

**TO: HEALTH AND WELLBEING BOARD  
5 JUNE 2014**

---

**DEPRIVATION OF LIBERTY SAFEGUARDS: IMPLICATIONS OF SUPREME COURT  
RULING**

**Director of Adult Social Care, Health and Housing**

**1. PURPOSE OF REPORT**

- 1.1. To inform Health and Wellbeing Board of the potential implications of a recent Supreme Court Ruling in relation to the Deprivation of Liberty Safeguards.

**2. RECOMMENDATIONS**

- 2.1 That the potential implications for the Council are noted and**
- 2.2 that the Board agrees arrangements for ensuring appropriate availability of S12/DoLS doctors.**

**3. REASONS FOR RECOMMENDATIONS**

- 3.1 If the potential implications are not considered and planned for appropriately the Council is at risk of not meeting its statutory requirements in a safe and timely manner.

**4. ALTERNATIVE OPTIONS CONSIDERED**

- 4.1 The Council could encourage all providers to respond to the revised "definition" of deprivation of liberty immediately, rather than according to the staged approach we are suggesting. This would result in demand that cannot possibly be met within current resources, and in resources being diverted from other more urgent requirements, thus potentially placing people at risk.

**5. SUPPORTING INFORMATION**

**5.1. Background**

- 5.1.1. The Deprivation of Liberty Safeguards (DoLS) were developed as a result of the Bournemouth judgement in 2005. This situation related to a young man with profound learning disabilities and an autistic spectrum disorder. He was informally kept in hospital (i.e. not detained under the Mental Health Act) against the wishes of his family. The situation was considered through the Court of Appeal, House of Lords, and European Court of Human Rights, where it was finally determined that he had been unlawfully detained.
- 5.1.2. Part of the Mental Capacity Act 2005, but not implemented until 2009, DoLS are intended to ensure that people who lack capacity to consent to specific arrangements are not deprived of their liberty or restricted any more than is necessary, and that there are legal routes to challenge situations where it is felt that the level of deprivation is inappropriate. The specific arrangements have, until recently, related to people being accommodated in a Registered Care Home (including Nursing

Homes), or staying in a hospital, **for the purposes of receiving care or treatment.** This excludes people who are detained under the Mental Health Act, as this legislation affords them the appropriate protections.

- 5.1.3. The process for assessing whether a person is
- being deprived of their liberty, and
  - whether or not this is in their best interests, and
  - whether this is the least restrictive option available

is **very** prescribed, and many believe it to be overly bureaucratic. It involves specifically trained staff (Best Interests Assessors –BIAs- and S12 Doctors<sup>1</sup>), and specialist advocacy (Independent Mental Capacity Advocates).

- 5.1.4. From 2009, Local Authorities were the Supervisory Bodies (i.e. responsible for authorising Deprivations of Liberty) for people with local Ordinary Residence, in both Registered Care Homes, and in April 2013 assumed this responsibility in relation to Hospitals, the latter having previously been the responsibility of PCTs.
- 5.1.5. Further detail on the Mental Capacity Act and DoLS can be found on Boris, or provided on request.

## 5.2. Deprivation of Liberty

- 5.2.1. The level of restriction of freedoms and choices that amounts to “deprivation of liberty” has never been well defined, and has recently been subject to legal challenge. Broadly, what was happening until the recent Supreme Court rulings (*P v Cheshire West and Chester Council* and *P&Q v Surrey County Council*) was that whether or not a person was being deprived of their liberty was a judgement based on:
- Whether the level of restriction on a person’s freedoms were of such a level that they amounted to deprivation of liberty, and if so,
  - how reasonable/minimised the restrictions were.

Requests for DoLS authorisations were often triggered by extent to which a person appeared to disagree with, be unhappy with, or challenge through their behaviour, the restrictions placed upon them in order for them to receive the required care and support, or treatment.

- 5.2.2. However, the Supreme Court has now judged that exactly the same test of deprivation must be applied to all people regardless of their disability or lack of capacity, and makes reference to the level of intrusion that results from the care and support arrangements, irrespective of whether a person appears to object to them.

