

**Decision Maker:** Executive

**For Pre-Decision Scrutiny by Care Services PDS Committee on:**

**Date:** 21<sup>st</sup> January 2015

**Decision Type:** Non-Urgent Executive Non-Key

**Title:** DEPRIVATION OF LIBERTY SAFEGUARDS UPDATE

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**Chief Officer:** Terry Parkin, Executive Director, Education and Care Services

**Ward:** Boroughwide

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1. Reason for report

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 updates the actions to address these.

The report also outlines the financial implications of this judgement following the mapping of numbers that has been undertaken and requests that the Executive agree further funding from contingency as highlighted in the report to Executive in June.

The report also asks members to note the proposal to establish a framework arrangement to provide the assessments that are required to be undertaken by psychiatrists.

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2. **RECOMMENDATION(S)**

2.1 Members of Care Services PDS are asked to note and comment on the contents of the report

2.2 The Executive is asked to

- agree the additional funding of £163,345 for 2014/15 and recommends the inclusion of £628,040 in the 2015/16 budget to meet the requirements of the Supreme Court Judgement. For 2015/16, due to the uncertainty of the potential costs, half of the funding should remain in contingency and be subject to a further report to Executive in the new financial year.
- note the intention to commission the services of doctors as required using a framework agreement, in order to fulfil the Council's duties under the Mental Capacity Act 2005.

### 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 £ 263,765 2014/15 £728,460 full year
  2. Ongoing costs: Recurring cost. £728,460
  3. Budget head/performance centre: Mental Capacity Act
  4. Total current budget for this head: £100,420
  5. Source of funding: Core funding
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### Staff

1. Number of staff (current and additional): 1 wte 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. Mental Capacity Act 2005
  2. Call-in: Call-in is applicable
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### Customer Impact

1. Estimated number of users/beneficiaries (current and projected): 900-1000 people
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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 (DOLS), 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.
- 3.2 Hospitals and care homes are the 'managing authorities', and under the Act are 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 The assessment process for a Deprivation of Liberty Safeguard is that the hospital or care/nursing home submit a request for an authorisation to the supervisory body, Bromley Council. This request, regardless of who is funding the placement, can either be:

**Urgent** , if there has been an unforeseen change in need , which requires an assessment within 7 calendar days;

**Standard** which requires an assessment within 21 calendar days.

On receiving the request a doctor, who is qualified under section 12 of the Mental Health Act 2007, and a Best Interest Assessor are identified (usually a qualified social worker who has received accredited training) to complete the following assessments:

- Establishing the individual is over 18 years;
- Individual 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;
- Individual has a mental disorder;
- Whether this is the least restrictive placement and whether it is in the individual's best interest to be deprived of their liberty;
- That the individual is not liable for detention or treatment under the Mental Health Act;
- Whether there is an advance decision or any other legal notice in place

The Best Interest Assessor must also identify someone to represent the person for the length of time the DOLS is in place; this is usually a member of their family. On completion of these assessments and the paperwork the Executive Director for Education, Care and Health Services authorises the DOLS. This has to be reviewed a minimum of annually although in some cases it will be more regularly than that, which requires the above process to be repeated. This process is outlined in the legislation and in the statutory code of practice on deprivation of liberty.

- 3.4 Nationally there was a year-on-year increase in the number of applications completed for Deprivation of Liberty Safeguards 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	26	14
2011/12	11,382	66	6
2012/13	11,887	4	5
2013/14	n/a	n/a	15

3.5 On 19 March 2014, the Supreme Court handed down its judgments in the case of “P v Cheshire West and Chester Council and another” and “P and Q v Surrey County Council”. The full judgments can be found on the Supreme Court’s website at the following link: [http://supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0068\\_Judgment.pdf](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 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 judgements is that a deprivation of liberty can take place because of a care regime in supported living, day care or the individual’s 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 UPDATE ON THE ACTIONS FOLLOWING THE SUPREME COURT JUDGEMENT

