

REPORT TO: Executive Board Sub-Committee
DATE: 2nd December 2010
REPORTING OFFICER: Strategic Director, Adults and Community
SUBJECT: Section 75 Agreement, Best Interest Assessors
WARDS All

1.0 PURPOSE OF REPORT

1.1 This Report describes the role and function of Best Interests Assessors under the Deprivation of Liberty Safeguards. It puts forward a proposed agreement for the delivery of this service across Halton, St Helens Borough Council and NHS Halton and St Helens (“the PCT”) under Section 75 National Health Service Act 2006.

2.0 RECOMMENDATION

It is RECOMMENDED that:

(1) Approval be given to the proposal to enter into an agreement for the delivery of Best Interest Assessors across Halton, St Helens Borough Council and the PCT

3.0 SUPPORTING INFORMATION

3.1 Context:

3.1.1 The Deprivation of Liberty Safeguards (DoLS) were introduced as an amendment to the 2005 Mental Capacity Act (MCA) by the Mental Health Act 2007. They came into force on 1st April 2009.

3.1.2 Both pieces of legislation – the MCA and DoLS – focus on people who lack the capacity to make specific decisions about their lives. Nationally, there are no clear figures as to how many people this may apply to – the Government’s “best guess” is around 4 million people. Most of these people will have impaired capacity to make decisions for a range of reasons, which include:

- a significant learning disability
- a brain injury or other trauma (such as a stroke) which affects reasoning and decision-making
- one of a range of conditions under the broad label of dementia
- a fluctuating mental illness

3.2 **The Mental Capacity Act:**

3.2.1 The MCA recognises that, for some people, they are so disabled by their condition that other people have to take key decisions for them. They lay down a clear framework about how these key decisions must be made, with the guiding principle that any decisions can only be made in the person's best interests. The guidance issued with the Act outlines clearly how this must be done, and local policies and procedures have been put in place to reflect this.

3.3 **The Deprivation of Liberty Safeguards:**

3.3.1 DoLS were brought in to deal with the situations of people who were so disabled by their condition that they had to be placed in a residential or nursing home, or were in hospital for more than 28 days. Clearly, these are likely to be the people with the highest levels of risk and most complex needs, who would require a substantial amount of support.

3.3.2 For some time it had been recognised that, for some people who lack the capacity to make their own decisions, and who have complex needs, the regime that was being provided for them was so restrictive that it actually amounted to a deprivation of their liberty – a form of detention. Examples of these restrictions in care homes can include:

- having a locked door on the unit the person lives in
- having a high sided bed to prevent people getting out at night and being at risk of falls
- stopping some people from visiting them (perhaps because they were known to abuse the person concerned)
- having them on high ratios of staff support, to manage challenging or dangerous behaviour
- giving them covert medication, because without this they would otherwise refuse to take their medication and become ill

3.3.3 For all other people who are detained – whether through the criminal justice system or through the Mental Health Act – the decision to detain someone can be challenged through a judicial process (a Court or a Mental Health Review Tribunal). This was increasingly challenged through the Courts (including a landmark case in England), and the European Court of Human Rights ruled that these cases were in breach of the people's human rights and were therefore illegal.

3.3.4 The Courts were clear that each of the restrictions in the examples in paragraph 3.3.2 were not in themselves illegal, if they were done in a way that could be shown to be in the person's best interests.

However, when there were a number of these restrictions in place, a threshold could be crossed and there could actually be a deprivation of liberty. The Courts ruled that there needed to be a legal process in place to oversee these deprivations.

- 3.3.5 Whenever a residential or nursing home identifies that a person may be subject to a potential deprivation of liberty, because of the number and type of restrictions placed upon them, then they must apply to the Local Authority for this to be authorised; without this, it is illegal. The Local Authority must then put in train a series of six different assessments, each of which has to be satisfied before an authorisation can be granted.
- 3.3.6 These assessments must be done by at least two different people: a Mental Health Assessor (who judges the mental health state of the person concerned and decide on whether to use the Mental Health Act instead of the MCA), and a Best Interests Assessor.
- 3.3.7 The Department of Health has estimated how many people may be subject to DoLS assessments in each Local Authority area each year. For Halton they have estimated that there will be around 16; however this is very much an estimate and cannot be relied upon.

3.4 **The Role of the Best Interests Assessor (BIA):**

- 3.4.1 The BIA is central to the effective delivery of DoLS. As with most areas, the local agreement is that the Best Interests Assessor will complete five of the six assessments:
- an age assessment, to determine whether the person is over 18
 - a “no refusals” assessment, to establish whether the person had, before they lost capacity, given any instructions as to how they wanted to be treated
 - a Mental Capacity Assessment, to determine whether they do indeed lack the capacity to make key decision
 - an eligibility assessment, to establish whether there are any other legal proceedings in place (such as those under the Mental Health Act) which would over-rule the DoLS process
 - a Best Interests Assessment: this is the key assessment, which looks at all the circumstances of a person’s situation, and consults with a wide range of people, to decide whether the deprivation of liberty is in the person’s best interests.

