

Joint Commissioning Board

Agenda Item 52

Brighton & Hove City Council
and NHS Brighton and Hove

Subject:	Deprivation of Liberty Safeguards		
Date of Meeting:	9 March 2009		
Report of:	Director of Adult Social Care and Housing Head of Partnerships and Public Engagement		
Contact Officer:	Name: John Child	Tel: 296112	
	E-mail: John.child@brighton-hove.gov.uk		
Key Decision:	No		
Wards Affected:	All		

FOR GENERAL RELEASE

1. SUMMARY AND POLICY CONTEXT:

- 1.1 The Deprivation of Liberty Safeguards (DOLS) are being introduced from 1st April 2009 as an amendment to the Mental Capacity Act 2005. These safeguards will provide legal protection where deprivations of liberty or restrictions in freedoms for individuals are assessed as necessary. These arrangements will only apply to people, not otherwise provided for in terms of legal safeguards who are currently resident in hospitals or care homes registered under the Care Standards Act 2000. These safeguards apply to people in England and Wales who have a mental disorder and lack capacity to consent to the arrangements made for their care and treatment; but for whom receiving care and treatment in circumstances that amount to a deprivation of liberty may be necessary to protect them for harm and appears to be in their best interests. These safeguards only apply to people detained in a hospital setting or a care home registered under the Care Standards Act 2000.
- 1.2 Compliance with these safeguards is a statutory obligation. This report is seeking agreement that the DOLS service is hosted by the Access Point within Adult Social Care and run in tandem with Brighton & Hove City Primary Care Trust (PCT) now known as NHS Brighton and Hove and will be referred to as such. In addition it is seeking agreement that authorisations of deprivation of liberty can be agreed by the Director of Adult Social Care and Housing, and nominated deputies as specified in this report.

2. RECOMMENDATIONS:

- 2.1 That the Joint Commissioning Board support and endorse the joint approach between the Council and the Primary Care Trust in implementing the Deprivation of Liberty Safeguards.

3. RELEVANT BACKGROUND INFORMATION/CHRONOLOGY OF KEY EVENTS:

- 3.1 The DOLS legislation has been introduced as an amendment to the Mental Capacity Act 2005 via the Mental Health 2007. These safeguards apply to people in England and Wales who have a mental disorder and lack capacity to consent to the arrangements made for their care and treatment; but for whom receiving care and treatment in circumstances that amount to a deprivation of liberty may be necessary to protect them for harm and appears to be in their best interests.
- 3.2 The Deprivation of Liberty Safeguards came into being due to the European Court of Human Rights ruling in 2004 on the Bournemouth case which highlighted the need for additional safeguards for people who lack capacity and might be deprived of their liberty. The Bournemouth case concerned an autistic man with severe learning disabilities who was informally admitted to Bournemouth Hospital in Surrey under common law. The European Court of Human Rights found that he had been deprived of his liberty unlawfully, because of a lack of a legal procedure that offered sufficient safeguards against arbitrary detention and speedy access to a court. The Deprivation of Liberty Safeguards have closed the 'Bournemouth Gap' and will ensure compliance with the European Convention on Human Rights.
- 3.3 The safeguards have created new roles namely 'Managing Authorities and Supervisory Bodies' which impose duties on both the city council and NHS Brighton and Hove with regards to service users accommodated in registered care homes or hospitals respectively. Both organisations are required to operate a system to receive requests for authorising deprivations of liberty, arranging for the statutory assessments if deprivation is thought to be taking place and for agreeing deprivations of liberty as required. Both organisations are required to have systems to review deprivations of liberty and appoint representatives and Independent Mental Capacity Advocates as required.

- 3.4 Brighton & Hove City Council is both a Managing Authority and a Supervisory Body. This is due to the in-house residential care that is provided across service user groups in the city.
- 3.5 As the legislation imposes this duty on both the city council and NHS Brighton and Hove it was felt beneficial to run the service jointly and to pool allocated financial resources accordingly. Without these approaches two separate systems for receiving referrals, assessing possible deprivations of liberty and authorisation would have to be created. A further new statutory role has been created; that of Best Interests Assessor. With separate systems two sets of staff would have to be commissioned to undertake Department of Health (DoH) approved training at Brighton University.
- 3.6 Brighton & Hove City Council already had the operational skill mix required to meet the Best Interests Assessors requirements, the administrative infrastructure at the Access Point in Adult Social care, familiarity with registered care homes across the city and an operational understanding of the duties imposed under the Mental Capacity Act. A single point of entry across the city, regardless of location will be better for service users, carers and efficiency of service provision.
- 3.7 The DoH has estimated that 80% of DOLS activity will be generated by registered care homes as Managing Authorities and 20% for those in hospitals. Without a joint system; staff trained via NHS Brighton and Hove may well not receive enough work to maintain a satisfactory standard of competence.
- 3.8 Partnership working with NHS Brighton and Hove allows for better monitoring of the DOLS activity across the city by way of performance indicators. It allows the city council to capture all DOLS referrals, queries and authorisations especially with NHS partners such as Sussex Partnership NHS Foundation Trust, Brighton and Sussex University Hospital NHS Trust and Southdowns NHS Trust. Many of the Best Interests Assessors are city council staff seconded under Section 75 agreements and it is likely that many of the service users who will be subject to DOLS will be under the care of mental health or learning disability services. There is the possibility of this legislation effecting Delayed Transfers of Care so joint working with colleagues in acute hospitals is key to the policy success.
- 3.9 Early indications suggest the Care Quality Commission will be monitoring DOLS activity for both statutory bodies and registered care homes. Partnership working will support a robust performance structure.

