

Cabinet – 16 September 2009

Implementation of Safeguarding Policy (Mental Capacity Act)

Portfolio:	Councillor McCracken, Social Care, Health and Housing
Service:	Social Care and Inclusion
Wards:	All
Key decision:	Yes
Forward plan:	Yes

1. Summary of report

This report introduces a policy that ensures that all staff working within Walsall Council and Walsall NHS Trusts are aware of and function in accordance with the requirements and legal framework of the Mental Capacity Act (2005) as amended by the Mental Health Act (2007) in regard to Deprivation of Liberty Safeguards (DOLS).

The core principles of this policy also link with the Walsall Council Corporate Plan 2009/10, with reference to ensuring citizens are safe and secure.

2. Recommendations

- 2.1 That the Cabinet supports and endorses the proposed policy relating to Deprivation of Liberty Safeguards (DOLS).
- 2.2 That the Cabinet support and approve the joint supervisory arrangements of the DOLS Project Manager that will be included within the Section 75 agreement with Dudley and Walsall Mental Health Partnership NHS Trust. The signatories to this agreement be delegated by the Executive Director, Social Care and Inclusion in consultation with the portfolio holder.

3. Background information

- 3.1 This policy is being introduced to comply with the requirements of the Mental Health Act amendments (2007) with specific reference to the Deprivation of Liberty Safeguards (DOLS). All councils are required to have a policy in place.
- 3.2 These amendments strengthen the protection of a very vulnerable group of people and address human rights incompatibilities by introducing deprivation of liberty safeguards for people who lack capacity to decide about their care or treatment, and who are deprived of their liberty to protect them from harm.

- 3.3 A comprehensive legal framework is now in place supporting this legislation that determines whether a person can legally be deprived of their liberty in their best interests and in order to prevent them from harm and is shown to be the least restrictive alternative.
- 3.4 This legislation was introduced with a degree of urgency in April 2009, as it was omitted from the Mental Capacity Act (2005).
- 3.5 This proposed policy has been discussed and developed at the Multi Agency Deprivation of Liberty/Mental Capacity Act Steering Group and agreed for forwarding to Cabinet for approval.

4. Resource considerations

- 4.1 **Financial:** Although investment is required to develop and maintain the infrastructure required to support an effective deprivation of liberty operational policy, funding is contained within existing multi-agency budgets.
- 4.2 **Legal:** External legal advisors have been retained for this matter but it has been requested that internal lawyers are kept apprised of progress.
- 4.3 **Staffing:** There are no direct employment issues as staff are currently employed by Dudley and Walsall Mental Health Partnership Trust. A joint supervisory relationship arrangement is contained within the overarching Section 75 agreement, currently being developed with Dudley and Walsall Mental Health Partnership Trust. All new job descriptions will refer to the policy and in addition all new starters to the service will be briefed on the policy during their induction period.

5. Citizen impact

Having a properly managed policy and supporting procedures in place will ensure that citizen's human rights and civil liberties are protected in line with legislative requirements.

6. Community safety

Amongst those who are deprived of their liberty there are community safety issues and risks that need addressing. By following the policy and procedural guidance it ensures that all are protected.

7. Environmental impact

No direct environmental implications.

8. Performance and risk management issues

- 8.1 **Risk:** It is a regulatory requirement to have a policy in place. Not having a robust policy will also expose the council to a judicial challenge.
- 8.2 **Performance management:** There are no specific performance indicators that relate to this, but there will be a monitoring process that reports to the Multi Agency Adult Protection Committee.

9. Equality implications

There has been an equality impact assessment completed to ensure that this policy supports the equality and diversity commitment of the local authority.

10. Consultation

This is a policy that will operate across the main partner agencies and appropriate consultations have taken place (see listings on page 2).

Background papers

This is a policy that directly links to new legislation. A full listing of the associated documents that were used to help develop this are contained in the references section on page 13.

