

## CABINET ITEM COVERING SHEET PROFORMA

### AGENDA ITEM

### REPORT TO CABINET

9 OCTOBER 2014

### REPORT OF CORPORATE MANAGEMENT TEAM

## CABINET DECISION

### Adult Services and Health - Lead Cabinet Member- Councillor Cllr. Jim Beall

### The implications of the Cheshire West and Chester Council and Surrey County Council Supreme Court Judgement Relating to Mental Capacity Act Deprivation of Liberty Safeguards

#### 1. Summary

This report provides details of the changes to the Mental Capacity Act Deprivation of Liberty Safeguards following the Supreme Court Judgement on the Cheshire West and Cheshire Council and Surrey County Council cases. The implications for the Council in relation to this are also outlined, including details of the work in progress to identify the risks and resource implications of the revised legal framework.

#### 2. Recommendations

- That Cabinet notes the content of the report, the implications of the judgement and the requirement for additional work to be carried out.
- That Cabinet agrees to receive a further report on progress against the work plan at the Cabinet meeting to be held on 12.2.15.

#### 3. Reasons for the Recommendations/Decision(s)

To keep Cabinet informed of progress with respect to the related plan of work.

#### 4. Members' Interests

Members (including co-opted Members) should consider whether they have a personal interest in any item, as defined in **paragraphs 9 and 11** of the Council's code of conduct and, if so, declare the existence and nature of that interest in accordance with and/or taking account of **paragraphs 12 - 17** of the code.

Where a Member regards him/herself as having a personal interest, as described in **paragraph 16** of the code, in any business of the Council he/she must then, **in accordance with paragraph 18** of the code, consider whether that interest is one which a member of the public, with knowledge of the relevant facts, would reasonably regard as so significant that it is likely to prejudice the Member's judgement of the public interest and the business:-

- affects the members financial position or the financial position of a person or body described in **paragraph 17** of the code, or
- relates to the determining of any approval, consent, licence, permission or registration in relation to the member or any person or body described in **paragraph 17** of the code.

A Member with a personal interest, as described in **paragraph 18** of the code, may attend the meeting but must not take part in the consideration and voting upon the relevant item of business. However, a member with such an interest may make representations, answer questions or give evidence relating to that business before the business is considered or voted on, provided the public are also allowed to attend the meeting for the same purpose whether under a statutory right or otherwise (**paragraph 19** of the code)

Members may participate in any discussion and vote on a matter in which they have an interest, as described in **paragraph 18** of the code, where that interest relates to functions of the Council detailed in **paragraph 20** of the code.

### **Disclosable Pecuniary Interests**

It is a criminal offence for a member to participate in any discussion or vote on a matter in which he/she has a disclosable pecuniary interest (and where an appropriate dispensation has not been granted) **paragraph 21** of the code.

Members are required to comply with any procedural rule adopted by the Council which requires a member to leave the meeting room whilst the meeting is discussing a matter in which that member has a disclosable pecuniary interest (**paragraph 22** of the code)

## **AGENDA ITEM**

### **REPORT TO CABINET**

**9 OCTOBER 2014**

### **REPORT OF CORPORATE MANAGEMENT TEAM**

## **CABINET DECISION**

### **1. SUMMARY**

This report provides details of the changes to the Mental Capacity Act Deprivation of Liberty Safeguards following the Supreme Court Judgment on the Cheshire West and Cheshire Council and Surrey County Council cases. The implications for the Council in relation to this are also outlined, including details of the work in progress to identify the risks and resource implications of the revised legal framework.

### **2. RECOMMENDATIONS**

- That Cabinet notes the content of the report, the implications of the judgement and the requirement for additional work to be carried out.
- That Cabinet agrees to receive a further report on progress against the work plan at the Cabinet meeting to be held on 12.2.15.

### **3. DETAIL**

3.1 Following the Supreme Court Ruling on 19 March 2014 : P -v- Cheshire West and Chester Council and P and Q -v- Surrey County Council, there has been a radical change to the legal definition of and the test for Deprivation of Liberty which must now be followed.

3.2 There are two key questions that need to be considered when applying the test:

- Is the person subject to continuous supervision and control?
- Is the person free to leave?

