

DEPRIVATION OF LIBERTY SAFEGUARDS

Report for Safeguarding Adults Board July 2014



Context

A report was compiled for SAB in April 2014 on MCA and DOLS. Since then, the Supreme Court issued a judgment in *n P v Cheshire West and Chester Council and P and Q v Surrey County Council* which changed the understanding of what constitutes a deprivation of liberty. The government has also published its response to the House of Lords Scrutiny Committee on the Mental Capacity Act entitled: Valuing every voice, respecting every right: Making the case for the MCA.

This report summarises the main issues arising from these developments and requests clarification on the role Plymouth Safeguarding Adults Board wishes to take in monitoring compliance with the MCA, DOLS, deprivation of liberty in the community and the Supreme Court judgement.

Summary of the Act

The Mental Capacity Act (MCA) 2005 provides a statutory framework to empower and protect some of the most vulnerable people in society. It makes it clear who can take decisions, in which situations and how they should go about this in respect of people who lack capacity to make particular decisions for themselves. It provides guidance to health and social care staff for providing care and treatment to people who are unable to consent in the form of the Mental Capacity Act Code of Practice. The Act provides guidance around advanced decisions, lasting power of attorney and accessing the court of protection (CoP). It gives some people who lack capacity a right to receive support from an Independent Mental Capacity Advocate. All health and social care providers and commissioners have responsibility for on-going implementation of the act. This is monitored by the CQC.

The Deprivation of Liberty Safeguards came into effect in 2009. They are part of the Mental Capacity Act 2005. Their aim is to ensure that people's human rights are protected when they are or may be deprived of their liberty in hospitals or care homes.

The role of the Local Authority in responding to DoLS applications

From April 2013, the local authority has responsibility to act as supervisory body in response to all deprivation of liberty applications from care homes and hospitals. The core duties and responsibilities of the supervisory body are to respond to applications and arrange for specialist assessments, investigate unauthorised deprivation, commission an advocacy service and ensure the person has a representative while deprived of their liberty.

The role of Clinical Commissioning Groups (CCG)

Clinical commissioning groups continue to receive funding for Mental Capacity Act implementation and training, (which includes ensuring a good understanding in hospitals of the Deprivation of Liberty Safeguards). CCGs are responsible for confirming that safe implementation of the Mental Capacity Act, including DoLS, is considered in all relevant commissioning processes and specified in all relevant contracts. The grant amount originally committed to Plymouth PCT was estimated to be £41,664 recurring annually. Subsequent guidance indicated that this amount was to transfer to CCGs.

It is recommended by the social care institute for excellence that CCGs should, working in partnership with local authority, commission from their mental health provider the supply, training and release from other duties of suitably qualified doctors to undertake mental health assessments for the DOLS process. There is currently a shortage of trained psychiatrists participating in these assessments in Plymouth. This has been highlighted to the medical director and commissioners responsible for section 12 doctors.

The role of Health, Social Care and 3rd Sector Providers

Residential care homes, nursing home and hospitals, including mental health hospitals are responsible for compliance with the mental capacity act and deprivation of liberty safeguards. They have functions as a DOLS managing authority to make applications to the local authority if a person in their care is deprived of their liberty. They must notify the CQC when they make these applications.

Where a person is deprived of their liberty in the community such as supported living arrangement, the commissioner of that service has a responsibility to seek legal authorisation for that arrangement from the court of protection. This has clearly been the case since 2007; however, the new guidance from the Supreme Court on what constitutes a deprivation of liberty means that the need to make applications to the court of protection will significantly increase.

Mental Capacity Act Awareness for Children's Services

There is an additional need for staff in Children's services and commissioning to be aware of the mental capacity act and deprivation of liberty safeguards in relation to the capacity of parents to give consent, the potential for young people age 16 and above to be subject to the MCA and also care arrangements for children and young people in residential or residential education which may amount to deprivation of liberty. The Supreme Court has reiterated that deprivation of liberty can occur even in foster care arrangements; however the court of protection can only authorise deprivation of liberty for young people over the age of 16, so specific legal advice will need to be taken in situations which may amount to a deprivation of liberty but cannot be authorised by DOLS process or the CoP.

Deprivation of Liberty

New interpretation of Deprivation of Liberty

The supreme court indicated that the two key questions to ask are:

