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By
Judith Laing

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Implementing the Mental Capacity (Amendment) Act 2019

Summary

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Summary

The Mental Capacity (Amendment) Act 2019 received Royal Assent on 16 May 2019. It is due to come into force on 1 April 2022. The Act amends the Mental Capacity Act 2005 and introduces a new process for authorising deprivations of liberty for persons who lack capacity to make a particular decision. It replaces the Deprivation of Liberty Safeguards which were introduced in 2008 as an earlier amendment to the Mental Capacity Act 2005.

This briefing outlines the legal and policy background to the Mental Capacity (Amendment) Act 2019 and provides an overview of the main provisions in the new Act. The briefing also includes links to relevant Department of Health and Social Care factsheets and guidance, in addition to responses to the legislation from professional bodies and special interest groups.

Further detail on the background to the reform process is available in Commons Library Briefings on the Deprivation of Liberty Safeguards (CBP8095) and the Mental Capacity (Amendment) Bill (CBP8466), as well as the Lords Library Briefing on the Mental Capacity (Amendment) Bill [HL]: Briefing for Lords stages.

1 Legal and policy background to the Mental Capacity (Amendment) Act 2019

1.1 The 'Bournewood gap'

The Deprivation of Liberty Safeguards were introduced to remedy a gap in the legal regulation of the process for admitting compliant patients who lack mental capacity for care and treatment in hospitals and care homes. The so-called 'Bournewood gap' stemmed from the House of Lords[1] decision in the case of *In Re L* in 1997.[2]

The case involved a young autistic man with severe learning disabilities (HL) who was admitted informally to Bournewood hospital. He was not allowed to leave or have any visits from his family. He was compliant and did not object to the admission, but his carers challenged his informal detention. A majority of the judges in the House of Lords decided that he was not unlawfully detained. This decision led to a successful legal challenge in the European Court of Human Rights in *HL v UK*.[3] The European Court of Human Rights found that HL had been unlawfully deprived of his liberty in breach of Article 5 of the European Convention on Human Rights, which protects citizens from arbitrary deprivations of liberty.

1.2 The Deprivation of Liberty Safeguards (DoLS)

The Deprivation of Liberty Safeguards[4] were introduced by the Government in 2008 to provide protection for patients like HL and put in place a legal process in the Mental Capacity Act (MCA) 2005 to formally authorise a deprivation of liberty for patients who lack the relevant capacity to consent to care and treatment. The safeguards are designed to ensure that someone is only deprived of their liberty when it is in their best interests and there is no other way to look after them. The DoLS framework does not apply to those under the age of 18 years.

[1] The Appellate Committee of the House of Lords was the final court of appeal at that time, now the Supreme Court.

[2] [1997] EWCA Civ 2879.

[3] (2004) 40 EHRR 761.

[4] For further detail about the DoLS see Deprivation of Liberty Safeguards, Commons Library Briefing Paper CBP-8095, 25 September 2018.

The DoLS framework requires a managing authority (i.e., a hospital or care home) to identify those at risk of a deprivation of liberty and request an authorisation for the deprivation from a supervisory body (which can be a local authority, or an NHS Trust in England/local health board in Wales). The supervisory body must arrange a series of six assessments to be carried out within a 21-day period. This is known as a standard authorisation.

It is also possible under the DoLS for the managing authority to grant an urgent authorisation for a 7-day period, which is renewable once for a further period of 7 days. This may take place before the supervisory body can respond to a request for a standard authorisation.

The person must in certain cases be provided with representation and support by an Independent Mental Capacity Advocate and/or a family member and friend (i.e., a relevant person's representative) throughout this process. The person, their relevant representative or IMCA can request a review of the deprivation at any time and can also apply to the Court of Protection to review the continued detention.

