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BRIEFING PAPER

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Deprivation of Liberty Safeguards

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Summary

Deprivation of Liberty Safeguards (DoLS) were introduced into the *Mental Capacity Act 2005* by the *Mental Health Act 2007*.

DoLS provide a framework for approving the deprivation of liberty for people who lack the mental capacity to consent to necessary treatment in a hospital or care home. The Supreme Court determined that deprivation of liberty occurs when:

> The person is under continuous supervision and control and is not free to leave, and the person lacks capacity to consent to these arrangements. *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor* [2014] UKSC 19).

DoLS ensure that people are only deprived of their liberty in a safe and correct way, and that this is only done when it is in their best interests and there is no other way to provide necessary care and treatment.

The safeguards provide a statutory framework for authorising a deprivation of liberty, including six separate assessments by designated professionals, and subsequent rights of review.

In 2014, a Supreme Court judgment significantly widened the definition of deprivation of liberty, meaning more people were subsequently considered to have their liberty deprived. There was a ten-fold increase in the number of deprivation of liberty applications following the judgment.

In March 2017, the Law Commission published a report and Draft Bill recommending an overhaul of the DoLS process. It recommended that DoLS are repealed and replaced by a new scheme called the Liberty Protection Safeguards, which would streamline the process for approving a deprivation of liberty.

The Government's final response, published in March 2018, broadly accepted the Law Commission's recommendations. Care Minister Caroline Dinenage confirmed that the Government would "bring forward legislation to implement the model when parliamentary time allows."

The Mental Capacity (Amendment) Bill was introduced to the House of Lords on 3 July 2018. Second reading is scheduled for 16 July. The Bill broadly follows the Law Commission's recommendations, with some changes.

This briefing paper relates to England and Wales only.

1. Deprivation of Liberty Safeguards

Deprivation of Liberty Safeguards were introduced in 2009, and form part of the *Mental Capacity Act 2005*. The Act provides a statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves.

DoLS provide a framework for approving the deprivation of liberty for someone who lacks the mental capacity to consent to necessary treatment in a hospital or care home. If a person's liberty needs to be deprived in other settings, an authorisation must be obtained from the Court of Protection.

The safeguards are intended to ensure that someone is only deprived of their liberty in a safe and correct way, and that this is only done when it is in the best interests of the person and there is no other way to look after them.

DoLS legislation sets out when and how deprivation of liberty may be authorised, and provides a statutory assessment process with designated professionals and responsible bodies. It also details arrangements for renewing and challenging a deprivation of liberty.

The *Mental Capacity Act 2005*, including DoLS, applies in England and Wales and is reserved to the UK Government. However, Welsh Ministers have powers to make regulations with regards to DoLS in Wales.[1]

1.1 The authorisation process

The safeguards provide the following process for authorising a deprivation of liberty:

- The hospital or care home identify those at risk of deprivation of liberty, and request authorisation from the supervisory body (the NHS Trust, local authority or local health board).
- The supervisory body must arrange a series of six assessments. Assessments must be completed within 21 days. An Independent Mental Capacity Advocate (IMCA) is instructed for anyone without representation.
- If all assessments support authorisation, a best interests assessor will recommend the period for which deprivation of liberty should be authorised, up to a maximum of a year.
- The best interests assessor also recommends a person to be appointed as the relevant patient's representative.
- Authorisation for deprivation of liberty is given, if appropriate, and the person's representative is appointed.

[1] The reserved nature of the *Mental Capacity Act 2005* is set out expressly in the *Wales Act 2017*, which amended the *Government of Wales Act 2006*.

- The authorisation is implemented by the managing authority (the person or body with management responsibility for the hospital or care home).
- The person and their relevant person's representative can request a review of the deprivation of liberty at any time. The managing authority also has a duty to monitor the case to see if the person's circumstances change and if they no longer need to be deprived of their liberty.
- The person and their representative also have a right to apply to the Court of Protection, which has powers to terminate authorisation or vary the conditions of the deprivation of liberty.

In urgent situations, a hospital or care home can give an urgent authorisation for seven days while obtaining a standard authorisation. This may be renewed for a further seven days.

The safeguards cannot apply to people while they are detained in hospital under the *Mental Health Act 1983*.

