

CDC legislation update 1 – July 2018



This update is intended to provide general information about relevant legislation going through Parliament. It cannot and does not provide a definitive guide to the legislation, nor does it give any advice in relation to individual cases. Where legal issues arise specialist legal advice should be taken in relation to the particular case.

The Mental Capacity Amendment Bill 2018

The House of Lords is currently considering a new Bill which will replace the 'deprivation of liberty safeguards' under the Mental Capacity Act 2005 with new 'liberty protection safeguards'. The Bill is based on detailed proposals from the Law Commission's project on mental capacity and deprivation and liberty. However the measures in the Bill as introduced fall some way short of the scheme proposed by the Law Commission.

The pressing need for law reform in relation to deprivation of liberty arose after the *Cheshire West* judgment, which made clear that thousands of disabled people were being deprived of their liberty in a range of settings, including potentially their own homes. In every such case formal authorisation is required to avoid a breach of Article 5 of the European Convention on Human Rights (right to liberty). However the deprivation of liberty safeguards ('DoLS') only applied in hospitals and care homes, and were in any event criticised as 'not fit for purpose' by a Parliamentary Committee. Where the DoLS do not apply the only means to get a deprivation of liberty authorised is through an application to the Court of Protection, which has created a logjam of cases before the court.

The Law Commission called for the DoLS to be replaced as a matter of 'pressing urgency' and set out a proposed replacement scheme. Although the government stated that it 'broadly agreed' with the model put forward by the Law Commission, in fact the Mental Capacity (Amendment) Bill ('the Bill') is rather narrower in important respects than the Law Commission's proposals.

The Bill will insert a new Schedule AA1 into the Mental Capacity Act 2005. This schedule creates the new scheme for authorising arrangements enabling care and treatment of people who lack capacity which would otherwise amount to a deprivation of liberty. This scheme is referred to as the 'Liberty Protection Safeguards' ('LPS'). It applies to England and Wales.

At the outset, it is vital to note that the LPS scheme only applies to those over 18, see the definition of a 'cared for person' in para 2 of Schedule AA1. This means the Court of Protection will continue to need to authorise arrangements which would otherwise result in a deprivation of liberty for 16 and 17 year olds where their parent(s) cannot give valid consent. It is not obvious why the Government considers that 16 and 17 year olds ought to be treated differently in this way.

Under the LPS scheme, a 'responsible body' (generally a local authority, but in some situations a Clinical Commissioning Group or hospital manager) will be able to authorise arrangements which would otherwise give rise to a deprivation of liberty in any setting – not just hospitals and care homes as currently under

the DoLS. Specific considerations apply to authorisations in relation to care homes, where the responsibility falls on the care home manager.

There are three conditions which must be satisfied before such authorisation is given under the LPS:

1. The person lacks capacity to consent to the arrangements
2. The person is of unsound mind
3. The arrangements are necessary and proportionate

There must be a 'pre-authorisation review' considering these matters by a person who is not involved in day to day care and treatment. This must be carried out by an 'Approved Mental Capacity Professional' (to be defined in regulations) in cases where the person is objecting to the proposed arrangements.

If authorisation is given, the safeguards include regular reviews by the responsible body or care home and the right to challenge the authorisation before the Court of Protection. Authorisations can be renewed for a year on the first occasion and then for up to three years.

An Independent Mental Capacity Advocate (IMCA) or 'appropriate person' (e.g. a willing family member) must be appointed when an authorisation is being proposed and when it is in place.

In broad terms, patients who are detained under the Mental Health Act 1983 cannot be the subject of an LPS authorisation, reflecting the current position under the DoLS.

There are a number of obvious concerns with the proposed new LPS scheme from the perspective of disabled young people. These include:

1. Firstly and most importantly, as noted above the new scheme does not currently apply to 16 and 17 year olds – contrary to the Law Commission's proposals. It may be thought unhelpful to continue to leave these young people within the scope of the Mental Capacity Act 2005 generally but outside the scheme which is intended to protect people's liberty under the 2005 Act.
2. There is no requirement for the arrangements which are authorised to be in a person's best interests, simply for them to be 'necessary and proportionate'. It is not clear from the Bill how necessity and proportionality are to be judged.
3. The extra safeguards for those who are objecting to the arrangements will not benefit young people with (for example) autism who may not be able to demonstrate objection in a way which is understood. This risks discriminating against those young people with communication impairments.
4. There is nothing on the Bill which would improve the Mental Capacity Act in other ways as recommended by the Law Commission, for example requiring a greater focus on the person's wishes and feelings in best interests decisions, providing greater protection for Article 8 ECHR rights or facilitating more supported decision making.
5. The reference to 'unsound mind', although echoing the language of Article 5 ECHR, is offensive and stigmatising, as Lucy Series has pointed out [link

to: <https://thesmallplaces.wordpress.com/2018/07/05/reading-the-mental-capacity-amendment-bill-on-the-train/>]

Many more concerns have been identified by experts on mental capacity issues, many of which have been collated in the posts on Lucy Series' 'The Small Places' blog [link to: <https://thesmallplaces.wordpress.com/>]

Since the Bill was introduced in the House of Lords, Peers have tabled a raft of amendments, including amendments in relation to applying the LPS to 16 and 17 year olds [link to [https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/18117\(a\).pdf](https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/18117(a).pdf)]. At the Second Reading of the Bill a number of Peers spoke forcefully about the various omissions compared with the Law Commission proposals. It is therefore possible that the final Act will look very different to the Bill as introduced and that some of the concerns above will be addressed. The final Act will be summarised in a future CDC Digest, hopefully before the new LPS comes into force.