

**SUPREME COURT'S RULING ON DEPRIVATION OF LIBERTY SAFEGUARDS**

*To:* **Adults Committee**

*Meeting Date:* **9 September 2014**

*From:* Claire Bruin - Service Director, Adult Social Care  
Mike Hay - Head of Practice & Safeguarding

*Electoral division(s):* All

*Forward Plan ref:* *Not applicable*      *Key decision:* *No*

*Purpose:* To brief the Committee on the impact of the recent supreme Court ruling on deprivation of liberty safeguards and to outline the impact of the ruling on practice, the capacity of the service to meet the requirements of the ruling and the cost implications.

The judgement clarifies what constitutes a deprivation of liberty. Potentially this means the judgement will affect thousands of people across the country who do not have the mental capacity to give valid consent to their placements in hospitals or care homes. This will include many older people with dementia or people with severe learning disabilities or acquired brain injuries, who live in supported accommodation or in their own homes.

The report sets out the practice and business planning implications.

An explanatory note and short glossary are attached at Appendix 1.

*Recommendation:* The Committee is asked to note and endorse the contents of the report:

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## **1.0 BACKGROUND**

- 1.1 The Mental Capacity Act Deprivation of Liberty Safeguards (MCA DOLS) came into effect on 1 April 2009.
- 1.2 This was to prevent breaches of the European Convention on Human Rights and provides for the lawful deprivation of liberty of those people who lack the capacity to consent to arrangements made for their care or treatment in either hospitals or care homes, but who need to be deprived of their liberty in their own best interests and to protect them from harm.
- 1.3 Local authorities are designated as 'Supervisory Bodies' under the legislation and have statutory responsibility for operating and overseeing the MCA DOLS.
- 1.4 Hospitals and care homes are designated as 'Managing Authorities' and have the responsibility for applying to the relevant local authority for a Deprivation of Liberty authorisation.
- 1.5 The MCA DOLS are designed to protect the human rights of an extremely vulnerable group of people with learning disabilities, dementia or acquired brain injuries and:
  - ensure these people can be given the care they need, that is the least restrictive and in their best interests
  - prevent arbitrary decision making that deprives them of their liberties
  - provide them with rights to challenge their detention if need be
- 1.6 Under the MCA DOLS, six assessments have to be successfully conducted before a local authority as Supervisory Body can authorise the deprivation of an individual's liberty in a hospital or a care home. These assessments must be carried out by appropriately qualified assessors appointed by the Supervisory Body and namely, the Best Interests Assessor (social worker) and the Mental Health Assessor (section 12 Doctor).
- 1.7 Assessments must be completed within 21 calendar days for a standard deprivation of liberty authorisation or where an urgent authorisation has been given; it must be completed within 7 calendar days. However, this can be extended for a further 7 calendar days under exceptional circumstances.

## **2.0 THE SUPREME COURT'S RULING**

- 2.1 People with disabilities regardless of whether they have mental or physical disabilities, have the same human rights as other people. This principle flows from the universal Charter of Human Rights and the United Nations' Convention on the Rights of Persons with Disabilities (UNCRPD). In 2009 the UK Government ratified the Convention and signalled its commitment to take concrete action to comply with the legal rights and obligations contained in the Convention.

2.2 The recent judgement involved two cases which originated in the Court of Protection about a man called 'P', whose care was arranged by Cheshire West and Chester Council, and two sisters called 'MIG' and 'MEG' (called 'Q' by the Court of Appeal). P lived in 'supported living' accommodation (housing with support commissioned by the local authority), but was subject to close supervision by staff and with restrictions on his freedom of movement to prevent him from trying to tear up and ingest his incontinence pads, which had resulted in him being admitted to hospital in the past.

MIG (aged 19) and MEG (aged 18) had been removed from their family home as children due to concerns about their wellbeing; MIG lived with a foster carer and MEG lived in a small children's care home. Like P, both young women were subject to close supervision by their carers to keep them safe and MEG was sometimes restrained and given anti-psychotic medication.

The Supreme Court was asked to decide whether or not P, MIG and MEG were 'deprived of their liberty' as a result of restrictions imposed by those caring for them.

