

Meeting: Governing Body			
Meeting Date	27 May 2020	Action	Consider
Item No.	7.4	Confidential	No
Title	Amended Mental Capacity Act 2019 and the introduction of Liberty Protection Safeguard Scheme		
Presented By	Cathy Fines Executive Lead Safeguarding		
Author	Clare Holder, Designated Nurse Adult Safeguarding		
Clinical Lead	Dr Cathy Fines, Clinical Director		

Executive Summary
<p>This report provides an update on the Liberty Protection Safeguard Scheme (LPS) introduced following the amendment of the Mental Capacity Act 2019 and the potential impact on Bury CCG – specifically the safeguarding and continuing healthcare teams.</p> <p>The report is for information and discussion at this stage.</p>
Recommendations
<p>It is recommended that the governing Body:</p> <ul style="list-style-type: none"> Consider the paper as an indication of impending changes to statutory responsibilities whilst we await practice guidance.

Links to CCG Strategic Objectives	
<p>SO1 People and Place To enable the people of Bury to live in a place where they can co-create their own good health and well-being and to provide good quality care when it is needed to help people return to the best possible quality of life</p>	<input type="checkbox"/>
<p>SO2 Inclusive Growth To increase the productivity of Bury's economy by enabling all Bury people to contribute to and benefit from growth by accessing good jobs with good career prospects and through commissioning for social value</p>	<input type="checkbox"/>
<p>SO3 Budget To deliver a balanced budget for 2019/20</p>	<input type="checkbox"/>
<p>SO4 Staff Wellbeing To increase the involvement and wellbeing of all staff in scope of the OCO.</p>	<input type="checkbox"/>
<p>Does this report seek to address any of the risks included on the Governing Body Assurance Framework? If yes, state which risk below:</p>	
<p>GBAF <i>[Insert Risk Number and Detail Here]</i></p>	

Implications						
Are there any quality, safeguarding or patient experience implications?	Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	N/A	<input type="checkbox"/>
The CCG will become a responsible body under the Mental Capacity Amendment Act (2019). The CCG as a responsible body will identify, assess and authorise a deprivation of liberty under the LPS. As a responsible body, if the CCG does not implement systems and processes to ensure Continuing Health Care (CHC) funded clients are lawfully deprived of their liberty through the authorisation process, it risks eligible clients having their human rights unlawfully breached – the responsible body potentially incurring financial penalties from the courts.						
Has any engagement (clinical, stakeholder or public/patient) been undertaken in relation to this report?	Yes	<input type="checkbox"/>	No	<input checked="" type="checkbox"/>	N/A	<input type="checkbox"/>
Have any departments/organisations who will be affected been consulted ?	Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	N/A	<input type="checkbox"/>
Head of Safeguarding Bury Council Head of Complex Care Bury CCG						
Are there any conflicts of interest arising from the proposal or decision being requested?	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
Are there any financial Implications?	Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	N/A	<input type="checkbox"/>
There are potential resource implications with regard to training of signatories for authorising deprivation applications within the CCG, payment of Approved Mental Capacity Practitioners when commissioned, potential of Provider organisations approaching the CCG for increased funding as their responsibilities under LPS also increase and have resource implications. At the time of writing this paper, the precise resource implications of implementation and any attached funding have not been outlined by the Department of Health and Social Care. As such, the financial impact on the CCG is unknown.						
Has a Equality, Privacy or Quality Impact Assessment been completed?	Yes	<input type="checkbox"/>	No	<input checked="" type="checkbox"/>	N/A	<input type="checkbox"/>
Is a Equality, Privacy or Quality Impact Assessment required?	Yes	<input type="checkbox"/>	No	<input type="checkbox"/>	N/A	<input checked="" type="checkbox"/>
Are there any associated risks including Conflicts of Interest?	Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	N/A	<input type="checkbox"/>
Are the risks on the CCG's risk register?	Yes	<input checked="" type="checkbox"/>	No	<input type="checkbox"/>	N/A	<input type="checkbox"/>

If you have ticked yes provide details here. If you are unsure seek advice from Lynne Byers, Email - lynnebyers@nhs.net about the risk register.

OR_SD_14 Deprivation of Liberty in Community Settings (DOLS)

If the CCG doesn't fulfil its **statutory duties** under The Mental Capacity Act 2005 to ensure appropriate and timely safeguards for care packages it commissions there is a risk of legal challenge (civil claims) and potential compensation to the parties involved.

Governance and Reporting		
Meeting	Date	Outcome
Name of meeting		These boxes are for recording where the report has also been considered and what the outcome was. This will include internal meetings like SMT.
		If the report has not been discussed at any other meeting, these boxes can remain empty.

