

Decision Maker: Executive

Date: 10th June 2014

Decision Type: Non-Urgent Executive Non-Key

Title: DEPRIVATION OF LIBERTY SAFEGUARDS – FUNDING REQUEST

Contact Officer: Claire Lynn, Strategic Commissioner Mental Health and Substance Misuse, Commissioning Division,
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Chief Officer: Terry Parkin, Executive Director, Education and Care Services

Ward: Boroughwide

1. Reason for report

- 1.1 This report outlines the recent Supreme Court judgement relating to Deprivation of Liberty Safeguards and to deprivation of liberty of individuals. The report considers the implications of the judgement and actions to address these.
- 1.2 The report also outlines the financial implications of this judgement and requests that the Executive agrees to the drawdown of the Local Government and Community Voices Grant, not previously accessed, to cover the increase in the volume of Deprivation of Liberty Safeguards.
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2. **RECOMMENDATION(S)**

2.1 **That Executive is asked to approve:**

- (i) **The drawdown of the Local Reform and Community Voices Grant for Deprivation of Liberty to meet the new legal requirements; and**
- (ii) **Notes that further monies may be required to meet any additional demands arising from this judgement. This will be clarified once further details of the judgement and its consequences are available and further mapping work has been carried out. These outcomes will be reported to a later meeting.**

Corporate Policy

1. Policy Status: Existing policy.
 2. BBB Priority: Supporting Independence. Safer Bromley
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Financial

1. Cost of proposal: Estimated cost £24, 057
 2. Ongoing costs: N/A. These are not known until further work is undertaken
 3. Budget head/performance centre: Mental Capacity Act
 4. Total current budget for this head: £97,130
 5. Source of funding: Core funding
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Staff

1. Number of staff (current and additional): 1wte temporarily, 1.5 wte established post
 2. If from existing staff resources, number of staff hours:
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Legal

1. Legal Requirement: Statutory requirement.
 2. Call-in: Call-in is applicable
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Customer Impact

1. Estimated number of users/beneficiaries (current and projected): not known until further work is undertaken
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Ward Councillor Views

1. Have Ward Councillors been asked for comments? No.
2. Summary of Ward Councillors comments:

3. COMMENTARY

- 3.1 The Deprivation of Liberty Safeguards, introduced as an amendment to the Mental Capacity Act in April 2009, aimed to prevent decision making which deprived people of their liberty unless properly authorised. The safeguards cover people, regardless of the funding source, in registered care/nursing homes and in hospitals, who have a mental disorder, and who lack the capacity to consent to the care provided, where that care may include the need to deprive people of their liberty. It does not apply to people detained under the Mental Health Act 1983. The test for this is broadly the individual, is over 18 years, lacks capacity to consent to being in the care home or hospital in order to receive the care or treatment that is necessary to prevent harm to them, they suffer from a mental disorder and finally the person needs to be deprived of liberty, in their best interests.
- 3.2 Hospitals and care homes are the 'managing authorities', under the Act responsible for identifying when a deprivation of liberty is occurring within their own service provision and for making referrals to the designated 'supervisory body'. The supervisory body is the Local Authority for both health and social care provision.
- 3.3 Nationally there has been a year-on-year increase in the number of applications completed for Deprivation of Liberty Safeguards (DoLS) since their introduction in 2009/10. This was not reflected in the Bromley figures which remained reasonably static (although the numbers are small).

