



Department
of Health

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F.A.O: MCA-DoLS Leads in Local Authorities and the NHS

Dear Colleagues,

Update following the 19 March 2014 Supreme Court judgment

I wanted to write to you personally to set out some of the latest developments with respect to the Deprivation of Liberty Safeguards (DoLS) and on-going work in this area.

But first I'd like to take the opportunity to thank you and your teams for the considerable efforts you have made since 19 March 2014. I have managed to discuss the issues with a good number of you since the judgment but I'm aware of how many I have not yet been able to personally speak to. It is clear the judgment sparked a considerable increase in DoLS activity and the commitment of professionals such as yourself in responding to this challenge has been truly impressive.

Approaches to responding to the 19 March 2014 judgment

There has been a good deal of consensus around how the response should be handled. It was clear to many local authorities that the clarified Supreme Court deprivation of liberty test could not be fully implemented overnight. It is equally clear however that a "do nothing" approach is not acceptable.

Best practice has been to rapidly identify those individuals who may potentially be subject to a deprivation of liberty and then work through this list, assessing first those individuals who stand to benefit most from the safeguards. Managing authorities and supervisory bodies need to have a plan as to how they will move towards full compliance with the law but it is clear that this action should be undertaken in a proportionate manner that does not for example, result in a decline in the level of care and support provided to service-users.

Particularly impressive is the re-assertion of the wider principles of the Mental Capacity Act 2005 (MCA). As you know, we face a considerable challenge in raising understanding and awareness of the MCA across the health and care system, and it is clear that success in this endeavour will reap benefits for the correct application of DoLS. In particular, the first step in identifying a potential deprivation of liberty should always be to seek to reduce restrictions and restraint where possible to avoid a deprivation of liberty occurring in the first place.

It is important to remember the fundamental purpose of DoLS. It is not, nor should it be, purely a paper-based exercise to provide the legal authority for depriving an individual of their liberty in their best interests. DoLS is about the individual and ensuring that a light is shone on the conditions of their care;

maximising their empowerment and human rights. There are countless examples of how DoLS has led to a real improvement in the care individuals receive. The individual must be central to our response to the Supreme Court judgment. Certainly, bulk assessments (for example assessing all individuals in a care home as one rather than considering each individual case-by-case) are clearly not in keeping with the purpose of DoLS.

The Department of Health, ADASS and the Care Quality Commission (CQC) support the type of response to the Supreme Court judgment detailed above.

ADASS-led DoLS Task Group

The Department is very grateful to ADASS for leading a Task Group these past few months to consider the implications of the Supreme Court judgment and provide some practical tips as to how local authorities might respond. Particular thanks are due to Sarah Norman and Lorraine Currie for leading this Task Group. The Task Group meets next on 18 September 2014 and ADASS will circulate a guidance note thereafter. Annexed to this letter is a list of the members of this Task Group. Should you wish to raise particular issues that require national attention, you may do so via the regional lead for your area.

The Task Group was established on a time-limited basis and together with ADASS we shall review whether there is value in this Task Force continuing after this calendar year.

Establishing the impact of the Supreme Court judgment

As mentioned earlier, it is clear that the Supreme Court judgment has resulted in significant increased activity on DoLS but the extent of this increase in terms of actual numbers of DoLS applications and authorisations nationally remains to be fully understood. You may be aware that ADASS conducted a survey of local authorities a few months ago. Looking through this survey it is clear that the expected increase in DoLS applications varied considerably across different local authorities; some predicted a 2-fold increase (still of course significant) whereas others predicted a 20-fold increase.

For future planning purposes and to understand the current challenges better, the Department has decided it would not be appropriate to wait for the next annual DoLS collection. The Health and Social Care Information Centre (HSCIC) has therefore agreed to conduct an additional voluntary DoLS data collection. The HSCIC has now circulated a letter in respect of this collection (supplied in annex here also). We anticipate that quarter one data will be published in early October 2014 and quarter two data in early November 2014.

This collection is voluntary and it is understandable that respondents may have concerns about the resource required to provide this data while continuing to manage the response to the Supreme Court judgment. However, we would strongly encourage you to respond to this collection. A truly robust and reliable national picture of the impact will help inform the national response.

Work due for completion by February 2015

DoLS standard forms

You may be aware that the Government, in its response to the House of Lords Select Committee Inquiry on the MCA, committed to revising the standard DoLS forms and publishing a new set by the end of November

2014. This was a challenging timetable but one that recognised the situation following the Supreme Court judgment.

We are delighted that ADASS and Lorraine Currie (lorraine.currie@shropshire.gov.uk) have agreed to lead this piece of work. Many of you may have made alterations to the DoLS forms over the years to suit your purposes. ADASS will be in touch to inform you how you can submit these forms for consideration in the process of drafting the new forms. The forms will remain non-statutory; local authorities are not obliged to use the new forms. However, there are clear advantages to be had in a shared set of forms and the Department would encourage you to engage with ADASS during this process to feed in your views.

DoLS Case Law Guidance

Another commitment from the Government response to the House of Lords was to produce new case law guidance as to what constitutes a deprivation of liberty in both social care and health care settings.