- 4.1 Following the Supreme Court judgement a report was agreed at Executive to drawdown monies from the Local Reform and Community Voices grant in order to meet the initial work that needed to be undertaken to map the implications of these judgements. This has included ensuring that staff are fully briefed, that all applications are responded to within the timeframes and that work was undertaken to identify the numbers of people who may be subject to deprivation of liberty.
- 4.2 Since the April 2014 Bromley has received 247 requests (up to 19/12/14) for people in care/nursing homes and hospitals. Information is being collected by the Department of Health to closely monitor the demand placed on Councils with this change in legislation which is reported in appendix two (Quarter 1 only). The total number of applications from 130 submitting councils in quarter 1 2014-15 was 21,600. In 2013-14 the total number of applications for these 130 councils was 12,400. There has been a further increase for quarter 2 but this detailed information has not yet been published. There are differences in the number of referrals across boroughs, in the main because of the size of the teams carrying out the work and how proactive they are able to be. For example Bexley has a team of nine Best Interest Assessors who are visiting all care/nursing homes and identifying the people subject to a deprivation rather than waiting for the homes to apply. On an on-going basis they have identified that they will need slightly less staff.
- 4.3 Mapping the probable numbers of people in Bromley that Deprivation of Liberty Safeguards (DOLS) would apply to has been difficult as identifying individuals has had to rely on detailed reading of assessments and making assumptions. It has been assumed that 50% of all people in residential/nursing homes should be subject to DOLS and the current referral rate of people in hospital who are subject to DOLS. This equates to 600 people. This level of referrals has not yet been received but can be expected from providers particularly as CQC will be making consideration of deprivation part of their inspection regime. If a referral is received we are unless there are exceptional circumstances which we must justify legally obliged to carry out an assessment within the prescribed timeframes. Damages can be awarded if these obligations are breached and not applying resources to deal with will not be accepted as exceptional circumstances.
- 4.4 For people who lack capacity and who fall outside the primary legislation, i.e. are under other care regimes apart from residential/nursing homes and hospitals, it is assumed there would be approximately 300 individuals to whom this would apply. This is a best case estimate as it assumes 100 young people under 18 who this may affect. Worst case assumes 200 taking the total to 400 people. The numbers depend on advice awaited on the position of residential schools. The Court of Protection has issued the process for cases falling outside of the primary legislation which for uncontested cases would be a paper process to a judge. This would cost £400 per case in Court fees plus assessments by a best interest assessor and Doctor, the latter costing about £300 per assessment and report. For the contested cases there would be an oral hearing costs of which could be between £5,000-£10,000 per case.
- 4.5 The current volume of work has been delivered by a small team of a senior practitioner, two best interest assessors seconded from Care Services with the use of additional assessors based in care services, a co-ordinator (seconded from Strategy and Performance) and other staff time in processing the authorisations. Independent assessors have been used for people placed outside of London and the home counties. Whilst there has been no breach of timeframes this has been difficult to maintain with a small number of staff. The staffing is on a secondment arrangement with locum staff being used to backfill their substantive posts. In all it has taken an average of 16 hours staff time (excluding the doctor and including administration) per assessment which would require at the current level of referrals between 4-5 staff to meet the demand, allowing for leave etc.

- 4.6 It has become evident that the work required to meet these legal requirements of the expected numbers is considerable and would equate to nine staff in total. (Using an average of 16 hours per assessment across 900 assessments). However as it is appropriate for some assessments to use independent assessors and best interest assessors in care services it is recommended that a central team is established with five care managers who are Best Interest Assessors, a senior care manager who will manage the processes required, and a full time administrative coordinator. These arrangement would be in line with other authorities staffing. Consideration has been given to other models of provision for example seconding best interest assessors from care services in the longer term and paying for back fill of their posts, however the costs would be equivalent and the risk is that care services would lose their more experienced staff thus destabilizing the service particularly in the safeguarding aspect of work. Reduction of the proposed staffing required, for example to meet the immediate demands only, would mean that if there was a demand over the current 4/5 assessments per week, assessments could not be completed nor could doctors be engaged to complete assessments. Therefore the authority would breach its statutory responsibility with the risks of Court awarding damages against the Council to individuals or organisations where liberty had been deprived.
- 4.7 A letter has been sent to all care providers to raise awareness of the Supreme Court judgment, as we are obliged to do by the Department of Health, and how to make a referral. Training is being updated both for providers and staff to ensure the awareness of the need to reduce restraint and restrictions and promote liberty in care plans.
- 4.8 The 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 have been detailed in this report but there may be further cases brought to Court to test circumstances and definitions which could change some of the detail of the provision, at the moment the interpretation of judgement will be left to local areas.

