

## ROTHERHAM BOROUGH COUNCIL – REPORT TO MEMBERS

1.	<b>Meeting:</b>	<b>Cabinet Member for Adult Social Care</b>
2.	<b>Date:</b>	<b>16 June 2014</b>
3.	<b>Title:</b>	<b>Deprivation of Liberty Safeguards (DoLS) Supreme Court Judgement.</b>
4.	<b>Directorate:</b>	<b>Neighbourhoods and Adult Services</b>

### 5. Summary

Deprivation of Liberty Safeguards were introduced to the Mental Capacity Act 2005 through the Mental Health Act 2007. They required a process to be implemented which ensured that people who were considered to be deprived of their liberty were safeguarded through the DOLs process. This has been subject to challenge and case law, the most recent of which is the judgement in P v Cheshire West and Chester Council and P & Q v Surrey County Council which was handed down by the Supreme Court on 19<sup>th</sup> March 2014. The judgement clarifies the meaning of 'deprivation of liberty' in the context of social and health care which have practical and legal implications for the future of the Mental Capacity Act and the application of Article 5 of the European convention on Human Rights and Article 5 being a person's right to liberty.

This report sets out the significant resource implications for the Local Authority in its role as Care Manager, Care Provider and Supervisory Body under the safeguards. There are currently insufficient resources to meet the expected demand. The Local Authority, in order to meet its statutory responsibility following the judgement, will need to invest in additional resources and workforce. This is a significant budget issue, initial costing for assessment alone could be in the region of £1,000,000 with a yearly recurrent cost of approximately £700,000 for reviews and new assessments. This does not include financial implications in terms of costs for commissioners, legal services, human resources, additional Mental Health Act assessments and implications for s117 funding.

### 6. Recommendations

- **That Cabinet Member notes the contents of this report and agree the recommendations within it.**

## 7. Proposals and Details

As a result of this judgement the local authority is now in the process of scoping the impact this will have in terms of numbers and resources across several areas of responsibility. This will include older people within care home placements, adults with a Learning Disability including those placed in Supported Living and Shared Lives arrangements, adults within Mental Health services and children aged 16-17 in foster care and residential care placements and all of those in these listed categories whose status is an inpatient in an acute or psychiatric hospital. **Please note that this only applies to those who lack the mental capacity to make their own arrangements or consent to the arrangements being made on their behalf.**

<b>Category</b>	<b>Residential Care/Respite</b>	<b>Hospital Acute/Psych</b>	<b>Community</b>
Older People	Y	Y	
Learning Disabled	Y	Y	Y
Mental Health	Y	Y	Y
Children (16+)	Y	Y	Y

Following the judgement, the Local Authority, in order to meet its statutory responsibility, has developed an initial action plan (Appendix A). This action plan is likely to change as national guidance emerges. The Department of Health, the Care Quality Commission and ADASS (Association of Directors of Adult Social Services) have all circulated briefings but they are not necessarily consistent with each other.

The plan covers a number of areas including communication, training, resource implications, and workforce and legal implications.

SLT are asked to approve the proposed plan of actions and recommendations.

### 7.1 Immediate Requirements

In order to meet the initial impact and demand on the Local Authority of an influx of DoLS applications and reviews to be conducted we will need to immediately increase the DoLS Team with a Best Interest Assessor (BIA) and additional business support in order to prioritise all Urgent DoLS requests (completion in 7 days) as these present the highest risk.

It is proposed that we adhere rigidly to the legislation in respect of standard and urgent authorisations and that urgent authorisations are only granted by the managing authority (care homes and hospitals) for unforeseen circumstances, therefore where the person has been a resident or patient in this environment for some time an urgent authorisation would not be accepted.

We will need to review all previous DoLS applications received in the past 2 years that were not granted on the grounds that it didn't meet our understanding of the then threshold for deprivation of liberty. This has been recommended as an action in the ADASS Advice Note circulated.

## **7.2 Further requirements**

To understand the full extent of the judgement a more detailed scoping exercise will need to be undertaken to understand how many individuals in Rotherham will be affected. This will include all Adults and Children (16years+ Foster Care) and those in receipt of health services. The results of an initial scoping exercise are detailed in section 9.

It is proposed that a working party is established to undertake this more detailed scoping exercise.

An approach to assessing / reviewing individuals that are impacted upon by the judgement needs to be approved. There are currently insufficient resources to meet the expected demand. Based on the initial scoping exercise there are 2291 residential beds in Rotherham, 16 people living in the Shared Lives and 150 people living in Supported Living and 32 16-18yr olds either in foster placement, remand or residential care. Of this it is anticipated from the initial scoping exercise that it is likely that 80% would meet the new eligibility criteria for being deprived of their liberty - this is based on the Department of Health's Impact Assessment undertaken prior to the introduction of the Safeguards in 2009.