I am very pleased to say that the Law Society, in particular their Mental Health Committee, have agreed to undertake this work, liaising closely with DoLS practitioners in the process. We expect this guidance to be published in February 2015.

If you would be interested in feeding into this work, please contact Anselm Benedict at the Law Society: Anselm.Benedict@LawSociety.org.uk.

Increasing the provision of Best Interest Assessor training

Many of you have highlighted that one of the biggest challenges in responding to the Supreme Court judgment is the supply of Best Interest Assessors (BIAs).

To try and provide assistance in this regard, the Department is currently considering providing a small amount of funding for a tender for BIA training. The expectation is that the successful bidder(s) would provide an increased number of training places on condensed BIA courses for a reduced cost over the coming six to twelve months. Local authorities would still need to pay for their staff to attend these courses but the cost would in effect be subsidised by the Department.

The Department will discuss this proposal with the members of the ADASS-led Task Group on 18th September before reaching a final decision. Again, your views would be welcomed and should be directed to the Task Group via your regional lead.

Long term work

As you know, the Government asked the Law Commission to consult on and review the legislation underpinning deprivation of liberty in community settings, whilst learning lessons for the existing DoLS system.

In response to recent developments and following consultation with stakeholders and the Law Commission, the Department has decided to extend the scope of this work to consider the legislation underpinning DoLS in its entirety (in addition to community settings).

It should be strongly emphasised however, that this should not in any way distract attention from the need for supervisory bodies and managing authorities to implement the current DoLS system fully. The outcome of the Law Commission's work will not be known for at least two years.

The Law Commission's work has already commenced and we would encourage you to engage with this process. Without your engagement our efforts to identify legislative changes that are going to achieve the outcomes for service users we all desire is unlikely to be successful. The initial point of contact at the Law Commission is Tim Spencer-Lane: tim.spencer-lane@lawcommission.gsi.gov.uk.

Some stakeholders have voiced their opinion that legislative change should be considered within a much shorter timeframe. As noted in the Government response to the House of Lords, we are determined that legislative change should not be rushed and should be developed in a transparent, consultative manner. Changes proposed (for example, extending DoLS now to community settings) may seem like attractive short-term solutions, but the Department's view is that such changes are far from simple, are substantive rather than merely cosmetic, and therefore require full and robust consultation – hence the engagement of the Law Commission.

Funding

A number of local authorities as well as ADASS and the LGA have expressed their concerns regarding the financial pressures resulting from the Supreme Court judgment. As you know, central government has funded local government to fulfil its statutory responsibilities under DoLS since the regime came into force in 2009. In this financial year alone, central government has provided over £35m for MCA-DoLS activities.

Government policy in respect of DoLS is unchanged but clearly the clarification in the law following the Supreme Court judgment has resulted in a significant increase in applications to local authorities. We will continue to assess the impact over the next few months (and in light of the HSCIC data return) and feed this into our future financial planning as has been the case previously.

Wider MCA work

As mentioned above, it is important to see the approach to DoLS as part of the wider effort to raise awareness and understanding of the MCA. The Department and our system partners, co-ordinating through our national MCA Steering Group, are working to implement the commitments made in the Government response to the House of Lords Inquiry (*Valuing every voice, respecting every right*).

The Department will write out to you again later this year with an update on progress but I would draw your attention to one major commitment; the Social Care Institute of Excellence (SCIE) review of MCA guidance, toolkits and other materials. SCIE will be launching this month a public call for practitioners to submit MCA materials that they find valuable with a view to identifying the very best in the country and providing these online for national dissemination. This review will only be a success if practitioners like yourself submit all your materials – we would strongly encourage you to do so.

Further information will be provided by SCIE in due course. The SCIE contact is David Cundy: David.Cundy@scie.org.uk.

Finally, I would draw your attention to a letter from the Chief Social Worker for Adults, Lyn Romeo, regarding the vital role of social workers in implementing the MCA – see annex.

Thank you once again for all you are doing. Please pass on the Department's thanks to your team. The Supreme Court judgment has clearly resulted in a significant increase in DoLS activity but, handled in a manner that puts individuals first and foremost, it provides a real opportunity to provide real benefits to some of the most vulnerable individuals in our society.

Yours sincerely

A handwritten signature in black ink, appearing to read 'N Fry', with a large, sweeping flourish underneath.

Niall Fry
Policy Lead
Mental Capacity Act & Deprivation of Liberty Safeguards
Department of Health

Annex A – Regional MCA-DoLS Members of the ADASS-Led DoLS Task Group

Region	Name of Lead	Email
North West	Penny Davidson	pdavidson@warrington.gov.uk
North East		
South West	Dennis Little	dennis_little@bathnes.gov.uk
South East	Sarah Pady	spady@buckscc.gov.uk
East	Joseph Yow	joseph.yow@cambridgeshire.gov.uk
West Midlands	Lorraine Currie	Lorraine.currie@shropshire.gov.uk
East Midlands	Heather Blow	Heather.bow@lincolnshire.gov.uk
London	Liana Kotz	Liana.Kotze@enfield.gov.uk