2.3 The Supreme Court's ruling has clarified a number of key areas of law in relation to the MCA DOLS as summarised below:-

- There is an "acid test" to determine if a person is deprived of their liberty i.e. they are (a) under continuous supervision and control and (b) not free to leave;
- The person's objection to or compliance with their living arrangements are irrelevant to the assessment;
- The purpose is irrelevant. "The fact that my living arrangements are comfortable and indeed make my life as enjoyable as it could possibly be should make no difference." (Supreme Court Deputy President Baroness Hale);
- The "relative normality" of the placement is also irrelevant as the Supreme Court has unequivocally rejected this concept and reaffirmed the universality of human rights and physical liberty should be the same for everyone;

A deprivation of liberty can occur outside the care home and hospital setting, for example in domestic or quasi-domestic settings and where the Council is responsible for such arrangements i.e. in supported accommodation or shared lives or extra care living arrangements. However, a deprivation of liberty in such placements can only be authorised by the Court of Protection.

### **3.0 MAIN ISSUES**

3.1 Whilst the "acid test" has clarified the factors in determining what constitutes a deprivation of liberty, it means that anyone meeting this definition will be deemed to be deprived of their liberty. Hence, potentially it will affect thousands of people across the country who do not have the mental capacity to give valid consent to their placements in hospitals or care homes. This will include many older people with dementia or people with severe learning disabilities or acquired brain injuries.

- 3.2 Since the publication of the Supreme Court's ruling in March, we have already seen a relatively big increase in the number of applications for DOLS authorisations. For example, in July, the Council had 54 applications which is equivalent of roughly the same number of applications for the whole of 2013/14. This has placed pressure on our MCA DOLS staff to complete their assessments within the legal timescale.
- 3.3 The Department of Health has accepted that there are difficulties with the DOLS and has asked the Law Commission to consider how deprivation of liberty should be authorised and supervised in settings other than hospital and care homes where it is possible that Article 5 rights would otherwise be infringed. They will also assess the implications of this work for DOLS across the board to ensure that any learning which may be relevant is shared. A report with recommendations for reform and a Draft Bill is expected in the Summer of 2017.
- 3.4 The financial implications of implementing the judgment and putting in place the necessary safeguards to protect the greater number of vulnerable adults are significant. Under the DOLS' procedure, these costs will include fees payable to section 12 Doctors who assess a person's mental health, independently employed Best Interest Assessors and Court and legal fees for cases that need to go to the Court of Protection for authorisation and general administrative costs.
- 3.5 Significant financial and human resources will have to be diverted from elsewhere in order to meet our legal responsibilities under the MCA DOLS' regime.
- 3.6 In psychiatric inpatient settings, clinical staff will need to review the situation of all their informal patients who are incapable of giving their valid consent to their admissions and consider whether they are being deprived of their liberty. If so, they must then decide whether to use the Mental Health Act or the MCA DOLS to protect the person's rights. Potentially, this may result in more people being detained under Section 3 of the Mental Health Act and in turn, will have financial implications on the S117 aftercare budget. (S117 relates to some people who have been detained in hospital under the Mental Health Act 1983 i.e. "sectioned" and who are entitled to free aftercare when they are discharged from hospital).
- 3.7 Children's services and especially the Fostering and Transition teams are also affected as there are some young people who are unable to give valid consent to their placements. The MCA principles apply to people over the age of 16, hence issues relating to lack of capacity must be addressed accordingly. What we already know from case law is that those with parental responsibility cannot consent to their child's deprivation of liberty. This judgement is significant for Section 20 placements in general. In this regard, authorisation for a deprivation of liberty can only be obtained from the Courts, be it the Family Court or the Court of Protection.
- 3.8 In response to this situation an agreed action plan has been signed off by the CFA Management Team and the Council's Senior Management

Team and will be monitored by the MCA DOLS governance group, the main focus will be on:

- Establishing what resources are needed for Best Interest Assessors (BIA's), Section 12 doctors, DOLS Administrators and Panel signatories to meet the increased demands in MCA DOLS application for authorisations.
- Working with the Eastern Region MCA DOLS' Leads meetings to explore issues/solutions that have been dealt with by other local authorities.
- Working In conjunction with the Eastern Region MCA DOLS leads to explore the possibility of joint commissioning options for training of BIAs and Section12 doctors.
- Understanding the legal implications of the Supreme Court Judgement, and Guidance from ADASS and the Department of Health.

