

FLINTSHIRE COUNTY COUNCIL

REPORT TO: **CABINET**

DATE: **16TH DECEMBER 2014**

REPORT BY: **CHIEF OFFICER (SOCIAL SERVICES) AND
CHIEF OFFICER (GOVERNANCE)**

SUBJECT: **DEPRIVATION OF LIBERTY SAFEGUARDS
IMPLICATIONS FOR FLINTSHIRE COUNTY COUNCIL**

1.00 PURPOSE OF REPORT

- 1.01 To update Cabinet on the Supreme Court ruling made in March 2014 that changed the way Deprivations of Liberty are assessed.
- 1.02 To inform Cabinet of the impact on services and actions taken to date.
- 1.03 To request that Cabinet consider the financial implications for social services and legal services,

2.00 BACKGROUND

- 2.01 The Mental Capacity Act Deprivation of Liberty Safeguards (DOLS) were implemented on 1 April, 2009. They provide a legal framework that protects people living in care homes and hospitals who are vulnerable because of mental disorder and problems with their mental capacity.
- 2.02 Under these safeguards people can be deprived of their liberty when there is no other way safely to care for them, and an assessment has been made of their best interests. The body responsible for co-ordinating and authorising these assessments is known in the Safeguards as the Supervisory Body. For care homes the relevant Supervisory Body is the Local Authority, for hospitals it is the Local Health Board. The care home or hospital is known as the Managing Authority. The DoLS assessments are carried out by a Best Interests Assessor (in Flintshire the best interest assessors are social workers with special training), and any assessment must include an assessment form a doctor with specialist skills in psychiatry (registered under Section 12 of the Mental Health Act 1983).
- 2.03 From 2009 until March 2014 the number of requests for DoLS authorisations received in Flintshire remained relatively low (an average of 17 referrals a year between 2010 and 2014). There had been general agreement, based on several significant pieces of case law, that for a deprivation to take place, a person would need to be

showing some sign of wanting to leave the care setting. There was also guidance that other factors such as the frequency and duration of the person's efforts to leave, and the number of restrictions which were placed on them should all be taken into account when assessing whether a person was deprived of their liberty. All these factors kept down the number of referrals received and authorised.

- 2.04 In March 2014 the Supreme Court (*P v Cheshire West and Chester Council and, P & Q v Surrey County Council*) issued a judgement that greatly increased the number of people who could be seen as being deprived of their liberty. The Court ruled that people are deprived of their liberty if they meet three key features (referred to as the "acid test"). These are that they
- Lack the mental capacity to make decisions about their care and residence and;
 - Are subject to continuous supervision and control under the responsibility of the state and;
 - Lack the option to leave their care setting
- 2.05 One of the Judges, Baroness Hale, said that whether or not the person was happy and settled in the home and whether or not they were receiving a high quality of care did not matter. As she said, "A gilded cage is still a cage".
- 2.06 Even though the Deprivation of Liberty Safeguards only apply to care homes and hospitals, the judgement clarifies that if a person over the age of 16 yrs is deprived of their liberty in a domiciliary setting (for example in supported living), their deprivation should be authorised by the Court of Protection, a process which is currently very expensive and protracted.
- 2.07 The implications of the judgement are significant and mean that
- Every person in a care home in Flintshire who lacks capacity to make a positive decision about living in the home and who is receiving continuous supervision and control from staff is being deprived of their liberty, and the home should apply to the Social Services Department for a Deprivation of Liberty Safeguards assessment.
 - Every person living in their own homes and who lack capacity can also be seen as being deprived of their liberty where "the state" is involved in providing a package of care. This group of people will have to be referred to the Court of Protection for an authorisation of their deprivation.
 - Children aged between sixteen and eighteen years can be deprived of their liberty in a domiciliary setting.
- 2.08 There are legal time scales attached to requests for assessments. If a care home believes they are already depriving a resident of their liberty they should issue an Urgent Authorisation, which authorises the

deprivation for up to seven days whilst a request for a standard authorisation is submitted. This must be dealt with by the Supervisory Body (the Local Authority) within five days of receiving the application. If the Managing Authority (the care provider) consider that they will be depriving someone of their liberty in the near future, then they would submit a Standard Authorisation request which the Supervisory Body should process within twenty-one days

2.09 As Deprivations of Liberty have to be reassessed and re authorised as a minimum annually, the demand for work is not a one off event but will be rolling year on year programme of work.