1.2 Deprivation of liberty assessments

There are six assessments that must be undertaken as part of the standard deprivation of liberty authorisation process. An authorisation for a deprivation of liberty cannot be granted unless all of these qualifying requirements are met:

- **age** - to confirm whether the relevant person is aged 18 or over.
- **no refusals** - to establish whether an authorisation to deprive the relevant person of their liberty would conflict with other existing authority for decision-making for that person. This may include advance decisions to refuse treatments, or valid decisions of a donee or a deputy.
- **mental capacity** - to establish whether the relevant person lacks capacity to decide whether or not they should be accommodated in the relevant hospital or care home to be given care or treatment.
- **mental health** - to establish whether the relevant person has a mental disorder within the meaning of the *Mental Health Act 1983*. That means any disorder or disability of mind, apart from dependence on alcohol or drugs. It includes all learning disabilities.
- **eligibility** - to determine whether the relevant person meets the requirements for detention under the *Mental Health Act 1983*; this would make them ineligible for a standard authorisation.
- **best interests** - to establish whether a deprivation of liberty is occurring and whether this is:
  - in the best interests of the relevant person
  - necessary to prevent harm to themselves
  - a proportionate response to the likelihood of them suffering harm and the seriousness of that harm.

Further information on each of these assessments is available in the *Mental Capacity Act, Code of Practice: Deprivation of Liberty Safeguards,* chapter four.

1.3 Involvement of family and friends

The Library is often asked how family and friends can contribute to a deprivation of liberty assessment. This may occur in a number of ways:

Best interests assessment

The *Mental Capacity Act* states that the views of the individual and those of people who are responsible for caring for the patient or interested in his welfare should be taken into account when deciding what is in their best interest:

> (6) He [the best interests assessor] must consider, so far as is reasonably ascertainable—
>
> > (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
> >
> > (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
> >
> > (c) the other factors that he would be likely to consider if he were able to do so.
>
> (7) He must take into account, if it is practicable and appropriate to consult them, the views of—
>
> > (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
> >
> > (b) anyone engaged in caring for the person or interested in his welfare,
> >
> > (c) any donee of a lasting power of attorney granted by the person, and
> >
> > (d) any deputy appointed for the person by the court,
>
> as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6)[2]

The *Code of Practice* states that it is the responsibility of the best interests assessor to enable family and friends to express their views, using support to meet communication or language needs as necessary.[3]

Relevant person's representative

Once a deprivation of liberty authorisation has been given, supervisory bodies must appoint the relevant person's representative. Often this is a family member, friend or carer. A paid representative may also be appointed.

The role of the relevant person's representative is:

- to maintain contact with the relevant person, and

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2 Mental Capacity Act 2005, Section 4, Clauses 6-7
3 *Mental Capacity Act, Code of Practice: Deprivation of Liberty Safeguards,* page 54

- to represent and support the relevant person in all matters relating to the deprivation of liberty safeguards, including, if appropriate, triggering a review, using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection.

Further information on the relevant person's representative is available in chapter 7 of the *Mental Capacity Act, Code of Practice: Deprivation of Liberty Safeguards.*

Lasting power of attorney

Lasting power of attorney enables the donor to appoint one or more attorneys to make decisions on their behalf at a time when they no longer have the mental capacity to make those decisions themselves. Family members are often appointed as lasting power of attorney.

Library Briefing Paper 3898 *Powers of attorney and other decision-making powers* (April 2017) gives further detail.

2. Recent changes

2.1 Definition of deprivation of liberty

A Supreme Court judgment in May 2014, known as "Cheshire West" [4], widened the definition of a deprivation of liberty. The Court held that the key feature is whether the person concerned is under continuous supervision and control and is not free to leave.

The judgment significantly increased the number of people who are considered to have their liberty deprived and require safeguards, leading to a tenfold increase in applications between 2013-14 and 2014-15[5].

The Law Commission found that the increase in DoLS applications has led to substantial processing delays:

> The implications for the public sector have been significant.
>
> […]
>
> Many responses [to the Consultation] (particularly from NHS bodies and local authorities) pointed to the practical and financial impact of Cheshire West, such as the increasing backlog of cases, referrals for authorisation being left unassessed, the legal timescales for authorisations being frequently breached and shortages of people qualified to perform roles under the DoLS provisions.[6]

2.2 Coroners' duty to investigate death of someone subject to DoLS

From 3 April 2017, a coroner no longer automatically investigates the death of someone subject to DoLS under the *Mental Capacity Act*. The change was provided for by the *Policing and Crime Act 2017*.

