GRAHAM CARE GROUP
GUIDANCE ON DEPRIVATION OF LIBERTY

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Introduction

1. You have asked me to summarise the position in relation to deprivation of liberty ("DOL") so that there is clarity for you and your staff in relation to the obligations and liability of Graham Care Limited and its associated companies, particularly in relation to deprivation of liberty safeguards ("DoLS").

2. The starting point is that DOL is based on Article 5 of the European Convention of Human Rights ("ECHR") which imposes obligations and sanctions on **the State** (including local authorities and CCGs) and not privately operated care homes and hospitals. There is established case law stating that private care homes for example are not "the State" for the purposes of the ECHR, as they merely contract with local authorities to provide care. Therefore local authorities remain primarily liable for any unlawful or unauthorised deprivation of liberty.

DoLS only applicable to your care home service users

3. Schedule A1 of the Mental Capacity Act 2005 ("MCA") introduced a streamlined procedure to enable local authorities to authorise deprivation of liberty for people lacking mental capacity who reside in a care home or in a private hospital. The DoLS procedure does not apply to tenants in supported living accommodation or to people residing in their own home where any deprivation of liberty can only be authorised by the Court of Protection under Section 16(2)(a) of the MCA.

4. The Supreme Court in the *Cheshire West* case has set the precedent of when deprivation of liberty arises. The case decided that a person ("P") will be deprived of his or her liberty for the purpose of Article 5 ECHR if: (i) P is unable to give his/her consent; (ii) P is under continuous supervision and/or control, and (iii) P is not free to leave. This is described in *Cheshire West* as the "acid test". All three conditions must be present for the acid test to be met.

5. Under the MCA, care home and independent hospital providers are obliged to apply to the relevant local authority for DoLS authorisations. In connection with such DoLS applications, local authorities are under increasing pressure, both in relation to human and financial resources, and cannot cope with the quantity of DoLS applications being made to them. This is particularly so because the *Cheshire West* decision, as outlined above, greatly increased the number of situations where a DoLS application is required.

6. Accordingly, most local authorities now adopt a "traffic light system" whereby they grade the severity of the deprivation of liberty on an increasing scale from green to red. It might therefore take some time for the relevant local authority to proceed with full consideration of the DoLS application. In such circumstances, I understand that some CQC inspectors have told care home providers that it is their duty to pursue the local authority until it proceeds with the relevant DoLS application. This is not correct and you are under no legal duty or obligation to do so. Your only obligation would lie in a situation where your original DoLS application has become more urgent because the nature of the deprivation of liberty has significantly increased, to the extent that, for example, it might have moved from a "green " to a "red" degree or urgency eg because the level of deprivation has increased due to a worsening in the challenging behaviour of the service user.

DOL in Supported Living – The Care Suites

7. As stated in 3 above, the DoLS procedure cannot be used in connection with deprivation of liberty in a supported living setting. A formal application should be made to the Court of Protection to authorise the deprivation of liberty. Please note that there is no legal obligation on the landlord or on the care provider to make such an application. As stated in 2 above, the obligations and sanctions in relation to DOL lie with the State ie the local authority. Therefore, if you deprive a service user of his/her liberty in a supported living setting, you should notify the local authority safeguarding department in the area where the supported living accommodation is situated, ie not the DoLS department. The local safeguarding team will then need to review the situation and decide whether the least restrictive mode of deprivation of liberty is being used. It then needs to make its own value judgment as to whether it needs to refer the matter to the Court of Protection for authorisation. For the record, as well as their not being an obligation on the care or hospital provider to apply to the Court of Protection, there is no obligation on the provider to be responsible for the local authority's costs in making that application.

This advice may be disclosed to CQC, safeguarding and commissioning authorities.

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