## 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. This budget is core funding. There is also £24,057 part of the Local Reform and Community Voices grant- 2014/15 which was drawn down following the agreement of the Executive in June 2014. The proposed actions and costs required to meet this statutory requirement detailed to Executive was the costing for the initial implementation which is laid out in the table below alongside the current budget spend.

Budget heading	Current budget	Implementation costs (one off)
Officers pay	£46,080	£3,857
Temporary staff	£15,700	£10,000
Training	£4,100	£7,700
IMCA Service	£25,620	NIL
Advocacy (RPR)	£5,120	£2,500
Supplies	£3,800	NIL
<b>TOTAL</b>	<b>£100,420</b>	<b>£24,057</b>

- 5.3 The table below shows costs additional to the existing budget including the additional costs for 2014/15 and the proposed spend for next year. The 2014 /15 costs reflect the transition process to a position in 2015/16 ensuring that all statutory responsibilities are met if the required staffing is in place.

TASK	2014/15 Part year costs	FULL YEAR COST	COMMENT
DOLS doctors	40,000	120,000	Assuming 50% (600) of people in residential/nursing lacking capacity and the level of hospital referrals remains static at an average of five per

assessments			year and that the average fee remains at £200 Including travel. There may be additional pressures if there is an increase in hospital referrals or a increase in the fees paid for assessments. In order to manage this a approved framework to call off the use of doctors is recommended.
Deprivation doctors assessments for court	15,000	90,000	Assumes 50% of people (200) in supported living including extra care lack capacity plus 100 under 18 who this may affect. Worst case (200). assumes the court will require a S12 doctor to do this at a fee of £300 per assessment.
Legal costs	20,000	141,000	The Court process has been outlined with paper consideration for all cases at £400 except where particularly complicated or is contested and therefore demands a hearing. Assuming 300 cases and the number contested (which is a total unknown) at 1%
Use of IMCA/RPR	5,000	20,000	Based on the assumption that we would require these services for 1 in 25 people subject to DOLS in the best case based on current usage based on 1000 people being assessed. Cost reflects the £5,000 in the existing budget for some of this activity.
Training	nil	20,000	If all assessment / review staff were BIA's and this was part of the care management process then the cost is £1,500 per person with a refresher required annually assuming . Best case assumes an established team of BIAS and on-going training. Additional training is required around MCA which would take it to £20,000
Staffing	83,345	237,040	To establish a central team consisting of the following: Senior Care manager (BR13) plus on costs £44,040 Five care managers (BR11) plus on costs £193,000 Co-ordinator (BR9) plus on costs 37,690 is currently costed against the existing budget
<b>Total additional funding</b>	<b>163,345</b>	<b>628,040</b>	
<b>TOTAL BUDGET</b>	<b>263,765</b>	<b>728,460</b>	

5.4 The doctors who are currently used to provide the required assessments are identified from a list of available doctors, work is offered dependent on location (to reduce travel payments) and cost. There are five doctors we use locally regularly and one we use occasionally (at his request). There are two who cover Kent, one in Essex and one in Sussex-these are used less often. On average doctors locally charge £180 per assessment and travel at 45p per mile, these costs can vary where doctors from other authorities have to be used. It is proposed, in order to meet financial regulations, as usage has increased, to procure these services from a framework of approved providers.

