

12th May 2014

Agenda Item: 5

REPORT OF DEPUTY CORPORATE DIRECTOR ADULT SOCIAL CARE AND HEALTH AND PUBLIC PROTECTION

DEPRIVATION OF LIBERTY SAFEGUARDS

PURPOSE OF THE REPORT

1. This report seeks to inform members of a Supreme Court Judgment and what the implications of this may be for the authority.

INFORMATION AND ADVICE

2. The Deprivation of Liberty Safeguards is an amendment to the Mental Capacity Act 2005. The Mental Capacity Act allows restraint and restrictions to be used, but only if they are in a person's best interests. Extra safeguards are needed if the restrictions and restraint used will deprive a person of their liberty. These are called the Deprivation of Liberty Safeguards.
3. The Deprivation of Liberty Safeguards can only be used if the person will be deprived of their liberty in a care home or hospital. In other settings the Court of Protection can be asked if a person can be deprived of their liberty. Care homes or hospitals must ask the local authority if they can deprive a person of their liberty.
4. On the 19th March, the Supreme Court published its judgment in the case of P v Cheshire West and Chester Council and P and Q v Surrey County Council, which further defined the meaning of Deprivation of Liberty.
5. Whilst the ramifications of the judgment are still being explored it is clear that there are a number of implications for the local authority in respect to resource utilisation, policy and practice.

What now constitutes a deprivation of liberty?

6. The Supreme Court has clarified what is known as the "acid test" that a person is deprived of their liberty if:

"The person is under continuous supervision and control and is not free to leave and the person lacks capacity to consent to these arrangements"

7. The effect of this change in test is that a much greater number of people in registered care homes (residential homes, nursing homes) and hospitals come under the Deprivation of Liberty Safeguards (DoLS) than previous case law indicated, and by law they must now be assessed under the DoLS procedure.
8. The DoLS procedure includes assessment by specially trained staff, that is, a Best Interests Assessor (BIA) and a doctor specifically trained in DoLS. The local authority has a statutory duty to make sure that the DoLS process is followed and that these assessments are undertaken within the legal timescales.
9. The Supreme Court has also clarified that Deprivation of Liberty can occur in domestic settings if the State (e.g. the Local Authority or NHS) is responsible for the arrangements. This means that a person could be deprived of their liberty in their own home, or in supported living. These Deprivations of Liberty do not come under the DoL Safeguards, but do have to be assessed with the same rigour and would have to be authorised by the Court of Protection.
10. This all means that assessments will now need to be done on a greatly increased scale compared with previous practice. The value of the safeguards will be severely compromised if the process for assessment becomes an administrative and bureaucratic adjunct to the wider Health and Social Care assessment and review processes. It is hard to see how this can in fact be avoided, if practitioners are to ensure that people who lack capacity with regard to decision making around accommodation receive a timely service.

- (1) **Registered care home and hospital settings:** For every admission into a registered care home or hospital for a person who lacks, or may lack capacity to make a decision in this regard, an assessment will need to be carried out by a BIA and an appropriately trained doctor. The capacity to do this is not in place. To implement the DoLS procedures correctly would run the risk of delaying treatment and paradoxically putting the patient at risk of harm.

The same would apply with hospital discharge to step down facilities, respite care and long term residential care. Again, if the DoLS procedures are to be implemented properly, within the current resources, hospitals would quickly become log-jammed and the system would collapse.

- (2) **Respite care and residential college:** for adults who lack capacity, they would need to be subject to a fresh assessment upon each and every admission/new term. Such a process would run the risk of becoming a paper exercise, adding no value but adding cost and professional time
- (3) **Supported Living:** Individuals who lack capacity, and are under continuous supervision and control, and are not free to leave will now need to be assessed and referred to the Court of Protection. The language of the court application process is adversarial and involves the Local Authority taking an action against the person, to deprive them of their liberty. The individual will also be entitled to legal aid to have a solicitor appointed for them, presumably so that they can contest what everybody wants for them as being in their best interests. A perverse consequence of the current situation is that supported living no longer becomes a realistic option, with a return to residential care as the main community care default service.

Analysis

11. It is clear that no local authority in the country will be able to meet the requirements that this change in Deprivation of Liberty definition places on them. In effect, every Local Authority will not be meeting its statutory obligations, and each Council will have to decide how closely they can meet with them, given the current constraints of cost, staff resources and the scarcity of doctors who are qualified to undertake assessments.
12. To begin to understand the potential volume of referrals it is helpful to consider the amount of provision and those using it that may lack capacity to make decisions in relation to their care.

Care Setting	Numbers
Older Adults Residential and Nursing Homes based on the total number of beds at care homes who take people with dementia	5,000
Hospitals	500*
Supported Living accommodation	850
Younger Adults Inc. Learning and Physical disability, Autism, Mental Health	1000
Domiciliary (ie own home)	500**

*These numbers are pure estimations and this number could be far greater (or far less).