Year	Number of applications nationally	% increase in applications nationally	Number of applications in Bromley
2009/10.	7,157	n/a	4
2010/11	8,982		14
2011/12	11,382	66	6
2012/13	11,887	4	5
2013/14	n/a	n/a	15
2014/15 (to date)	n/a	n/a	12

- 3.4 Currently provision for administering the Deprivation of Liberty Safeguarding process is through a part time post, in the Education, Care and health Commissioning Division, who also delivers the training on the Mental Capacity Act and Deprivation of Liberty across the borough. There was some co-ordination/administrative support provided from existing staff within the Commissioning division. The borough provides on average ten Best Interest Assessors across all care groups including mental health from LBB Care Services and Oxleas NHS Trust. The doctors who have to carry out the mental health assessment are called in on a sessional basis. Up until March 2014 this provided adequate cover for the activity.
- 3.5 On 19 March 2014, the Supreme Court handed down its judgment in the case of "P v Cheshire West and Chester Council and another" and "P and Q v Surrey County Council". The full judgment can be found on the Supreme Court's website at the following link: http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf
- 3.6 The Supreme Court held that the individuals, all young people with learning difficulties, had been deprived of their liberty as they were under continuous supervision and control and were unable to leave their placements. This was the case even though the individuals enjoyed lives outside their placements and seemed to be content with their situations. The Court held that the individuals were entitled to the protection afforded to them by the Mental Capacity Act 2005, which requires, among other things, a periodic review to ensure the deprivation of liberty remains in the individual's best interests.

3.7 The Supreme Court has now confirmed that to determine whether a person is deprived of their liberty there are two key questions to ask, which they describe as the 'acid test':

- Is the person subject to continuous supervision and control? (all three aspects are necessary)

AND

- Is the person free to leave? (The person may not be saying this or acting on it but the issue is about how staff would react if the person did try to leave).

This now means that if a person is subject both to continuous supervision and control and not free to leave they are deprived of their liberty. Unfortunately the Court did not define these elements.

3.8 The judgment is significant in determining whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty. The Court emphasised that even though an individual may never have tried to leave, the fact that there are measures in place to prevent them from leaving amount to a deprivation. A deprivation of liberty for such a person must be authorised in accordance with one of the following legal regimes: a deprivation of liberty authorisation or Court of Protection order under the Deprivation of Liberty Safeguards in the Mental Capacity Act 2005, or (if applicable) under the Mental Health Act 1983.

3.9 The other consequence of the Supreme Court judgement is that a deprivation of liberty can take place because of a care regime in supported living, day care or the individuals own home and although currently the Mental Capacity Act does not cover a Deprivation of Liberty Safeguard process being followed these situations should be referred to the Court of Protection. The judgement also lowered the age of consideration for a deprivation of liberty to 16 years. This is in terms of an individual's capacity and takes no account of whether there is parental consent for any care regime

4 IMPLICATIONS OF THE SUPREME COURT JUDGEMENT

4.1 There are fundamental implications arising from this judgement both in terms of practice and also the number of Deprivation of Liberty Safeguards which will need to be considered and until further cases are brought to Court to test circumstances and definitions the interpretation of these will be left to local areas. Since the judgement Bromley has received over fifty requests. The impact of this judgement is outlined in the table in Appendix 1 together with recommended actions required based on the action plan published by the Department of Health who suggest that the further steps that Local Authorities could consider taking:

- Ensuring awareness of the Supreme Court judgment among care providers
- Ensuring awareness of the need to reduce restraint and restrictions and promote liberty in care plans
- Mapping any additional requirements for Best Interest Assessors (BIAs) and working collaboratively with other Local Authorities to reduce training costs
- Reviewing information on the number of individuals in supported living arrangements to identify those individuals whose arrangements should be reviewed.

4.2 It is understood that the Department of Health will be issuing further guidance in June.

5 FINANCIAL IMPLICATIONS

- 5.1 The activity for Deprivation of Liberty Safeguards is funded through the Mental Capacity Act budget which is £97,180 for 2014/15 within the revenue support grant. There is also £24,057 allocated to Bromley via the Local Reform and Community Voices grant for 2014/15. The allocation for 2013/14 was not utilised in the last financial year.
- 5.2 The table below sets out the anticipated spend against the core 14/15 budget together with estimated one off costs which are expected to be required in 14/15 in order to ensure compliance with the new requirements arising from the court judgement. It is proposed that the £24,057 from the Local Reform and Community Voices Grant be allocated to these one off costs and therefore draw down of the funding is requested. The proposed actions and costs required to meet this statutory requirement include some unknown costs until more mapping work is undertaken. This will be reported back to a subsequent meeting once clarification has been given from the Department of Health which is expected shortly.

