

CHESHIRE EAST COUNCIL

ADVISORY PANEL – PEOPLE

Date of meeting: 8 December 2008
Report of: John Weeks, Strategic Director Designate (People)
Title: Deprivation of Liberty Safeguards

This paper, which is in the format of a Cabinet report, is presented to the Advisory Panel (People) to enable Panel Members to be aware of a forthcoming Cabinet issue and to contribute views to inform the decision making of the Cabinet.

1.0 Purpose of Report

- 1.1 To introduce to Members a new statutory responsibility, the Deprivation of Liberty Safeguards, which will come into force in April 2009 and to consider the appropriate administrative and procedural machinery that will be required to ensure their successful implementation.
- 1.2 This is a new statutory power which will affect all electoral wards and will be a significant element in the wider safeguarding role and function of the Council. It is therefore a key decision.

2.0 Decision Required

- 2.1 To consider the appropriate mechanisms for the receipt and scrutiny of assessments for Deprivation of Liberty in partnership with the Primary Care Trust.

3.0 Financial Implications for Transition Costs

- 3.1 None

4.0 Financial Implications 2009/10 and beyond

- 4.1 The financial implications of these new safeguards are uncertain (see below section 6). The Mental Capacity Grant is an Area Based Grant and for 2007/08 is £282,000, for 2009/10 it will be £357,000, and for 2010/11 £344,000. These amounts refer to the grant allocation to Cheshire County Council. This grant is also used to support the wider implementation of the Mental Capacity Act, including the Independent Mental Capacity Advocacy Service.

5.0 Legal Implications

- 5.1 The Mental Capacity Act 2005 has now been amended by the Mental Health Act 2007 to introduce for the first time in law, the Deprivation of Liberty Safeguards. These safeguards will have significant implications for all health and social care staff working in hospitals, residential/ nursing homes and in assessment and care management teams.
- 5.2 The Deprivation of Liberty Safeguards mean that a hospital or care home (managing authority) must seek authorisation from a Primary Care Trust or the Local Authority (the supervisory bodies) in order to deprive someone of their liberty who has a mental disorder, and who lacks capacity to consent. These safeguards are intended to bring UK law into compliance with the European Convention of Human Rights (ECHR) and came about as a result of the Bournemouth case.
- 5.3 The Bournemouth case involved a man with profound autism and learning disability, who lacked capacity to, or to refuse, admission to hospital for treatment. The European Court of Human Rights found that the manner in which he was deprived of his liberty was not in accordance with a procedure prescribed by law and was therefore in breach of Article 5(1) of the ECHR.
- 5.4 Furthermore there was no procedure available to him to review the legality of his detention which failed to satisfy Article 5(4).

6.0 Risk Assessment

- 6.1 Failure to implement the Deprivation of Liberty Safeguards could result in a vulnerable person who lacks capacity being deprived of their liberty outside of these procedures. This could amount to a breach of the Local Authority's statutory duty to ensure that these safeguards are properly implemented.
- 6.2 There is great uncertainty about how many assessments will result as a consequence of these new safeguards. We need to ensure that we have sufficient doctors and Best Interest Assessors available to carry out these assessments. If we have too many assessors because we have over-estimated the work, the Council may find itself paying a premium for staff which is not required. On the other hand, if there is an underestimation of the level of demand for this work, the Council could find itself overwhelmed with requests for assessments.

7.0 Background and Options

- 7.1 Not everyone who lacks capacity and who is in a hospital or a nursing home will be deprived of their liberty. When considering whether or not an application is necessary, managing authorities will need to consider the entire care package for the person concerned and what, if any, restrictions are necessary to support that person. For example, being located in a day room with a key pad system to gain access to and

from a unit for adults with dementia would not in itself amount to a deprivation of liberty. Factors to be taken into account include:

Is the person allowed to leave?

What degree of choice do they have over their life within the care home?

Is the person prevented from maintaining contact with the outside world?

7.2 The assessment of deprivation of liberty includes six elements:

- 1) Age Assessment – must be over 18
- 2) Mental Health Assessment to determine the presence of a mental disorder
- 3) Mental Capacity Assessment
- 4) Best Interest Assessment
- 5) Eligibility Assessment – to make sure that they should not be subject to the Mental Health Act instead.
- 6) No refusals Assessment – to make sure that the proposed care plan does not conflict with an Advanced Decision, an existing Lasting Power of Attorney or Court appointed Deputy.