Amended Mental Capacity Act 2019 and the introduction of Liberty Protection Safeguard Scheme

1. Introduction

The right to liberty is enshrined through Article 5 of the Human Rights Act 1998 (HRA). The state can only remove an individual's liberty through a lawful procedure, for example that related to the criminal justice process or the Mental Health Act (2007). A person may be deprived of their liberty if the following conditions are met;

- the person lacks mental capacity to consent to their accommodation for the purposes of care/ treatment
- the care amounts to continuous supervision and control and they are not free to leave
- the care arrangements are attributable (in whole or in part) to the state

When those conditions are evident, the deprivation of liberty must also be authorised through lawful procedure, primarily to allow the person access to exercise their rights under the HRA. The Deprivation of Liberty Safeguards (DoLS) system is the current authorisation arrangement for adults either residing in a care home or hospital. The Court of Protection directly authorises all other deprivations of liberty not covered by DoLS, including those in community settings, as well as young people aged 16-17.

The Liberty Protection Safeguards (LPS) will replace these existing processes, to authorise a deprivation of liberty.

Currently care homes and hospitals are the 'Managing Authority' and are responsible for ensuring any proposed deprivation of liberty is lawful. They must make a DoLS application to the Local Authority when they identify a person, aged 18 and over, who lacks capacity and is being deprived of their liberty. The hospital or care home manager must consider whether:

- It is in the persons best interests and necessary to protect them from harm
- There are alternative, less restrictive care regimes that do not amount to a deprivation of liberty.

If it is believed to be in the persons best interests and a less restrictive arrangement is not possible, the hospital or care home manager must apply to the Local Authority who are the 'supervisory body' for authorisation of a deprivation of liberty. A six stage assessment is then carried out by a best interest assessor and a Mental Health Professional to decide whether the person needs to be deprived of their liberty to keep them safe and to have care or treatment. Currently DoLS only applies to those in care homes and hospital settings. However, Deprivation's of Liberty identified in a community settings (persons own home, supported housing etc) would have an application made to the Court of Protection. The application can be made by a community provider, the Local authority and a CCG if a person is in receipt of continuing healthcare funding.

The LPS replaces the "supervisory body" under DoLS with the "responsible body",

as the agency charged with authorising the care that amounts to a deprivation of liberty. The CCG will become a responsible body under the Mental Capacity Amendment Act (2019). The new arrangements will also mean LPS will apply to any person over 16 years in **ANY** setting and the CCG will be the responsible body for any patient in receipt of CHC funding (no matter where they reside). The CCG as a responsible body will identify, assess and authorise a deprivation of liberty under the LPS. This reduces pressure and responsibility currently placed on the Local Authorities. This means the CCG will become responsible for this workload when the person is under CHC care. This will then have resource implications.

2. Liberty Protection Safeguards

2.1 The legislation does not define what a deprivation of liberty consists of. Instead, it retains section 64(5) of the MCA, which provides that references to deprivation of a person's liberty have the same meaning as in Article 5(1) of the ECHR. As a result the meaning of deprivation of liberty will continue to be led by case law, such as Cheshire West and the decisions of the European Court of Human Rights.

Deprivation of Liberty Safeguards only applies to those over the age of 18 and being accommodated within hospitals and care homes. The LPS can be used in other settings, for instance supported living, shared lives and private and domestic settings. Authorisations can also be given for arrangements being carried out in more than one setting, for example, if a person is transferred from a care home into hospital, previously this would have required two applications to the Local Authority. Under the LPS, the authorisation would transfer with them, as long as the deprivations do not alter.

2.2 The LPS replaces the "supervisory body" under the DoLS with the "responsible body", as the agency charged with authorising the arrangements that give rise to a deprivation of liberty. The CCG will become a responsible body under the amended Mental Capacity Amendment Act (2019). There can only be one responsible body for any authorisation that is granted, identifiable through the following hierarchy:

- If the arrangements are carried out mainly in an NHS hospital, the responsible body is the "hospital manager".
- If the arrangements are carried out mainly in an independent hospital, the responsible body is the local authority (normally the authority meeting the person's needs or in whose area the hospital is situated).
- If the arrangements are carried out mainly through the provision of NHS continuing health care, the responsible body is the relevant clinical commissioning group; and
- If the responsible body is the "responsible local authority" (in most cases this will be the authority that is meeting the person's needs or in whose area the person is ordinarily resident).

2.3 For patients who are fully funded by CHC, the CCG would be the responsible body (Funded Nursing Care patients would not be included within this). An SLA with the Local Authority would have to be put in place to agree with the process for those CHC

patients who are jointly funded. Under LPS, a responsible body may authorise arrangements if the following “authorisation conditions” are met:

- The person lacks capacity to consent to the arrangements;
- The person has a mental disorder within the meaning of section 1(2) of the Mental Health Act 1983; and
- The arrangements are necessary to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to the person.

The regulation of the CCG role as a responsible body is likely to be undertaken by the CQC. This will mean that CQC may inspect the CCG for this activity, although details of precisely how the LPS will be regulated are still to be confirmed. In the case of the assessments for the first two criteria (referred to as the “capacity” and “medical” assessments) the responsible body can rely on previous assessments or assessments for any other purposes, if it is reasonable to do so. Before arrangements can be authorised, a thorough consultation must take place and in addition, before authorising, the responsible body must:

- Be satisfied that any duty to appoint an appropriate person or independent mental capacity advocate has been complied with; and
- Have arranged a pre-authorisation review which has been completed.