1.3 Criticism of the DoLS

The DoLS are regarded as complex and overly bureaucratic and there have been concerns about the operation of the process since its inception. For example, a House of Lords Select Committee on the MCA reported in 2014 that the DoLS were 'unfit for purpose' and said:

> 'the provisions are poorly drafted, overly complex and bear no relationship to the language and ethos of the Mental Capacity Act [...] Worse still, far from being used to protect individuals and their rights, they are sometimes used to oppress individuals, and to force upon them decisions made by others without reference to the wishes and feelings of the person concerned'.[5]

In the same year, the Supreme Court in the case of *P v Cheshire West and Cheshire Council and another; P & Q v Surrey County Council* [6] had to decide when a person is deprived of their liberty in social care. Drawing on case law from the European Court of Human Rights, the Supreme Court said that a person is subject to 'confinement' when the person is objectively 'not free to leave' and 'under continuous supervision and control'. It does not matter whether the person is content or compliant. This has become known as the 'acid test' for a deprivation of liberty.

[5] House of Lords Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: Post-legislative scrutiny*, 13 March 2014, HL 139 2013-14, page 7.

[6] [2014] UKSC 19.

The Supreme Court decision expanded the reach of the DoLS provisions and led to a huge rise in the number of DoLS applications. Official figures indicate a sharp rise in the number of DoLS applications in the first year after the decision, and the numbers continued to grow in the years following the decision. There was a 55% increase in DoLS applications between 2014/15 and 2016/17.[7] This created significant pressures on local authority budgets and on those who authorise deprivations of liberty, including the Court of Protection, and led to huge delays and a back log of applications.[8]

1.4 The Law Commission proposals

In response to these concerns, the Government asked the Law Commission in 2014 to review the legal framework for the DoLS. The Law Commission consulted widely on potential changes to the process and published a final report and draft Bill on *Mental Capacity and Deprivation of Liberty* in March 2017. The Law Commission recommended introducing a new simplified scheme to replace the DoLS, as well as proposing some wider changes to the MCA around supported decision-making and best interests, how the Act relates to children and the interface with the mental health legislation.

The Parliamentary Joint Committee on Human Rights said in a report on the DoLS in June 2018 that the Law Commission's proposals 'could form the basis of a better scheme for authorising deprivations of liberty, directing scrutiny to those that need it most', and urged the government to implement the scheme 'urgently'.[9]

1.5 The Government's response

The Government responded to both the Law Commission[10] and JCHR reports,[11] and that was followed by the introduction of a new Bill in the House of Lords on 3 July 2018. The Mental Capacity (Amendment) Bill broadly reflected the Law Commission's proposals to replace the DoLS scheme. It did not however take forward the Commission's recommendations for wider reform of the MCA.

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[7] NHS Digital, Mental Capacity Act (2005) Deprivation of Liberty Safeguards (England), England 2016-17 National Statistics, 1 November 2017.

[8] "Practitioners complete record number of DoLS cases but backlog continues to grow", *Community Care*, 22 November 2019.

[9] Joint Committee on Human Rights, The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards, 29 June 2018, HC 890 2017-19, paragraphs 75 and 16.

[10] Department of Health response to the Law Commission's consultation on mental capacity and deprivation of liberty, 3 April 2018.

[11] The Government's Response to the Joint Committee on Human Rights 7th and 12th Reports, CP 80 April 2019.

There were several important changes in the Lords, and during the Commons Public Bill Committee stage as the Mental Capacity (Amendment) Bill passed through Parliament. In particular, the government had included a partial definition of deprivation of liberty in the Bill with the aim of providing clarity, and to 'bring proportionality to the situation and ensure that liberty protection safeguards are appropriately applied'.[12] The Law Commission had not recommended a statutory definition in its proposals, recommending instead that deprivation of liberty should have the same meaning as in Article 5(1) of the European Convention on Human Rights.[13] But the Joint Committee on Human Rights had said that it was important to include a definition to provide greater certainty about the scope of the new scheme.[14]

