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Law Commission's report on mental capacity and deprivation of liberty

Written by Sue Garwood – Housing LIN Dementia Lead

The Law Commission has recently published its long-awaited proposals to replace current arrangements for authorising the deprivation of a person's liberty for the purpose of care and treatment when a person lacks the mental capacity to agree to the arrangements. Given the weight of numbers following the Cheshire West judgement in 2014 the Law Commission had a real challenge to come up with a proposal that balances efficiency and cost with effective safeguards that do more than tick a box.

[Mental Capacity and Derivation of Liberty \(Law Com No 372\)](#) calls for the Deprivation of Liberty Safeguards to be replaced and sets out a new scheme called the Liberty Protection Safeguards (LPS) which will apply across all settings including housing. It is less onerous than the current DoLs mechanism. Essentially, it comprises three assessments (of capacity, mental state and whether the arrangements are necessary and proportionate) which can be part of the care planning process provided that at least two of the assessors are independent of each other. This is followed by an independent review by someone not involved in the day-to-day care of the person. In cases where there is an objection, or where the arrangements are being proposed for the safety of others, a referral for an independent judgement must be made to a new professional called the Approved Mental Capacity Professional (AMCP). It falls to the Responsible Body (local authority, hospital manager or CCG, depending on setting) to authorise the deprivation.

There is a good summary written by Tim Spencer Lane - lead lawyer for the project at the Law Commission - in a special report produced by 39 Essex Street Chambers. This also includes some thought-provoking responses from a range of different perspectives – carers, a parent, a Best Interests Assessor, a psychiatrist and a law academic. On the [Housing LIN website](#) there is also a presentation given by Alex Ruck Keene who worked with the Law Commission to develop the proposals, a flowchart showing the LPS steps, and my own bullet points summarising key aspects of the Law Commission's report.

For those living in supported housing schemes, replacing an application to the Court of Protection with Liberty Protection Safeguards should be more proportionate and less onerous, but a few concerns remain.

One of these is how truly independent the various assessments and the subsequent review will be. While there is good sense in bringing together care planning and arrangements surrounding that care, it arguably increases the risk of budgetary pressures and organisational loyalties interfering with independence and objectivity, particularly if the independent review is allowed to be undertaken by a member of the same team.

The proposals also include a number of welcome amendments to the Mental Capacity Act (MCA). Firstly, it proposes giving the person's wishes, feelings, beliefs and values greater weight when determining what is in their best interests. This strikes as a good development and would bring MCA provisions closer to the United Nations Convention on the Right of Persons with Disabilities

Secondly, it proposes limitations to s5 protection of paid staff in relation to serious interferences with the autonomy of the person. (s5 of the MCA provides statutory protection against civil and criminal liability for certain acts undertaken for purposes of care and treatment if the person lacks the capacity to consent to them.) One act for which additional requirements are proposed before the professional gains protection relates to decisions that restrict the person's contact with others. Another, of particular interest to the housing sector, is where a public body moves the person to long-term accommodation. In these situations, it is proposed that s5 protection will only apply where a written record is kept of key elements in the decision-making process, including: the steps taken to support the person to make their own decisions; a description of the steps taken to establish whether or not it is in the person's best interests; and that any duty to provide advocacy has been complied with. The intention behind these additional safeguards is to improve implementation of the core principles of the Mental Capacity Act and improve protection of people's rights to privacy and family life (Article 8 of the ECHR).

How effective these will be in improving practice on the ground in the best interests decision-making process remains to be seen. This is particularly pertinent in the context of moving from rented or leased housing where there is currently a significant issue in relation to terminating occupancy agreements where the person does not have the capacity to agree and there is no Lasting Power of Attorney in place. This can result in accrual of arrears and properties being left full of contents, while an application is made to the Court of Protection or a notice to quit is given. Anecdotal evidence suggests that some local authorities regard these as the housing provider's problem despite responsibilities under s 47 of the Care Act. While there was a discussion about signing of tenancies during the Law Commission's consultation, signing or relinquishing of tenancies appears not to have been addressed in the Commission's proposals.

These are my own personal views based on my own current level of understanding. In any case, what transpires will depend on whether the proposals become law, which provisions are included – and importantly, how effectively they are implemented. In the meantime, current arrangements for authorising a deprivation of liberty in housing settings still apply – i.e. applications to the Court of Protection.

It also remains important for the housing sector to empower people by implementing the Mental Capacity Act effectively. To this end, I would urge housing providers and others in the sector to consider applying to join the National Mental Capacity Forum. This is a joint initiative between the Ministry of Justice and Department of Health and was set up following the House of Lords review of the Mental Capacity Act. Its purpose is to identify actions which member organisations (both national and local) can take to improve understanding, awareness and implementation of the MCA. The housing sector can make a significant contribution to this. To join the MCA forum, please email NMCF1@justice.gsi.gov.uk and request an application form.

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Published on Thursday, 18 May 2017 by the Housing LIN