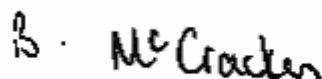
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David Martin
Executive Director

Date: 7 September 2009



Councillor Barbara McCracken
Portfolio holder

Date: 7 September 2009

Deprivation of Liberty Safeguards (DOLS) (Overarching policy)

August 2009

CONTRIBUTION LIST

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Changes since previous version:

- Draft document prepared in-line with best practice and amendments to Mental Capacity law
- Removal of Dudley & Walsall Mental Health Partnership Trust in Target audience.

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1. Introduction

- 1.1 The purpose of this policy is to ensure that all staff working within Walsall NHS Trusts and the Council are aware of, and function in accordance with, the requirements and legal framework of the Mental Capacity Act (2005) as amended by the Mental Health Act (2007) with reference to Deprivation of Liberty Safeguards (DOLS).
- 1.2 It addresses the key principles of the Mental Capacity Act (2005) and the deprivation of liberty safeguards addendum. The roles and responsibilities of key members of staff involved in the delivery and monitoring of the Act and local sources of information and guidance concerning the Act.
- 1.3 The Mental Health Act amendments 2007 that received Royal Assent in July 2007, as well as amending the Mental Health Act 1983, was used as the vehicle for introducing deprivation of liberty safeguards into the Mental Capacity Act 2005.
- 1.4 The amendments to the Mental Capacity Act 2005 both strengthen the protection of a very vulnerable group of people, and tackle human rights incompatibilities, by introducing deprivation of liberty safeguards for people who lack capacity to decide about their care or treatment, and who are deprived of their liberty to protect them from harm, but who are not covered by the Mental Health Act 1983 safeguards.
- 1.5 Deprivation of a person's liberty is a very serious matter and should not happen unless absolutely necessary, and in the best interests of the person concerned.
- 1.6 This change to the law will provide a comprehensive legal framework to determine whether a relevant person can legally be deprived of their liberty in their best interests and in order to prevent them from harm and is shown to be the least restrictive alternative.
- 1.7 In light of the legislative change this local policy, referred to as the Deprivation of liberty safeguards (DOLS) overarching policy has been developed within and for Walsall NHS organisations and Walsall Council to broadly outline how staff will respond and comply with all aspects of the legislation and its Code of Practice.
- 1.8 It is identified that this overarching policy is required to ensure that anyone who requires assessment in relation to DoLS is dealt with consistently and in line with the legislation and the Code of Practice.
- 1.9 It is further identified that, over time, this overarching policy, and local practice, will be supported by a comprehensive range of additional local policy documents and guidance which shall serve to provide staff with additional information and direction concerning specific aspects of the legislation.

2 Scope

- 2.1 This overarching policy document applies across the whole of Walsall NHS organisations and Council and must be referred to in all circumstances where the Deprivation of Liberty Safeguards are used or considered.
- 2.2 The policy applies to all situations where a deprivation of liberty may apply or be proposed and the relevant person:
- Is 18 years or over
 - Has a mental disorder
 - Lacks capacity to consent to their care and/or treatment in a hospital or care home
 - Is not detained in hospital under the Mental Health Act 1983
 - Does not have an alternative valid and applicable decision making authority that conflicts with the proposal
 - And, that the proposed deprivation of liberty is necessary to enable them to receive treatment or care in their best interests, to protect them from harm and is proportionate to the risk of that harm (the least restrictive option).
- 2.3 An authorisation issued under DoLS is based on 6 assessments which address the criteria listed at 2.2 above:
- Age assessment
 - Mental health assessment
 - Mental capacity assessment
 - Eligibility assessment
 - No refusals assessment
 - Best interests assessment
- 2.4 The deprivation of liberty safeguards are not a means to authorise poor practice, and should abuse or neglect be suspected Adult Protection procedures should be followed
<http://www.walsall.gov.uk/adultprotproceduresnewapproc06.pdf>

3 Definitions

Term	Meaning
AMHP - (Approved mental health professional)	A qualified professional who is either a social worker, nurse (in mental health or learning disability), occupational therapist or clinical psychologist, with additional training to be 'approved'.
Authorisation	The process of putting safeguards in place to protect the individual from harm and in their best interest.