The Lords and Commons had disagreed about the drafting of the definition. The definition proposed by the government in a new clause 1 at the Public Bill Committee stage was opposed and does not appear in the final statute. The Opposition had called for the government to withdraw the clause as it was not clear how the new definition would relate to the case law and it was 'not sufficiently clear as to be useful'.[15] Accordingly, the Opposition urged the Government to consult more widely on the definition to ensure that it had broad support.[16] The Government removed the definition from the Bill and said that guidance on the meaning of deprivation of liberty would instead be included in the Codes of Practice under the Act.[17]

The Bill was given Royal Assent in May 2019. Helen Whatley MP, Minister of State for Care, made a written statement in Parliament on 16 July 2020 indicating that the new provisions will be implemented in April 2022, after the Department for Health and Social Care has consulted on new guidance in the Code of Practice and associated regulations.[18]

The Department of Health and Social Care set out the provisional timetable for the implementation process in a LPS newsletter published in September 2020.

It is anticipated that the DoLS and LPS will operate concurrently for up to a year to enable a smooth transition across from one system to the other.

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[12] House of Commons Committee Stage (day 3), 22 January 2009, c209.

[13] Law Commission, Mental Capacity and Deprivation of Liberty (Law Com No 237), 2017, HC1079.

[14] Joint Committee on Human Rights, Legislative Scrutiny: Mental Capacity Amendment) Bill, 26 October 2018, HC 1662 2017-19.

[15] House of Commons Committee stage (day 3), 22 January 2019, c211-212.

[16] *Ibid*. c214.

[17] House of Lords Mental Capacity (Amendment) Bill Commons Amendments, 24 April 2019, c613.

[18] Implementation of Liberty Protection Safeguards, Statement made on 16 July 2020 by Helen Whatley MP, Minister for Care. It is anticipated that some provisions, covering new roles and training, will come into force ahead of 1 April 2022. The original intention was for the LPS to come into force on 1 October 2020, but implementation was delayed due to the impact of the COVID-19 pandemic.

2 The Mental Capacity (Amendment) Act 2019

Section 1(4) inserts a new Schedule AA1 into the MCA setting out a new process for authorising a deprivation of liberty. The new provisions are commonly referred to as the Liberty Protection Safeguards (LPS), although this terminology is not used in the new Act. There is no provision for an urgent authorisation, but instead a new interim deprivation of liberty power is introduced.

Unlike the DoLS, the LPS are setting neutral which means that they can apply in any setting and have been extended beyond care homes and hospitals to include domestic settings, such as supported living and the person's own home and family home.

The LPS are also wider in scope as they extend to younger age groups i.e., those aged 16 and over in England and Wales, whereas DoLS only apply to those aged 18 and over.

The DHSC LPS Factsheet states that LPS could apply to autistic people, and persons with a learning disability or dementia, among others, who lack relevant decision-making capacity.

2.1 Responsible body

Deprivations will be authorised by a 'responsible body' for a maximum period of 12 months initially, up to a maximum period of 3 years. The deprivation must be renewed annually within that maximum period.

The DHSC LPS factsheet states that in most cases, a local authority or NHS Trust (or a local health board in Wales) will be the responsible body, and anyone can make a referral to that body, either via email or an online form.

2.2 Authorisation conditions

For the responsible body to authorise any deprivation of liberty, it must be clear that all the 'authorisation conditions' listed below are met:

- The person lacks the capacity to consent to the care arrangements; and

- The person has a mental disorder, within the meaning of section 1(2) of the Mental Health Act 1983; and
- The arrangements are necessary to prevent harm to the cared-for person and proportionate to the likelihood and seriousness of that harm.

2.3 The 3-assessment process

The responsible body must authorise 3 assessments required for the authorisation, which are:

- The capacity assessment and determination; and
- The medical assessment and determination; and
- The necessary and proportionate assessment and determination.

2.4 Consultation

The assessment process must involve the responsible body consulting with the person and others (such as a family member or someone else close to that person, including any attorney,[19] court-appointed deputy or Independent Mental Capacity Advocate – see 2.8 below), as far as is practicable and appropriate, to understand what the person's feelings and wishes are.