---

<sup>1</sup> S12 Doctors have specific responsibilities under Section 12 of the Mental Health Act, but with additional DoLS training.

## Unrestricted

"If it would be a deprivation of my liberty to be obliged to live in a particular place, subject to constant monitoring and control, only allowed out with close supervision, and unable to move away without permission even if such an opportunity became available, then it must also be a deprivation of the liberty of a disabled person. The fact that my living arrangements are comfortable, and indeed make my life as enjoyable as it could possibly be, should make no difference. A gilded cage is still a cage."

Baroness Hale

### 5.3. Implications

#### 5.3.1. People living in Residential Care Homes and Nursing Homes

- 5.3.2. The implication is that every person who lacks capacity to agree to being accommodated in a residential care home and/or to their care plan will now be considered to be deprived of their liberty, and therefore the processes for authorising deprivation must be followed. This will relate to many/most people with dementia or a severe or profound learning disability.
- 5.3.3. Cost/Resource implications will include See attached for further detail
- payment for S12 Doctors for every assessment undertaken
  - the time taken by Council employees (BIAs, Authorising officers etc.), and the recruitment and training of any additional BIAs that may be required
  - IMCA time for assessments and for ongoing involvement as the person's representative where appropriate. Currently, IMCA are commissioned through a low cost contract in partnership with the other Berkshire LAs, but this contract will not cover new the demand.
- 5.3.4. Deprivation of Liberty authorisations can only be for an absolute maximum of a year, after which the full process must be undertaken again. Should a deprivation be authorised for a shorter period, that authorisation cannot be ended or extended without the full process being undertaken.

#### 5.3.5. People receiving treatment in hospital

- 5.3.6. In addition to the current cohort of people, the NHS should now be applying to the Council for authorisation for deprivation of liberty for people who cannot consent to being in hospital or their treatment, because they are unconscious, unless they have given prior consent such as for elective surgery.
- 5.3.7. This might therefore involve people who are hospitalised for treatment following an incident that results in temporary or permanent loss of consciousness, such as a stroke or road traffic accident.
- 5.3.8. Many Acute Hospitals have not fully recognised or implemented their current obligations under the Mental Capacity Act, and it is not anticipated that it will be an easy task to ensure that they comply with the revised requirements.

#### 5.3.9. People living in the Community

- 5.3.10. Significantly, neither P nor P&Q in the Supreme Court cases above were

## Unrestricted

accommodated in Registered Care Homes, or in hospitals. This judgement therefore widened the concept of deprivation of liberty to all other accommodation and support arrangements. The current Deprivation of Liberty Safeguards **only** relate to people living in Registered Care Homes, or staying in hospital. Those living at home who may be receiving state arranged care support via a LA and whose liberty may be deprived currently will have to be subject to a S 16 MCA welfare application to the Court of Protection.

- 5.3.11. Any issues of decision making for people who lack capacity – wherever they live - are covered by the Mental Capacity Act 2005, and there are very carefully prescribed processes that must be followed. However, significant issues such as those circumstances where there is disagreement about what arrangements are in a person's best interests, or the appointment of Deputies or Power of Attorney must be referred to the Court of Protection for a decision. This will now include all people living in the community who are assessed as needing to be deprived of their liberty: subject to care arrangements that may be deemed intrusive, or who are unable to leave their homes alone, AND do not have capacity to agree to those care and support arrangements. This would include people in hospital who, for example, may be unconscious following a road traffic accident.
- 5.3.12. Where there has been any Council involvement in arranging or advising on care and support arrangements for a person, regardless of funding arrangements (excepting NHS funded support), the Council may be considered to be responsible for the deprivation, and therefore would have to ensure that appropriate authorisation processes are followed. This may be recharged to a person if they fund their own support.
- 5.3.13. Every referral to the Court of Protection involves significant preparation, and has a minimum cost of £400 (at 04/2014). In addition, the Court may decide to appoint an Official Solicitor and require the appointment of a range of independent practitioners (for example Social Worker or Psychiatrist) to carry out independent assessments to assist the Court to make a decision on what arrangements are in the person's best interests. The costs of such appointments are borne by the parties involved, and in the circumstances under consideration here, by the party seeking authorisation of the deprivation of liberty. This will either be the NHS or the Council, although depending on the outcome of the financial assessment, the person who is the subject of the Court referral may be required to pay themselves or refund the council if they are not eligible for Legal Aid.
- 5.3.14. The implications for families will be considerable, and may deter them from seeking support ,or making appropriate arrangements.
- 5.3.15. The Court of Protection is currently unable to meet demand arising from obligations prior to this ruling, and has already had to prioritise work. Meeting this additional demand would require a considerable increase in resource. They have advised that they will be issuing guidance "in due course", and proceedings have to determine the authority of the Court in relation to Deprivation of Liberty. .