Term	Meaning
Best Interests Assessor	The person who carries out the Best Interests Assessment (and up to 4 others). A professional, not a doctor, with special experience and training.
Care Quality Commission	New inspection body comprised of Commission for Social Care Inspection (CSCI), Health Care Commission (HCC) and the Mental Health Act Commission (MHAC), operational April 2009.
DOLS	Deprivation of Liberty Safeguards
Eligible Person	Someone who can require the Supervisory Body to carry out a review: The relevant person, their representative or the managing authority. This can also be a third party, but they should approach the managing authority in the first instance.
IMCA	Independent Mental Capacity Advocate – specially trained advocates for the MCA DOLS
Manager	The person designated, within the managing authority, as responsible for deciding whether a relevant person may be or actually is being deprived of their liberty.
Managing Authority	The person registered under part 2 of the Care Standards Act 2000 who is responsible for applying for authorisation under DOLS. This role can be delegated and in many cases will be the manager of the care home.
Mental capacity	The ability to make a decision
MCA	Mental Capacity Act 2005
Mental Health Assessor	The person who carries out the Mental Health Assessment (and possible up to 2 others). A doctor with expertise in mental health.
Relevant Person	A person, such as the resident, service user or patient, who is subject to assessment and authorisation under DOLS
Representative	A person appointed by the Supervisory Body to support and represent the relevant person.
Section 12 (s12) doctor	A doctor approved to assess mental disorder under the Mental Health Act.

Term	Meaning
Supervisory body	These are the Primary Care Trust (PCT) and Local Social Services (LSSA) who receive DOL requests, commission the DOLS assessments, grant or decline authorisations.

4 Principles

- 4.1 A lack of capacity cannot be established merely by reference to a person's age or appearance, or a condition, or an aspect of behaviour, which might lead others to make unjustified assumptions about the person's capacity.
- 4.2 The deprivation of liberty safeguards should not impact in any different way on different racial or ethnic groups, and care should be taken to ensure that the provisions are not operated in a manner that discriminates against particular racial or ethnic groups. It is up to managing authorities and supervisory bodies to ensure that staff are aware of their responsibilities in this regard and of the need to ensure that the safeguards are operated fairly and equitably.

The deprivation of liberty safeguards are in addition to the safeguards set out in the Mental Capacity Act 2005. This overarching policy draws attention to the 5 principles set out in Section 1 of the Act. These 5 principles should underpin all actions taken in relation to the deprivation of liberty safeguards.

These 5 principles are: -

- A person must be assumed to have capacity to make a decision unless it is established that they lack the capacity to make that decision.
- A person is not to be treated as unable to make a decision unless all practicable steps to help them to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- An act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in their best interests.
- Before an act is done, or decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

5 Working within the Act

- 5.1 All Walsall NHS Trust and Council staff will at all times follow both the word and the spirit of the Mental Capacity Act 2005 as amended by The Mental Health Act 2007, have regard to it's Code of Practice and follow the detailed guidance contained in the attached procedure documents.

- 5.2 In taking actions and/or decisions under the Act all staff will follow the requirement to consider the 5 principles.
- 5.3 Section 5 of the MCA offers staff protection from liability for acts in connection with care or treatment if
- a) before doing the act, staff take reasonable steps to establish whether the person lacks capacity in relation to the matter in question and
 - b) when doing the act staff reasonably believe
 - i) that the person lacks capacity in relation to the matter, and
 - ii) that it will be in the person's best interests for the act to be done.
- 5.4 Nothing in section 5 excludes a person's civil liability for loss or damage, or staffs criminal liability, resulting from their negligence in doing the act.
- 5.5 Section 6 of the MCA says restraining a person may receive protection from liability if staff reasonably believe that it is necessary in order to prevent harm to the person and that it is a proportionate response to
- a) the likelihood of the person suffering harm, and
 - b) the seriousness of that harm – see MCA code of practice.
- 5.6 Under no circumstances must deprivation of liberty be used as a form of punishment, or for the convenience of professionals, carers or anyone else. Deprivation of liberty should not be extended due to delays in moving people between care or treatment settings, for example when somebody awaits discharge after completing a period of hospital treatment.