3.3 For a person to be deprived of their liberty, they must be subject both to continuous supervision and control and not be free to leave. They must also lack the mental capacity to consent to the relevant care and support arrangements, where they have been put in place by the State. Please see Appendix 1 for more details of the Judgment (a link to the full Judgment is embedded in the Department of Health letter).

#### The Safeguards

3.4 As a result of this Judgment, a much greater number of existing and potential clients are considered within the scope of the Safeguards, including the current care home population and people living in supported living, both within and outside the Borough, who are Stockton residents. These clients require assessments for mental capacity as the first stage in the process. This would include people with dementia, a learning disability, a mental health problem and young people between 16-18 with complex needs.

3.5 Future planned admissions to care homes and care planning for supported living need to include an assessment for Deprivation of Liberty (DoL) before admissions to care homes are made / care packages are put in place.

- 3.6 The Deprivation of Liberty Safeguards (DoLS) for people in twenty four hour care settings aged 18 years and over (care homes and hospitals) remain as previously and consist of six assessments to establish if the DoL is in the client's Best Interests and that care arrangements constitute the least restrictive option to ensure the safety and well being of the client. These assessments are carried out by Best Interest Assessors and doctors approved under the Mental Health Act 1983 (s.12). In complex cases, an application to the Court of Protection should be made. For clients living with support in the community and young people aged between 16 and 18 years, all Deprivations need to be authorised through the Court of Protection. A Preliminary Judgment has been given by the President of the Court of Protection on the consummate cases presented in June 2014, which has clarified that all cases need to be considered by a judge and that mental capacity assessments need to be undertaken by a medical practitioner. Details of the Judgment can be found at Appendix 2.
- 3.7 Clients with mental health problems and / or a learning disability who are resident in, or assessed as needing care in, a hospital facility and would previously have been considered as 'informal' admissions, will need to be assessed for a Deprivation of Liberty Authorisation or for detention under the Mental Health Act. This will require more assessments to be carried out by Approved Mental Health Professionals (AMHPs) and, potentially, an increase in detentions under s.3 of the Mental Health Act, with the associated risk of an increased number of clients eligible for s.117 jointly funded NHS and Social Care aftercare. This is of particular importance for Stockton, as there are two independent Mental Health Hospitals in the area that provide Mental Health Services.
- 3.8 The Tees Coroner has decided that all deaths of people subject to an authorised DoL at the time of their death will be treated as a death in custody. The coroner will be informed of the each death and will decide if any examination of the client's records is necessary, on a case by case basis.

#### The work programme and resource implications

- 3.9 Following an initial scoping exercise, a work programme is in progress to ensure that current clients are not unlawfully deprived of their liberty. Working practices have also been reviewed to ensure that the new test is embedded in practice and risk to vulnerable clients and the Council mitigated as far as reasonably practicable.
- 3.10 The following dedicated resource was agreed by Corporate Management Team in May 2014 in order to support the required assessments, consideration for authorisation and administration of the Deprivation of Liberty Safeguards:
- 1 WTE Social Worker to liaise with care homes and home care providers to co-ordinate mental capacity assessments and requests for authorisation of potential Deprivation of Liberty.
  - 2.4 WTE Best Interests Assessors (BIA) to carry out the Best Interests Assessments.
  - 0.5 WTE Administrator to assist with the significant amount of administration that is involved.
- 3.11 Client assessments are being prioritised by client group and care and support arrangements. The clients who have been identified as the first priority are those with dementia or a learning disability who are living in a care home. Clients with a learning disability who live in supported living arrangements are the group identified as next to be assessed. All people subject to Mental Health Act Guardianship, Community Treatment Orders and Conditional Discharge need to be assessed for potential Deprivation of Liberty. Consideration also needs to be given to incapacitated people who have care needs met by the state but who are living at home with their families

3.12 The additional work is creating workload pressures across adult services including:

- Care Managers
- Best Interest Assessors
- Commissioning Managers
- Signatories
- Mental Health Assessors
- Approved Mental Health Professionals (AMHPs)
- Administrators
- Legal Services, particularly where authorisation of the Court of Protection will be needed, for example for clients in supported living arrangements.

3.13 The additional work for Commissioning Managers, who oversee the administration of the process, and Signatories, who consider the requests for authorisation, is being dealt with without additional resource.