5.5 The additional funding required for 2015/16 could be as high as £628k. However there are some elements of uncertainty that remain in terms of the potential funding requirement. It is therefore recommended that 50% of the £628k (£314k) be agreed to be draw down for 2015/16. The remaining half would remain in contingency and be subject to a further report to Executive in the new financial year once the costs have been clarified further

## 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. These must be read in conjunction with any Judicial authority to interpret the requirements placed upon a local authority or hospital by the recent decision of the Supreme Court in P-v-Cheshire and others . The Supreme Court in the judgments mentioned above has identified a range of people who are subject to DOLS

6.2 We are 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. Failure by the Council to adopt a lawful , correct and proportionate approach to the application of DOLS in seeking the court to authorise detention would be unlawful. If a deprivation is not authorised there is a material risk that the Local authority could be subject to an application for judicial review a

claim for breach Article 8 of the Human Rights Act (Right to Respect for Private and a Family Life), and a claim for compensation.

- 6.4 There are active advocacy groups in this area and as affected individuals are likely to have access to public funds the litigation risk of non-compliance is significant.
- 6.5 If there is non-compliance there is also a lower but still material litigation risk from care providers if they suffer loss as a consequence,

## 7 PERSONNEL IMPLICATIONS

- 7.1 In order to obtain the widest field of candidates with the appropriate skills and experience it would be necessary to seek authority to advertise positions both internally and externally in line with the Council's recruitment procedures.

<b>Non-Applicable Sections:</b>	Policy Implications
Background Documents: (Access via Contact Officer)	<a href="http://cds.bromley.gov.uk/documents/g4918/Public%20reports%20pack%20Tuesday%2010-Jun-2014%2019.00%20Executive.pdf?T=10">http://cds.bromley.gov.uk/documents/g4918/Public%20reports%20pack%20Tuesday%2010-Jun-2014%2019.00%20Executive.pdf?T=10</a>



## APPENDIX ONE

TASK		DATE TO BE COMPLETED	COMMENT
<b>IMMEDIATE RESPONSE</b>			
<b>Respond to immediate increase in number of DOLS requests</b>	Agreement that existing BIA 's (and their line management ) must see any assessment as a priority	On going	Currently there are 16 BIA's. Two BIA's are based centrally to carry out the majority of the work but other BIA's are being used.
	If required pay overtime if capacity of existing staff is problematical	On going	This facility has not been required. Independent BIA's have been employed on a one off basis for individuals in placements where travel for local staff would be excessive. To date just under £4,000 has been spent on this.
	Issue letter to all settings and all partner organisations outlining the judgement.	Completed	Letter was sent to all providers both in borough and out of borough
	Provide guidance for BIAs in light of new judgement	On going	Regular meetings held with all BIA'S to continue to discuss the implications of the judgement and improving practice.
<b>REVIEW OF CASES</b>			
<b>Review any DOLS decisions not granted (or expired) since 2009</b>	Prioritise within that those most like P and Q i.e. learning disability with 1:1 support or similar	Completed	In Bromley this is twelve cases for some DOLS were authorised in light of the new criteria
<b>Review all cases where the individual lacks capacity and direct services are being provided</b>	Map projected numbers of DoLS Cases	Completed	It is assumed that 50% of all cases and new referrals should be subject to DOLS. Assuming 50% (600) of people in residential/nursing lacking capacity and the level of hospital referrals. Best case estimate only of the number of young people (100) under 18 who this may affect. Worst case (200). Awaiting legal advice on the position of residential schools.
	Map projected numbers of Court of Protection (Court of Protection) cases	Completed	It is assumed based on this that there would be approximately 300 individuals this would apply to.
	Prioritise cases identified		This proactive work has not yet commenced due to the volume of referrals from providers
	Establish a plan to screen through these and make applications to Court of Protection where applicable.	Completed	The Court of Protection has issued some detail of the process it will follow and it is recommended that locally the same process as a DOLS will be followed locally with the BIA preparing a report for Court in addition to the Doctors recommendation-this would be