In respect of acute hospital patients, due to the transient nature of their care, this will possibly be the most difficult sector to quantify. However it is predicted that there will be a significant impact on Rotherham Foundation Trust.

For psychiatric inpatients, the likelihood is that almost all patients will fit the criteria of being under constant supervision and control and not free to leave, however some patients will have the capacity to consent to their inpatient status. The question remains as to whether those patients who lack the mental capacity to consent will need to be subject to a DoLS authorisation or be detained under a section of the Mental Health Act. If it is the latter, the impact in terms of additional s117 funding, for those on section 3 of the MH Act, will add to the resource implications.

In respect of standard requests (completion in 21 days) it is proposed a planned and measured approach is applied, working with providers to identify, screen and prioritise assessments over a longer time frame e.g. 12 months to avoid standards being submitted in bulk. It is

proposed that in future applications will not be accepted without an appropriate Mental Capacity Assessment and evidence of a well worked best interests decision that clearly demonstrates that all other alternatives to a deprivation of the person's liberty have been explored and ruled out.

In this time period in 2013 we had received 10 DoLS applications for assessment and this was expected and by the end of 2013-14 we had received 56 requests for the whole year. To date in 2014 since the judgement we have received 51 assessment requests

The local authority will need to work with our commissioning partners in Rotherham CCG in terms of negotiating the availability of Section 12 Approved Doctors practicing within the local area. Consideration of different contracting arrangements for these professionals is required.

### **7.3 Workforce requirements**

We have 4 internal Best Interests Assessors (BIA) who are currently working in Assessment and Care Management and in the past have undertaken this role in addition to other duties within their teams. We also have a pool of 6 external assessors. Three Social Workers have enrolled for the next BIA course starting on 12<sup>th</sup> May 2014 but will not be qualified until the autumn. Identification of further Social Workers to attend future training is crucial and the University are willing to accommodate further applications in July 2014. Health and Wellbeing Senior Management Team are currently considering whether this qualification should be mandatory for all experienced social workers. We currently have 3 qualified Section 12 Doctors, with only two of those undertaking assessments on a regular basis.

Based on current and estimated volume, we know that continuing to work in this way is not dealing with the influx and will have a significant impact on Assessment and Care Management should this be drawn upon on an adhoc basis. Consideration needs to be given on how the local authority will recruit trained BIA's from external sources and/or invest in the development of the internal workforce to conduct reviews/assessments. Informal discussions with Leeds Met University suggest that they would be happy to run a further course in South Yorkshire in September where we may be in a position to send a considerable number of the workforce to train and qualify as BIA's.

It is anticipated that when we have the final outcomes of the scoping exercise a permanent resourced team of between 10 and 15 BIA's will be required to work on DoLS assessments and reviews on a permanent basis. In order to administer this level of assessment there would need to be a minimum increase to support the team of approximately 4 Business Support Officers.

Part of the scoping exercise will need to include the impact of the additional demand this will have on our RMBC legal services in terms of the additional applications to be made. Another local authority with similar provision have suggested that 30 plus applications to the COP will need to be made per month and believe that to facilitate this they will require 0.25 of a solicitor and a full time legal assistant.

A further option will be to not apply the new criteria from the judgement, thereby undertaking only those applications which meet the pre judgement definition, however this would require considerable screening at point of referral and would also be unlawful leaving the local authority vulnerable to litigation

## **8. Finance**

Implementing the outcomes of the judgement will require considerable additional finances. This can only be more accurately calculated when we know the true extent of what resources and training will be required.

An initial scoping exercise, in respect of the potential numbers of new DoLS applications we could be facing, is indicated in the data listed below; however it should be noted that accurate figures regarding numbers of self-funding residents and those fully funded by continuing health care will be required. This information is currently being scoped more thoroughly.

- Total Residential beds (All adults) in Rotherham = 2291
- Funded by RMBC (including out of area placements) = 1,150
- CHC Funded = not known at this time
- Self-funding residents = Approx. 200 (based on an average of the information provided to us by providers)

An estimate of 80% of total residents would lack capacity to decide where they live, this information is based on data obtained from the Department of Health's Impact Assessment prior to the introduction of DoLS in 2009.