3.14 Additional care management resource is required to undertake timely reviews of clients subject to an authorised DoL and so that Mental Capacity Assessments can be fully embedded in practice. Active care management is essential to ensure that any restrictions imposed continue to be proportionate and in each client's Best Interests.

3.15 There are also additional direct costs relating to:

- Payments to Mental Health Act s.12 approved doctors, who are commissioned to carry out the required assessments for clients in twenty-four hour care settings.
- Payments to Independent Mental Capacity Advocates (IMCAs)
- Court of Protection applications for clients living in supported living arrangements. There are costs associated with the application, the hearing and the mental capacity assessment.

3.16 The initial exercise could cost up to £725,000 as illustrated at Appendix 3. However, this is extremely uncertain and will be clarified as work progresses. The costs in this financial year are not expected to exceed £425,000 and this can be funded from managed surplus.

3.17 Next Steps

*National*

- A Task Group, led by the Association of Adult Social Services (ADASS), has been established to consider the implications of the Supreme Court judgement and to provide practical advice to Local Authorities on how they should respond.
- Voluntary quarterly activity returns have been established and will be collated by the Health and Social care Information Centre.
- Further guidance from the Department of Health is still awaited, but the Court of Protection Preliminary Judgment (Re X) on the consummate cases considered was given on 7.8.14, and is included as Appendix 3. In Re X the President has given guidance on the process for dealing with the anticipated large increase in cases in the Court of Protection. Further guidance and amended court documents will follow, but this should not delay applications where there are unauthorised Deprivations.
- The Law Society will issue new case law guidance relating to what constitutes a DoL.

*Local*

- The action plan will continue to be implemented.
- Options to incorporate the additional work and potential new ways of working will be explored and considered at Adult Care Management Team and the Adult Board.

- The Local Executive Committee (Safeguarding Adults) will continue to be informed of progress against the action plan.
- Consideration of the requirements for Quality Assurance of the whole process.
- Consideration of the requirements for ensuring that Mental Health Assessors meet eligibility requirements and the quality of their assessment is satisfactory.
- Close contact is being maintained with regional Councils and NHS partners with the aim of confirming both regional pressures and identifying efficient methods of demand management and emerging best practice.
- The responsibility for ensuring that s.12 doctors have the required indemnity and Disclosure and Barring Scheme clearance in place is no longer being administered regionally on behalf of the Department of Health. Discussions are in progress across the region to establish the most efficient and effective way of carrying out this function.

#### **4.0 FINANCIAL IMPLICATIONS**

- 4.1 This is a legislative requirement and the Council has no option other than to implement. The full costs of the exercise will be identified as work progresses, but could be up to £725,000. The cost in the current year of £425,000 will be met by managed surplus. Should any further funding be required, this will be considered in future reports.
- 4.2 The Council currently receives circa £98,000 per annum to discharge its duties under the Mental Capacity Act. These duties are wider than the DoLS function.
- 4.3 The Association of Directors of Adult Services is lobbying for additional resources to be identified for the significant associated financial burden Councils are facing in relation to this change in the law (please see Appendix 4).
- 4.4 NHS England has secured additional funding for Durham and Tees Valley to support training for the NHS and providers commissioned by the NHS.

#### **5.0 LEGAL IMPLICATIONS**

- 5.1 It is a legal requirement for the Council to adopt the 'new test' for Deprivation of Liberty following the Supreme Court Judgement.

#### **6.0 RISK ASSESSMENT**

- 6.1 The Council's Risk Register is in the process of being updated.
- 6.2 The Council's Insurers are being consulted in relation to insurable risks.

#### **7.0 SUSTAINABLE COMMUNITY STRATEGY IMPLICATIONS**

- 7.1 Health and wellbeing: the work programme will promote the Best Interests of vulnerable Stockton residents.

#### **8.0 EQUALITIES IMPACT ASSESSMENT**

Not applicable.