2.10 **New Demand on Services**

On a broad basis the expectation is that Flintshire County Council face the task of assessing and authorising up to 300 DoLS authorisations and considering applications to the Court of Protection for up to 670 service users in the community. These figures are covered in more detail as follows.

2.11 Possible Deprivation of Liberty Safeguards applications (people in a care setting) :

26 EMI Nursing
30 Nursing
110 Residential Care
122 EMI Residential Care

Estimate 288 (This number should be considered alongside the previous year's 13 applications)

2.12 Potential deprivations of liberty that require authorisation by the Court of Protection (people in their own homes)

100 Learning Disability - Supported Living
200 Learning Disability - care package in own home
20 Physical Disability Sensory Impairment
50 Mental Health
300 Older People - care package in own home

Estimate 670

2.13 The Court of Protection is to issue further guidance in February 2015 about deprivations of liberty in settings outside care homes or hospitals but has made it clear that priority should given to people in Supported Living, and until further guidance is received, recommendations in this report are based on the 100 people identified as living in this category of care in Flintshire.

2.14 The Courts issued new guidance in June 2014 around Court of Protection applications for people in the community, stating that some uncomplicated applications for Court of protection may be a paper

exercise requiring the local Authority to submit a detailed technical paper to the court of approximately 50 pages. Complicated or contested Court of Protection applications will require written submissions in the first instance but then will also require oral hearings with representation by the local authority at the court.

- 2.15 Responsibility for making applications to Court of Protection in supported living or individuals own homes (where individuals have a large package of care funded through the state) is likely to lie with the Councils social work service, supported by the service provider.
- 2.16 The cost of a standard application to the Court of Protection is £400 application fee, with an additional £500 hearings fee for complex cases. For the 100 supported living cases alone, if we estimate that 20% of cases might be complex, this would amount to £50,000.

Actual impact to date and actions taken

- 2.17 Significant efforts have been made to make the best use of existing resources using the Safeguarding Manager and Administrator and existing qualified social work staff to undertake referrals as they have arrived. Despite these efforts the service has not been able to keep pace with demand. The use of existing staff has had a detrimental and unsustainable adverse effect on existing workload and waiting lists.
- 2.18 Since April 2014, 149 requests for authorisation have been received by the Supervisory Body, (LA) of these :
- 67 requests have been assessed and completed
 - 83 applications are outstanding and more are expected
 - 30 mental health assessments have been completed by Section 12 doctors (at a cost of up to £200 per assessment, including fee and travel)
- 2.19 Each application requires an average of 10/12 hours of Best Interest Assessor (social work) time to assess the individuals, speak to appropriate people and record the assessment. This work is time consuming and requires administrative support to collate the 10 page document and deal with the necessary correspondence. Since April DOLS requests have taken up approximately 80% of the Adult Safeguarding Manager's time, negatively affecting our capacity to respond to Adult safeguarding issues.
- 2.20 The change in legislation is backdated 12 months to when these above mentioned cases begun their passage through the court. The failure to deal with the backlog of cases could result in a breach of human rights, specifically Article 5, the right to liberty. If the problem is not resolved quickly, the council could potentially face adverse legal action for the failure to respond.

2.21 The safeguarding budget allocated by Welsh Government which previously covered appointment of S12 Drs for Deprivations of liberty has already been exceeded. Steps have been taken with health colleagues to seek their engagement of Section 12 Doctors across the region but progress is currently at an early stage.