			co-ordinated by the DOLS team.
	Map likely on-going costs to take cases to Court	Completed	The Court has detailed costs as part of the process which will be £400 for paper authorisation if it is a complex or contested case then it would be subject to an oral hearing when costs could be an average of £7,000 per case, obviously the number of these is difficult to forecast but would be a minority.
	Develop process for this Court work and how it is undertaken	Completed	It is recommended that this work is undertaken by a centrally established Deprivation of Liberty Team eventually as part of Safeguarding service using BIAs to prepare the requisite papers for the Court.
	Map and cost the impact on the use of the IMCA and RPR	Completed	An up to date costing is currently being mapped but is part of the review of advocacy services and is also dependent on awaited guidance on independent advocacy as part of the Care Act
<b>INFORMATION/TRAINING REQUIREMENTS</b>			
Inform all key stakeholders of the Supreme Court judgement and of the agreed actions	Key meetings to be identified	On-going	Key meetings have been identified with regular reports to BSAP Executive, PDS, Executive, ECHS MT and the CCG.
<b>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</b>	This will include attendance at Care Homes Forum, meeting with DoLS Lead CCG & Hospital Trust Discuss with Oxleas and agree actions for mental health	On-going	This is on going
	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 January	The CCG has secure funding for this piece of work, it is currently underway as a joint piece of work with a pack/leaflet being produced both on websites and hard copy for all health and social care providers (including GP's) to use when individuals come into contact with services. Alongside this the funding is also going to be used to produce an information leaflet for providers to issue to families when they are about to make a referral for a DOLS authorisation.
	Ensure that capacity assessments are being completed appropriately and separately on Carefirst by changing the overview assessment form to ensure that the information is captured on the capacity form only	End of June	Carefirst are working on ensuring that if the overview assessment form requires the capacity assessment is completed. The majority of teams have been visited and informed on DOLS changes, least restrictive practice and the legal requirement for capacity assessments. Further training is required and is currently being commissioned by L&D.
<b>Offer training updates/ briefings in as many settings as possible making clear the need for</b>	Training identified for senior managers, refreshers for staff and the need for "roadshows" Develop a training plan for	On going	Session for managers is planned for end of November, with further roadshows planned as required. Meeting to be held with the hospital to look at training of hospital staff

<b>less restrictive options before resorting to DoLS</b>	hospital staff		
	Visit all care management/social work and medical teams to discuss the implications of least restrictive practice	On going	The majority of teams (including children's and education management teams have been visited, this is an on-going process
	Update training materials	Completed	Meeting has been held with Training and development to scope this. Training programme is being commissioned as is a robust process to select individuals for BIA training
	Provide regular briefings as an e mail update using In Touch	On going	This has yet to be done
	Update policies and procedures in line with the acid test	End of January	These procedures are being drafted for consideration .
	Ensure that all staff are aware of the Mental Capacity Act and how to carry out assessments.	On going	Whilst the majority of staff have received training the application of the Act is variable –see comments above
<b>Increase the number of BIA's</b>	Staff have been identified to do the BIA training and refresher training for existing BIA's is also being procured	On going	Three staff were trained as BIA's in May and a robust process has been developed to ensure that staff who request this training can meet the demands of the course and the work.
<b>STAFFING</b>			
<b>Ensure the immediate review work is resourced</b>	Recruit temporary staff (1WTE ) to carry out review work	Completed	Two BIA's have been seconded from Care services and an individual to coordinate the administration of this has been seconded from Strategy and Performance. It has been impossible to find agency BIA s on a locum basis but this continues to be pursued.
	Discussions with Legal Services as to the possible impact on their staffing as a result of the review	Completed	Legal services are unable to assess the impact until Court cases are pursued. Their view is that if experience BIA's are part of a central team then routine court papers will be of the required quality reducing the legal services workload

## APPENDIX TWO

Quarter one applications for DOLS by comparator or neighbouring boroughs (who provided data to Department of Health)

LA Name	Number of Applications Q1	Number of Applications (2013/14)
Greenwich	47	27
Wandsworth	74	37
Barnet	58	48
Bexley	244	74
Bromley	39	12
Croydon	52	46
Enfield	51	66
Harrow	33	14
Havering	53	27
Hounslow	45	16
Kingston upon Thames	98	28
Merton	46	29
Redbridge	47	29
Richmond upon Thames	103	31
Sutton	50	31