**Name of Contact Officer: Liz Hanley**  
**Post Title: Adult Services Lead**  
**Telephone No. 01642 527055**  
**Email Address: liz.hanley@stockton.gov.uk**

Education related? No

Background Papers

Ward(s) and Ward Councillors: Not ward specific

Property (<http://sbcintranet/library/64521/RES/Capital.doc?view=Display>)



Department  
of Health

Mr Niall Fry  
Social Care Quality & Safety Team  
Area 313B, Richmond House  
79 Whitehall, London SW1A 2NS  
E-mail: [niall.fry@dh.gsi.gov.uk](mailto:niall.fry@dh.gsi.gov.uk)

28<sup>th</sup> March 2014

Dear Colleague,

### **DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS)**

#### **Judgment of the Supreme Court P v Cheshire West and Chester Council and another P and Q v Surrey County Council**

I am writing to draw your attention to last week's judgment in the Supreme Court to help to ensure that health and social care organisations continue to comply with the law following the revised test now supplied by the Supreme Court about the meaning of a deprivation of liberty.

**The contents of this letter are specifically addressed to all those who are**

- **involved in the assessment and/or authorisation of a deprivation of liberty**
- **involved in the care of individuals who may lack capacity**
  - **responsible for policies and procedures relating to the care of individuals who may lack capacity.**

Mental Capacity Act (MCA) and Deprivation of Liberty Safeguard (DoLS) leads should ensure this letter is cascaded to all relevant staff.

#### **Background**

On 19 March 2014, the Supreme Court handed down its judgment in the case of "P v Cheshire West and Chester Council and another" and "P and Q v Surrey County Council". The full judgment can be found on the Supreme Court's website at the following link:

[http://supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0068\\_Judgment.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf)

The accompanying press release with a short description of the cases under consideration can be found at the following link:

[http://supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0068\\_PressSummary.pdf](http://supremecourt.uk/decided-cases/docs/UKSC_2012_0068_PressSummary.pdf)

The judgment is significant in the determination of whether arrangements made for the care and/or treatment of an individual lacking capacity to consent to those arrangements amount to a deprivation of liberty.



A deprivation of liberty for such a person must be authorised in accordance with one of the following legal regimes: a deprivation of liberty authorisation or Court of Protection order under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act 2005, or (if applicable) under the Mental Health Act 1983.

### **Key points from the Supreme Court judgment**

#### *Revised test for deprivation of liberty*

The Supreme Court has clarified that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights in the following circumstances:

The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements.

The Supreme Court held that factors which are NOT relevant to determining whether there is a deprivation of liberty include the person's compliance or lack of objection and the reason or purpose behind a particular placement<sup>1</sup>. It was also held that the relative normality of the placement, given the person's needs, was not relevant. This means that the person should not be compared with anyone else in determining whether there is a deprivation of liberty. However, young persons aged 16 or 17 should be compared to persons of a similar age and maturity without disabilities.

#### *Deprivation of liberty in "domestic" settings*

The Supreme Court has held that a deprivation of liberty can occur in domestic settings where the State is responsible for imposing such arrangements. This will include a placement in a supported living arrangement in the community. Hence, where there is, or is likely to be, a deprivation of liberty in such placements that must be authorised by the Court of Protection.

### **Suggested actions**

#### *Relevant staff should*

- Familiarise themselves with the provisions of the Mental Capacity Act, in particular the five principles and specifically the "least restrictive" principle.

---

<sup>1</sup> NB. These factors (compliance/ objection and the reason or purpose for the placement) are of course still relevant to assessment of best interests and consideration of Article 8 rights.

- When designing and implementing new care and treatment plans for individuals lacking capacity, be alert to any restrictions and restraint which may be of a degree or intensity that mean an individual is being, or is likely to be, deprived of their liberty (following the revised test supplied by the Supreme Court)
- Take steps to review existing care and treatment plans for individuals lacking capacity to determine if there is a deprivation of liberty (following the revised test supplied by the Supreme Court)
- Where a potential deprivation of liberty is identified, a full exploration of the alternative ways of providing the care and/ or treatment should be undertaken, in order to identify any less restrictive ways of providing that care which will avoid a deprivation of liberty

- Where the care/ treatment plan for an individual lacking capacity will unavoidably result in a deprivation of liberty judged to be in that person's best interests, this MUST be authorised.

*Local authorities should in addition*

- Review their allocation of resources in light of the revised test given by the Supreme Court to ensure they meet their legal responsibilities.