Once the consultation and assessments have been carried out, a pre-authorisation review will be completed to enable the responsible body to decide whether to authorise the arrangements. If, having reviewed all the evidence, the responsible body decides to make an authorisation, it can take effect immediately or within 28 days of being issued.

2.5 Deprivation of Liberty

There is no statutory definition of a deprivation of liberty in the Act. Consequently, the current 'acid test' developed by the Supreme Court in the case of *Cheshire West* outlined in 1.3 above will still apply. This means that a deprivation of liberty occurs when a person is objectively 'not free to leave' and 'under continuous supervision and control'.

[19] This would be an attorney acting under a health and welfare power of attorney, as authorised under the provisions of the MCA.

2.6 Appropriate person

The Act has created a new role for an 'appropriate person' to provide representation and support for the cared-for person during the LPS authorisation process and throughout the period of any authorisation. This role effectively replaces the person's representative in the DoLS process. The appropriate person is described in the DHSC LPS Factsheet as a 'key role in securing the person's wishes and feelings about their care, treatment and support.' The Government envisages that the role will usually by fulfilled by a family member or a volunteer from a third-sector organisation.

The appropriate person will be able to apply to the Court of Protection to challenge the authorisation and may need to provide support to the cared-for person during the court process.

2.7 Approved Mental Capacity Professional (AMCP)

A new professional role is also created by the Act, namely the Approved Mental Capacity Professional (AMCP). The AMCP is based on the current Best Interest Assessor role under the DoLS and the role is described in the DHSC LPS Factsheet as a 'new, specialist role providing enhanced oversight for those people who need it most'. Most AMCPs will be independent, trained, and registered professionals and will normally be employed by a local authority, NHS Trust, local health board or clinical commissioning group.

AMCPs will be required to carry out the pre-authorisation review if the cared-for person is objecting to the proposed arrangements in the following ways:

- the arrangements provide for the cared-for person to reside in a particular place and it's reasonable to believe that the cared-for person does not wish to reside in that place;
- the arrangements provide for the cared-for person to receive care or treatment at a particular place, and it's reasonable to believe that the cared-for person does not wish to receive care or treatment at that place;
- the arrangements provide for the cared-for person to receive care or treatment mainly in an independent hospital, or the case is referred by the Responsible Body to an AMCP and that individual accepts the referral.

The AMCP should consult with the cared-for person as well as those close to the person during the review process to determine their wishes and feelings.

2.8 Independent Mental Capacity Advocate (IMCA)

IMCAs were introduced in the MCA to support patients who are unable to make decisions for themselves. IMCAs are trained and experienced to provide support to the cared-for person throughout the LPS process. They are described in the DHSC LPS Factsheet as 'a vital safeguard to the person's human rights throughout the assessment process and duration of any authorisation given'. In broad terms, there is a presumption that an IMCA will be appointed by the responsible body to represent and support the cared-for person, unless it would not be in the person's best interests.

2.9 Authorisations for life-saving treatment or a 'vital act'

The DHSC LPS Factsheet provides that, in exceptional cases, it may be necessary to take steps which deprive a person of their liberty before a formal authorisation decision has been made by a responsible body or court. Exceptional circumstances are defined in the Act as those when it is necessary to carry out life-sustaining treatment or a 'vital act'. A vital act is where there is a reasonable belief that it is necessary to prevent a serious deterioration in the person's condition.

In these circumstances, there are four conditions to be met (set out in a new section 4B inserted in the MCA) to deprive the person of their liberty:

1. The steps consist of, or are for the purpose of, giving life-sustaining treatment to the person or for doing any vital act;
2. The steps are necessary to give the life-sustaining treatment or carry out the vital act;
3. There is a reasonable belief that the person lacks capacity to consent to the steps;
4. An authorisation to deprive someone of their liberty is being sought from the responsible body under the LPS, or a relevant decision is being sought from the court, or there is an emergency.

