

**From:** Clair Bell, Cabinet Member for Adult Social Care and Public Health  
Richard Smith, Corporate Director of Adult Social Care and Health

**To:** Adult Social Care Cabinet Committee – 29 September 2021

**Subject:** **Local Government And Social Care Ombudsman Public Report On Deprivation Of Liberty Safeguards (Dols) In Kent**

**Classification:** Unrestricted

**Previous Pathway of report:** None

**Future Pathway of report:** None

**Electoral Division:** All

**Summary:** This paper gives an overview of Kent County Council’s proposed response to a report published by the Local Government and Social Care Ombudsman on 2 September 2021 about a complaint received from Mr C about the decision to place his partner in a care home. The public report was issued on 2 September 2021, highlighting the Council’s failings in this matter along with a number of recommendations.

Officers believe that it is not possible for the Council to comply with all the following recommendations but will be able to meet some of the recommendations made by the Local Government and Social Care Ombudsman,

**Recommendation(s):** The Adult Social Care Cabinet Committee is asked to **CONSIDER** and **DISCUSS** the Local Government and Social Care Ombudsman’s report to enable the Cabinet Member for Adult Social Care and Public Health, to make a decision of non-compliance to some of the recommendations set out by the Local Government and Social Care Ombudsman as the Council is unable to comply with them.

## 1. Introduction

- 1.1 In May 2020, Kent County Council (KCC) was informed that a complaint was made to Local Government and Social Care Ombudsman (LGSCO) by Mr C who stated that “there was fault in the decision to place his late partner Ms D in a care home...this caused both of them injustice as they are no longer able to live together as a couple”.

1.2 The LGSCO upheld the complaint, and has issued a Public Report on the organisation's failing, has recommended KCC to undertake a series of actions and to make a payment of £500 to Mr C. The LGSCO has stated that:

- ***Within one year of this report, the Council should review all cases from January 2019 to date where DOLS assessments have not been completed at all or not been completed within the prescribed timescales and consider whether any injustice has arisen because of the delay.***
- ***If so, the Council should take action to remedy any injustice in line with the principles set out in our published Guidance on Remedies.***
- ***Before starting the review and within three months of the date of this report, the Council should provide us with an action plan of how it intends to conduct the review. The action plan should set out numbers, methodology and scope of the review and should be agreed with us before the Council starts the review.***

1.3 The LGSCO also states that KCC, within three months of the date of the report, must:

- ***Ensure all current and future requests for standard authorisations are completed within prescribed timescales, including low and medium risk cases currently held as pending.***
- ***Provide us with written evidence showing it has monitored all requests for standard authorisations post-dating our final report and completed them within the legal timeframes described in this report***
- ***Review its Care Act assessment processes to ensure case managers document consideration of Article 8 rights when making decisions about care placements which separate couples***
- ***Ensure relevant staff receive training on the Human Rights Act 1998 and how it may apply to their role.***

1.4 Whilst accepting the finding of fault, Officers believe that it is not possible for the Council to comply with the recommendations noted in paragraph 1.2 and bullet 1 and 2 in paragraph 1.3. Should the decision be made to not comply with all the recommendations, a public notice of non-compliance will need to be issued in addition to the report. It is unusual for Councils to not comply with recommendations made by the LGSCO and should the decision to not comply be made, it may generate additional media and public interest.

## **2. Background**

2.1 In May 2020, the LGSCO wrote to KCC to advise the Local Authority they were investigating a complaint. The complaint was from the partner of Ms D and the

issues arose when Adult Social Care and Health became involved with providing care and support for her in the summer of 2019.

- 2.2 The LGSCO upheld the complaint, focusing on specific aspects of the Deprivation of Liberty Safeguards (DOLS) applications process and the Council's failure to meet the requirements of the Human Rights Act 1998, specifically Ms D's Right to family life. The LGSCO made recommendations and informed KCC, that they would be issuing a public report of the findings on their website on 2 September 2021.
- 2.3 Since 2019, the DOLS Service at KCC has continued to improve its practice leading to positive performance in relation to national comparisons.