Although local authorities are the supervisory body for DoLS for both care home and hospital settings, the NHS (commissioners and providers) have a vital role to play in correctly implementing DoLS (and the wider MCA). We expect that the NHS and local authorities will continue to work closely together on this.

### **Authorising a deprivation of liberty**

The DoLS process for obtaining a standard authorisation or urgent authorisation can be used where individuals lacking capacity are deprived of their liberty in a hospital or care home.

The Court of Protection can also make an order authorising a deprivation of liberty; this is the only route available for authorising deprivation of liberty in domestic settings such as supported living arrangements. This route is also available for complex cases in hospital and/ or care home settings.

Individuals may also be deprived of their liberty under the Mental Health Act if the requirements for detention under that Act are met.

### **Further information**

In the first instance professionals should contact their organisation's MCA-DoLS lead for further information.

In the meantime the Government is preparing its response to the House of Lords Select Committee report into the MCA and DoLS. We expect to issue this response by the summer.

I also enclose an annex with some additional background.

Yours faithfully,

**Niall Fry**  
**Policy Manager – Mental Capacity Act/DoLS**

## **Annex – Further background and steps for consideration**

It is difficult to predict the number of individuals who lack capacity whose arrangements should be assessed in light of the Supreme Court judgment and the number of additional individuals for whom deprivation of liberty will need to be authorised.

Local authorities submit information on the number of assessments undertaken for deprivation of liberty authorisations under the Mental Capacity Act 2005 and the number of authorisations approved to the Health and Social Care Information Centre. The Department of Health and the Care Quality Commission will explore how best to monitor the evolving situation to assist in determining the practical impact of the Supreme Court's revised test.

Professionals must remember that the deprivation of liberty authorisations and Court of Protection orders under the Deprivation of Liberty Safeguards (DoLS) in the Mental Capacity Act 2005 are rooted in the principles of that Act. DoLS exists to provide protection to individuals – to safeguard these individuals when a deprivation of liberty is an unavoidable part of a best interests care plan. Individuals who are identified as potentially deprived of their liberty must be considered on a case-by-case basis and all appropriate steps taken to remove the risk of a deprivation of liberty where possible. The emphasis should be on empowerment and

enablement. Further steps that Local Authorities could consider taking are:

- Ensuring awareness of the Supreme Court judgment among care providers
- Ensuring awareness of the need to reduce restraint and restrictions and promote liberty in care plans
- Mapping any additional requirements for Best Interest Assessors (BIAs) and working collaboratively with other Local Authorities to reduce training costs
- Reviewing information on the number of individuals in supported living arrangements to identify those individuals whose arrangements should be reviewed.



Neutral Citation Number: [2014] EWCOP 25

**COURT OF PROTECTION (In Open Court)**

Case No: 12488518 and 28 others

Royal Courts of Justice  
Strand, London, WC2A 2LL Date: 7 August 2014

**Before :**

**Sir James Munby President Of The Court Of Protection**

-----  
**Re X and others (Deprivation of Liberty)**

**Mr Alexander Ruck Keene and Mr Benjamin Tankel** for the Official Solicitor as advocate to the court

**Ms Joanne Clement** for the Secretary of State for Health and the Lord Chancellor and Secretary of State for Justice

**Mr Stephen Cragg QC** for the Law Society of England and Wales

**Ms Alison Ball QC and Mr Andrew Bagchi** for the Association of Directors of Adult Social Services

**Mr Neil Allen** for Cheshire West and Chester Council, Surrey County Council and Northumberland County Council

**Mr Michael Dooley** for Cornwall Council

**Ms Bethan Harris** for Worcestershire County Council

**Mr Conrad Hallin** for Sunderland City Council

**Ms Natalia Perrett and Ms Emily Reed** for Barnsley Metropolitan Borough Council

**Mr Simon Burrows** for Rochdale Metropolitan Borough Council

**Mr Michael Mylonas QC** for Surrey Downs Clinical Commissioning Group **Mr Jonathan Auburn**

for NHS Sheffield Clinical Commissioning Group **Mr John**

**McKendrick** for Nottinghamshire Healthcare NHS Trust

**Mr Jonathan Butler** for KW (a patient) **Ms Katie Scott** for AS and GS (patients) **Mr Joseph O'Brien** for PMLP (a patient)