Budget heading	Current budget	14/15 One off costs to meet new requirement
Officers pay	£43,750	£3,857
Temporary staff (including Doctors)	£15,700	£10,000
Training	£4,000	£7,700
Independent Mental Capacity Advocacy Service	£25,000	NIL
Advocacy	£5,000	£2,500
Supplies	£3,730	NIL
TOTAL	£97,130	£24,057

6 LEGAL IMPLICATIONS

- 6.1 The statutory regime for the implementation and administration of what is deemed to constitute the deprivation of liberty of an individual is prescribed within sections 4-6 of the Mental Capacity Act 2005 and statutory guidance. Such must also be taken together with any decision and interpretation of the requirements placed upon a local authority or hospital by the recent decision of the Supreme Court in P-v-Cheshire .
- 6.2 The local authority is obliged to put in place and ensure that its DoLS regime is compliant with all legal requirements and have due regard to relevant guidance and case law.

Non-Applicable Sections:	Personnel Implications, Policy Implications
Background Documents: (Access via Contact Officer)	

LB Bromley Actions Identified in Response to the Impact of this Judgement APPENDIX 1

IMMEDIATE RESPONSE			
	TASK	DATE TO BE COMPLETED	COMMENT
Respond to immediate increase in number of Deprivation of Liberty Safeguard requests	Issue letter to all settings and all partner organisations outlining the judgement.	1 May 2014	Letter has been send to all providers both in borough and out of borough
	Provide guidance for Best Interest Assessors in light of new judgement	May 2014	Meeting with Best Interest Assessors and legal held
REVIEW OF CASES			
Review all cases where the individual lacks capacity and direct services are being provided including any Deprivation of Liberty Safeguard decisions not granted (or expired) since 2009	Prioritise cases	End of September	
	Map projected numbers of Court of Protection (Court of Protection) cases	End of September	
	Establish a plan to screen through these and make applications to Court of Protection where applicable.	End of September	
	Map likely on-going costs to take cases to Court	End of September	
	Develop process for this Court work and how it is undertaken	End of October	
	Map and cost the impact on the use of the Independent Mental Capacity Act Advocate and Relevant Persons Representative	End of September	
INFORMATION/TRAINING REQUIREMENTS			
Inform all key stakeholders of the Supreme Court judgement and of the agreed actions		On-going	BSAP Executive for May 2014
Develop tools/guidance to establish practice when providing a direct care regime, ensuring awareness of the need to reduce restraint and restrictions and promote liberty in care plans	This will include attendance at Care Homes Forum, meeting with Leads in the CCG & Hospital Trust . Discuss with Oxleas and agree actions for mental health	End of September	
	Develop pack to be given to all individuals assessed for direct services on establishing LPA'S, Advance decisions to ensure that individuals can prepare if they may lose capacity	End of September	
Offer training updates/ briefings in as many settings as possible making clear the need for less restrictive options before resorting to Deprivation of Liberty Safeguard	Training identified for senior managers, refreshers for staff and the need for "roadshows" Develop a training plan for hospital staff	End of September	
	Visit all care management/social work and medical teams to discuss the implications of least restrictive practice	End of September	
	Update training materials	End of June	Meeting has been held with Training
	Update policies and procedures in line with the acid test	End of June	
Increase the number of Best Interest Assessors	Staff have been identified to do the BIA training and refresher training for existing Best Interest Assessors is also being procured	On going	The next available course is in May and spaces are available
STAFFING			
Ensure the immediate review work is resourced	Recruit temporary staff (1WTE) to carry out review work	Immediate	
	Discussions with Legal Services as to the possible impact on their staffing as a result of the review	End of September	
Agree DLS co-ordinator post (P/T) AND F/T Project Manager	Recruit staff	End of September	
	Hand over period with the existing staff	October 2014	