3.00 CONSIDERATIONS

3.01 Given the known pressures on the adult safeguarding services and on the broader social work service, neither the social services or the legal service are able to cope with the dramatic increase in demand for DOLS within the specified timescales, without additional resources.

3.02 A change in case law unlike change in legislation hasn't allowed time to plan resource allocation ahead of demand. Consequently the service is facing a significantly increased area of responsibility without corresponding increase in resource / capacity to respond.

3.03 Discussions have begun on a regional basis and with health colleagues to discuss how best to commission section 12 Drs given the sudden increased level of cost and potential capacity available. No agreement has yet been reached, although we will continue to press for progress to be made.

3.04 An experienced social worker has been moved within the Department to work exclusively on DoLS assessments. This has been managed in the short term within existing financial resources.

3.05 Welsh Government have allocated some one off funding to train DoLS assessors and Flintshire allocation of £5k, which will support the essential raining requirement for new assessor role.

4.00 RECOMMENDATIONS

4.01 To undertake these assessments on an ongoing basis the Council needs to consider increased funding to manage this unexpected and unfunded significant new responsibility. It is recommended that the following resource is required as a minimum to deal with the first year's work:

- 3 Social workers with approved Mental Health qualification or substantial knowledge and experience of mental health / mental capacity and safeguarding legislation.
- 1 Solicitor
- Section 12 Doctor costs
- Court of protection cost.

Total cost 270 k

4.02 It is recommended that the following be identified as an ongoing resource requirement for future years whilst the judgement remains in force.

- 4.03 2 Social Workers
0.5 Solicitor.
Section 12 Doctor Costs
Court of Protection costs.
- 4.04 Total Cost 210k
- 4.05 Recognise the increased workload for Social and Legal Services in arranging and authorising significant numbers of legal deprivations of liberty.
- 4.06 Acknowledge that as for every authority, there has inevitably been a short term "waiting list" for DoLS referrals and associated work until resources can be found to meet new demand.

5.00 FINANCIAL IMPLICATIONS

- 5.01 In order to clear the current backlog of assessments as outlined in paragraph 4.01, the additional costs of 3 x Social Workers and 1 x Solicitor are £0.180m. A further £0.060m is required to fund the services of Doctors qualified under Section 12. A further budget of £0.050m is required for Court of Protection applications, inclusive of additional costs of £0.010m to cover the more complex cases where an additional fee of £500 per hearing will apply.
- 5.02 The total additional budget requirement in Year 1 is therefore estimated at £0.290m for dealing with all assessments, including those which must be carried out by S12 qualified Doctors, and the costs of Court of Protection applications and hearings.
- 5.03 After the first year when the current backlog of assessments has been cleared, the additional staffing capacity can be reduced to 2 x Social Workers, plus 0.5 FTE for a Solicitor. The ongoing annual budget requirement would therefore be £0.216m.

6.00 ANTI POVERTY IMPACT

- 6.01 None.

7.00 ENVIRONMENTAL IMPACT

- 7.01 None.

8.00 EQUALITIES IMPACT

- 8.01 Human Rights Legislation.

9.00 PERSONNEL IMPLICATIONS

9.01 As detailed above

10.00 CONSULTATION REQUIRED

10.01 Negotiate with S12 Doctors direct regarding block cases eg one Dr has agreed to undertake a number of assessments in one home for a smaller % of cost.

10.02 Work with other LA's and Health on a regional basis to seek regional solution eg health employment of 2 x FTE S12 Drs cost to be shared across region. Paper proposal being prepared. Regional procurement and contract for Drs will deflect from the need to engage with FCC contract procedure rules that would arise from engaging S12 Drs for so many assessments.

11.00 CONSULTATION UNDERTAKEN

11.01 As above.

12.00 APPENDICES

12.01 None.

**LOCAL GOVERNMENT (ACCESS TO INFORMATION ACT) 1985
BACKGROUND DOCUMENTS**

None.

Contact Officer: Neil Ayling, Chief Officer, Social Services
Telephone: 01352 702500
Email: Neil.j.ayling@flintshire.gov.uk