

**Decision Maker:** Executive

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

**Date:** 23<sup>rd</sup> September 2015

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

**Title:** DEPRIVATION OF LIBERTY SAFEGUARDS UPDATE

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**Chief Officer:** Lorna Blackwood, Assistant Director, Education, Care and Health Services

**Ward:** Boroughwide

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1. Reason for report

This report updates Members on the service activity following the Supreme Court judgement in March 2014 relating to Deprivation of Liberty Safeguards and to deprivation of liberty of individuals. The report updates the actions to address the implications of the judgement.

The report requests that the Executive agree the drawdown of the further agreed funding for continued staffing as highlighted in the report to Executive in February 2015.

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2. **RECOMMENDATION(S)**

2.1 **Members of Care Services PDS are asked to:**

i) **Note and comment on the report including the additional grant funding relating to 2015/16**

ii) **Agree proposals set out in paragraph 5 and refer to the Executive for approval.**

2.2 **The Executive are asked to:-**

i) **Note that additional grant funding of £126,982 has been allocated by Government and approve that it is released from the central contingency to the Care Services budget to fund the additional costs of £130k as set out in this report.**

### 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 £755k full year
  2. Ongoing costs: Recurring cost. £755k
  3. Budget head/performance centre: Mental Capacity Act
  4. Total current budget for this head: £441k
  5. Source of funding: Core funding
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### Staff

1. Number of staff (current and additional): 5.5wte tempory staff, 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? N/A.
2. Summary of Ward Councillors comments:

### 3. COMMENTARY

3.1 Members will recall that 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. Assessments are carried out by a doctor, who is qualified under section 12 of the Mental Health Act 2007, and a Best Interest Assessor these establish the following:

- 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

3.2 On completion of these assessments and the paperwork the Assistant Director for Care 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.

3.3 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.

3.4 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 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.

3.5 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?

**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.

- 3.6 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.
- 3.7 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 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 REPORT TO EXECUTIVE IN NOVEMBER 2014**

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 this judgement. This 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. The outcome of this was reported to Executive in February 2015, when it was agreed that further monies would be identified to establish a small team, pay for Section 12 doctor's assessments and Independent Best Interest assessors as required. The monies also included a budget for legal costs as required.

4.2 The activity to date in terms of assessments is detailed in the table below:

	April 2014-April 2015	April 2015 – July 2015
Number of referrals	388	258
Number Granted	351	238
Number not granted	31	9
Number withdrawn	6	11

- 4.3 There are also 70 possible Court referrals awaiting further details and 66 referrals awaiting advice from Queens Counsel.
- 4.4 The current volume of work has been delivered by a small team of a senior practitioner and one best interest assessors seconded from Care Services with the use of additional assessors based in care services, a co-ordinator and other staff time in processing the authorisations. Temporary staff (four) are being used to assess people within Bromley and London. Independent assessors have been used for people placed outside of London and the Home

Counties. A permanent central DOLS team will be established as agreed with adverts placed internally in September.

- 4.5 A contract framework, as agreed has been established for the use of S12 doctors and Independent BIA's, ensuring that professionals used comply with the requirements of the Act and of the Council.
- 4.6 As a consequence of the Supreme Court Judgement the death of any individual subject to DOLS has to be reported to the Coroner for investigation. This has required liaison with Coroner's Office to ensure that the process for this is in place and that they have all the required documentation.
- 4.7 Training and awareness still continues with all the teams and services. Letters 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, with regular updates being given. Updated training is being provided both for providers and staff to ensure the awareness of the need to reduce restraint and restrictions and promote liberty in care plans. The new forms from the Department of Health have been distributed and are being used (from April 2015) with guidance circulated.
- 4.8 There are further cases which may need to be brought before the Court for which the preparatory work is being carried out. The Court recently changed its requirements which mean that individuals have to be represented with the costs being borne by the Council, this may increase the legal costs to the authority. To date no cases have been taken to Court and therefore there has (to date) been no spend on this additional monies.
- 4.9 A new Independent Mental Capacity Advocacy Service was established, with the responsibility to provide paid Relevant Persons Representative's (specialist advocate for people subject to a DOLS) locally if required, as agreed in a report to this Committee in November 2014.

## **5 FINANCIAL IMPLICATIONS**

- 5.1 A sum of £127k is available in the 2015/16 budget for Deprivation of Liberty Safeguards. In addition to this a sum of £628k was approved by the Executive in February 2015 as part of the 2015/16 budget process to meet the additional cost pressures arising from the legislation.
- 5.2 In March 2015 the government allocated one off grant of £127k to help meet some of the new cost pressures arising from the legislation. This grant is for 2015/16 only and therefore this needs to be used before any further drawdown from the central contingency.
- 5.3 This report is requesting drawdown of a further £130k to continue to fund additional staff and the continuation of doctors' assessments as set out in this report and the previous report to Executive in February 2015. Without this funding the Council would not be able to meet its statutory obligations. The additional grant allocated in March 2015 by government can be used to offset this expenditure.
- 5.4 In total there is £755k of expenditure available in the budget for DOLS broken down as follows:-

## DOLS

£000

2015/16 ORIGINAL BUDGET	127
GROWTH - ALLOCATED TO CARE SERVICES BUDGETS	314
GROWTH - ALLOCATED TO CENTRAL CONTINGENCY	314
	<b>755</b>

Of the total budget of £755k, £441k has been allocated to Care Services. A further £130k is being requested for cost pressures which will be offset by the additional grant leaving 314k in the central contingency should it be required.

## **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.

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