### **5.3.16. Other**

- 5.3.17. There is significant concern nationally that the implications of this judgement are unworkable: the burden placed upon Councils and the NHS is significant, and the implications for families cannot be underestimated. The increase in Council involvement with people who fund their own support as a result of the Care Bill will increase this burden even further, as even advising families on how to support

## Unrestricted

people safely may result in involvement in a referral to the Court of Protection.

- 5.3.18. It is understood that the Department of Health have yet to consider the implications of these judgements, but until they do, and changes to the Mental Capacity Act and/or DoLS result, the Council is expected to implement the law as it has now been established.
- 5.3.19. It is already extremely difficult to find appropriately trained S12 doctors: the bulk of the referrals locally are currently undertaken by one doctor. There will be insufficient capacity to undertake the additional work required. Ensuring sufficient availability of appropriately trained doctors is an NHS responsibility, although it is unclear which part of the NHS, following the recent structural changes.

### 5.4. Resources

An analysis of the potential resource implications in relation to Deprivation of Liberty in registered care homes and the community has been undertaken. The CCG is assisting with a similar analysis for people in hospital. Unless there are changes to the arrangements as we currently understand them to be, the costs to the Council will be significant.

### 5.5. Strategy

- 5.5.1. It is worth noting that the Deprivation of Liberty Safeguards were already under review before the Supreme Court ruling, and they are widely considered to be disproportionately complex and bureaucratic. It is impossible to pre-empt the outcome of this review, but it is to be hoped that it would take account of the issues that have arisen from this ruling.
- 5.5.2. In the meanwhile it is expected that Local Authorities will demonstrate how they are responding to these rulings by September. Rather than make a “knee-jerk” response, which may result in unmanageable demand as has happened in some Councils, it is advised that a pragmatic and proportionate approach is taken. To this effect, a small group of officers, has convened to analyse risks and agree priority areas for implementation.
- 5.5.3. Local Care Homes have been advised of this, and asked to cooperate with this approach to ensure that we are able to respond appropriately. This will enable the Council to thoroughly assess each situation in a timely manner, whilst ensuring that resources remain available to meet the usual day-to-day demands.

## 6 ADVICE RECEIVED FROM STATUTORY AND OTHER OFFICERS

### Borough Solicitor

- 6.1 The Cheshire implications are set out above.

A consolidated case currently going through the Court of Protection has joined about 6 LAs (including the parties to the Cheshire case), the Law Society and various bodies representing interest groups is expressly looking at the implication of the Cheshire decision. The President of the Court of Protection gave directions on the 21<sup>st</sup> of May 2014 with a return date in early June when all interested bodies who are joined to the consolidated proceedings will be able to submit evidence on what approach should be taken to streamline the deprivation of liberties procedures. The

## Unrestricted

Official Solicitor and the Court of Protection are feeling as over whelmed as LA' s and providers are about the implications of the Supreme Court judgement and the President is committed to try and find a way to streamline the process, to make it workable whilst maintaining the principles of Article 5 and the availability of suitable review processes where a person is deprived of their liberties.

### Borough Treasurer

- 6.2 As the report makes clear, there are significant financial implications for the Council arising from the recent Supreme Court ruling in relation to the Deprivation of Liberty Safeguards, and financial modelling work is on-going to estimate what this might be.

### Background Papers

#### Contact for further information

Zoë Johnstone,  
Department of Adult Social Care, Health and Housing - 01344 351609  
zoe.johnstone@bracknell-forest.gov.uk