### **3. The Mental Capacity Act and Deprivation of Liberty Safeguards**

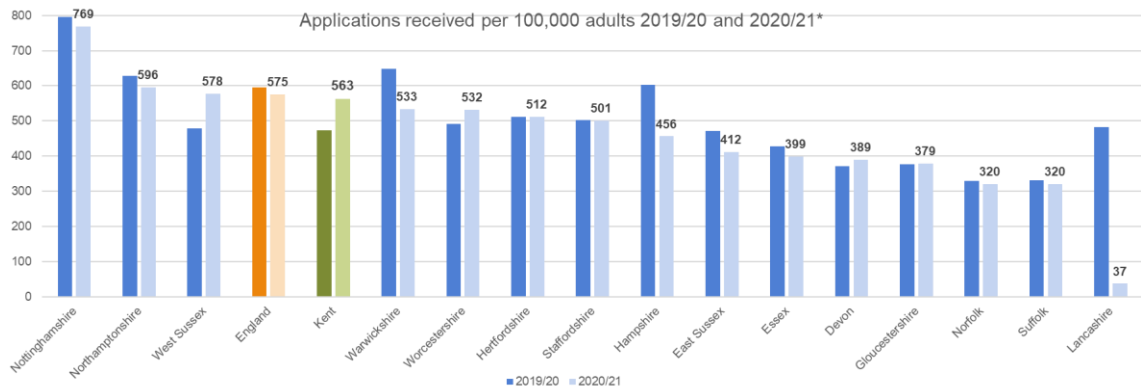
- 3.1 The Mental Capacity Act 2005 includes the DOLS for people who may have been deprived of their liberty in a care home or hospital and lack the capacity to consent to their care arrangements. The Act and its Code of Practice state that assessments must be completed within 21 days for a standard authorisation or where an urgent authorisation has been given, before the urgent authorisation expires.
- 3.2 It is a legal framework that protects the people who cannot consent to their care should those arrangements deprive them of their liberty. The process is extensive and involves a person being assessed by a doctor experienced in mental health (e.g. psychiatry) and a social care practitioner - Best Interest Assessor (BIA) who holds a formal 'Best Interest' qualification. In total the DOLS comprises of six assessments that are used to authorise the deprivation of a person's liberty.
- 3.3 If a person residing in a care home or hospital, is thought to be deprived of their liberty, the Managing Authority (for example a hospital or care home) must complete an urgent authorisation and a request for a standard authorisation to the Supervisory Body (KCC). The urgent authorisation provides the Managing Authority with the legal safeguards to continue to detain the Relevant Person in their best interests, until the Supervisory Body has completed the statutory assessments. The urgent authorisation is valid for seven days, with the ability to extend for a further seven days in exceptional circumstances
- 3.4 A Managing Authority can request a Standard Authorisation where the Relevant Person is already residing at the Managing Authority and is currently subject to a DOLS Standard Authorisation which is due to expire or when it appears likely that at some time in the next 28 days, someone will be accommodated in a hospital or care home in circumstances that amount to a deprivation of liberty within the meaning of Article 5 of the European Convention on Human Rights. An application for a Standard Authorisation must come from the Managing Authority to the Supervisory Body. Authorisation should be obtained in advance a planned move. The statutory timeframe in these cases is 21 days from application to the commencement of a DOLS Standard Authorisation.

- 3.5 In 2014, the Cheshire West Judgment in the United Kingdom Supreme Court held that far greater numbers of people met the criteria to be considered under the DOLS than had previously been thought. Despite the outcome of the Cheshire West judgement there were no changes made to the statutory timescales and the Code of Practice remains as it was with the implementation of the Act. The impact of the judgment meant KCC and local authorities across England saw a significant rise in the number of DOLS applications presented to them for consideration.
- 3.6 In Kent, DOLS is coordinated and managed by the County DOLS team. Applications are received and triaged for assessment using national recognised Association of Directors of Adult Social Services (ADASS) risk assessment tool and good practice principles. On average, Kent prioritises 55% of applications. The remaining 45% go into 'pending' and are monitored through data validation or direct contact with a setting.
- 3.7 The ADASS tool is a framework that helps Councils to respond in a timely manner to requests that have the highest priority. The tool sets out the criteria most commonly applied which indicates that an urgent response may be needed to safeguard the individuals concerned. The use of this tool is balanced against the legal criteria for the Deprivation of Liberty Safeguards which remains unchanged. The criteria is an indicative guide only as it will generally be based on information provided by the Managing Authority in the application and each case must be judged on its own facts.