3.9 The Council has raised the issues created by the Supreme Court ruling at national and local levels with colleagues to advocate for a central government response that acknowledges the challenging legal position that each local authority is facing. In particular, the scale of increased resources that may be needed to comply with the law and also to provide practical suggestions on how to meet the challenges to protect this vulnerable group of people as a consequence of the ruling.

#### **4.0 ALIGNMENT WITH CORPORATE PRIORITIES**

##### **4.1 Developing the local economy for the benefit of all**

The MCA DOLS ensures people can be given the care they need by our local Providers which is the least restrictive and also justified to be in their best interests.

##### **4.2 Helping people live healthy and independent lives**

Meeting the requirements of the Supreme Court Judgement ensures people are given the care they need and protects them from abuse.

##### **4.3 Supporting and protecting vulnerable people**

The report sets out the implications of the Supreme Court judgement and how the local authority as the supervisory body will work within the new legislation.

#### **5.0 SIGNIFICANT IMPLICATIONS**

##### **5.1 Resource Implications**

5.1.1 The following bullet points set out details of significant implications identified by officers:

- 5.1.2 • Recent Supreme Court rulings could have significant implications for Local Authority practice in depriving individual liberty under the Mental Capacity Act. As a result of this new case law, a significant increase in the number of best interest and mental health assessments would be necessary. The earliest indications suggest that the number of requests for best interest assessment has increased six-fold on the previous year.
  
- 5.1.3 • The financial risk to CFA has been estimated and is set out below
  - Additional best interest assessments in 2014/15 gives a pressure of £400,000, based on the current availability of appropriately trained assessors. This capacity is not sufficient to respond to all expected assessment requests. The General Purposes Committee has been asked to approve a transfer from CFA reserves to fund this pressure.
  - If more assessors were available to respond to the total number of expected assessment requests in a 12 month period, the pressure is estimated to be £800,000.
  - In addition, where the process requires the decision to be made through the Court of Protection the legal fees for a 12 month period are estimated as £1,540,000. The impact in 2014/15 will depend on the speed at which providers make referrals and how quickly the Court of Protection responds to further recent guidance from Judge Mumby that allows them to design a fast track process for some situations – currently the Court of Protection are holding cases. This estimate has assumed that the fast track process would be available for about 50% of people requiring a Court of Protection decision.
  
- 5.1.4 The costs of undertaking assessments, including legal costs will be recurrent as the assessment process is only authorised for a maximum period of twelve months. The Local Government Association and the Association of Directors of Adult Social Services are lobbying government to consider these pressures under the New Burdens Protocol, with particular emphasis on the high cost of legal fees.
  
- 5.1.5 Regular monitoring of numbers of referrals will be enhanced and will refine the financial impact over the coming months.

## **5.2 Statutory, Risk and Legal Implications**

- 5.2.1 The increasing volume of referrals is putting added pressure on the team to meet its statutory responsibilities under the DOLS legislation, however we have an agreed action plan and national advice has been provided by the Department of Health, ADASS and the CQC.

We will be sending out a letter explaining our current position to all Managing Authorities who have sent in applications for DOLS clarifying why we have not been able to respond in accordance to the specified timescales due to the sheer number of cases.

### **5.3 Equality and Diversity Implications**

5.3.1 This principle flows from the universal Charter of Human Rights and the United Nations' Convention on the Rights of Persons with Disabilities (UNCRPD).

### **5.4 Engagement and Consultation Implications**

5.4.1 The MCA DOLS Manager is part of the ADASS working group looking at the DOLS implementation, Chairs the Eastern Region DOLS Leads Meetings and is working with the Department of Health.

### **5.5 Public Health Implications**

5.5.1 None.

### **5.6 Localism and Local Member Involvement**

5.6.1 This is a countywide issue and briefings have been provided to Spokes.

<b>Source Documents</b>	<b>Location</b>
Briefing on the Supreme Court Ruling in March 2014 re P v Cheshire West and Chester Council and P and Q v Surrey County Council and in particular, its implications on practice for Cambridgeshire County Council	<a href="http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf">http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf</a>

## Appendix 1

### **Mental Capacity & Deprivation of Liberty Safeguards**

The **Mental Capacity Act** provides a framework to empower and protect people who may lack capacity to make some decisions for themselves.

