

Report to Cabinet

Meeting to be held on Thursday, 10 August 2017

Report of the Head of Service, Learning Disabilities, Autism & Mental Health

Part I

Electoral Divisions affected:
All

Deprivation of Liberty – Prioritisation of Applications to the Court of Protection (Appendices 'A' and 'B' refer)

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Executive Summary

This report gives an overview of the position regarding the legal requirements placed on the Council regarding applications to the Court of Protection (COP) in relation to people who may be deprived of their liberty in community settings.

It outlines the pressures on social work and legal resources since the Supreme Court ruling of March 2014 (known as the Cheshire West ruling) which dramatically increased the number of people who come within the remit of Deprivation of Liberty legislation, and the potential risks of not complying fully with the law.

Deprivation of Liberty for those over the age of 16 years in a community settings can only be authorised via an application to the COP. (For people over 18 years in a hospital or care home there is a separate procedure under the Deprivation of Liberty Safeguards (DOLS) which is not covered in this report).

The resource implications on the Council as a result of this ruling are significant and ongoing. Whilst new legislation which could reduce the impact of COP work (as well as DOLS) has been proposed, this is unlikely to be implemented in the foreseeable future.

This report recommends Cabinet to agree to adopt a pragmatic approach to ensure that the most pressing cases are identified and progressed through to the Court as priority. This will ensure that citizens who most need the protective legal framework are dealt with first. Although this means applications for those of lower priority will be delayed, it is considered that it is reasonable to believe that their care has been arranged by social care staff with the best intentions to keep them safe and well.

This is deemed to be a Key Decision and the provisions of Standing Order No. 25 have been complied with.

Recommendation

The Cabinet is recommended to:

- (i) Note the legal requirements placed on the Council as a result of the Cheshire West ruling and the consequential financial implications.
- (ii) Agree to the adoption of the Court of Protection Prioritisation Tool as set out at Appendix 'A'.

Background and Advice

The Mental Capacity Act (MCA) 2005 established the Court of Protection (COP) which introduced a duty that required public authorities to place certain matters before the COP. One of these circumstances is to seek an authorisation to lawfully deprive a person of liberty in a community setting.

Prior to March 2014, the number of applications to the COP to lawfully deprive a person of liberty in a community setting were very small, 109 across England and Wales in 2013 and approximately 10 in Lancashire. However, in March 2014, the Supreme Court set out a much wider definition of 'deprivation of liberty' (the 'Cheshire West Test') which brought thousands more people within scope of deprivation of liberty safeguards (DOLS). The impact on the numbers for DOLS (Hospitals and Care Homes) is well documented, but the impact on people requiring a Court of Protection Deprivation of Liberty application has been hidden.

After March 2014, the numbers of people in community settings requiring an application of this type has increased dramatically and by 2016 the actual number of applications made across England and Wales had risen tenfold.

The Commissioning body, which more often than not is the local authority, is responsible for making the application to the COP. The financial risk to the local authority of depriving someone of their liberty without the appropriate authorisation in place may result in a claim for damages. The level of any such claim will depend upon whether the matter is considered to be a substantive or procedural breach and the length of time the individual may have been deprived of their liberty. In addition to this there may also be a claim for costs against the local authority to cover the legal expenses incurred by the individual in seeking such redress.

It is estimated that 3,150 adults in the community in Lancashire will require an application to be made to the COP to seek an authorisation and this will need to be reviewed on an annual basis. This does not take into account service users waiting for a social care review, nor any increase in demand.

Following the Cheshire West case a Judicial Review challenge was brought by four local authorities against the Secretary of State for Health on the grounds that a one-

off Government Grant to address the back log created by the Supreme Court decision was insufficient to implement the ruling. This challenge was however unsuccessful.

A conservative estimate of average Social Work time to complete a COP application is 47 hrs per case; this is the equivalent of 89 x FTE social workers per annum for the estimated 3,150 applications.

Similarly the legal resource per annum for the 3150 applications is estimated to be over 7 hours per application 'on the papers' i.e. with no oral hearing required. This equates to an estimated 4.5 x FTE Solicitors, 8 x FTE Paralegals and application fees of £540,000 (based on £400 fee x 3150 applications). For complex or contested cases the legal resources and costs would be considerably more.

The greatest impact is on the Learning Disabilities & Autism Services, with 85% of people with a Learning Disability in Supported Living potentially meeting the criteria for deprivation of liberty.

The Care Quality Commission (CQC) is directing that Care Providers identify all service users in their care who may be deprived of their liberty, and to make referrals to the local authority for COP applications to be made, and to chase up regularly, which adds to the pressure on the Council.

A COP Prioritisation Tool (Appendix 'A' refers) has been drafted by officers of the council to help manage the pressures and has been successfully piloted with a sample of Adult Social Care Teams and Providers. It has also been accepted in principle by the NHS Commissioning Support Unit (NHS CSU) Clinical Commissioning Groups (CCGs) and Advocacy Services. Improved systems are being developed in collaboration with these organisations to support the management and efficiency of COP activity.

Consideration has also been given to the options available when an urgent move of accommodation is required prior to the Court being able to authorise the present or future deprivation or move in accommodation. Whilst options are limited, an approach is proposed which considers risks when urgent decisions are required. This process has also been piloted with social workers.

