

REPORT TO:	HEALTH AND WELLBEING BOARD (CROYDON) 10 June 2015
AGENDA ITEM:	11
SUBJECT:	MENTAL CAPACITY ACT / DEPRIVATION OF LIBERTY SAFEGUARDS
BOARD SPONSOR:	Paul Greenhalgh, Executive Director for People Department

BOARD PRIORITY/POLICY CONTEXT:

- *the joint health and wellbeing strategy – see [www.croydonobservatory.org/Strategy Health and Social Care/](http://www.croydonobservatory.org/Strategy%20Health%20and%20Social%20Care/)*

This report addresses the priority of improving people’s experience of care by ensuring that those people who lack capacity to consent to their care arrangements and whose care arrangements amount to a deprivation of their liberty are afforded the protection of the Deprivation of Liberty safeguards. This is a legal requirement under the Deprivation of Safeguards legislation as qualified by Case Law via the Supreme Court ruling regards the Cheshire West case.

FINANCIAL IMPACT:

The Supreme Court ruling has led to a significant additional spend for the Council during 2014/15 due to the significant increase in number of assessments that need to be undertaken.

In order to be able to meet the increased demand a business case for growth in revenue funding in 2015/16 has been approved and an additional £558k has been allocated for this work.

More recently the Department of Health has announced a one-off additional contribution for Councils for 2015/16 in response to concerns that had been highlighted nationally about the financial implications for councils of the Supreme Court ruling. Through this process Croydon has been allocated £149K..

1. RECOMMENDATIONS

This report recommends that the health and wellbeing board:
Notes the content of this report and takes steps to ensure that all health and social care agencies affected by this ruling are aware of their responsibilities to people who lack capacity and who may be deprived of their liberty.

2. EXECUTIVE SUMMARY

2.1 Deprivation of liberty safeguards is the system put in place under the Mental Capacity Act to ensure that people who lack capacity to consent to their care arrangements are afforded proper scrutiny of these arrangements if the level of care amounts to them being deprived of their liberty.

- 2.2 Until recently people living in care homes and hospitals were only considered to be deprived of their liberty if they were being supported under the most restrictive forms of care – for example if they were clothed in specialist garments, such as a person placed in an all-in-one body suit to prevent ingestion of continence pads, or a person who kept trying to leave the home and was constantly prevented. It had been viewed that people who showed no obvious unhappiness with their care arrangements and who made no attempt to leave, were not being deprived of their liberty. They may be restricted in what they can do for their best interest, but that this was not viewed as amounting to deprivation of liberty.
- 2.3 For any person who may be deprived of their liberty, the MCA - DOLS framework allows for the deprivation to be authorised and made lawful via a process of careful and very specific assessment. This determines if the deprivation is in their best interests. There are many people who could lack capacity to agree to care arrangements, such as people with advanced dementia and people with a severe learning disability. In a hospital setting it may also apply to a person who would normally be able to agree to their care or treatment but due to specific circumstances is now unable to – for example following a serious accident.
- 2.4 It is worth emphasising that it is not necessarily a bad thing for a person to be deprived of their liberty. For someone who lacks capacity to maintain their own safety, providing 24/7 care and supervision and not allowing them to leave can be a necessary arrangement to keep the person safe. What the Deprivation of Liberty Safeguards assessment process does is to ensure that the arrangement is necessary, proportionate to their needs and that it is the least restrictive way of supporting the person.
- 2.5 When a person is considered to be deprived of their liberty, the assessment to check that this is acceptable and to authorise it, includes 6 separate assessments; that the person is:
- 18 and over
 - Suffering from a mental disorder
 - Lacking capacity for the decision to be accommodated in the hospital or care home
 - No decision previously made to refuse treatment or care, or conflict relating to this such as Lasting Power of Attorney
 - Not ineligible for DoLS (such as for example when applications of the Mental Health Act may be more appropriate)
 - That the person needs to be deprived of their liberty, in their best interests and that it is the least restrictive solution.
- 2.6 The Deprivation of Liberty Safeguards legislation requires that all applications to authorise a deprivation are completed within strict timescales. There are two types of authorisations – urgent and standard.
- 2.7 An urgent authorisation is made when the person concerned is already being deprived of their liberty. The care provider or hospital (termed the ‘managing authority’) can give themselves an urgent authorisation for up to 7 days and apply to the Local Authority (termed the ‘supervisory body’) to ratify this. The assessment process for an urgent authorisation, when a deprivation suddenly occurs, must be completed within 7 calendar days by the supervisory body, ie

the Local Authority. In exceptional circumstances only, the urgent authorisation can be extended for a further 7 days. No other extension period is possible.

