

## 4. Related issues.

### 4.1. Introduction.

This section covers a number of issues which may need to be considered when working to safeguard adults if the person affected has care and support needs.

### 4.2. Deprivation of Liberty Safeguards.

The Deprivation of Liberty Safeguards (DoLS) provides protection to people in hospitals and care homes. DoLS apply to people who have a mental disorder and who do not have mental capacity to decide whether or not they should be accommodated in the relevant care home or hospital to receive care or treatment.

Care homes and hospitals must make requests to their Local Authority supervisory body for authorisation to deprive someone of their liberty if they believe it is in their best interests. Some organisations may operate joint supervisory boards. All decisions on care and treatment must comply with the MCA and the DoLS codes of practice. Be mindful that case law is evolving in this area and there have been some significant cases that have been brought to the attention of the Court of Protection.

In March 2014 a judgment was made in the Supreme Court regarding two cases which have had a significant effect on the application of the Deprivation of Liberty Safeguards. The two cases are-

- “P v Cheshire West and Chester Council and another”
- “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 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) 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 complete or 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. 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.

Relevant staff should-

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

**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 a 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.

#### **4.3. Consent.**

It is always essential in adult safeguarding to consider whether the adult is capable of giving informed consent in all aspects of their life. If they are able, their consent should be sought. This may be in relation to whether they give consent to:

- An activity that may be abusive – if consent to abuse or neglect was given under duress (e.g. as a result of exploitation, pressure, fear or intimidation), this apparent consent should be disregarded;
- An adult safeguarding Enquiry going ahead in response to a concern that has been raised. The person must be given information and have the opportunity to consider all the risks and fully understand the likely consequences of that decision over the short and long term.
- The recommendations of an individual safeguarding plan being put in place.
- A medical examination.
- An interview.
- Certain decisions and actions taken during the adult safeguarding process with the person or with people who know about their abuse and its impact on the adult.

If, after discussion with the adult who has mental capacity, they refuse any intervention, their wishes will be respected unless:

- there is an aspect of public interest (e.g. not acting will put other adults or children at risk).
- there is a duty of care on a particular agency to intervene (e.g. the police if a crime has been or may be committed).

#### **4.4. Hate crime.**

A hate crime is any criminal offence that is motivated by hostility or prejudice based upon the victim's:

- disability;
- race;
- religion or belief;
- sexual orientation;
- transgender identity.

Hate crime can take many forms including:

- physical attacks such as physical assault, damage to property, offensive graffiti and arson;
- threat of attack including offensive letters, abusive or obscene telephone calls, groups hanging around to intimidate and unfounded, malicious complaints;
- verbal abuse, insults or harassment taunting, offensive leaflets and posters, abusive gestures, dumping of rubbish outside homes or through letterboxes, and bullying at school or in the workplace.

#### **4.5. Exploitation by radicalisers who promote violence**

Individuals may be susceptible to recruitment into violent extremism by radicalisers. Violent extremists often use a persuasive rationale and charismatic individuals to attract people to their cause. The aim is to attract people to their reasoning, inspire new recruits, embed their extreme views and persuade vulnerable individuals of the legitimacy of their cause. The Home Office leads on the anti-terrorism strategy. See Prevent Strategy 2011.

#### **4.6. Abuse by another adult with care and support needs.**

Where the potential source of risk is also an adult with care and support needs, the safety of the person who may have been abused is paramount. Organisations may also have responsibilities towards this person, and certainly will have if they are both in a care setting or have contact because they attend the same place (e.g. a day centre). In this situation it is important that the needs of the adult who is the alleged victim are addressed separately from the needs of the potential source of risk.

It may be necessary to reassess the adult who is the potential source of risk. This may involve a meeting where the following could be addressed:

- the extent to which this person is able to understand his or her actions
- the extent to which the abuse or neglect reflects the needs of this person not being met (e.g. risk assessment recommendations not being met)
- the likelihood that this person will further abuse the adult or others.

The principles and responsibilities of reporting a crime apply regardless of whether this person is deemed to be an adult with care and support needs.

#### **4.7. Allegations against carers who are relatives or friends.**

There is a clear difference between unintentional harm caused inadvertently and a deliberate act of either abuse or omission, however contact must be made with the police if a crime has been or may be committed.