### **8.1 Deprivation of Liberty Safeguards**

The current cost of a DoLS assessment is approx. £600, comprising costs of both Mental Health Assessors (s12 Approved Doctor), the cost of either payment for an independent BIA or to supplement Assessment and Care Management for lost Social Work time. This does not include the costs of management and administration, any necessary involvement of an Independent Mental Capacity Advocate and Paid Representative. Since 2009 the local authority received monies from the Department of Health to resource this responsibility and to date have not overspent on their budget in this area. The current allocation for 2014/15 is £137,689. The total expenditure last year was £126,277.

Based on the estimated figures above there is a potential for an additional 1000 DoLS assessments required within residential care homes in Rotherham (this excludes CHC and hospital patients), at a cost of approximately £650,000. This cost would be for the assessments only and does not include associated costs. This would be recurrent as Dols need to be reviewed at least annually. In addition each year we would be considering all new admissions into permanent care as requiring a DoLS assessment. In 2013/14 there were a total of 344 new admissions into permanent care. This does not include self-funding residents and those fully funded by continuing health care.

The DoLS assessments cannot be undertaken by the assessing or reviewing Social Worker.

## **8.2 Court of Protection**

In respect of Court of Protection (CoP) cases a current application costs between £400 and £900. The Courts have indicated that in order to deal with the vast numbers that will now be required they may deal with these as "bulk applications". Based on current numbers should these applications require to be completed individually this could amount to an estimated cost of £150,000.

In respect of 16-18yr olds in foster care or residential care there are only 32 and it is anticipated that few would meet the criteria.

It is extremely difficult to predict the overall costs at this stage. This will be dependent on the approach the Local Authority take in respect of the judgement, future national guidance and the reality of how many staff need to be trained to meet future demand and the outcome of a more comprehensive scoping exercise. However initial costing for assessment alone could be in the region of £1,000,000 with a yearly recurrent cost of approximately £700,000 for reviews and new assessments. This does not include financial implications in terms of costs for commissioners, legal services, human resources, additional Mental Health Act assessments and implications for s117 funding and training.

## **9. Risks and Uncertainties**

In terms of uncertainties we at this stage cannot realise the full impact of the judgement. However, the local authority has drafted an initial action plan to deal with the known quantities at this stage, which will need to be updated regularly as the 'ripple effect' of this judgement is realised.

If the local authority fails to acknowledge the implications and fails to address the emerging issues, the likelihood of litigation is significant as is the reputation the Council. Discussions will need to be undertaken with the Council's insurers. Damages can be claimed for any period of unlawful deprivation of liberty, however benevolent the deprivation, and these can be

awarded by the Court of Protection without the need for a separate legal claim.

Due to the likely costs of dealing with the impact of this judgement there may be an impact on what the Council can deliver in other areas.

If we cannot finance and resource this sufficiently to meet the demand anticipated, there is an increased risk to vulnerable adults in terms of breaches in human rights and moves us in to the realm of safeguarding.

## **10. Policy and Performance Agenda Implications**

At this initial reporting stage the full impact on the performance agenda cannot be fully quantified. Considered planning at every stage will be important to minimise the impact, although it is inevitable that this will be significant.

## **11. Implications for other Services**

Whilst the principal impact of the Supreme Court judgment will be felt by Adult social services in its provision of care services to those adults with mental disorders which render the individual incapable of making decisions about their accommodation and care there could be substantial impact on services providing professional support. In particular for Legal Services. Standard authorisations can be appealed in the Court of Protection and where the Council does not have the statutory power to authorise any identified deprivation would require an application to the Court of Protection. Currently Legal Services has one adult services legal practitioner, who is also required to provide legal advice and assistance to Education Officers and the headteachers of local authority maintained schools. Legal Services are currently attempting to recruit a solicitor whose professional assistance will be shared between Adult Services and Child care. It is unlikely that any new practitioner would be able to assume his/her duties before the end of July 2014. This recruitment process was initiated to cover needs envisaged before the Supreme Court judgment was handed down and will not prove adequate to cover the potential flood of extra litigation.

The judgment clarified the meaning of deprivation of liberty. The human right not to be deprived of liberty without the process of law applies to individuals of all ages. The youngest of the persons concerned in the cases considered by the Supreme Court was only 17 years old. The Court of Protection has jurisdiction over persons aged 16 years or more although the Council can only grant authorisations in respect of adults aged 18 plus. In the case of a 16/17 year old if any provision of accommodation or services amounts to a deprivation of liberty as recently judicially defined, and that is not covered by for instance a children's care order and application to the Court of Protection will be required if the child concerned suffers from a mental disorder and is not capable of making his/her own decisions about accommodation and/or care and/or contact with others. Undoubtedly CYPS would require legal assistance and that is likely to place greater pressure on Legal Services.

All other frontline and supporting services and in particular those services of CYPs involved in child care must consider the impact of this judgement on their own procedures and human and financial resources.