6 Corporate Procedures/responsibilities

- 6.1 Responsibility for the implementation of the Mental Capacity Act (2005) and the Deprivation of Liberty Safeguards lays with the Trust Board for NHS organisations and for Local Authorities the Council.
- 6.2 Each organisation has established a Scheme of Delegation that enables officers (staff) to carry out certain functions on its behalf.
- 6.3 The supervisory bodies in Walsall have established a Mental Capacity Act/DoLS Monitoring Committee to oversee the implementation of the Act across the borough. The committee provides reports to the executive of each supervisory body.
- 6.4 The committee will receive reports on activity and ratify procedures and guidance regarding the implementation of the legislation. They will be multi-agency bodies with wide stakeholder representation and will seek to ensure that staff implement the Act lawfully and with regard to the Code of Practice.

7 Key Staff Roles and Responsibilities

- 7.1 There are a number of key roles and responsibilities outlined throughout the deprivation of liberty safeguards and its Code of Practice, such key roles include: Managing Authorities

(hospitals and care homes registered under part 2 of the Care Standards Act (2000)), Supervisory Bodies (PCT's and Local Authorities (Councils)), Mental Health Assessor and Best Interest Assessor. For further detailed guidance and information in respect to these roles please refer directly to the Act, including the regulations and the Code of Practice.

<http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm>

- 7.2 The Supervisory bodies agreed to have a single point of access for DoLS and have contracted with Dudley and Walsall Mental Health Partnership NHS Trust, via the Mental Health Act Administration department (medical records DOLS team), to provide the administrative role – see appendix 1 p. 15. However Supervisory bodies (PCT and Council) will retain the authorising role and will identify appropriate staff to undertake this function.

Managing Authorities

- 7.3 A managing authority has responsibility for identifying anyone who is planned to be or is being deprived of his or her liberty in a hospital or care home and to make a request for an authorisation.
- 7.4 It is the managing authorities duty to inform the relevant person and their representative of their rights and to support the relevant person throughout the deprivation of liberty assessment process.
- 7.5 For NHS hospitals the managing authority is the NHS body responsible for running the hospital.
- 7.6 For a care home or private hospital the managing authority will be the person registered under part 2 of the Care Standards Act 2000 for that home or hospital.

Supervisory Bodies

- 7.7 Supervisory bodies consider requests for authorisations, commission assessments and where appropriate authorise assessments.
- 7.8 Supervisory bodies will instruct appropriate mental health (MH) and best interests assessors (BIA) assessors in line with department of health regulations and requirements.
- 7.9 Supervisory bodies are responsible for instructing an Independent Mental Capacity Advocate (IMCA) where required in line with DOLS requirements and appoint the relevant person's representative.
- 7.10 For hospitals the supervisory body is the commissioning PCT. If the relevant person is self/private funded the supervisory body is the local PCT for the area in which the hospital is sited.
- 7.11 For care homes the supervisory body is usually the funding Local Authority. If the person is self/private funded or of no fixed abode the supervisory body is the local authority where the care home is sited.

Mental Health Assessors

- 7.12 There are 6 assessments required for DoLS (see 2.3) and the mental health assessor will undertake at least one of these – the mental health assessment. The mental health assessor may also carry out the eligibility assessment if they are a Section 12 doctor.
- 7.13 A mental health assessor must be a doctor who is approved under section 12 of the Mental Health Act 1983, or a registered medical practitioner with a minimum of 3 years post-registration experience in the diagnosis and treatment of mental disorder. In addition before undertaking assessment all doctors would need to have completed standard training for DoLS mental health assessments.