In cases where unintentional harm has occurred this may be due to lack of knowledge or due to the fact that the carer's own physical or mental health needs make them unable to care adequately for the adult with care and support needs. The carer may also be an adult with care and support needs. In this situation the aim of adult safeguarding work will be to address risk and determine how the adult with care and support needs feels about any risks. It may be appropriate to help the carer to provide support and make changes in their behaviour in order to decrease the risk of further harm to the person they are caring for.

Assessment of both the carer and the adult they care for must include consideration of both their wellbeing. As such, a needs assessment or carer's assessment is an important opportunity to explore the individuals' circumstances and consider whether it would be possible to provide information, or support that prevents abuse or neglect from occurring, for example, by providing training to the carer about the condition that the adult they care for has or to support them to care more safely and take into account the following factors:

- whether the adult for whom they care has a learning disability, mental health problems or a chronic progressive disabling illness that creates caring needs which exceed the carer's ability to meet them;
- the emotional and/or social isolation of the carer and the adult with care and support needs;
- whether there is minimal or no communication between the adult with care and support needs and the carer either through choice, mental incapacity or poor relationship;
- whether the carer is or is not in receipt of any practical and/or emotional support from other family members or professionals;
- financial difficulties;
- whether the carer has an enduring or lasting power of attorney or Appointeeship;
- whether there is a personal or family history of violent behaviour, alcoholism, substance misuse or mental illness;

- the physical and mental health and wellbeing of the carer.

If a carer speaks up about abuse or neglect, it is essential that they are listened to and that where appropriate a safeguarding enquiry is undertaken and other agencies are involved as appropriate.

If a carer experiences intentional or unintentional harm from the adult they are supporting, or if a carer unintentionally or intentionally harms or neglects the adult they support, consideration should be given to:

- whether, as part of the assessment and support planning process for the carer and, or, the adult they care for, support can be provided that removes or mitigates the risk of abuse. For example, the provision of training or information or other support that minimises identified stress experienced by the carer. In some circumstances the carer may need to have independent representation or advocacy; in others, a carer may benefit from having such support if they are under great stress or similar; and
- whether other agencies should be involved; in some circumstances where a criminal offence is suspected this will include alerting the police, or in others the primary healthcare services may need to be involved in monitoring.

Other key considerations in relation to carers should include:

- involving carers in safeguarding enquiries relating to the adult they care for, as appropriate;
- whether or not joint assessment is appropriate in each individual circumstance;
- the risk factors that may increase the likelihood of abuse or neglect occurring; and
- whether a change in circumstance changes the risk of abuse or neglect occurring.

A change in circumstance should also trigger the review of the care and support plan and, or, support plan.

#### **4.8. Abuse by children.**

If a child or children is or are causing harm to an adult with care and support needs, this should be dealt with under the adult safeguarding policy and procedures, but will also need to involve the local authority children's services.

#### **4.9. Transitions (care leavers).**

Where someone is over 18 but still receiving children's services and a safeguarding concern is raised, this should be dealt with as a matter of course through adult safeguarding procedures. Where appropriate, they should involve the local authority's children's safeguarding colleagues as well as any relevant partners (e.g. police or NHS) or other persons relevant to the case. This also applies where someone is moving to a different local authority area after receiving a transition assessment but before moving to adult social care.

Robust joint working arrangements between children's and adults' services should be in place to ensure that the medical, psychosocial and vocational needs of children leaving care are assessed as they move into adulthood and begin to require support from adult services.

The care needs of the young person should be at the forefront of any support planning and require a co-ordinated multi-agency approach. Assessments of care needs at this stage should include issues of safeguarding and risk. Care planning needs to ensure that the young adult's safety is not put at risk through delays in providing the services they need to maintain their independence, wellbeing and choice.

#### **4.10. Position of trust (PoT).**

The Care Act statutory guidance 2016 formalised the expectations on local safeguarding adults boards to establish and agree a framework and process for how allegations against people working with adults with care and support needs (i.e. those in a position of trust) should be notified and responded to.