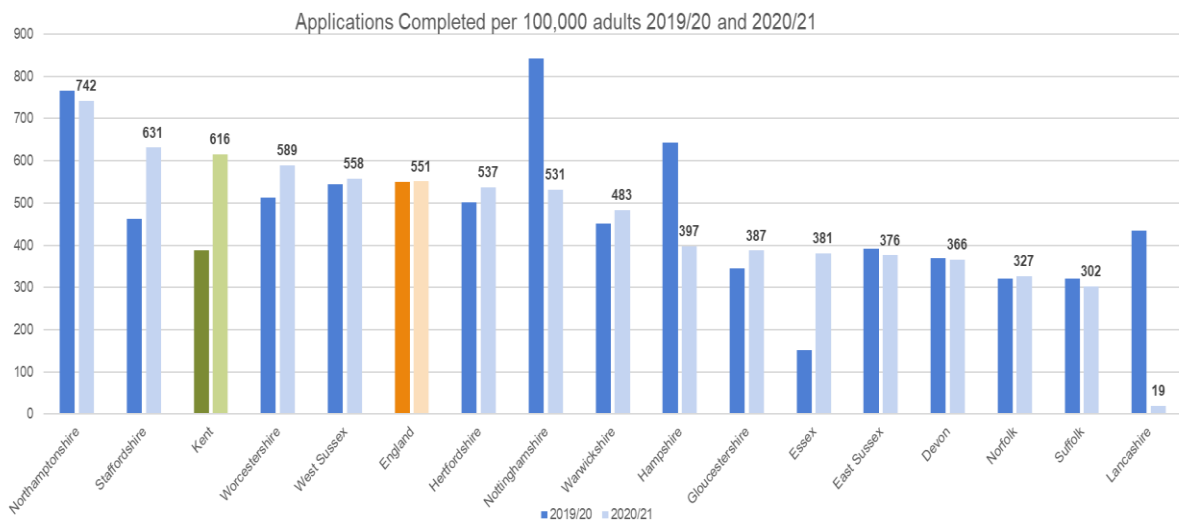
#### 4. Response to the LGSCO Recommendations

- 4.1 As noted above, the following recommendations will be met and work has already taken place to ensure that this is done within the prescribed LGSCO timescales.
- ***Review its Care Act assessment processes to ensure case managers document consideration of Article 8 rights when making decisions about care placements which separate couples***
  - ***Ensure relevant staff receive training on the Human Rights Act 1998 and how it may apply to their role.***
- 4.2 The training offer to support practitioners to develop a greater understanding of the application of the Human Rights Act 1998 has been launched with a key message from the Corporate Director for Adult Social Care and Health. In addition to this, the Council has apologised and made a symbolic payment of £500 to recognise Mr C's distress. However, there are several recommendations that cannot be met by the Council specifically:
- ***Within one year of this report, the Council should review all cases from January 2019 to date where DOLS assessments have not been completed at all or not been completed within the prescribed timescales and consider whether any injustice has arisen because of the delay.***

- ***If so, the Council should take action to remedy any injustice in line with the principles set out in our published Guidance on Remedies.***
  - ***Before starting the review and within three months of the date of this report, the Council should provide us with an action plan of how it intends to conduct the review. The action plan should set out numbers, methodology and scope of the review and should be agreed with us before the Council starts the review.***
  - ***Ensure all current and future requests for standard authorisations are completed within prescribed timescales, including low and medium risk cases currently held as pending (within 3 months).***
  - ***Provide us with written evidence showing it has monitored all requests for standard authorisations post-dating our final report and completed them within the legal timeframes described in this report (within 3 months)***
- 4.3 Members are asked to consider and discuss the recommendations to enable the Cabinet Member for Adult Social Care and Public Health to make a decision of non-compliance to some of the conditions set out by the LGSCO, as the Council is unable to comply with the recommendations.
- 4.4 The Council is unable to comply with the recommendations, as the availability of Best Interest Assessors (BIAs) is not only limited within KCC but more broadly across London and the South-East. Should the Council seek to employ additional BIAs within the Local Authority, it would have a significant detrimental impact on KCC and neighbouring authorities' ability to complete current and new DOLS assessments, thereby increasing risks of depriving liberty and associated human rights to those waiting for an assessment. This would place a significant burden on an already fragile national system, making it an impossible or untenable condition of compliance.
- 4.5 The practitioner resource availability is a significant challenge for many other local authorities across the country, as is the availability of commissioned services such as advocacy services that are needed to support this work.
- 4.6 Recent statistics published on the NHS Digital website (19 August 2021) verify the position local authorities face about the number of applications received. Data published in August 2021 demonstrates that Kent has moved from 10<sup>th</sup> to 4<sup>th</sup> in ranking (of 16) against its Chartered Institute of Public Finance and Accountancy (CIPFA) neighbours in terms of applications received, and was one of six local authorities to experience an increase from 2019/20 to 2020/21