** This is an area requiring further interpretation. At this stage our assumption is that where individuals are being cared for within their own homes by close family members and without paid carer support, it will not be necessary to carry out an assessment

13. **NB:** These figures are estimates and obviously not all of these will lack capacity. Therefore, there is further work to be undertaken to ascertain which people we might need to assess. However, there will clearly need to be some work undertaken to understand the scale of the issue to ensure we have the relevant resources to deal with these referrals.
14. Of those who may require assessment, we know that 10% of people in care homes who have previously been assessed will require reassessment under the new guidance. In addition, as the new guidance is less restrictive and more encompassing, we may estimate that a further 10% of people will require assessment. Therefore we need to assess and potentially make provision for 1200 assessments. It follows therefore that we will have a recurrent responsibility to review any of those individuals who meet the DoLS criteria.
15. We are aware that one of our largest supported living providers is seeking legal advice following the Supreme Court Judgement. People in Supported Living and other domiciliary environments cannot have their assessments authorised by the local authority but must be referred to the Court of Protection. We may assume that 20-30% of these individuals will also require assessment and court decision; this could equate to 250 assessments per year.
16. It is difficult to estimate the number of assessments which may be required for people entering hospital for treatment and therefore we can only make a best guess at this stage but it would be prudent to suggest at least 250 to 500 assessments will be required

17. Respite care is currently provided to over 300 families per year within local authority managed short breaks services and additional respite care is provided to older adults and adults with disabilities in the independent sector. If fresh assessments are required on each admission of over three days then it may be determined that between 300 and 500 assessments would be required

Capacity Requirements

18. We currently undertake about 185 assessments per year with our current staffing and the Supported Living cases would not need a trained BIA. Therefore the working hypothesis is we may need to undertake an additional 2000 DoLS assessments per year.
19. This tenfold increase in activity will require additional staffing and financial resources to ensure the authority can meet its statutory obligations. It may be that the Government may determine that legislative changes are required and over time further guidance will be developed, however in the immediate, short term and medium term the Council needs to ensure sufficient capacity is in place.

Additional staffing costs

20.

Mental Health Assessors (£196.00 per assessment plus travel)	£390,000
An additional FTE Team manager and 12.5 FTE BIAs – this is based on undertaking 160 assessments per year. This has been worked out by assuming four assessments per week over a 40 week period (i.e. full year minus annual leave, bank holidays and sickness absence)	£675,000
Additional business support	£100,000
Management 1 FTE Group Manager /Principal Social Work post	£65,000
An additional Legal Practitioner will be required to undertake the increased volume of cases referred to the Courts and to deliver advice and guidance on matters relating to the DoLS	£50,000
Additional workforce development, training and accommodation costs	£40,000
TOTAL	Approximately £1,320,000

Supported Living/Domiciliary Care

21. Supported Living cases would need to go to the Court of Protection to have their DoLS authorisation granted. Each case will require an application fee to the Court and an additional cost of authorisation which together amount to £1,000.00 per individual.
22. In complex cases where families, providers or others contest the application, there can be very significant legal costs incurred of up to £30,000.00 per case.

23. Therefore if we assume that 90% of cases will be straightforward and 10% may require additional legal requirements we may estimate:

25 x £15,000	=	£375,000
225 x £1,000	=	£225,000
Total Court fees and costs=		£600,000

The total cost to the authority to implement the Supreme Court Judgement (noting the conservative estimates of numbers requiring assessments) may therefore be in excess of £1.8m.

24. The Council currently employs 41 FTE BIAs , of whom 9 are not currently in practice, 7 are not able to practice due to other commitments, and a further 5 are absent from the workplace.

25. Due to the large increase in activity anticipated, it is not thought possible to distribute out the work across the department as was proposed through the recent consultation on the budget and agreed by members at Council in February. Therefore a central BIA team will be required to provide assessment capacity backed up with a locality based rota of staff. This model is tried and tested in relation to Mental Health Act Assessment activity where similar numbers of referrals and assessments may be required.

26. In order to manage the new central BIA team it is suggested that a post of Group Manager Principal Social Work post is established the post would be a new post and subject to job evaluation. The post would be responsible for managing the central BIA team, and the Central Approved Mental Health Professional team alongside other duties in relation to Social Work practice and policy as required by the Munro Report.

OTHER OPTIONS CONSIDERED

27. If there was availability, we could buy in BIAs at a cost of £600 per assessment but this would be more costly.

- (1) Total to undertake the BIA work - approximately £1,200,000
- (2) Plus the same level of Mental Health assessors, business support and some of the management costs and training/accommodation costs – an additional cost of around £550,000
- (3) Plus the Supported Living/Domiciliary Care costs of £600

= **approximately £2,350,000**

REASONS FOR RECOMMENDATIONS

28. In order to ensure the County Council is working toward compliance with the law in responding to the new test for Deprivation of Liberty, it will be necessary to take action in the immediate, short, and medium term. In the longer term it is assumed that the Government will need to make a response both to the Judgment of the Supreme Court and the House of Lords report on the implementation of the Deprivation of Liberty Safeguards.