Best Interest Assessors

- 7.14 The best interests assessor can be an Approved Mental health Professional (AMHP), mental health or learning disability nurse, occupational therapist or clinical psychologist, with relevant experience in mental disorder and who have completed the required best interest assessor training.
- 7.15 All best interests assessors can undertake 4 of the 6 required assessments apart from the mental health assessment and the eligibility assessment. Best interests assessors who are also Approved Mental Health Professionals can undertake the eligibility assessment.
- 7.16 AMHP's are approved by the Local Social Services Authority (LSSA) which will maintain a register of those approved to act on their behalf. The role of the AMHP is to provide a counterbalance to the medical Model and provide a view independent of that held by Doctors or other professionals. In this respect, the LSSA has a duty to protect the independence of the AMHP role and ensure that AMHPs are supported in this.
- 7.17 All best interests assessors are to provide an independent view and the Supervisory bodies have a duty to protect that role.
- 7.18 The best interest assessor will firstly establish whether a deprivation of liberty is occurring, or is going to occur and, if so:
- It is in the best interests of the relevant person
 - It is necessary to prevent that person harm, and
 - Deprivation of liberty is a proportionate response to the likelihood of the person suffering harm and the seriousness of that harm.

8 Standards for practice

- 8.1 As previously identified within this overarching policy all staff within the organisations to which this policy applies are expected at all times to act lawfully and within the spirit of the Act by:
- Taking heed of the Codes of Practice (MCA and DOLS)

- Following procedures/guidance and flowcharts developed to support the implementation of the Act
- Maintaining the required competence for roles undertaken
- Employing the 5 principles in their decision making in relation to the Act
- Following the Adult Protection procedures where there is a suspicion of or evidence of abuse
- Referring to other legislation/guidance as detailed in the above summary sheet under National and local documents

9 Links with Standards for Better Health Domains

9.1 The policy links with the following standards for Better Health

- Clinical & Cost Effectiveness – C5, C6 (D2a,b,c)
- Governance - C7c & e, C8, C9, C10, C11a & b (D5b, D6)
- Patient Focus - C13, C14, C16 (D8)

10 Training

- 10.1 Best Interest Assessors are required to complete specific training before being eligible to undertake this role.
- 10.1 Mental Health Assessors must be appropriately qualified doctors and have undertaken specific training in deprivation of liberty safeguards.
- 10.2 All assessors will be required to undertake further training on an annual basis and supervisory bodies will keep up to date registers of all assessors.
- 10.3 Supervisory Bodies will ensure that their workforce is adequately trained for DoLS, this training will be supported by local steering groups.
- 10.4 Training will be provided for all new staff and as updates for existing staff as required in conjunction with Mental Capacity Act training.

11 Legal and Professional Issues

- 11.1 As previously mentioned within this overarching policy, all staff have a legal requirement to abide by the Mental Capacity Act (2005).

- 11.2 The Codes of Practice and the Regulations provide assistance to staff in their use of the Act, as do the procedures attached to this policy.
- 11.3 Further advice on the Act is available from Mental Health Act Administration DOLS Team at Dorothy Pattison Hospital, Walsall (see appendix 1)

12 Documentation and Record Keeping

- 12.1 Standard forms are available free of charge from the Department of Health.
- 12.2 Walsall PCT and Council have agreed to use these standard forms.
- 12.3 In the event that any staff member is unsure whether or not they have the appropriate form they must check with Mental Health Act Administration DOLS team.
- 12.4 While a person is subject to DoLS all original forms should be filed in Mental Health Act Administration departments with copies provided to the managing authority, the relevant person, their representative and all interested persons named by the BIA, including any involved IMCA.
- 12.5 Where a managing authority issues an urgent authorisation it should forward the original form to the Supervisory Body, with a request for a standard authorisation, and retain copies of both forms.
- 12.6 All records will be maintained safely and securely in line with the Data Protection Act 1998.

13 Audit and Monitoring

- 13.1 Each Supervisory Body will submit quarterly minimum data set reports to the Department of Health. DoLS administration will provide this data from the local database.
- 13.2 The Care Quality Commission will include data reports on DoLS in its annual reports and will have responsibility for the inspection process as part of their monitoring role for care homes and hospitals
- 13.3 The inspection will:
- Monitor the manner in which deprivation of liberty safeguards are implemented by:
 - i) visiting hospitals and care homes
 - ii) interviewing people accommodated there
 - iii) requiring production of relevant records
 - have the power to require supervisory bodies and managing authorities to disclose information to them

- look at protocols and procedures in place and evaluate their effectiveness

13.4 Local multi-agency monitoring groups will continue to meet on a regular basis and receive reports on activity, costs and practice issues.