The Chief Coroner has issued new guidance which outlines that the death of any person subject to a deprivation of liberty would no longer be considered to have occurred 'in state detention'. The coroner would still investigate some deaths in the usual way:

> 51. When that person dies the death should be treated as with any other death outside the context of state detention [footnote to text: Obvious exceptions to this include where a person subject to a DoL is also in police custody. Other complicating factors may arise in individual cases and coroners should – as always - be alive to the specifics of the reported death]: it need only be reported to the coroner where one or more of the other requisite conditions are met.
>
> 52. Of course, where there is a concern about the death, such as a concern about care or treatment before death, or where the medical cause of death is uncertain, the coroner will investigate thoroughly in the usual way. There will always be a public interest

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4 P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor [2014] UKSC 19).

5 NHS Digital, Mental Capacity Act (2005) Deprivation of Liberty Safeguards (England) England 2015-16 National Statistics, 28 September 2015

6 Law Commission, Mental Capacity and Deprivation of Liberty Summary, 13 March 2017, para 8

> in the careful scrutiny of any death in circumstances akin to state detention. As in all cases there must be sufficiency of coroner inquiry.
>
> 53. Senior coroners should maintain close liaison with the DoLS lead in their local authority, working together to deal with this extra activity.[7]

The Library briefing, Policing and Crime Bill – Lords Amendments (January 2017), provides further information.

[7] Chief Coroner, Guidance No 16A, DEPRIVATION OF LIBERTY SAFEGUARDS (DoLS) – 3rd April 2017 onwards.

3. The Mental Capacity (Amendment) Bill

3.1 Law Commission review

In 2014, the House of Lords Select Committee on the *Mental Capacity Act 2005* described DoLS as not fit for purpose, poorly drafted and overly complex.[8] As a result, the Government asked the Law Commission to review the *Mental Capacity Act* and DoLS.

The Law Commission's final report and draft Bill were published in March 2017:

- Law Commission, Mental Capacity and Deprivation of Liberty, March 2017
- Mental Capacity (Amendment) Bill (Annex A)

The Law Commission recommended that DoLS are repealed as a matter of urgency, and are replaced by a new scheme called the Liberty Protection Safeguards. The intention is to streamline the process for assessing whether a deprivation of liberty is necessary, and obtaining the required authorisation. The Liberty Protection Safeguards would also authorise particular arrangements and conditions for a person's care or treatment, rather than simply authorising a deprivation of liberty.

The DoLS requirement for six assessments, which the Law Commission described as "a paperwork-heavy process...much of the assessment process goes over the same ground as has already been gone over by health and social care professionals in deciding to make the placement in the first place", would be removed.

Under the proposed scheme, when there is a potential deprivation of liberty, the responsible body – the NHS body or local authority - arranges three assessments: a capacity assessment, a medical assessment, and a 'necessary and proportionate' assessment. They must also consult with friends and family of the relevant person. Each case is verified by an "independent reviewer", and those where the placement are contrary to the person's wishes are referred to an Approved Mental Capacity Profession (AMCP). The scheme also provides for statutory review of the deprivation of liberty, as well as the provision of an advocate or appropriate person to represent and support them both during the initial authorisation process and during the period of the placement.

The new scheme would extend beyond hospitals and care homes, removing the need for deprivations of liberty to be authorised by the Court of Protection in other settings such as sheltered accommodation. It also proposed extending the provisions to 16 and 17 year olds, whereas DoLS only apply to those aged 18 and over.

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[8] House of Lords, Select Committee on the Mental Capacity Act 2005: post-legislative scrutiny, 25 February 2014,

The Bill also proposed that authorisation for a deprivation of liberty would apply to a range of settings, so that the person can move between specified health and care settings. This is unlike the current DoLS legislation that contains a duty to request a new authorisation if there is a change in place of detention.