**Mr Ian Wise QC, Ms Martha Spurrier and Ms Alison Fiddy** filed written submissions on behalf of Mind

Hearing dates: 5-6 June 2014  
-----

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

SIR JAMES MUNBY PRESIDENT OF THE COURT OF PROTECTION

This judgment was delivered in Open Court

	Costs
<p><b>1 Social Worker to manage the process, ensuring that care homes provide appropriate information to deliver an efficient process, and ensuring that authorisations are requested for all new admissions. 243 requests for authorisation have been received this financial year to date.</b></p>	<p><b>£40,000 per annum</b></p>
<p><b>1 Administrator to complete the administration required, ensuring that all letters are sent out in a timely manner and client records are managed appropriately to required standards.</b></p>	<p><b>£20,000 per annum</b></p>
<p><b>3 Best Interests Assessors (BIA) to complete Best Interests Assessments to support the current BIA rota, with existing BIAs continuing to complete the urgent authorisations.</b></p> <p><b>In the current financial year we have received 243 requests for Deprivation of Liberty safeguarding (DoL) authorisations.</b></p> <p><b>Current requests are averaging 7 to 10 per week. This will mean that 4 will be completed by the current staff on the rota, with any more being completed by the 3 staff seconded. The 3 BIAs will continue to work through the standard requests.</b></p> <p><b>There are currently 161 existing authorisations completed and in place, which will need a minimum of annual renewal, and it has been identified that there is a target group of approximately 940 clients in Stockton care homes who will require an authorisation. Completing these at 15 per week will be completed by the end of September 2015; whereas completing 20 per week the completion date will be June 2015. All authorisations on completion will subsequently require a minimum annual review (subject to any further demands through the Care Act from April 2015 onward).</b></p>	<p><b>£120,000 (approx.)</b></p>
<p><b>9 Care Managers to complete reviews.</b></p> <p><b>Any client with an existing authorisation in place requires a minimum of a 3-monthly care management review. This is to ensure that the authorisation continues to be needed, and that it is the least restrictive way of providing the care.</b></p> <p><b>There are currently 161 existing authorisations that are being</b></p>	<p><b>£360,000 (approx.)</b></p>

<p>referred to the teams. This equates to an extra 644 reviews per annum. When all the assessments are completed, it is expected that there will be approximately 1000 authorisations in place in Stockton. This equates to 4000 reviews to be completed by care management teams. Currently review officers complete 2 reviews per day. On this basis a minimum of 9 additional staff to complete the reviews is required.</p>	
<p>Section 12 approved doctors to complete the 3 assessments required costs £173 per client, plus mileage, which results in a cost of approximately £180 per assessment. This equates to a minimum of 1000 assessments per annum if authorisations are for 12 months.</p>	<p>£180,000 (approx.)</p>
<p><b>Court of Protection (CoP) costs for clients in Supported Living:</b></p> <p>There are currently approximately 17 clients in supported living who care managers have identified will require authorisation. The minimum cost of a CoP application is £400 per application. This does not include the associated legal costs and care management costs as well as additional costs for the Client Protection &amp; Financial Affairs Team against demand.</p>	<p>£7,000 (approx.)</p> <p><b>Total Cost £727,000</b></p>
<p><b>NB: The above costs do not include Signatory time. The Signatory (authorisation) function is currently carried out by service managers and the Adult Services Lead, who each dedicate approximately ½ day per week to this work.</b></p> <p><b>Further work is needed to identify the number of clients who live in extra care housing, mental health clients who live in supported living, and all clients who live at home with their families who will need to be assessed.</b></p> <p><b>The number of young people aged 16-18 who need to be assessed is 9.</b></p>	

## **Update for Directors on action being taken by ADASS & LGA in response to the Supreme Court Decisions on the Deprivation of Liberty Safeguards**

In April we circulated an [Advice Note to all Directors](#) to provide guidance on action that should be taken in response to the Supreme Court judgment.

Since then ADASS has been working with LGA to understand the impact and implications of the judgment and we have established a Task Force with stakeholders to find workable ways forward.