7.3 A person can only be deprived lawfully of their liberty if the managing body has been issued with a standard authorisation from the supervisory body, following the completion of the above assessments. These assessments will need to be completed within 21 days of the confirmation of the request from the managing body by the supervisory body. If the person is already in a care home and is subject to a deprivation of liberty, the managing body must issue an urgent authorisation and the assessments must be completed within seven days (a seven day extension is available in certain circumstances)

7.4 The Mental Health assessment will need to be carried out by an appropriately qualified and experienced doctor. The Best Interest Assessment will be carried out most probably by a new Approved Mental Health Professional or a social worker, nurse or occupational therapist who has been trained to undertake these assessments

7.5 The Deprivation of Liberty Safeguards will impact on hospital and nursing/residential care homes looking after older people with dementia and adults with a learning disability. It will also have an impact on staff working with adults with an acquired brain injury and those with a severe mental illness.

7.6 Managers of hospitals and care homes will need to set up systems for identifying where someone's liberty may be at risk, making applications to the supervisory body and the issuing of urgent authorisations.

- 7.7 The Council and the Primary Care Trust will need to set up systems for the receipt and scrutiny of requests from managing bodies, commissioning and receiving assessments of deprivation of liberty and their active monitoring and reviewing.
- 7.8 Staff are already undergoing training around the Mental Capacity Act.
- 7.9 The Department of Health estimate that 20% of all assessments will be the responsibility of the Primary Care Trust and 80% the Local Authority. Guidance recommends the use of joint procedures wherever possible, but at the point of authorisation each organisation must take responsibility for its own decision.
- 7.10 The Appendix outlines the administrative and procedural mechanisms that will be required to implement the Deprivation of Liberty Safeguards.

8.0 Overview of Day One, Year One and Term One Issues

- 8.1 On day one there will need to be sufficient Best Interest Assessors and doctors who can respond to any requests. The Department of Health is anticipating an “administrative bubble” in April and under transitional arrangements has doubled the period of time allowed for authorisations to be considered; 42 days for standard authorisations and 14 days for urgent authorisations.
- 8.2 There will be a minimum of six Best Interest Assessors working across the Council. The Primary Care Trusts are currently exploring with some GP practices the inclusion of this service as part of a Locally Enhanced Service.
- 8.3 Referrals will be received via determined access points and allocated accordingly.
- 8.4 Assessments will be considered by the relevant senior officer on behalf of the Director and issued accordingly. This is consistent with the current process for the receipt and scrutiny of applications for Guardianship under the Mental Health Act.
- 8.5 After 12 months of operation, a formal review of these procedures will be undertaken to ensure that they are fit for purpose and to adopt lessons learnt from the first year of operation.

9.0 Reasons for Recommendation

- 9.1 To implement the new statutory framework of safeguards for people at risk of being deprived of their liberty, to establish the Council as a functioning supervisory body and to ensure that these procedures are delivered efficiently and effectively jointly with the Primary Care Trust.

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ACTIONS REQUIRED FOR DEPRIVATION OF LIBERTY SAFEGUARDS

Stage	Proposed processes	Requirements	Risks	Actions
1. Referral	All Deprivation Of Liberty Safeguards referrals will be handled and allocated by a nominated team in each authority	<ul style="list-style-type: none"> All identified staff to be trained in Deprivation Of Liberty Safeguards in order to screen referrals correctly 	1. Workload may be onerous 2. Lack of availability of Best Interest Assessors	1. Training plan to be developed 2. Manager to be made aware of predicted impact of Deprivation Of Liberty Safeguards 3. Referral form to be devised
2. Allocation	All Deprivation Of Liberty Safeguards referrals allocated to relevant Best Interest Assessor, as per rota	<ul style="list-style-type: none"> Adequate number of Best Interest Assessors for rota Contact details for all Best Interest Assessors available and up to date Allocation to occur same day 	1. Low numbers of Best Interest Assessors 2. Delayed allocation	1. Best Interest Assessors recruitment process to be implemented 2. Allocation process to be defined (electronic preferably), including recording of allocation 3. Rota to be defined and implemented
3. Assessment	Best Interest Assessors appointed and will then co-ordinate all six assessments.			
3.1 Age assessment	Captured on referral form	<ul style="list-style-type: none"> All referral forms to be completed correctly 	1. Time spent by Best Interest Assessor chasing incomplete information	1. Training of forms and processes to all managing authorities. (likely via cascade)
3.2 Mental Capacity assessment	Two-stage test carried out in-line with principles of Mental Capacity Act. Could be carried out by Best Interest Assessor or S12 doctor?	<ul style="list-style-type: none"> Forms for recording Best Interest Assessor/S12 Doctor fully trained and competent 		1. Training plan for Best Interest Assessors 2. Recruitment of Best Interest Assessors 3. Contracting of S12 doctors for assessments

