HEALTH, SOCIAL CARE AND WELLBEING SCRUTINY COMMITTEE – 8TH SEPTEMBER 2015

SUBJECT: DEPRIVATION OF LIBERTY SAFEGUARDS (DOLS)

REPORT BY: DIRECTOR OF SOCIAL SERVICES

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1. PURPOSE OF REPORT

1.1 To up-date elected members of the changes in the emerging case law involving authorising deprivations of liberty for people in care homes and in the community. The report will also highlight the changes proposed by the Law Commission, currently out to consultation.

2. SUMMARY

2.1 In March 2014, the 2014, the Supreme Court, considered 2 cases concerned with potential deprivations of liberty. These cases were:

- P (by his litigation friend the Official Solicitor) (Appellant) *v* Cheshire West and Chester Council and another (Respondents)
- P and Q (by their litigation friend, the Official Solicitor) (Appellants) *v* Surrey County Council (Respondent)

2.2 In the above ruling the Supreme Court clarified the criteria for judging whether the living arrangements made for a person who lacks capacity amounts to a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights.

2.3 The ruling has many implications for how the Mental Capacity Act (MCA) is interpreted and used and for the situations in which people can be lawfully deprived of their liberty. The emerging case law is consistently redefining what is classified as a deprivation of liberty particularly in community settings.

2.4 The Law Commission were asked to review current practice and make recommendations for changes in the law and practice following criticism on MCA & DoLS by the House of Lords and the current un-sustainable position following Cheshire West.

2.5 This report contains an up-dated position on the current state of deprivations of liberty within Caerphilly, improvement initiatives within Wales and a very brief outline of the proposed scheme within the current consultation paper ending on the 2nd November 2015.

3. LINKS TO STRATEGY

3.1 Compliance with statutory responsibilities.

4. THE REPORT

4.1 Members will remember from the previous paper that a consideration of whether people are deprived of their liberty follow different processes for those residing in the community or a care home. Deprivation of liberties for people living in the community, including supported living schemes, are assessed by the local authority and authorised by the Court of Protection; while deprivations of liberty in care homes are authorised by the local authority following assessment undertaken through pan Gwent collaborative arrangements hosted by Aneurin Bevan University Health Board (ABUHB).

4.2 In respect of cases in the community since Cheshire West Caerphilly have undertaken a number of "test cases" to gain a greater understanding from the Court of Protection, an evaluation of what is involved in the process, an evaluation of the resources that would need to be applied both from a social work practice and legal standpoint, the timescales to undertake the work, and test on the authorisation of the deprivation of liberty on the papers process proposed by the President of the Court of Protection. Following the judgment the President of the Family Division proposed a "paper process" to try to deal with the huge escalation in applications. 3 cases were initially chosen including an older person with dementia with live in carers, an older person with an acquired brain injury whose care is jointly funded with ABUHB and a person with a learning disability in supported living. Of these cases only one has been formally approved, the others being "stayed" following a challenge in the Court of Appeal.

4.3 From these cases we have now developed a process involving social work and legal services through which we can progress future cases and a greater understanding of the timescales and work involved:

- Preparing the cases to go to the Court of Protection is a substantial commitment in social work time. It can take several weeks to undertake and pull together the various assessments and reports.
- A medical opinion of a person's impairment of the brain and mental incapacity is required for each application and there are limited resources available to undertake these assessments which adds to the timescales on each application.
- An independent view of the individual's circumstances is also required and this can be at additional costs.
- This small number of cases has consumed considerable resources from Legal Services.
- There is no additional capacity at the Court of Protection or with the Official Solicitor.

4.4 One of the cases above has been authorised by the Court of Protection and this was done on the papers submitted under the scheme highlighted above. However, this scheme is no longer available following a judgement at the Court of Appeal. The remaining 2 cases are currently waiting a hearing and determination by the Court.

4.5 Emerging case law appears to be determining that people who are in receipt of care and who are also cared for by informal arrangements with families and others are not deprived of their liberty, as in some case, the formal care is not deemed to be continuous or "imputable to the state". If this is consistently applied then it should reduce the number of people in the community deemed to be deprived of their liberty. However, the only way to be sure would be to assess each case on its own merits.

4.6 Further training on MCA / DoLS has been provided through the Workforce Development Team jointly with Blaenau Gwent. The training consisted of a half day basic awareness on mental capacity, a more detailed full day on social work practice in relation to the Mental Capacity Act and a further half day on Deprivation of Liberty Safeguards. 113 staff attended the basic awareness on mental capacity, 106 attended the full day on mental capacity and 71 have attended the Deprivation of Liberty course. There is evidence from practice to indicate that this training has had a positive impact. One member of staff has now completed the Best Interest Assessor training and, in addition to their usual role, is able to give advice to other staff on practice.

4.7 Since the Cheshire West judgement the DoLS Team (pan Gwent) have received 399 requests for a standard authorisation in respect of Caerphilly residents cared for in care home settings with 300 still waiting for an assessment. It is acknowledged that the number of people referred under represents those requiring assessment and further training needs to be provided to Managing Authorities (care homes) to ensure they meet their legal obligations to refer people they believe may be deprived of their liberty. Of note care homes granted 142 urgent authorisations which lapse after 7 days; 96 of these are still waiting for an assessment and these are counted in the 300 cases identified above. The number of Best Interest Assessors (BIA's) has risen to 6.5 but as the number of un-allocated cases above indicates is far short of the number of BIA's required.