## **12. Background and Consultation**

### **12.1 Background**

The Mental Capacity Act (MCA) was introduced in 2007 to protect the most vulnerable persons in our community. It ensures that those making decisions on behalf of a person who lacks capacity does so in their best interests. In respect of whether a person is being deprived of their liberty MCA looks at their ability to make the decision about where they live or are placed to receive appropriate care and treatment.

The Deprivation of Liberty Safeguards (DoLS) came into force in April 2009 without any clear definition of what constitutes a deprivation of liberty as opposed to a restriction of liberty. Interpretation of the legislation has varied widely nationwide.

The Local Authority has a responsibility in its role as Supervisory Body under the Safeguards to ensure that any person considered to be deprived of their liberty in a residential care home or hospital setting is subject to an assessment and authorises the deprivation of liberty where appropriate. This offers the person subject to the authorisation “safeguards” in order to protect their human rights.

In addition to this role, the Council also has a responsibility under the MCA to take cases of ‘deprivation of liberty’ in the community to make an appropriate application to the Court of Protection and has done so on several occasions.

A number of cases have appeared in the Court of Protection and the Court of Appeal where attempts at offering a definition have been made. More recently the Supreme Court has ruled on the cases of P v Cheshire West and Chester Council and P & Q v Surrey County Council and issued its judgement in March 2014. It is our interpretation that this has significantly lowered the threshold of what amounts to a deprivation of a person’s liberty whether they are in a care home or hospital or community setting.

There were three applicants in this case, all of whom lacked capacity for the purposes of the MCA.

P, in the case of Cheshire West is an adult with cerebral palsy and Down’s syndrome who requires 24-hour care to meet his personal care needs. P was accommodated in local authority accommodation, which was a bungalow shared with two other residents (Supported Living). P received 98 hours of one-to-one support each week, as well as general support from the care home staff. He was able to leave the house



whenever he wanted with the assistance of his carers. He went out most days and saw his mother regularly. P required prompting and help with all of the activities of daily living, he wore a 'body suit' of all-in-one underwear to prevent him from pulling at his continence pads and intervention was sometimes required to deal with his challenging behaviour.

P&Q in the case of Surrey County Council were sisters.

P (aged 18 at the time of the final hearing) lived with a foster mother who provided her with intensive support in most aspects of her daily living. P never tried to leave the home by herself but if she had done, the foster mother would have prevented her from doing so. P attended a further education unit daily.

Q (aged 17 at the time of the final hearing) lived in a residential NHS home for learning disabled adults with complex needs. Q sometimes required physical restraint, she was on sedative medication and her care needs were only met as a result of continuous supervision and control. Q showed no wish to go out on her own and so did not need to be prevented from doing so. She was accompanied by staff wherever she went and attended the same education unit as her sister.

The Supreme Court set down the criteria for determining what factors amounted to a deprivation of liberty based on the person being:

- Unable to consent to the living arrangements and
- Not free to leave (to live elsewhere) and
- Subject to continuous supervision and control.

Where Supervisory Body's and even the Courts have considered in the past a persons lack of objection, the relative normality of the situation and purpose of the arrangements being made, this is no longer relevant, rather now an indicator of whether it's in a this is deemed to be in the person's best interest.

## **12.2 Consultation**

In order to ensure that staff and others are informed and kept up to date there is a plan in place to:

Host a Leadership Session to outline and discuss the implications of the judicial review

Develop and share briefings for the following groups to communicate the implications of the judgement and convey the plan of action:

- Members
- Providers
- NAS workforce
- CYPS workforce

Present a report to the Safeguarding Adults Board and the Health and Wellbeing Board and Operating Executive of Rotherham CCG.

Ensure the Rotherham MBC website is updated with accurate/ appropriate advice and information.

Initial discussions with local CQC management have taken place. They will on inspection of care homes be ensuring that providers are aware of the judgement and applying it appropriately. CQC appreciate that Local Authorities as Supervisory Bodies do not have the resources to deal with multiple applications from providers immediately. Providers will need to demonstrate that they have recognised the issues and are managing the risks and are in consultation with the Local authority. Where CQC are satisfied that this has been managed appropriately there would be no penalties for the providers.

They are not in a position to say that local arrangements may not change dependent on national guidance that they receive in respect of this issue.

### **13 Background Papers**

P and Q (by their litigation friend, the Official Solicitor) (Appellants) v Surrey County Council (Respondent) and P (by his litigation friend the Official Solicitor) (FC) (Appellant) v Cheshire West and Chester Council and another (Respondents)

[http://supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0068\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf)

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