The person must be provided representation by an appropriate person or IMCA (if no appropriate person forthcoming). A pre-authorisation review can be completed by either an Approved Mental Capacity Professional (AMCP) which is a new role (similar to the current Best Interest Assessors), or some other health/care professional (the government has said it will set out which professions can undertake this role in the expected statutory guidance). A pre authorisation review must be undertaken when:

- It is reasonable to believe that the person does not wish to reside in, or receive care or treatment at a particular place;
- The arrangements provided for the person to receive care or treatment are mainly in an independent hospital.

2.4 Under LPS, the pathway for legal challenge is to the Court of Protection. Applications can be made by the person and/or others without the permission of the court. The court can determine whether the authorisation conditions are met, the duration of the authorisation and what the authorisation relates to. In doing so, the court can make an order varying or terminating the authorisation, or directing the responsible body to make specific changes to the authorisation. Specific assessments of the person’s capacity and whether or not they have a mental disorder, as described in the Mental Health Act, is expected to be a responsibility of the person’s GP. Unless the arrangements are carried out mainly in an NHS hospital, then the responsibility would become that of the hospital manager and responsible clinician. It is expected that the statutory guidance will provide further clarity for this.

3 Associated Risks

- 3.1 As a responsible body, if the CCG does not implement systems and processes to ensure CHC funded clients are lawfully deprived of their liberty through the authorisation process, it risks eligible clients having their human rights unlawfully breached – the responsible body potentially incurring financial penalties from the courts. The current average compensation award for unlawful deprivation of liberty is £130 per day. Additionally, it would not be unknown for the courts to order the responsible body to pay all relevant legal costs. At the time of writing this paper, the precise resource implications of implementation and any attached funding have not been outlined by the Department of Health and Social Care. As such, the financial impact on the CCG is unknown.

The CCG will be required to prepare for the implementation of LPS which comes into force October 2020.

The Designated Nurse Safeguarding Adults will be working closely with the Local Authorities DoLS team and the Clinical Lead for Continuing HealthCare, to ensure processes and training will be aligned as responsible bodies.

The drafting of a Code of Practice for the LPS and Parliamentary approval of this will clarify how the LPS will work in practice (Due Spring 2020).

The CCG can minimise risks associated with implementation by undertaking a scoping exercise to determine the number of CHC funded clients who:

- have current Deprivation of Liberty authorisation
- are waiting for Deprivation of Liberty authorisation, following an application.
- are potentially Deprived of their Liberty but no application has been made

A scoping exercise can help the CCG to develop an associated impact assessment detailing potential costs of other aspects of the LPS implementation, such as the responsibility to provide information and advocacy.

- CHC team to complete scoping
- Suitably knowledgeable external professional to scope (such as a Best Interest Assessor)

The duty placed on responsible bodies will result in an associated administrative function requiring robust operational systems and processes. This is necessary to arrange, collate and monitor, for example, completion of assessments, review dates, expiry dates and the appointment of an appropriate person.

New governance and quality arrangements will need to be put in place to ensure compliance and oversight of the new legislation.

Arrangements for access to legal advice will need to be in place, including when to

seek advice from the Court of Protection.

The GM Designated Nurse Network for Safeguarding Adults are working on a GM approach to the LPS process and seeking National Guidance from NHS England/Improvement. Designated Safeguarding Professionals should build in the planning for LPS in to existing assurance systems for commissioners and commissioned services.

The Bury Integrated Safeguarding Partnership (BISP) will need to consider establishing MCA/LPS task and finish group. This will need to consist of professionals from children's and adult services to review current systems and processes, develop awareness/training and to provide the BISP with assurance that the MCA is embedded into practice.

The CCG as NHS commissioners will need to consider the changes in light of the NHS trusts becoming responsible bodies also. The trusts may require additional support and the CCG will need to consider the quality assurance of the NHS trusts new role.

The CCG needs to consider the changes in light of their new role as a responsible body for LPS and ensure resources are in place to manage the changes to be compliant with the legislation.

4 Recommendations

Considerations required include:

- Impact of the safeguarding team's existing statutory responsibilities and consideration of employing and training a new CCG LPS team, which may include a LPS lead for adults and children, reviewing officers (qualified staff), AMCP's and administrators and/or a joint approach with the Local Authority who's existing DoLS team have the experience and possess many of the skills required going forward
- Consideration of who the senior manager's/directors would be that would sign off each application.
- A joint Service Level Agreement with the Local Authority would be required when CHC cases are jointly funded in order to determine who would be the responsible body.
- The cost, commissioning and capacity for additional GP assessments via face to face visits/ home visits to determine whether or not the person has a mental disorder, effectively as described in the MHA.
- The contracting and quality assurance of NHS provider's responsibilities around LPS including, training to comply with the new Act of law, systems and processes.

5 Actions Required

5.1 The Governing Body is required to:

- Consider the paper as an indication of impending changes to statutory responsibilities whilst we await practice guidance.

Clare Holder

Designated Nurse Adult Safeguarding

Clare.holder@nhs.net