



HEALTH, SOCIAL CARE AND WELLBEING SCRUTINY COMMITTEE – 2ND DECEMBER 2014

SUBJECT: DEPRIVATION OF LIBERTY

REPORT BY: CORPORATE DIRECTOR SOCIAL SERVICES

1. PURPOSE OF REPORT

- 1.1 To inform elected members of the changes in case law involving authorising deprivations of liberty for people in care homes and in the community.

2. SUMMARY

- 2.1 On 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 is interpreted and used and for the situations in which people can be lawfully deprived of their liberty.

3. LINKS TO STRATEGY

- 3.1 Compliance with statutory responsibilities.

4. THE REPORT

- 4.1 The application of the Mental Capacity Act 2007, and the Deprivation of Liberty Safeguards (DOLS) subsequently incorporated into the Act, is complex and complicated, and as such has been subject to interpretation by practitioners and the courts since its enactment. The Act, including the Deprivation of Liberty Safeguards, is currently under review by the Law Commission, which is due to report in 2017.
- 4.2 The above judgement, known as the “Cheshire West” case, has introduced a revised test about the meaning of a deprivation of liberty. The Supreme Court has now clarified that there is a deprivation of liberty for the purposes of Article 5 of the European Convention on Human Rights when the following applies when the person is:

- Under the continuous supervision and control (and the care provided is imputable to the state),
- Is not free to leave, and
- The person lacks the capacity to consent to these arrangements.

4.3 As a result of the judgement the following circumstances are no longer relevant to the test of deprivation:

- The person's compliance or lack of objection,
- The relative normality or quality of the placement (“a gilded cage is still a cage”), and
- The reason or purpose behind the placement or restriction.

4.3.1 The latter circumstances influenced previous practice and contributed to low numbers of individuals considered to have been deprived of their liberty. The low numbers of deprivations have been highlighted in successive Annual Monitoring Reports on DoLS leading to an all Wales Inspection of DoLS practice to be conducted by Welsh Government in 2014.

4.4 There are 5 guiding principles in considering whether people lack mental capacity:

1. There is a presumption that people have capacity. Capacity is also issue and time specific.
2. People are empowered to contribute to the process and helped in whatever way possible to engage.
3. The foolish are not necessarily incapable.
4. Decisions are taken in the best interest of the individual, and
5. The least restrictive options are pursued.

4.5 There are different processes when considering deprivation of liberties depending on where the person lives. For people who live at home or in community settings, e.g. supported living placements, deprivations of liberty can only be authorised by the Court of Protection. For people who live in care homes, or are currently occupying a bed on a hospital ward, the deprivation can be authorised by a Supervisory Body. This authority is a Supervisory Body for people who now live in a care home setting. Care homes (and hospital wards) are known as Managing Authorities under the Act and, as the authority has its own care homes, this local authority is a Managing Authority. Thus this authority is, therefore, both a Supervisory Body and a Managing Authority under Deprivation of Liberty Safeguards.

4.6 To respond to deprivations of liberty in care homes Caerphilly is part of a Pan Gwent Consortium where assessments are coordinated through a small DoLS Team managed by Aneurin Bevan University Health Board (ABUHB). Before the Supreme Court judgement the team comprised 2 Best Interest Assessors (BIA's) supported by casual staff and administration. The original funding for the team was through grant funding for DoLS from Welsh Government, the responsibility for DoLS resides with each local authority and ABUHB individually. Subsequent to the judgement authorisation was given to recruit 2 additional BIA's from existing resources. Further funding has recently been agreed to increase the staffing by 6 FTE with agreement for each statutory body to contribute funding for a further BIA including associated training costs.

4.7 The Supreme Court judgement is recognised as having a significant increase in the demand for assessing for potential deprivations of liberty. Actual numbers are difficult to estimate due to the individual nature of people's circumstances and care provided, and there are variations in estimates across local authority areas in England and Wales. Within Caerphilly we estimate that potentially 776 people may be deprived of their liberty based on the Supreme Court ruling (see 4.2 & 4.3 above). This is broken down into 459 people in long-term care placements, and 132 people who live in supported living type settings and 185 people in the community.