As you know following an email from David Pearson on 5th June 2014, we had also been invited and provided advice to the Court of Protection at a two day hearing on 5<sup>th</sup> and 6<sup>th</sup> June 2014. From this, we know that there are a number of areas of law that still remain uncertain, to include definitions such as Article 5 and the meaning of “unsound mind”, and clarity as to those arrangements that are “imputable to the State” (i.e. what level of involvement would there need to be for the State to be then held responsible) and therefore constitute a situation in which people could be regarded as deprived of their liberty. This will have a direct bearing on what we already know and increase the number of situations which need to be considered by Councils and the Courts. We are currently awaiting Directions from the Court of Protection hearing about some of the proposals made by ourselves and other parties, for example fast tracking cases, and we will provide further information once this is made available.

### **Financial Impact**

108 Councils have completed the Survey we circulated to understand the likely impact on Councils. The headlines from this Survey shared at a recent hearing at the Court of Protection indicate a projected 10 fold increase in activity and additional costs of £45 m for 14/15 for the councils responding. These increases are also predicted for 15/16 although at a higher rate to reflect demographic increases

ADASS are now working with the LGA to put together a submission to DH in response to their commitment to review the original DoLS Impact Assessment in light of the Supreme Court judgment. To support this we will need an assessment that is as robust and comprehensive as possible. We are therefore asking all Councils who did not respond to the original survey to respond now via the online link by Friday 19th June (<https://www.surveymonkey.com/s/MR9BRJW>) and also to help us if they receive requests to clarify their original response, particularly relating to status of their Best Interest Assessor (BIA) capacity i.e. dedicated posts or social workers with additional responsibilities. Once submitted this submission is likely to need to go to the Treasury for consideration and is likely to take some time to be considered. However in view of the immediate and substantial pressures facing Councils we will be pressing for a timely response.

### Deprivation of Liberty Processes for those in settings other than hospitals and care homes

A significant consequence of the Supreme Court judgment is the need to consider deprivation of liberty for many new adults within settings outside of hospitals and care homes including domestic settings and to take these cases to the Court of Protection. ADASS's view is that it would be both more consistent and reduce delays if the existing DoLS scheme for people in residential care could be extended to cover individuals in these circumstances. The Department of Health have acknowledged this and have already asked the Law Commission to consider a legal framework

for deprivations of liberty in supported living arrangements, and the lessons to be learnt from

the DOLS regime. However they have also indicated that no change in legislation can be made before the next General Election and is likely to take 2 – 3 years. Consequently as well as contributing to the Law Commission review we are also working with the Court of Protection on ways in which they could deal with the vastly increased volume of applications that they will now receive in a way that is consistent with the DoLS scheme and are hoping that this will result in some kind of fast track arrangement for straight forward cases which will both prevent delays and reduce costs. It is anticipated that guidance on proceeding with these cases will be given shortly by the Court of Protection and ADASS will respond with a briefing paper for Councils to assist them in understanding the process.

### Timescales

The current shortage of BIAs makes it inevitable that some councils will not be able to get all assessments done in time to meet timescales for urgent authorisations. Councils are taking differing pragmatic approaches to this which include routinely extending to 14 days and asking care homes to prioritise which residents they submit for authorisation first. The main message from ADASS is that to do nothing is not an acceptable position. Councils will need to prioritise cases based on risk both to the individual and to the Council.

### Good Practice

The ADASS Task Force, which includes all the Regional DoLS leads, has agreed to produce some Top Tips Guidance for Councils to help manage the current arrangements as effectively as possible – such as ensuring proper consideration of the Mental Capacity Act in the care planning process to reduce the BIA task and different models for the efficient use of DoLS Mental Health Assessors to reduce costs. This will be available later this summer.

### Workforce

The ADASS Task Force is undertaking some mapping of available BIA training to share with Councils to assist Councils to increase the number of BIAs and is also doing some work with providers to stimulate refresher training for “lapsed BIAs”.

For more information about the Task Force and the progress of this work please contact

Sarah Norman (Mental Health Co Chair) [sarah.norman@wolverhampton.gov.uk](mailto:sarah.norman@wolverhampton.gov.uk)

Lorraine Currie (Mental Health DoLS lead) [lorraine.currie@shropshire.gov.uk](mailto:lorraine.currie@shropshire.gov.uk)

Jonathan Gardam (ADASS Policy - DoLS Survey) [Jonathan.gardam@adass.org.uk](mailto:Jonathan.gardam@adass.org.uk)