4.8 In a Welsh context a Leadership Group, an Expert Working Group (looking at streamlining the DoLS forms) and a national MCA / DoLS network have been established. The final draft of the streamlined "Once for Wales" forms and Welsh Prioritisation tool are currently with Legal Services in Welsh Government with the forms being reduced from 24 to 14 to support a clearer and more effective process. Associated Guidance will also be published. Discussions between the Care Council for Wales with Welsh Universities are proceeding on a curriculum for qualifications for Best Interest Assessors in Wales. Guidance instructions for Coroners have been issued by the Chief Coroner and Chief Medical Officer for Wales.

4.9 The Law Commission's proposals for a new scheme has been published in their Consultation Paper no. 222 entitled "Mental Capacity and Deprivation of Liberty" and is available on their website under current consultations. The proposed changes identify a new scheme based on:

- **Supportive Care** – Would apply where a person is living in care home, supported living or shared lives accommodation, or if a move into such accommodation is being considered. Supportive care would cover people who may lack capacity as a result of an impairment of, or a disturbance in the functioning of, the mind or brain, in relation to the question whether or not they should be accommodated in particular care home, supported living or shared lives accommodation for the purpose of being given particular care or treatment.
- **Restrictive Care** – The restrictive care and treatment scheme would apply in respect of a person who is moving into, or living in, care home, supported living or shared lives accommodation and some form of "restrictive care and treatment" is being proposed. In addition, the person must lack capacity to consent to the care and treatment, and the lack of capacity must be the result of an impairment of, or a disturbance in the functioning of, the mind or brain. The meaning of restrictive care and treatment scheme would be determined by reference to a non-exhaustive list:
  - continuous or complete supervision and control;
  - the person is not free to leave;
  - the person either is not allowed, unaccompanied, to leave the premises in which placed (including only being allowed to leave with permission), or is unable, by reason of physical impairment, to leave those premises unassisted;
  - barriers are used to limit the person to particular areas of the premises;
  - the person's actions are controlled, whether or not within the premises, by the application of physical force, the use of restraints or (for the purpose of such control) the administering of medication - other than in emergency situations;
  - any care and treatment that the person objects to (verbally or physically); and
  - significant restrictions over the person's diet, clothing, or contact with and access to the community and individual relatives, carers or friends (including having to ask permission from staff to visit - other than generally applied rules on matters such as visiting hours).
- **Protective Care in Hospital Settings** - Separate bespoke system for hospitals and palliative care. This would enable the authorisation of deprivations of liberty in NHS, independent and private hospitals where care and treatment is being provided for physical disorders, and in hospices. The hospital scheme would apply when the following conditions are met:
  - the patient lacks capacity to consent to the proposed care or treatment; and
  - there is a real risk that at some time within the next 28 days the patient will require care or treatment in his or her best interests that amounts to a deprivation of liberty; or

- the patient requires care or treatment in their best interests that amounts to a deprivation of liberty; and
- deprivation of liberty is the most proportionate response to the likelihood of the person suffering harm, and the likely seriousness of that harm.

- **A new role of an Approved Mental Capacity Professional (ACMP)** – All restrictive care and treatment assessments would be referred to an AMCP.
  - The AMCP would retain overarching responsibility for ensuring that the assessment is carried out, however they would be given wide discretion over how this is achieved. In some cases the AMCP might decide that the assessment should be carried out by the professional already working with the person. The AMCP might also act as a general source of advice for the assessor – to assist them to apply the principles of the Mental Capacity Act and share good practice. In other cases, the AMCP could take charge of the restrictive care and treatment assessment themselves and thereby ensure that an independent assessment takes place. This would depend on the circumstances of the case.
  - AMCPs would be in the same position legally as Approved Mental Health Professionals. In other words, they will be acting as independent decision-makers on behalf of the local authority. The local authority would be required to ensure that applications for protective care appear to be "duly made" and founded on the necessary assessments.
  - Advocacy – it is vital that independent advocacy continues to play a central role in our new scheme. It is provisionally proposed that, in all cases, an advocate should be instructed for those subject to protective care.
  - The Interface With The Mental Health Act – The new scheme could not be used to authorise the detention in hospital of incapacitated people who require treatment for a mental disorder.

5. EQUALITIES IMPLICATIONS

5.1 There are no equalities implications arising from this report.

6. FINANCIAL IMPLICATIONS

6.1 There are considerable financial implications detailed in the body of the report, significantly around the provision of an appropriate number of Best Interest Assessors, legal support and court fees, continued training for staff on mental capacity as well deprivations of liberty, and on social work resources particularly those supporting people who live in the community. Deprivations of liberty that are not properly authorised can be subject to un-limited court fines and compensation consistent with the facts of the case.

7. PERSONNEL IMPLICATIONS

7.1 There are no personnel implications arising from the report.

8. CONSULTATIONS

8.1 All feedback from consultations are contained in the body of the report.

9. RECOMMENDATIONS

9.1 Elected members note the current position and the implications for practice and resources.

9.2 Members are also asked to note the Law Commission's proposals for changes in the law and the resource implications that this presents.

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