- 4.8 The judgement has significant implications for local authorities and Health Boards:
- 4.8.1 For those people in care homes and hospitals (including Continuing NHS Health Care) who require an authorised DoLS involves a complex assessment process (6 assessments ranging from an age requirement to complex needs assessments and best interest assessments and decisions). This has to be done at least annually for each resident and on each significant change in circumstances.
 - 4.8.2 For those in community settings – their case would need to go to the Court of Protection. These cases are currently reviewed four monthly at the Court of Protection for the first year and then annually if there are no objections; if there are objections then 4 monthly. This has significant implications for current social work practice specifically in increased complexity and time management, should numbers increase substantially.
 - 4.8.3 Those people who fund their own care, and lack mental capacity are also subject to the same provisions if they are resident in a care home and will need to be assessed by social workers to ensure they have not been inappropriately placed in long-term care by family members or others who lack the necessary legal decision making powers to do so.
 - 4.8.4 The capacity of Gwent Deprivation of Liberties Safeguarding Supervisory Body is insufficient to manage the demand. This situation is replicated across all Local authorities and Health Boards in Wales, and those in England who have responsibilities.
 - 4.8.5 The current waiting list (25/9/2014) stands at 700+ across the Health Board and 5 Local Authorities to manage the risks a screening tool has been implemented to identify those individuals at greatest risk in order to prioritise their assessment over those who would normally not have fallen within the criteria of the safeguards.
 - 4.8.6 The level of required increased advice and activity around cases, particularly those going to the Court of Protection, has implications for Legal Services.
 - 4.8.7 Taking Court of Protection legal proceedings and defending challenges to these illegal detentions will be expensive and no budget exists for this volume of work.
 - 4.8.8 There is a risk of litigation, particularly in cases where we may have taken action to protect people by care arrangements where families are not in agreement with our actions, or has implications for them e.g. potential breaches of the Convention of Human Rights on the right to family life.
 - 4.8.9 There is a lack of capacity in the Court of Protection and with the official solicitor's office to deal with this many cases coming forward. The fact that the Court of Protection does not have capacity to deal with issues does not excuse the Council from having to make applications. The Court of Protection is working on a fast tracked "paper process" for non-contested cases, although each application will still require the authorisation of a judge.
 - 4.8.10 There are significant issues for the authority in relation to our Managing Authority status as we provide residential care and the community resources identified above. The ruling will mean that we will have services for people suffering from dementia where everyone receiving that service will be deprived of their liberty under DoLS e.g. dementia care homes.
 - 4.8.11 The ruling substantially changes the practice requirements for social workers both in knowledge, training, and complexity. This is significantly so where applications to the Court of Protection are involved. Given the numbers of cases identified and the increases in practice requirements social work capacity and training resources will be required.

Welsh Government has not yet issued guidance in relation to the management of these increased applications.

4.8.12 The Association of Directors Social Services (ADSS) have met with Welsh Government and agreed to work closely with Department of Health (DoH) and Association of Directors Adult Services (ADASS), Welsh Government is already represented on the national steering group.

4.8.13 It was agreed to set up Welsh steering group and an expert network group. Who will be responsible for developing an action plan which training, streamlining process and forms, mapping needs, advise to care homes using CSSIW web site, risk management and development of an audit tool.

5. EQUALITIES IMPLICATIONS

5.1 There are no equalities implications arising from this report.

6. FINANCIAL IMPLICATIONS

6.1 Financial implications to date are £58,587 per organisation for recruitment of additional staff with associated training.

6.2 There are other 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, training for staff on mental capacity as well deprivations of liberty (currently being arranged with the Workforce Development Team), and on social work resources particularly those supporting people who live in the community.

7. PERSONNEL IMPLICATIONS

7.1 There are no personnel implications arising from the report.

8. CONSULTATIONS

8.1 All consultations are included in this report.

9. RECOMMENDATIONS

9.1 Elected members note the changes in the case law and the implications for practice and resources.

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Appendices:
Appendix 1 - A National Review of the Deprivation of Liberty Safeguards