they go next door. They find Mrs Jones slumped in her kitchen with the toaster on and a piece of burned charcoal in the toaster.

1.2 Mrs Jones is admitted to hospital with a diagnosis of severe community acquired pneumonia. She responds well to antibiotics and after a week tells the treating team that she wants to go home. She has been assessed during her admission by the physiotherapy and occupational therapy team, who feel that she has significant problems with her activities of daily living. Their professional opinion is that it would be unsafe for her to return home. The doctors treating her note that she is slightly confused, and she scores 8/10 repeatedly on a mini-mental test.

1.3 Mrs Jones is adamant that she will not consider anything other than returning home. Her neighbours, who have visited her daily in hospital, are very concerned about her returning home. The treating team considers that she should stay in hospital for further assessment and thereafter a suitable care home should be found for her. She will have to remain on the acute ward until then, and there is no immediate prospect of her returning home.

1.4 The key factors pointing to a deprivation of liberty are:

- the monitoring and supervision of Mrs Jones on the ward;
- the decision of the treating team not to let her leave to return home;
- the potential that Mrs Jones will have to remain on the ward for a significant period of time.

2. Care Home for Older Adults

2.1 Peter is 78. He had a stroke last year, which left him blind and with significant short-term memory impairment. He can get disorientated needs assistance with all the activities of daily living. He needs a guide when walking. He is married but his wife Jackie has struggled to care for Peter and with her agreement Peter has been admitted into a residential care home.

2.2 Peter has his own room at the home. He can summon staff by bell if he needs help. He tends to prefer to spend time in his room rather than with other residents in the communal areas. He can leave his room unaccompanied at any time he wishes. Due to his visual and cognitive impairments, he does not feel safe doing this. He has access to the communal garden, the dining room, the lounge area and any other resident's room. He is able to use the telephone when he wants. It is in a communal area of the home. He is unable to remember a number and dial it himself. He rarely asks to make phone calls.

2.3 He is visited regularly by Jackie. She has asked to be allowed to stay overnight with Peter in his room but this request has been refused. The home has a key pad entry system, so service users would need to be able to use the key pad to open the doors to get out into the local area. Peter has been taken out by staff after prompting and does not ask to go out. He would not be allowed to go out unaccompanied. Most of the time Peter is content but on occasions he becomes distressed saying that he wishes to leave. Members of staff reassure and distract Peter when this happens.

2.4 The key factors pointing to a deprivation of liberty are:

- the extent to which Peter requires assistance with all activities of daily living and the consequent degree of supervision and control this entails;
- Peter is not free to leave either permanently or temporarily

3. Supported living

3.1 Gordon is 30 years old and has autism, cerebral palsy, hearing and visual impairments and a learning disability. He resides in a one-bedroom flat with 1:1 staffing at all times. He requires a second member of staff to access the community who is available 35 hours per week. The front door is locked for his safety.

3.2 He cannot weight bear and pulls himself around inside, and requires a wheelchair outside. Due to a history of attempting to grab members of the public, a harness is used to strap his torso to the wheelchair, allowing free movement of his arms.

3.3 The key factors pointing to a deprivation of liberty are that Gordon is under continuous supervision and control on a 1:1 basis at all times.