4.7 Despite the increase in applications the Council, in comparison to its statistical neighbours, compares positively in meeting the statutory obligations for DOLS applications. Performance data indicates that KCC has continued to strongly improve the rate at which it meets its statutory obligations and has moved from 11<sup>th</sup> to 3<sup>rd</sup> in ranking against its CIPFA neighbours. Kent now has a higher application completion rate per 100,000 adults than the England application completion rate per 100,000 adults.



4.7 In addition to the positive trends reported and the investment made in the DOLS service, there have been occasions where people who have had loved ones subject to a Best Interest assessment have reported positive experiences throughout the process.

4.8 As noted above, there are two authorisations which the Local Authority are the supervisory body for. Hospitals and Care Homes submit either an 'urgent' or a 'standard' authorisation. Reports available from our client system (Mosaic) confirm that currently 32% of applications received are for a standard authorisation. To focus on these cases as requested in the LGSCO report, could potentially create an inequitable service depending on where a person finds themselves in the system. Settings - Hospitals or Care Homes (and indeed families, carers and loved ones) who submit an urgent application will have cause to provide a further challenge to the Local Authority if a person is not seen and a deprivation of their liberty occurs. It is of note that many of the cases

will have been screened through the nationally recognised ADASS tool and this will have mitigated many immediate risks.

- 4.9 The number of historical applications that fall within the time scope of the recommendations that would need to be reviewed amounts to approximately 15,000 applications. This number does not consider the applications that continue to be made weekly.
- 4.10 In July 2021, the Council received 467 urgent applications and 111 standard applications. There are in the Council, 6.5 Full Time Equivalent (FTE) Best Interest Assessors (BIAs) in the DoLS team and approximately 44 BIAs who work on a rota basis to assist the core team by undertaking 1 assessment per month. The work is reviewed by 13 Authorisers who hold senior roles in Adult Social Care and undertake the Authoriser role in addition to their day-to-day responsibilities. To review all historical applications as recommended by the LGSCO, the Council would need to employ an additional 96<sup>1</sup> FTE BIAs and additionally some may need an assessment by Section 12 Doctor, who are externally contracted. It is also of note that the current advocacy service cannot meet the demands of the service.
- 4.11 After the Committee discussion, the Council must write to the LGSCO with a formal response about the recommendations following the decision that will be taken by the Cabinet Member for Adult Social Care and Public Health with regard to compliance.
- 4.12 KCC has publicised the Public Report in two local newspapers and made copies available to members of the public who are interested. If the Council is not compliant with the recommendations this will trigger a secondary Public Report. It is unusual for Councils to not comply with recommendations made by the LGSCO and should the decision to not comply be made, it may generate additional interest.

## **5. Change in legislation**

- 5.1 Managing the demand for DOLS has become and continues to be a national challenge since the Cheshire West judgment in 2014.
- 5.2 In July 2018, the government published a Mental Capacity (Amendment) Bill, that passed into law in May 2019. It replaces the DOLS with a scheme known as the Liberty Protection Safeguards (LPS). LPS will have a significant impact on this area of work as assessments will last for a maximum of three years. Because the authorisation period will cover a longer period, it is expected that there will be fewer authorisations. Furthermore, there will be a new role for Clinical Commissioning Groups (CCG) and NHS trusts in authorisation arrangements, which will mean that there are less applications made to the Council for authorisation.

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<sup>1</sup> The calculation is based on one BIA undertaking 3 assessment per week over 1 year.