The Mental Capacity Act makes clear who can take decisions in which situations, and how they should go about this. Anyone who works with or cares for an adult who lacks capacity must comply with the MCA when making decisions or acting for that person.

This applies whether decisions are life changing events or more every day matters and is relevant to adults of any age, regardless of when they lost capacity.

The underlying philosophy of the MCA is to ensure that those who lack capacity are empowered to make as many decisions for themselves as possible and that any decision made, or action taken, on their behalf is made in their best interests.

The five key principles in the Act are:

- Every adult has the right to make his or her own decisions and must be assumed to have capacity to make them unless it is proved otherwise.
- A person must be given all practicable help before anyone treats them as not being able to make their own decisions.
- Just because an individual makes what might be seen as an unwise decision, they should not be treated as lacking capacity to make that decision.
- Anything done or any decision made on behalf of a person who lacks capacity must be done in their best interests.
- Anything done for or on behalf of a person who lacks capacity should be the least restrictive of their basic rights and freedoms

### **Deprivation of Liberty Safeguards**

The Deprivation of Liberty Safeguards (DOLS) are part of the Mental Capacity Act 2005. They aim to make sure that people who are incapacitated to give valid consent to their placements either in care homes and hospitals are looked after in a way that does not inappropriately restrict their freedom. The safeguards should ensure that a care home and hospital only deprives someone of their liberty in a safe and correct way and that this is only done when it is in the best interests of the person and there is no other way in ensuring that they receive the care or treatment.

The key elements of the safeguards are:

- to provide the person with a representative
- to give the person (or their representative) the right to challenge a deprivation of liberty through the Court of Protection (see 'Useful organisations')
- to provide a mechanism for deprivation of liberty to be reviewed and monitored regularly

## **Glossary of terms**

**Court of Protection:** The specialist Court for all issues relating to people who lack capacity to make specific decisions. The Court of Protection is established under Section 45 of the MCA.

A deprivation of liberty can be authorised in one of two ways, depending on the setting in which it is to happen:

- If a care home or a hospital that facility has to obtain an authorisation from the local authority as supervisory body under the statutory DOLS scheme.
- In a setting other than a care home or hospital (for example, a supported living setting, or the individual's own home) the body seeking authorisation which will often be the individual's local authority has to obtain authorisation from the Court of Protection.

**BIA:** Best Interests Assessor is the person who assesses whether or not deprivation of liberty is occurring or not and if so, whether it is in the person's best interests, is necessary to prevent harm to the person and is a proportionate response to the likelihood and seriousness of that harm.

### **Article 5 Right to liberty and security**

Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law.

### **Section 12 Approved Doctors**

A Section 12 approved doctor is a medically qualified doctor who has been recognised under Section 12(2) of the Mental Health Act. They have specific expertise in mental disorder and have additionally received training in the application of the Act. They are usually psychiatrists, although some are general practitioners (GPs) who have a special interest in psychiatry.

### **Law Commission**

The Law Commission is the statutory independent body created by the Law Commissions Act 1965 to keep the law under review and to recommend reform where it is needed. The aim of the Commission is to ensure that the law is: Fair, modern, simple and as cost-effective as possible.

### **Section 20 placements**

Local Authorities are under a statutory obligation to provide accommodation for any Child In Need within their area who appears to them to require accommodation as a result of:

- There being no person who has parental responsibility for them
- His/her being lost or abandoned
- The person who has been caring for him/her being prevented (whether or not permanently for whatever reason) from providing him with suitable accommodation or care (S.20.1 CA 1989)

### **ADASS**

Association of Directors of Adult Social Services.

### **CQC**

Care Quality Commission.

**Section 117**

Section 117 of the Mental Health Act 1983 requires district health authorities and social services authorities (SSAs) to provide aftercare services for any person who has been discharged from compulsory detention in hospital until they are satisfied that the person concerned no longer needs such services.