- 2.8 A standard authorisation is an agreement given by a supervisory body, giving lawful authority to deprive a person of their liberty. It must be requested by the managing authority whenever they believe that a person may be deprived of their liberty in the next 28 days. The application for a standard authorisation should always be requested in advance wherever possible. The Local Authority has 21 calendar days to complete the assessment and authorise the deprivation.
- 2.9 New definition of what it is to be deprived of one's liberty
- 2.10 In March 2014 the Supreme Court overturned the accepted definition of the meaning of what it is to be deprived of one's liberty, by broadening the scope to include many more people. The judgement widened the definition of when a person who lacks capacity to agree to the arrangements for their care and support and who is receiving care support funded by a statutory body, is deemed to be deprived of their liberty. The new ruling says that anyone lacking capacity to agree to being in a care home, nursing home or hospital, or anyone living in a tenancy or the family home and who is subject to 24 hour supervision and control and who would be prevented from leaving if they tried, is deemed to be deprived of their liberty. This is said to be the new 'acid test'. This is regardless of whether they and other key people such as relatives are happy with the arrangements.
- 2.11 The new ruling makes clear that even people supported to lead full and active lives are to be considered to be deprived of their liberty if they are supervised 24/7 and would not be free to leave if they tried.
- 2.12 In order to make this deprivation lawful, the local authority as the supervisory body for this process has to arrange for an assessment, as described above, within a strict timescale. This 6 part assessment needs to be carried out jointly by a s12 doctor and a Best Interest Assessor. Both will have received specialist training to be qualified to do this work.

3 DETAIL

- 3.1 This report provides follow up on the very serious demand issues created by the Supreme Court ruling of March 2014 regarding the 'acid test' for Deprivation of Liberty Safeguards which widened the numbers of people now falling under the 'deprivation' category and hence requiring assessment. Over the past year this has led to a twelve fold increase in numbers of people deprived of their liberty for which the MCA/DOLS service was not resourced to meet.
- 3.2 The immediate response to this unprecedented change to the case law interpretation of existing legislation was that the MCA/DOLS Coordinator led a programme of information sharing with providers who needed to understand the implications of the ruling, and to meet with them to look at individual cases to ensure that applications were appropriate. This included setting up various forums for providers and involved the MCA/DOLS lead from the Department of Health, Dr Lucy Bonerjee.

- 3.3 As a result of this initial work providers began to make increasing numbers of applications for DOLS assessments which then led to demands exceeding capacity. ADASS (Association of Directors of Adult Social Services) provided guidance on prioritising cases. It must be noted that this issue has affected all Local Authorities as supervisory bodies for DOLS and across the country there has been a 10 – 12 fold increase in numbers of people subject to DOLS. This has also meant that it has not been possible to meet statutory timescales for assessments.
- 3.4 Although a number of social workers employed within Adult Social Services were licenced Best Interest Assessors (BIAs) and were accustomed to carrying out DOLS assessments on a rota, the huge increase in referrals during 2014/15 meant that this arrangement was no longer sufficient to deal with the volume of applications. The service therefore commissioned Bournemouth University to deliver a Best Interest Assessor course for social workers employed in Adult Social Services, with 23 staff undertaking the training in January and March 2015. Once these social workers have successfully completed the written assignments and shadowed existing BIAs, they will become licensed and able to join the rota.
- 3.5 Part of the additional funding granted for 2015/16 is being used to create a dedicated BIA team to carry out the majority of DOLS assessments, supported by the BIA rota. This team began to operate in late 2014 with locum BIA social workers, to address the increased number of overdue assessments, although it has been difficult to find suitable locum BIAs, and so the team is not yet operating at full capacity. Adult Care Services will be advertising for registered social workers within the coming weeks and will be seeking to employ a number of BIA licensed social workers in BIA team. The assessment process also requires involvement of s12 approved doctors and again there have been problems sourcing sufficient numbers of doctors able to carry out this work although there are signs of more s12 doctors coming on stream to manage demand.
- 3.6 During recent months the MCA/DOLS team has relied to a large extent on independent BIA's to supplement the Croydon staff, and this poses considerable additional costs, which should be mitigated once the above actions have been achieved.
- 3.7 At the end of April 2015 the volume of DOLS assessments was as follows:

Total Number of DoLs by Quarter for 2014/15

Quarter 1 – 58

Quarter 2 – 105

Quarter 3 – 170

Quarter 4 – 236

This included 72 referrals of people in hospital as follows:

CUH – 35

SLAM- 18

Ceased due to patient being discharged – 19

3.8 The plan for 2015-16

3.9 A business case has been made and accepted by Council's Cabinet which has resulted in £558k being put into the budget for 2015/16 in order to meet the demands for DOLS assessments. This includes not only people who are within residential, nursing homes and hospitals but also people living in their own home who may be deprived of their liberty but for whom the DOLS assessment process is not a legal option and instead applications and assessments must be submitted direct to the Court of Protection. Although social workers are aware that individuals within this group of people may potentially be being deprived of their liberty, work to increase the awareness of providers has not yet been prioritised given the overwhelming demands of assessing those people currently living in residential and nursing homes and hospitals.

3.10 Plans to manage the current situation over the forthcoming year include:

- Recruitment to another BIA locum post as an interim measure.
- A recruitment campaign across adult social care which will include 3 posts for full time BIA assessors.
- Complete training programme for 23 Croydon staff to become licensed as BIAs and to commence work on the rota.
- Implementation of revised DH forms for DOLS assessments aimed at streamlining the process.
- More focus to be given to people living in their own homes by social workers / care managers and applications to the Court of Protection being made as appropriate. The staff on the BIA rota will be well placed to undertake this work.