- 3.10 Although partnership working is the proposed model it is important to stress that final responsibility for authorisation for a deprivation of liberty cannot be transferred from NHS Brighton and Hove to the city council or vice versa. If the service user is accommodated in the hospital then NHS Brighton and Hove must authorise and in a care home then the city council must take the final decision.
- 3.11 It has been suggested there will be a peak of referrals and enquiries about DOLS in April 2009 as the safeguards become statute. To manage this peak demand the DOLS regulations have doubled the time scales for assessments only for April 2009 to 14 days for urgent authorisations and to 42 days for standard authorisations. In Brighton and Hove we are proposing two Best Interests Assessors be seconded into dedicated posts for a period of three months supported by the Implementation Officer to manage the proposed demand.
- 3.12 To support the implementation process and ensure that the council and NHS Brighton and Hove meet statutory duties the IMCA contract with Advocacy Partners has been extended to provide the IMCA role and that of Paid Representative.
- 3.13 The above proposal will be reviewed at the end of three months and the DOLS implementation will be reviewed after six months locally to ensure there is a structure to support the on-going work. The Department of Health has committed to a formal review a year after implementation and has suggested that DOLS authorisations will reduce from an initial peak as care planning and service provision adapts to prevent deprivation of liberty.
- 3.14 National Guidance from Care Service Improvement Partnerships (CSIP) recommends that the authorisation for deprivations of liberty is agreed at the level of senior management to ensure a robust system of accountability. It is proposed that for Brighton & Hove City Council the agreed signatories for authorising deprivations of liberty be the Director of Adult Social Care and Housing, and nominated deputies at Assistant Director and Heads of Service level. For NHS Brighton and Hove (PCT) the proposed signatory would be the Chief Executive with the following Directors nominated deputies:
- Strategy
 - Governance and Development
 - Finance
 - Delivery
 - Joint Director of Public Health

- Deputy Director of Finance
- Deputy Director of Commissioning

4. CONSULTATION

- 4.1 During the run up and since the implementation of the Mental Capacity Act 2005 in October 2007 there has been a Local Implementation Network (LIN) in Brighton and Hove that meets monthly to discuss issues relating to this legislation. This is a format replicated across England and Wales on the suggestion of the DoH and their local representatives from The Care Services Improvement Partnership (CSIP). Since April 2008 the LIN's focus has included DOLS and all local stakeholders have been invited and minutes circulated.

The membership of the LIN can be found at Appendix 1

In addition a stakeholder event was held in September 2008 entitled a DOLS 'Think Tank' and attended by multi-agency partners from the NHS, council and the private and voluntary sector.

The consultation has been extended to colleagues in the voluntary and charitable sectors. Extensive awareness training has taken place and continues to do so; this has been taken up by colleagues in the private sector with whom the city council contract services. Their feedback has been noted and acted upon.

The Implementation Officer has written to all care home providers across the city, both private and in-house provision, explaining about DOLS, their statutory responsibilities and offering to meet and discuss. In addition he is providing targeted training sessions for Sussex Partnership NHS Foundation Trust and Brighton & Sussex University Hospital Trust staff.

5. FINANCIAL & OTHER IMPLICATIONS:

Financial Implications:

- 5.1 Notional funding to cover the costs of implementing DOLS has been included in the Area Based Grant. The total funding earmarked for 'Mental Capacity Act Grant' for 2009/10 is £152,000 and for 2010/11 is £145,000. In addition, some funds are being paid to PCTs and for NHS Brighton & Hove it is expected that approximately £50,000 will be available to fund DOLS in 2009/10 with a similar amount for 2010/11. It is proposed that Brighton & Hove City Council and NHS Brighton & Hove will pool this funding.
- 5.2 DOLS will require additional staffing and this is detailed in the main body of the report. The Best Interest Assessors function will look to be absorbed within existing posts, but it is likely that there will be a need for at least one dedicated post for the first 6 months to cover

the expected peak in activity. Due to the uncertainty surrounding activity levels it is very difficult to assess exactly how much DOLS will cost, but it is expected that this can be managed within the grant funding outlined above.