3.2 Government response

The Government provided an interim response to the Law Commission's report on 30 October 2017, in which it welcomed the recommendation to establish a new system. It said it recognises that the current DoLS system is "increasingly unsustainable" and may divert resources from frontline care, and said safeguards should serve three main purposes:

- Improve the quality of care
- Ensure access to safeguards is improved
- Deliver value for money

Following consultation with a range of stakeholders, the final Government response to the review was published on 14 March 2018. Care Minister Caroline Dinenage confirmed in an accompanying Ministerial Statement that the Government broadly accepted the Law Commission's recommendations, and would "bring forward legislation to implement the model when parliamentary time allows."[9]

Although most recommendations were accepted in full, some received more qualified acceptance:

- The recommendations on the third Liberty Protection Safeguards assessment – the 'necessary and proportionate' assessment – would be looked at as part of the ongoing review into the *Mental Health Act*.

  Responses to the consultation raised concerns that the assessment's focus on potential harm to others, mirroring requirements in the *Mental Health Act 1983*, were contrary to the ethos of the *Mental Capacity Act 2005*.

  Recommendations on the other two assessments – the capacity assessment and the medical assessment - were accepted by the Government.

- Other interactions between the new Liberty Protection Safeguards and the *Mental Health Act 1983* would also be considered as part of the ongoing review into the Act.

  The review is scheduled to produce a report with recommendations for change in autumn 2018.

- The Government agreed in principle on the need to review some wider issues related to the *Mental Capacity Act 2005* (for example, the ability to hold private care providers to account where there has been an unauthorised deprivation of liberty), but

9 Final Government Response to the Law Commission's review of Deprivation of Liberty Safeguards and Mental Capacity, 14 March 2018 HCWS542

further consideration would be given on the best way to achieve these objectives.

The Government also rejected the Law Commission's recommendation to review mental capacity law relating to children.

3.3 The Mental Capacity (Amendment) Bill

The *Mental Capacity (Amendment) Bill 2017-19* was introduced to the House of Lords on 3 July 2018, and would reform the *Mental Capacity Act 2005*. The Bill is based on the Law Commission draft Bill, published as part of its report Mental Capacity and Deprivation of Liberty (2017).

The Bill provides for a new scheme that applies only to people aged 18 and over, as opposed to the Law Commission recommendation to extend the scheme to people aged 16 and over.

The Government have said that one of the key aims of the Bill is to strengthen protections and rights for vulnerable adults.[10] A brief overview of relevant provisions is given below:

- The Bill would introduce **three assessments** to authorise a deprivation of liberty – these are (1) the person who is the subject of the arrangements lacks the capacity to consent to the arrangements; (2) the person is of unsound mind; and (3) the arrangements are necessary and proportionate;
- It would introduce a new duty for **pre-authorisation independent review** – from someone who is not involved in the cared-for person's day to day care or in providing their treatment – to determine whether it is reasonable to conclude that the authorisation conditions are met;
- It would introduce a new requirement for an **Approved Mental Capacity Professional** to review cases where the person objects to the proposed arrangements;
- Once an authorisation for deprivation of liberty has been given, there are a number of safeguards put in place for the person. These include **regular reviews** of the authorisation by the responsible body or care home, and **the right to challenge the authorisation** before the Court of Protection;
- Additionally, there would be a duty to appoint an **Independent Mental Capacity Advocate** or an **appropriate person** to represent and support the person when an authorisation is being proposed and while an authorisation is in place.

The Bill also aims to reduce the burden on local authorities, and the Government envisages that the reforms will save local authorities an estimated £200 million or more a year.[11]

The Bill extends and applies to England and Wales. Although health is a devolved policy area, meaning usually Westminster would not legislate for the Welsh Assembly, the explanatory notes to the Bill state that the

[10] Department of Health and Social Care, New law introduced to protect vulnerable people in care, 3 July 2018

[11] *ibid*

subject matter of the Bill is "not within the legislative competence of the National Assembly for Wales". Accordingly, legislative consent is not being sought from the Welsh Assembly in relation to any provision of the Bill.[12]

The House of Lords Library has produced a detailed Bill paper, which explains the Bill clause by clause - Mental Capacity (Amendment) Bill [HL]: Briefing for Lords Stages.

12 Mental Capacity (Amendment) Bill [HL], Explanatory Notes, July 2018, para 13

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