Stage	Proposed processes	Requirements	Risks	Actions
3.3 No refusals assessment	Carried out by Best Interest Assessor to ensure that any authorisation does not conflict with other existing authority for decision making for that person, e.g. advanced decisions, Local Provision Agreements.	<ul style="list-style-type: none"> Supporting documentation in Deprivation Of Liberty Safeguards forms to instruct Best Interest Assessors in what they are looking for and suggestions of how to locate it 		
3.4 Eligibility Assessment	Carried out by Best Interest Assessor to establish whether person is covered by Mental Health Act or Mental Capacity Act.	<ul style="list-style-type: none"> Supporting documentation in Deprivation Of Liberty Safeguard forms Best Interest Assessor to be sufficiently knowledgeable of Mental Health Act Should person fall under Mental Health Act, hand-off process may be required (e.g. if Best Interest Assessor is not an Approved Mental Health Provider) 	1. Incorrect legislation used 2. Challenge from 3 rd parties, e.g. family	1. Process to hand of to Approved Mental Health Person if Mental Health Act is appropriate
3.5 Mental Health Assessment	Best Interest Assessor refers to S12 doctor to complete.	<ul style="list-style-type: none"> Contracting structure for S12 doctors to carry out assessment Referral process to S12 Doctors Forms for recording. Training plan for S12s (part of contract?) 	1. No S12 doctors ready and willing and time of assessment	1. Devise appropriate contract to ensure adequate responsiveness of S12 doctors.

Stage	Proposed processes	Requirements	Risks	Actions
3.6 Best Interest assessment	Best Interest Assessor's to carry this out to determine whether Deprivation Of Liberty is appropriate and for what length of time.	<ul style="list-style-type: none"> Deprivation Of Liberty Best interest assessment form Electronic record of decision plus review date Best Interest Assessors to complete 	1. Lack of clarity around who can assess whom in Cheshire. E.g. Approved Mental Health Persons working for Cheshire Wirral National Health Service Partnership Foundation Trust effectively commissioned to cover whole of county, therefore could be construed as having conflict of interest under Court of Protection guidelines	1. Procedures reflect Court of Protection. 2. Clarity of Cheshire and Wirral National Health Service Partnership Foundation Trust position to be sought.
4. Authorisation	Person(s) required within each supervisory body to sign-off Best Interest Assessor recommendations Appointing of Relevant Persons Representative (RPR) by above person. (from Best Interest Assessor recommendation)	<ul style="list-style-type: none"> Senior staff identified in each authority Authorisation process, including Service Level Agreement for response Key staff and Independent Mental Capacity Act Service to be briefed around role of Relevant Persons Representative and made aware that they may have to act as one on the future 	1. Lack of individuals to sign off in a timely manner 2. Definition Of Liberty not authorised within 21 days	1. Three people from each org identified as sign-offs 2. Auth process mapped and briefed
5. Review	Supervisory body responsible for ensuring the timely review of any Deprivation Of Liberty	<ul style="list-style-type: none"> Recording of Definition Of Liberty with review date Named person responsible for following up. Best Interest Assessor made aware that they will be responsible for review also 	1. Review date missed and therefore person unlawfully deprived	1. Gatekeeper appointed for database to monitor and prompt reviews (county wide?) 2. Review procedure written and adopted county-wide

Stage	Proposed processes	Requirements	Risks	Actions
6. IMCA	Independent Mental Capacity Act to be instructed as per Mental Capacity Act criteria	<ul style="list-style-type: none"> Referral process already in situ 	1. Independent Mental Capacity Act not fully aware of role within Definition Of Liberty Safeguard cases	1. Training for local Independent Mental Capacity Act service required. (is it part of current contracts that they train themselves?)