The Care Act does not set out any primary legal duties on the local authority associated with managing allegations against people who work in a position of trust with adults with care and support needs, but the statutory guidance sets out the expectation for local authorities and their relevant partners (as described in section 6 (7) of the Care Act) to have clear policies in line with those from the safeguarding adults board for dealing with allegations against people who work, in either a paid or unpaid capacity, with adults with care and support needs.

A Position of Trust (PoT) concern would arise when:

- a person who works with adults with care and support needs in a position of trust, whether an employee, volunteer or student (paid or unpaid); and,
- there are concerns or allegations that indicate the person in a position of trust poses a risk of harm to adults with care and support needs.

These concerns or allegations could include, for example, concerns or allegations that the person in a position of trust has:

- behaved in a way that has harmed or may have harmed an adult or child;
- possibly committed a criminal offence against, or related to, an adult or child;
- behaved towards an adult or child in a way that indicates they may pose a risk of harm to adults with care and support needs.

#### *Interface with this Procedure*

Local Safeguarding Adults Boards and member agencies should have published arrangements for how PoT concerns should be addressed. It is important to note that allegations against people who work with adults should not be dealt with in isolation. Any action necessary to address corresponding welfare concerns in relation to an adult involved, including under this procedure, should be taken without delay and in a coordinated manner.

#### **4.11. Prisoners and persons in approved premises.**

Most Care Act duties apply to adults who are prisoners or who live in approved premises, for example, Local Authorities have a duty to undertake Care Act section 9 needs assessments for adults who are prisoners or who live in approved premises. However, the Care Act section 42 duty of enquiry does not apply to adults who are prisoners or who live in approved premises. In these circumstances, prison governors and National Offender Management Service (NOMS) respectively have responsibility.

#### **4.12. Personal budgets (PB) and self-directed care.**

Increasingly people are deciding to use less traditional ways of having their eligible social care and health care needs met. Many are taking the opportunity to exercise greater choice and control over what kinds of services they receive, who provides them and the way in which they are delivered. This revolution brings with it opportunities and challenges from the perspective of risk enablement and safeguarding.

Regardless of the person's preferred method of managing a PB (e.g. local authority managed account, direct payment, individual service account or a combination of these), the local authority still retains its duty of care with regard to the person and their protection from abuse. However, the balance of power and consequently how risk is managed can be significantly different from previous, traditional models of social care management. This model is more about the co-production of risk enablement, with the person having a greater say and therefore greater control over how risk is managed. This is therefore an inherently less risk adverse arrangement than before.

Throughout the process, from self-assessment (supported or otherwise) through to PB- setting, arranging direct payments or other PB management arrangements, to final sign-off of a support plan, appropriate risk assessment should be taking place with the individual and their supporters.

At the various key stages in the process, risk and safety should be considered-

- Self-assessment: initial identification of any safeguarding issues, either one-off or ongoing. If these needs are being met, how is this being done? If they are not being met, they need to be clearly identified.
- Budget-setting: if significant safeguarding risks are identified as unmet needs, will the amount of the PB be sufficient to reduce or mitigate them?
- Support planning: how will the support plan meet the safeguarding needs in outcome terms? What services are best suited to meet the adult's needs and how will they be delivered in a person-centred way?
- Sign-off: authorisation of the support to ensure it is legal, cost efficient and safe.

In this arrangement people using PBs, to a greater or lesser degree, are the commissioners of their own services, particularly where they are using direct payments to manage them.

Different arrangements exist to support people through the process of setting up a support package. In some areas this may be the responsibility of local authority adult social care staff, independent brokerage services or user-led organisations (ULOs).

The kinds of support available may include:

- advice about safe recruitment;
- advice about safeguarding and dignity;
- using approved or accredited providers of employment services;
- advice and support in relation to the quality of services;
- contractual issues.

It should be remembered that, where someone has capacity to make their own decisions in these matters, they may choose not to seek or use such advice or support services. This does not necessarily have a detrimental impact on the legality or safety of the support plan.

People with PBs and support plans which utilise direct payments are subject to the same reviewing arrangements as those in receipt of other services (i.e. a minimum of once per year).

**4.13. Those who fund their own care arrangements.**

People who fund their own care arrangements are legally entitled to receive support if subject to abuse or neglect in exactly the same way as those supported or funded by the local authority. They are also entitled to the protections of the Deprivation of Liberty Safeguards process.