13.5 Representation will be maintained at the regional administrators group and practice support forum.

14 References

The Mental Health Act (1983) as amended by The Mental Health Act (2007)

Available at :

http://www.dh.gov.uk/en/Healthcare/NationalServiceFrameworks/Mentalhealth/DH_4001816

Mental Capacity Act (2005)

Available at:

<http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityAct2005/index.htm>

The Code of Practice for the Deprivation of Liberty Safeguards, supplemental to the Mental Capacity Act (2005) Code of Practice

Available at :

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

Code of Practice for the Mental Capacity Act (2005)

Available at:

<http://www.dca.gov.uk/menincap/legis.htm#codeofpractice>

The Deprivation of Liberty Safeguards Regulations and Secondary Legislation

Available at :

http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/DH_084948

DOLS team and Support Contacts

**DOLS Team– medical records,
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Appendix 2: Equality Impact Assessment Tool

To be completed and attached to any procedural document when submitted to the appropriate committee for consideration and approval.

Title of the policy/guidance:	DEPRIVATION OF LIBERTY SAFEGUARDS	
	Yes/No	Comments
1 Does the policy/guidance affect one group less or more favourably than another on the basis of:		
Race	NO	
Ethnic origins (including gypsies and travellers)	NO	
Nationality	NO	
Gender	NO	
Culture	NO	
Religion or belief	NO	
Sexual orientation including lesbian, gay and bisexual people	NO	
Age	YES	Only applicable to those aged 18 and over
Disability - learning disabilities, physical disability, sensory impairment and mental health problems	YES	Only applicable to those who lack capacity to understand that they need to receive care and/or treatment in a registered care home or hospital and have a mental disorder. DOLS will have a positive impact on disability equality. It provides important safeguards for people who lack capacity to consent to the arrangements made for their care or treatment.
2 Is there any evidence that some groups are affected differently?	YES	As above – as the DOLS addendum to the MCA is specifically designed to protect those aged 18 and over who lack capacity.
3 If you have identified potential discrimination, are any exceptions valid, legal and/or justifiable?	YES	The MCA and DOLS addendum provide a legal framework for depriving the individual of their liberty and give that person rights within the Act
4 Is the impact of the policy/guidance likely to be negative? (If no, please go to question 5.)	NO	

If so can the impact be avoided?		
What alternatives are there to achieving the policy/guidance without the impact?		
Can we reduce the impact by taking different action?		
5 Health inequalities	NO	
6 Please consider the following questions relating to Human Rights Act:		
Will it affect a person's right to life? Will someone be deprived of their liberty or have their security threatened?	NO YES	The purpose of the policy is to ensure that deprivation follows the legal framework of the DOLS. It brings England & Wales into line with the ECHR with regard to the circumstances in which a person who lacks capacity to consent to the arrangements made for their care and treatment, and who is not detained under the MHA 1983, may be deprived of their liberty within the meaning of Article 5 of the ECHR.
Could this result in a person being treated in a degrading or inhuman manner?	NO	
Is there a possibility that a person will be prevented from exercising their beliefs?	YES	Safeguards are in place to protect the person's beliefs, by working in the person's best interest, on occasions this may mean that all their beliefs can not be followed for the period of the deprivation.
Will anyone's private and family life be interfered with?	YES	This could happen if it is assessed as being in the person's best interest.

If you have identified a potential discriminatory impact of this procedural document, please complete Impact Assessment Action Plan identifying the action required to avoid/reduce this impact.

For advice in respect of answering the above questions, please contact the Equality and Diversity Manager.

Is further detailed impact assessment required? No

If yes, please detail how this is to be processed and by whom

The Department of Health completed a National impact assessment for DoLS Title: ***"Impact assessment of the MCA 2005 deprivation of liberty safeguards to accompany the Code of Practice and Regulations"*** which can be accessed at http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_084982

3 monthly data returns are required to be sent to the Department of Health, which include equality data and the DOLS process is monitored by the Care Quality Commission