3.11 It is expected that these measures will enable timely processing of applications and avoid unlawful deprivations.

3.12 The HWBB is asked to note the content of the report and to ensure that:

- Partners who are managing authorities (where people who lack capacity to consent to their care arrangements and who may be deprived of their liberty reside) understand the implications of DOLS and that if there is any doubt advice is sought from the MCA/DOLS lead. This will apply to nursing and residential care home providers and to hospitals. This includes the CCG who commissions providers of health care including people subject to Continuing Health Care funding or to those in receipt of Registered Nursing Care funding.
- Similarly, the Board is asked to be aware that providers supporting people in their own homes must ensure that they and their staff understand the implications of DOLS and to approach the care manager if they have concerns that a person who lacks capacity may be being unlawfully deprived of their liberty.
- The Board is asked to note that the supervisory body for people potentially unlawfully deprived of their liberty is the funding Local Authority and not where the person is placed.

3.13 The Board is asked to note that the Supreme Court ruling has led to a twelve fold increase in DOLS applications and that this number is likely to continue to increase. It is a legal requirement that people who are deprived of their liberty are afforded a comprehensive assessment of their needs.

4 CONSULTATION

There has been very wide consultation regarding this change with:

- The CCG
- Providers of residential, nursing care and hospitals.
- Social workers and case managers
- Best Interest Assessors
- Legal services
- Commissioners

5 SERVICE INTEGRATION

5.1 The Local Authority as the Supervisory body has responsibility for ensuring that any one potentially deprived of their liberty has a comprehensive assessment under the DOLS process.

5.2 However this requires that Managing Authorities understand their role in notifying the Local Authority of people subject to a deprivation.

5.3 We continue to negotiate with SLAM who have integrated health and social care teams with staff who are BIA trained and who could carry out DOLS assessments rather than pass this responsibility to the DOLS team which is part of the Council. Similarly SLAM employs doctors who are s12 approved and who could carry out this work. This would create a much more efficient and patient responsive service, but may create resourcing pressures for the mental health service.

6 FINANCIAL AND RISK ASSESSMENT CONSIDERATIONS

6.1 The unanticipated and unprecedented additional demands created by the Supreme Court ruling has led to the need

6.2 Within the Council a business case for 2015/16 has been approved and an additional £558 k made available and recently the Department of Health has provided an extra £149,476 on a one off basis for this work.

6.3 At this stage it is not possible to accurately predict the financial demands of this ruling over the next 2 years as more applications are being made due to managing authorities understanding their responsibilities. We are aware that the number of applications for people living in their own homes who are being deprived of their liberty is likely to increase.

6.4 As the year progresses the budget and spend will be carefully monitored and reported as part of the Council's budget monitoring process.

6.5 Approved by: Lisa Taylor – Head of Finance and Deputy S151 Officer – Croydon Council.

7 LEGAL CONSIDERATIONS

The Supreme Court ruling has created an additional statutory responsibility by widening the definition of someone deprived of their liberty.

- 7.1 The Law Commission is aware of the national pressures arising from the Supreme Court Judgement and is working on an amendment to the law which resolves the current tensions. It is expected that the Law Commission will consult on proposed changes to the law in July 2015. Even if this consultation is positive, it is not expected that any new legislation will come into effect until 2017.
- 7.2 Approved by: Jacqueline Harris-Baker, head of social care and education law on behalf of the Borough Solicitor & Director of Democratic & Legal Services

8. Human Resources Impact

- 8.1 This report makes recommendations that will have implications for the recruitment and selection of adult social workers in the Council to ensure we have the right people with the right skills, such as licenced Best Interest Assessors. As such, the service has begun working with colleagues in HR consultancy and recruitment to ensure the appropriate HR/recruitment processes is followed.
- 8.2 Approved by: Deborah Calliste on behalf of the Director of Human Resources, Croydon Council

9. EQUALITIES IMPACT

- 9.1 The Supreme Court ruling impacts on any adult who lacks capacity to agree to decision about their care and support, including healthcare and when these arrangements may amount to a deprivation of their liberty.

As such the ruling impacts on people who possess a range of protected characteristics such as disability, ethnicity, religion, gender and age and is intended to protect the rights and freedoms of this group of people. The one overriding factor however, is that the adult must lack capacity to consent to their care and support arrangements. Any adult who is able to give consent does not fall under the Deprivation of Liberty Safeguards.

This ruling has impacted across the whole country. We have not yet been able to ascertain whether the DH has carried out an equality analysis

- 9.2 An Initial equality analysis was undertaken to ascertain the potential impact on protected groups compared to non-protected groups. This concluded that further equality analysis was not required as the change would not have any impact on protected groups.
- 9.3 Approved by: Yvonne Okiyo, Equality Officer, Equality and Community Relations Team

CONTACT OFFICER: Kay Murray Head of Quality Assurance and Adult Safeguarding Board.

BACKGROUND DOCUMENTS None.