2.10 Review and renewal process

The authorisation must be reviewed regularly by the responsible body with access provided to an IMCA or appropriate person to represent and support the cared-for person throughout the authorisation period.

The responsible body can renew an authorisation at any time, but it must consult with the cared-for person and other relevant individuals (including an IMCA) before doing so, to ascertain whether the person's wishes for their care and treatment have changed.

The authorisation can end at any time if the responsible body determines that it should, or if the responsible body believes, or ought reasonably to suspect, that any of the authorisation conditions are not met. That means it will end one if one of the following conditions is met:

- the cared-for person has capacity, or has regained capacity, to consent to the arrangements; or
- the cared-for person no longer has a mental disorder; or
- the arrangements are no longer necessary and proportionate.

2.11 Challenging the authorisation at the Court of Protection

The new LPS authorisation process will be overseen by the Court of Protection which has jurisdiction over these matters to hear appeals and disputes. Where an LPS authorisation is in place, the cared-for person, their appropriate person or IMCA, or anyone else can apply to challenge the arrangements at the Court of Protection under section 21ZA of the MCA. The Court of Protection has power to uphold, vary or terminate the authorisation.

Non-means-tested Legal Aid will be available for cases brought to the Court of Protection in these circumstances.

In some cases, the responsible body may need to make an application to the Court of Protection, for example, if for some reason the cared-for person should have taken their case to court but it did not happen.

3 The Code of Practice and regulations

Section 4(2) of the Act amends section 42 of the MCA to specify that guidance must be included in one or more Codes of Practice about what kind of arrangements for enabling the care or treatment of a person would give rise to a deprivation of liberty.

Section 4(3) of the Act provides that the Lord Chancellor must review the guidance in the Codes and a report of this review must be laid before Parliament. The first review must take place within 3 years of coming into force, and subsequent reviews must take place thereafter every 5 years.

There will be six sets of regulations setting out how the LPS will operate in England and in some cases Wales.[20] These cover: the IMCA role; assessment regulations; transitional regulations; and a set of consequential regulations to amend other pieces of legislation that will need updating as a consequence of the Act.

The Government has committed to a 12-week public consultation on the draft Code of Practice and regulations in England. There is no information available yet about precisely when it will launch the consultation. However, various DHSC LPS factsheets with information on the new process have been published ahead of any public consultation.

The devolved government in Wales has authority to publish a separate set of regulations and guidance on certain matters relating to LPS implementation in Wales,[21] in the same way it has done for the DoLS.[22]

[20] The detail of the regulations has been set out in a LPS National Steering Group meeting: Liberty Protection Safeguards National Steering Group meeting, December 2020 and Liberty Protection Safeguards National Steering Group meeting, October 2020, p2.

[21] Liberty Protection Safeguards National Steering Group meeting, December 2020 p1.

[22] Welsh Government, Mental Capacity Act and deprivation of liberty: guidance and forms, 29 October 2015.

4 Reactions to the new law

Several professional and special interest groups have published their reactions to the new law, and are available on the links below:

Age Concern, Protecting older people's precious right to liberty (20 January 2020)

British Association of Social Work, Liberty Protection Safeguards (LPS) implementation Delay (22 July 2020)

British Institute of Human Rights, Campaigning on the Mental Capacity (Amendment) Act 2019

MIND, More work to be done as Mental Capacity (Amendment) Bill becomes law (16 May 2019)

Royal College of Psychiatrists, The Mental Capacity (Amendment) Bill: an update (26 April 2019)

Social Care Institute for Excellence, From DoLS to LPS: An important time for mental capacity (16 March 2021)

The Law Society, Mental Capacity (Amendment) Act 2019 (2 October 2019)

5 Further information

Explanatory Notes on the Mental Capacity (Amendment) Act 2019.

Department for Health and Social Care factsheets on aspects of the LPS process.

Department for Health and Social Care national plans for workforce training and readiness.

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