

From
Chair of the LGA Community Well-being Board
Cllr Izzi Seccombe

President of the Association of Directors of
Adult Social Services
David Pearson

22 January 2015

Dear Minister,

Impact of Supreme Court Judgement on Deprivation of Liberty Safeguards (DoLS)

Thank you for your letter of 2 December and your welcome recognition of both the challenges facing the sector as a result of the Supreme Court judgement and councils' considerable efforts in keeping the system operating as effectively as possible in extremely testing circumstances.

Funding

As we enter the New Year and councils begin the process of signing off their budgets following another difficult Local Government Finance Settlement the funding pressure posed by DoLS is brought into even sharper relief. This is a very real concern for both council members and officers across the country who are clear that they cannot (and should not be expected to) absorb this in-year and recurring cost pressure. We are therefore disappointed that your latest letter does not address the specific issue of funding to meet the DoLS new burden.

Furthermore, this is not a standalone issue; it sends signals about the Government's commitment to funding other high profile agendas. The Care Act is a clear case in point. As you will be aware, concerns remain about the affordability of the Act in 2015/16 given that the costs associated with it will be driven by a level of demand which ultimately remains unknown until the provisions go live. The sector's confidence that the Government will fund this crucial legislation is being tested when it sees that the Government is not funding the known and clearly evidenced additional costs of DoLS. As we said in our letter of 2 December our current best estimate of the additional cost to councils arising from DoLS is £98 million – over and above the current funding for DoLS activity in 2014/15. We are keen to work with the Department to agree the true cost of DoLS applications as part of wider collaborative efforts to inform the next Spending Review.

As per your offer we remain extremely keen to arrange a meeting at the earliest opportunity for the three of us to discuss this matter further. We run the risk of failing some of our most vulnerable residents and exacerbating the already significant strain that adult social care budgets are under. We therefore request that a meeting be arranged to discuss the issues as a matter of urgency.

Ensuring adequate funding for DoLS is not our only priority of course. Whilst we are very keen to discuss the issues with you in person we thought it would be helpful to update you on our position on two other related matters: improving the process; and avoiding unintended consequences.

Improving the process

Improving the DoLS process is in the interests of both the individual and the public purse. We believe there are longer-term considerations that need to feed into the Law Commission's review as well as more immediate changes that could improve the short-term.

In the longer-term we are suggesting a change in the law for people who lack capacity who need continuous supervision and who are, or are to be, in supported living environments. At the moment these people are considered by the Court of Protection but we believe it makes sense for councils to take full responsibility for all DoLS applications – both community- and hospital-based. This would obviously carry significant funding and workforce implications and we would be happy to work these through with your officials. If we can overcome them we would realise a more straightforward and cost effective system; councils taking full responsibility for all DoLS applications would:

- Speed up the process for people, as the Court of Protection process (notwithstanding the current pressures arising from the Supreme Court Judgement) is slower than that undertaken by councils
- Reflect the policy priorities of successive governments that the preferred model of care for people in this position is care outside hospital and residential settings
- Save money by cutting out the cost of referring people to the Court of Protection.

In the shorter-term we believe there are actions that could be taken now to free up capacity in the system whilst still keeping to the principles of the MCA. These include:

- Extending the timescale requirements for submitting applications
- Extending the timescale requirements for reviewing DoLS cases and/or extending the length of an authorisation
- Reviewing whether evidence of mental disorder must be confirmed by an approved assessor each time a case is reviewed after 12 months.

Such actions help address one of the main immediate issues following the Judgement – pressure on capacity and the associated risk of litigation in cases where deadlines are missed.

Avoiding unintended consequences

We are also keen to address any unintended consequences arising from the Supreme Court Judgement. As raised in a letter from your Department on 14 January, people in intensive care or comas are subject to DoLS. Applications in such cases – where people are in restrictive settings due to severe health problems – do very little, if anything, for an individual's outcomes and can be extremely upsetting for their families. We do not believe that this group of people are the intended focus of Parliament so it would therefore still be helpful to review the need for DoLS applications in such cases.

Similarly, we are conscious of the need to avoid unnecessary distress and costly bureaucracy for people in end of life care and their families. Previously we have excluded these people from DoLS as we determined that their autonomy could not be promoted any further as it was their medical condition which dictated treatment. Now however they fit the acid test for DoLS.

When DoLS policy was formulated in the MCA we do not believe that Parliament's intended focus was people in intensive care and/or at the end of life. It would therefore be very helpful if the Government could provide a clear statement to this effect and/or amend relevant regulations so that such exceptions are noted.

Further problems arise from the fact that a death whilst subject to DoLS must be notified to the Coroner. This has increased exponentially which in turn increases distress and anxiety for family members where death was entirely expected.

In all our work on DoLS to date we have been driven by two primary considerations: securing what is in the best interests of our citizens; and ensuring that the costs associated with DoLS are addressed fairly and in a way that maximises value for money to the public purse. These motivations go hand in hand with one another so we remain extremely keen that both are dealt with swiftly by the Government.

While we are ready and willing to support the Law Commission's review, waiting until 2017 for wider change is simply too late. We are therefore of the clear and firm view that this matter now needs immediate action – both on funding and improving the process. As a first step we would like to reiterate our desire to meet with you at the earliest opportunity to discuss these issues further as part of bringing about meaningful change on the ground.

Yours sincerely,

David Pearson

David Pearson
President of the Association of Directors of Adult Social Services



Cllr Izzi Seccombe
Chair, Community Well Being Board, Local Government Association