STATUTORY AND POLICY IMPLICATIONS

29. This report has been compiled after consideration of implications in respect of crime and disorder, finance, human resources, human rights, the NHS Constitution (Public Health only), the public sector equality duty, safeguarding of children and vulnerable adults, service users, sustainability and the environment and ways of working and where such implications are material they are described below. Appropriate consultation has been undertaken and advice sought on these issues as required.

CRIME AND DISORDER IMPLICATIONS

30. None

FINANCIAL IMPLICATIONS

31. The total cost to the authority to implement the Supreme Court Judgment (noting the conservative estimates of numbers requiring assessments) may be in excess of £1.8m. The department will need to identify a contingency sum to provide temporary financial resources to deliver services to meet the new requirements. In 2014/15 it is estimated that £500K will be required.

HUMAN RESOURCES IMPLICATIONS

32. It is proposed to establish a temporary team to consist of

- FTE Group Manager/ Principal Social Worker (to be evaluated) the posts will be allocated authorised car user status
- FTE Team Manager – Band D the posts will be allocated authorised car user status
- 12.5 FTE BIA Assessors (Band C or Band B) the posts will be allocated authorised car user status
- 5 FTE Business Support Officer (Grade 3)

1. Due to the uncertainty of the demand and activity level in relation to the impact of the judgment. it is proposed initially to recruit to 6 of the BIA posts , 5 business support posts, 1 team manager post and the group manager post all of which will be subject to an ongoing review.

HUMAN RIGHTS IMPLICATIONS

33. Deprivation of liberty legislation arises from the “Bournewood” case which was heard by the European Court of Human Rights. The case decided that where a person is deprived of their liberty without any legal authority then it is a breach of Article 5 of the European Convention of Human Rights: “No one should be deprived on their liberty unless it is prescribed by law”. Therefore, when a person needs to be deprived of their liberty there must be safeguards in place in order to ensure we uphold their human rights

SAFEGUARDING OF CHILDREN AND VULNERABLE ADULTS IMPLICATIONS

34. The value of the new safeguards will be severely compromised if the process for assessment becomes an administrative and bureaucratic adjunct to the wider health and social care assessment and review processes. It is hard to see how this can in fact be avoided, if practitioners are to ensure that people who lack capacity in regard to decision making around accommodation receive a timely service. There will need to be a balanced approach based on risk. Managers will need to ensure our experienced practitioners are not all taken away from safeguarding adults work to avoid any perverse and unintended consequences putting people at more risk of abuse or neglect. Where individuals are unlawfully deprived of their liberty it has been considered to be a Safeguarding Adults issue.

IMPLICATIONS FOR SERVICE USERS

35. Service users who do need to be deprived of their liberty will have protection to ensure it is undertaken in the least restrictive manner possible.

IMPLICATIONS FOR SUSTAINABILITY AND THE ENVIRONMENT

36. None

RECOMMENDATION/S

38. Committee are asked to

1. Note the contents of this report and have regard to the new test for Deprivation of Liberty safeguards and the increased demand on the resources of the local authority
2. Approve the establishment of a temporary central BIA service for a period of 12 months which will co-ordinate activity, undertake assessments and provide advice to managing authorities and the County Council. To include:
 - 1 FTE Group Manager/ Principal Social Worker (to be evaluated) the posts will be allocated authorised car user status
 - 1 FTE Team Manager – Band D the posts will be allocated authorised car user status
 - 12.5 FTE BIA Assessors (Band B or Band C) the posts will be allocated authorised car user status
 - 5 FTE Business Support Officer - Grade 3
3. Approve the use of additional legal services to support the potential increase in court related activity and requests for advice, guidance and interpretation of the law. This may be achieved in the short term through external provision with a view to increasing the in-house establishment in the medium term if demand is forthcoming.

4. Approve a Lean Plus review of the business support and administrative arrangements which support the process of application, authorisation and review.
5. Approve the Development of revised guidance and information for providers of social care and health services to aid understanding of the new test.
6. Receive a further report in six months to provide information to the Adult Social Care and Health Committee in relation to activity and resource demands.
7. Approve the request for a budget pressure allocation of £2m to meet the recurrent cost of implementation from 2015/16.

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For any enquiries about this report please contact:

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Constitutional Comments (LM 29/04/14)

39. The Adult Social Care and Health Committee has delegated authority within the Constitution to approve the recommendations in the report

Financial Comments (KAS 17/04.14)

40. The financial implications are contained within the body of the report, and summarised in paragraph 31.

Background Papers and Published Documents

41. Except for previously published documents, which will be available elsewhere, the documents listed here will be available for inspection in accordance with Section 100D of the Local Government Act 1972.

None

Electoral Division(s) and Member(s) Affected

- All