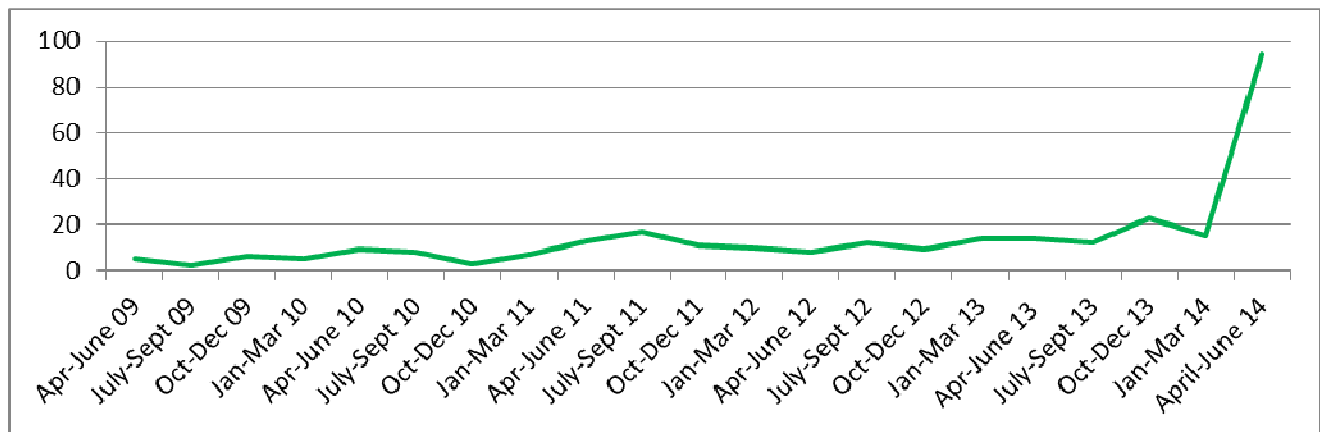
Is the person free to leave? And

Is the person under continuous supervision and control?

When considering whether a person is deprived of their liberty, it is **not** relevant to consider:

- Whether the person has made an attempt to leave
- Whether the person is content with the arrangement
- Whether the person objects to the arrangement
- The purpose of the restrictions or whether they are necessary for the person's safety
- Whether any person with similar needs would be subject to similar restrictions

Patterns of DOLS application rates since introduction of the Safeguards



Supported living

Both adult social care and Plymouth community healthcare have begun to scope commissioned services where person who lacks capacity to consent to their care is likely to be deprived of their liberty in the community where an application to the court of protection may be required.

Options for Level of Oversight/Scrutiny from Plymouth Safeguarding Adults Board

1. Continue to receive periodic update reports from DOLS officer and Lead officer Group
2. Seek specific assurance from member organisation on compliance with the MCA/DOLS including progress updates on compliance with the Supreme Court Judgment and request information from the Safeguarding Children's Board regarding their parallel actions.
3. Form a Task and Finish group to agree a city-wide approach to response to the Supreme Court Judgment and require progress updates to ensure that DOLS applications or court of protection applications are made for anyone in the city (or in out of county placements made by Plymouth commissioners) who may be deprived of their liberty.

Summary of Government Response to House of Lords Scrutiny on the MCA

www.gov.uk/government/uploads/system/uploads/attachment_data/file/318730/cm8884-valuing-every-voice.pdf

- Implementing organisations must assure themselves that MCA governance is up to the task
- All implementation partners should plan MCA awareness raising strategies
- MCA should have a strong advocate within each organisation. Government urge that where responsibility for the MCA is assigned to the named safeguarding lead, “care is taken to ensure that the ‘MCA voice’ is heard in equal measure to the ‘safeguarding voice.’
- Government will consider the case for establishing a new MCA advisory board (Autumn 2014)
- DH MCA Steering Group will continue and hold implementing organisations to account
- LGA will develop a self-peer-audit tool for local authorities (early 2015)
- NHS England is investigating the possibility of self-audit tools for NHS Trusts.
- DH will commission SCIE to carry out a review of the current guidance and tools (end 2014)
- Following SCIE review DH will determine if review of the code of practice would be valuable
- DH will develop “credit-card sized” statement of rights under MCA
- Academy of Medical Royal Colleges, Police, Housing and Safeguarding Adults Alliance, Standing Commission on Carers, Financial Conduct Authority, Healthwatch England, and Health and Wellbeing Board should report to the MCA Steering group on implementation and awareness.
- MCA steering group will produce case studies (early 2015)
- Chief social worker for Adults will write to the sector stressing importance of the MCA
- Government recognises the need for more qualified Best Interest Assessors
- Government working group will scope how MCA training can be made more widely available
- SCIE will produce a report detailing how MCA principles can be embedded into the process of care planning (early 2015) including Advance Decisions and Lasting Powers of Attorney.
- Government will build on new duties to provide advocacy in the Care Act 2014 linking these to existing duties to provide advocacy under the MCA
- Government will commission guidance on IMCAs as litigation friends (autumn 2014)
- Public Health England and DH will work together to see how DPH can contribute.
- Government will ask the Law Commission to consult on and potentially draft a new legislative framework that would allow for the authorisation of deprivation of liberty in supported living. It will also consider any improvements that might be made to the Deprivation of Liberty Safeguards process (this work will not complete for a few years)
- Government will keep the need to refresh the DOLS code of Practice under review
- Government recommends that “NHS England includes expectations on the effective use of the Deprivation of Liberty Safeguards in the standard contract for providers.”
- ADASS will lead a task group to consider implications of the supreme court judgment
- Government will commission a revision of the DOLS standard forms (November 2014)
- Government has commissioned up to date guidance on DOL case law (end 2014)
- Government will draft new chapter for the revised MHA code of practice on the topic of overlap between MCA, DOLS and MHA. (consultation summer 2014).
- Government has committed to revising the Court of Protection Rules by April 2015