

## **MEETING BETWEEN LAW COMMISSION AND REPRESENTATIVES OF THE HOUSING AND CARE SECTOR**

### **SUMMARY**

- 1.1 On 21 October 2014 a meeting was held at the offices of the Law Commission of England and Wales to discuss issues of concern to housing and care providers arising from the Commission's project to reform the law regarding mental capacity and detention.
- 1.2 This note provides a short précis of proceedings for circulation to housing and care stakeholders. However, it should be noted that the views expressed by participants at the meeting are not necessarily the views of the Law Commission.

### **THE LAW COMMISSION'S PROJECT OF LAW REFORM**

- 1.3 The Law Commission is an independent statutory body with responsibility for recommending law reform to government.
- 1.4 The Commission's mental capacity and detention project will consider how deprivations of liberty should be authorised and supervised in hospitals, care homes and community settings including supported living arrangements. This will include a review of the present legislation and the DoLS process.
- 1.5 The review is in its early stages. The Commission is due to publish a consultation paper in summer 2015, followed by a four month public consultation. The paper will make a number of detailed provisional proposals for the reform of the law in this area. It is hoped that this paper will lead to a wide ranging debate on the new detention system at that time. The Commission then aims to publish a final report and draft Bill in summer 2017.

### **THE PARTICIPANTS**

- 1.6 Present at the meeting from the Law Commission were Nicholas Paines QC, Richard Percival, Tim Spencer-Lane, Horatio Waller and Tom Pontre – collectively constituting the team at the Law Commission responsible for preparation of the consultation paper.
- 1.7 Present representing the housing and care sector were representatives from Housing LIN, the National Housing Federation, SITRA, ARCO, SHIP, and the Housing and Support Alliance, as well as various housing with care providers.

### **THE KEY ISSUES RAISED BY HOUSING AND CARE PARTICIPANTS**

- 1.8 The key issues, as raised by the housing and care participants, were the following.

### **Deprivations of liberty**

- 1.9 Participants expressed concerns about the scope of the definition of a deprivation of liberty, and their obligations regarding the authorisation of such deprivations following the *Cheshire West* decision in the Supreme Court. That case essentially held that the “acid test” for a deprivation of liberty is a situation of continuous supervision and control and a lack of freedom to leave premises. This test has clarified the law, but it has also had the effect of widening the circumstances in which actions taken will amount to deprivations of liberty. For instance, a deprivation may exist where a person is precluded from exiting premises without being accompanied, albeit that they are still ultimately permitted to exit.
- 1.10 Participants noted that the response of local authorities to *Cheshire West* appears to be inconsistent – for instance with some favouring bulk applications and others not. Participants also noted perceived conflict of interest issues arising from the powers of local authorities to influence placement decisions and for authorisation of the deprivations involved in these decisions.
- 1.11 Participants noted that following *Cheshire West*, the Care Quality Commission has begun increased inspections to identify where deprivations are present.
- 1.12 Participants noted that these issues concern housing providers because questions arise regarding the point at which a housing provider will become a participant in a deprivation of liberty through the mere provision of housing in which care is provided. In these situations it may be unclear whether the housing provider will become responsible for, or have notification obligations regarding, a deprivation of liberty arising from actions of a local authority or of carers in the provision of care.

### **Restrictions upon other human rights falling short of a deprivation of liberty**

- 1.13 Participants noted that issues also arise regarding other human rights restrictions falling short of a deprivation of liberty, such as restrictions upon correspondence or visits or other areas of personal liberty.
- 1.14 Participants noted that, at present, there are not clear procedures to properly authorise such actions short of an application to the Court of Protection, which may be a disproportionate avenue in some cases. Again, issues arise regarding when a housing provider may become a participant in restrictions of such liberties.

### **Mental capacity**

- 1.15 Participants noted that difficult issues can arise where a person to be provided housing is of fluctuating capacity. Some may initially have capacity to determine their living arrangements when a lease/tenancy is entered, but subsequently over time their capacity reduces.

### **THE LAW COMMISSION’S ROLE**

- 1.16 The Law Commission’s role is to recommend legal reforms to government. It does not extend to providing authoritative guidance on the operation of the present law.

- 1.17 In order to further its project of reform in this area of law, the Law Commission intends that a consultation paper to be published will take into account these and other difficult issues.
- 1.18 The Commission will benefit from the further formal participation of stakeholders upon the publication of the consultation report. Such contributions will help ensure that the recommendations ultimately made for the design of the law comply with relevant human rights principles whilst remaining workable for those who will be involved in the administration of the system on the ground.