1. The COP Prioritisation Tool enables:
 - a. Social Work Managers to identify most at risk cases and deploy social work resource accordingly
 - b. Care Providers to make appropriately 'flagged' referrals

If the NHS and Advocacy Services locally adopt the tool, this will ensure a consistent approach and understanding across partner organisations.

2. The adoption of the Tool impliedly acknowledges that:
 - a. Not all COP applications can be completed imminently within existing social work and legal resources, even those deemed high priority.

- b. Lower priority COP cases may be held in abeyance without limit of time
 - c. Managers will need to prioritise COP work alongside all other statutory social work, and make professional judgements about urgency in the wider context
 - d. The local authority, individual managers and staff members may face a legal challenge if COP work has not been completed
3. If the COP Prioritisation Tool is adopted, it is also intended to approve a written position statement, including an assurance that the Council has the lead responsibility for progressing COP applications if the CQC registered provider has taken reasonable steps to refer the issue to the Council.
4. Senior Management will maintain an overview of the pressures of COP work by receiving regular reports on COP activity and will consider savings targets in light of the potential increasing demands of COP work

Consultations

The following consultations have taken place regarding the proposal to implement the COP Prioritisation Tool:

- NHS Midlands & Lancashire CSU
- Lancashire CCGs
- Merseycare NHS Trust
- The Lancashire Adult Safeguarding Board
- Advocacy Focus (Statutory Advocacy Services)
- Key organisations involved impacted by this work
- LCC Social work staff and their managers faced with these decisions

The estimated numbers for Lancashire and concerns about impact have been shared and discussed with the President of the Court of Protection in person and with other North West local authorities via the ADASS network

Implications:

This item has the following implications, as indicated:

Risk management

The proposal to adopt the COP Prioritisation Tool will mitigate the risks associated with substantive breaches through vetting the cases and prioritising high risk cases.

If it is not adopted then this would mean that the current workforce would be without any guidance to enable them to prioritise applications according to risk; decisions would be made in an ad-hoc inconsistent way, increasing the exposure of the Council to legal challenge and reputational damage.

Social Workers would be exposed to professional challenge as they may be in breach of professional standards to uphold the law, while the use of the prioritisation tool would mean that some applications are not made to the COP, professionals will

feel supported by the organisation and less at risk in respect of their professional reputation and registration.

Social work teams are currently unable to meet the demand associated with the volume of COP cases. Increasing staffing to meet the need would represent a pressure to staffing budgets, management overheads, legal overheads, support functions, accommodation and equipment. If caseloads are not properly prioritised this can lead to staff pressures and dissatisfaction

Social Care providers will submit referrals for applications for all their customers in bulk, without any indication of priority; this will result in a backlog that would be extremely problematic to screen, increasing the risk of a serious breach going unnoticed.

Legal

In accepting the recommendations the Council is acknowledging that there are a number of Lancashire residents who are presently deprived of their liberty and may continue to be until the relevant applications to seek a lawful authorisation can be made. In the majority of cases, when the initial arrangements for care were made for those residents, the legal definition was not as wide as it now is and therefore they would not at that time have been considered to have been 'deprived of liberty'.

The Council's position is therefore that all care arrangements have been made with the best intentions to keep people safe and well. The Council will continue to meet care needs in line with the individuals care and support plans which in some instances may require an authorisation from the Court which will be sought as soon as possible in line with the COP Prioritisation toolkit which will assist in minimising risk to both the service user and the Council.

However, it must be acknowledged that the Council will nevertheless be in a position where it is accepting that it is responsible for some individuals who are being unlawfully deprived of their liberty. This presents an increased risk of legal challenges as any unlawful deprivation of liberty is a breach of an individual's Human Rights under Article 5 (The Right to Liberty and Security of Person) and potentially Article 8 (The Right to Private and Family Life).

Damages for breaches could range from £1 per day for a procedural breach up to £3000 - £4000 per month where there has been a substantive breach. In addition to this there may also be a claim for legal costs of any such application.

The proposals do not place the Council in a risk free position. They do however assist the Council's workforce by introducing a process that should enable prioritisation of the most pressing cases, and while those at least risk will be delayed, this should reduce the risk of challenge.

Those matters which may involve a substantive breach will be identified and addressed at an earlier stage. This will result in an increase in legal work as the social work teams will be able to identify the more complex and pressing applications which will need to be prioritised by Legal Services to ensure authorisations are obtained in a timely manner.

Financial

It is not anticipated that adoption of the protocol listed above will lead to increased costs, however there is a possibility that there could be future additional costs to meet demand levels as highlighted within this report. This area will be closely monitored and any financial pressures may need to be built into the medium term financial strategy (MTFS).

There are indirect positive financial implications of adopting the Tool; by prioritising applications for the highest risk cases, there is less likelihood that the local authority will substantively breach citizens' human rights, and therefore less likelihood of damages and costs being awarded against the local authority.

Equality and Diversity

An Equality Analysis is set out at Appendix 'B'.

List of Background Papers

Paper	Date	Contact/Tel
'Cheshire West' Supreme Court judgment		Charlotte Hammond /07771338882

Reason for inclusion in Part II, if appropriate

N/A