5.3 However, the implementation of the legislation has been delayed and is now expected in April 2022, with the Code of Practice due to be published in the spring of 2021 yet to appear. Local Authorities continue to await sight of this document, which will also have a 12-week consultation period. Kent has done a significant amount of planning to prepare for the implementation of the new legislation, working with providers, partners and care settings.

## **6. Financial implications**

6.1 As noted above, Kent has invested in the DOLS service since the inception of the Cheshire West Judgment, for example in Project DOLS and continues to allocate additional targeted resources to the delivery and improvement of the service.

6.2 There has been substantial investment made by the Council to meet its legal obligations since the Cheshire West Judgment through Project DOLS which saw the Council invest £1.54 million in services. Furthermore, in Quarter 4 of 2020/2021, £225,000 of Winter Pressures funding was agreed with a further £225,000 in Q1 of 2021/2022 agreed. All of which in addition to wider service improvement activity focused on high standards of practice driven by the Making a Difference Every Day programme, has led to an increase in the number and quality of assessments undertaken.

## **7. Legal implications**

7.1 Once the LGSCO has published his final decision it becomes legally binding and can only be challenged in High Court, however in this case KCC does not dispute the upheld ruling but only its ability to carry out some of the recommendations.

7.2 KCC has publicised the LGSCO report in two local newspapers and made copies available to members of the public. This may be of interest to people who believe that their rights may not have been met through the DOLS process and may raise more complaints with the Council or the LGSCO.

7.3 Members will need to consider the recommendations and discuss non-compliance with some of the recommendations set out by the LGSCO.

7.4 After the Committee the Council must write to the LGSCO with its formal response to recommendations following the decision taken by the Cabinet Member for Adult Social Care and Public Health with regards to compliance.

7.5 If the Council is unable to adhere to or is not compliant with the LGSCO's recommendations, a secondary Public Report will be triggered. KCC will at that point have to publish a statement in the local press stating why it is not complying with the LGSOC's recommendations. The final decision not to comply with recommendations rests with the Cabinet member for Adult Social Care and Public Health.

## **8. Equality implications**



8.1 Most people subject to DOLS are older people (Age) and people who have a disability (Disability). Early analysis points to there being a higher number of people with learning disabilities who receive a DOLS authorisation. Failure to manage the DOLS process will mean that this cohort of people are more likely to not have their Human Rights preserved and will also result in a breach of the Council's Public Sector Equality Duty. To undertake the review will as noted above place a significant burden on the system making it more difficult to respond to new applications within legislative timescales. Such a response would adversely impact the protected group identified.

## **9. Other corporate implications**

9.1 In not complying with the LGSCO's recommendations, the Council may be considered as one that does not uphold the Human Rights of people who lack mental capacity in sufficient regard.

9.2 Additionally, people who see the report may believe that they or their loved ones have been unfairly deprived of their liberty and may come forward to seek remedy from the Council. The DOLS team will monitor the any financial impact in relation to the cost of reviewing cases and any potential remedy if complaints are received by the Council. Members will be kept informed.

## **10. Conclusion**

10.1 Officers believe that it is not possible for the Council to comply with the recommendations noted in paragraph 1.2 and bullet 1 and 2 in paragraph 1.3. The availability of BIAs is limited within KCC and more broadly across the South East. This is exacerbated by the ongoing number of applications received by the service. The impact of complying with the recommendation would serve to increase the risks of the deprivation of liberty and human right breaches as it would place a significant burden on an already fragile system.

10.2 Members should note that there will be ongoing scrutiny for the work undertaken by the DOLS team. The team will submit regular reports and updates to the Kent and Medway Adult Safeguarding Board to report the DOLS position for scrutiny and challenge. The DOLS work also remains on the Council's risk register.

10.3 Managing the demand for DOLS continues to be a national challenge since the Cheshire West judgment in 2014. The impact of the LGSCO recommendations will mean that in addition to the ongoing and rising demand, approximately 15,000 applications would fall under the remit of the review, placing untenable demands on the already highly burdened system.

10.4 There has been substantial investment made by the Council to meet its legal obligations since the Cheshire West Judgment through Project DOLS which saw the Council invest £1.54 million in services. Furthermore, in Quarter 4 of 2020/2021, £225,000 of Winter Pressures funding was agreed with a further £225,000 in Q1 of 2021/2022 agreed. All of which in addition to wider service



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