Finance Officer Consulted: *Name Mike Bentley* *Date:*
12/02/09

Legal Implications:

- 5.3 The recommendations contained in paragraph 2 of the report will put structures in place which will enable the Council to comply with its statutory responsibilities in respect of the deprivation of liberty provisions under the Mental Capacity Act 2005, as amended. The body of the report sets out in detail the main provisions of this new legislation. These provisions come into force on 1 April 2009.

Lawyer Consulted: *Serena Kynaston* *Date: 13/02/09*

Equalities Implications:

- 5.4 An Equalities Impact Assessment will be carried out prior to the 1st April 2009 when DOLS comes into statutory force. It has not taken place to date due to the availability of training dates. There is a national Impact Assessment carried out by the Department of Health which will reflect local themes.
- 5.5 The DOLS legislation has been produced to safeguard some of the most vulnerable groups in society by legal means which are currently lacking. It will place a new focus on their human rights and the lawfulness of arrangements made for their care.

Sustainability Implications:

- 5.6 There are no sustainability implications.

Crime & Disorder Implications:

- 5.7 There are no crime and disorder implications

Risk and Opportunity Management Implications:

- 5.8 Brighton & Hove City Council and NHS Brighton and Hove has a statutory obligation to enact the safeguards (as both a Managing Authority and Supervisory Body) and ensure there is a robust process in place to meet the anticipated demand. This will ensure that the city council is not put at risk financially or in terms of public image, reputation or breach of the law.

The city council must ensure that those nominated signatories are clear about their responsibilities and those of the council as the routes of appeal are via the Court of Protection and / or Judicial review which would be both considerably expensive and potentially tarnish the council's reputation.

The city council and NHS Brighton and Hove should be aware that in certain circumstances, deprivations of liberty may need to be authorised for some people known to the council and whilst alternative means of providing the care in a less restrictive manner are explored and developed.

Corporate / Citywide Implications:

- 5.9 The DOLS safeguards will affect service users across the city both in registered care homes and hospital. In addition they will affect service users living in other local authority areas in care that has been commissioned by Brighton & Hove City Council or NHS Brighton and Hove. The council remains responsible for service users who are 'ordinary resident' of Brighton & Hove City Council.

6. EVALUATION OF ANY ALTERNATIVE OPTION(S):

- 6.1 It was considered running separate services between the council and NHS Brighton and Hove but for the reasons stated above it was felt to be beneficial to all parties for one system of assessment and referral to be implemented.
- 6.2 There were no other options considered because the safeguards are statutory legislation to which the council and NHS Brighton and Hove must respond.

7. REASONS FOR REPORT RECOMMENDATIONS

- 7.1 The council and NHS Brighton and Hove have a statutory duty to meet the Deprivation of Liberty Safeguards and deliver the appropriate service with suitable resource allocation to make the process viable. The proposed signatories have a suitable level of seniority and expertise in these areas to meet the requirements and safeguard the council from legal challenge.

SUPPORTING DOCUMENTATION

Appendices:

1. Membership of DOLS Local Implementation Network]
2. DOLS Process Flowchart Draft Feb 09

Documents In Members' Rooms

1. None

Background Documents

1. Deprivation of Liberty Safeguards Code of Practice, Mental Capacity Act 2005
2. Impact Assessment of the Mental Capacity Act 2005 Deprivation of Liberty Safeguards to accompany the Code of Practice and Regulations. May 2008

Appendix 1

Membership of DOLS Local Implementation Network:

Ambrose Page: Contracts Manager, BHCC
Angie Emerson, Head of Income and Payments, BHCC
Colin Lindridge, Associate Director, OPMH, SPT
Edwina Sabine- Specialist Social Worker, Mental Capacity Act, BHCC
Hilary Priestly- Senior Lawyer, BHCC
Jane Simmons- Head of Partnerships- Brighton & Hove PCT
Jen Allan- IMCA
John Child- DOLS Implementation Officer, BHCC
Julie Knight- BSUH
Karen Lillington- Associate Director, BSUH
Karen Swirsky, Southdowns NHS Trust
Matt Hutchison, BSUH
Melinda Stone, Lawyer, BSUH
Michelle Jenkins, Safeguarding Adults Manager, BHCC
Mike Dennis, Contracts Manager, BHCC
Naomi Cox, Integrated Services Manager, LD Services BHCC
Rachel Stone, BSUH
Rosie Key, Southdowns NHS Trust
Sara Fulford- Reg 26 Officer, BHCC
Sarah Lines, Resource Centre Manager, BHCC
Serena Kynaston, Lawyer, BHCC
Terry Pegler, Professional Lead Social Work, SPT
Tim Wilson, Training and Development Manager, BHCC
Wendy Vodrey, Sussex Police