These assessments must be completed within very tight timescales.

- 3.4.2 The BIA then makes a recommendation to the Local Authority as to whether the DoL should be authorised. (if it is not to be authorised then the care home must put a different regime in place person to reduce the level of restrictions around them). The Local Authority

has to abide by the opinion of the BIA.

3.4.3 In Halton, as most all Local Authorities, BIAs are drawn from a pool of qualified and experienced social workers, who then undertake a specific training programme at a University; this is laid down in national regulations. In Halton there are currently five BIAs, with another four in training.

3.4.4 The same process applies for people who are in hospital and are subject to restrictions on their liberty. In this case, however, it is the PCT which must give an authorisation, rather than the Local Authority, but the process is the same as that described above.

3.5 **The Partnership Agreement:**

3.5.1 There are some restrictions on when a BIA can operate; the main ones are:

- when they have had previous direct involvement in the case
- when the organisation itself has direct responsibility for the care home which is making the application for a DoL (for Halton, this only relates to Oak Meadow, but many Local Authorities still have their own provision of residential care for older people)
- when there is any other potential conflict of interest.

3.5.2 In addition, all PCTs and Local Authorities have tended to supply restricted numbers of BIAs, and it is quite possible that there may not be a BIA available at certain times to fulfil these functions.

3.5.3 The legislation therefore builds in the provision for BIAs to work outside their own employing organisations into other organisations, by agreement between those organisations. The guidance is very clear that structured agreements must be in place to ensure that staff are appropriately indemnified.

3.5.4 In consequence, a Section 75 Agreement has been drafted between the Council, the PCT and St Helens Borough Council. This puts in place a clear structure for the delivery of the BIA function across the organisations, with fully identified governance, accountability and reporting arrangements. The development of this draft has been supported by the Council's Legal Services Department and has been assessed against the Council's partnership checklist.

3.5.5 This agreement, therefore, puts in place shared management arrangements for the delivery of the BIA function across each of the organisations. The arrangements require a Joint Management Board consisting of senior officers from each organisation. There will be no change in employment status or terms and conditions for the staff concerned, and all disciplinary, grievance and complaints issues will be retained by the employing Authority.

4.0 POLICY IMPLICATIONS

- 4.1 The delivery of the MCA and DoLS has been a key element of government policy in adult social care and has had wide-ranging implications for service delivery. The proposal for this arrangement is part of the delivery of this key policy.

5.0 FINANCIAL IMPLICATIONS

- 5.1 There are no direct financial implications arising from this Report.

6.0 IMPLICATIONS FOR THE COUNCIL'S PRIORITIES

6.1 Children and Young People in Halton

- 6.1.1 There are no implications for children and young people – DoLS only applies to people who are over 18.

6.2 Employment, Learning and Skills in Halton:

- 6.2.1 This Report has no Employment, Learning and Skills implications.

6.3 A Healthy Halton:

- 6.3.1 There are no implications for the health improvement objectives of A Healthy Halton.

6.4 A Safer Halton

- 6.4.1 There are minor implications for A Safer Halton, in that the DoLS are closely aligned to the Adult Safeguarding processes. They are in place to ensure that the most vulnerable people are protected, both in terms of their day to day living circumstances, and their human rights.

6.5 Halton's Urban Renewal:

- 6.5.1 There are no implications for Urban Renewal in Halton.

7.0 RISK ANALYSIS

- 7.1 The development of a Joint Management Board to oversee the delivery of the BIA service across the organisations will be the mechanism for managing any risk issues as they arise. This is a robust process given the internal accountability arrangements for each organisation.

8.0 EQUALITY AND DIVERSITY ISSUES

- 8.1 Both MCA and DoLS provide mechanisms for addressing key human rights issues for an extremely vulnerable group of people. The BIA process applies equally to all people over the age of 18. Community Impact assessments have been completed.

9.0 LIST OF BACKGROUND PAPERS UNDER SECTION 100D OF THE LOCAL GOVERNMENT ACT 1972

Document	Place of Inspection	Contact Officer
Mental Capacity Act policy and procedure	Divisional Manager (Mental Health), 2 nd Floor, Runcorn Town Hall	Lindsay Smith
Deprivation of Liberty Safeguards Policy and Procedure	Divisional Manager (Mental Health), 2 nd Floor, Runcorn Town Hall	Lindsay Smith
Mental Capacity Act and Code of Practice	Divisional Manager (Mental Health), 2 nd Floor, Runcorn Town Hall	Lindsay Smith
Deprivation of Liberty Safeguards Code of Practice	Divisional Manager (Mental Health), 2 nd Floor, Runcorn Town Hall	Lindsay Smith