Housing LIN
Connecting people, ideas and resources

HOUSING LIN RESPONSE TO LAW COMMISSION CONSULTATION ON MENTAL CAPACITY AND DEPRIVATION OF LIBERTY

ABOUT THE HOUSING LIN

Previously responsible for managing the Department of Health's Extra Care Housing Fund, the Housing Learning and Improvement Network (LIN) is the leading 'learning lab' for a growing network of housing, health and social care professionals in England involved in planning, commissioning, designing, funding, building and managing housing, care and support services for older people and vulnerable adults with long term conditions. With over 40,000 subscribers the Housing LIN meets its aims through a highly-rated website containing an extensive range of resources, the circulation of regular newsletters and updates to its members, and regional and national network events and conferences (www.HousingLIN.org.uk).

The Housing LIN is a signatory of the Concordat following the 'Winterbourne View Review'and also of the health and housing Memorandum of Understanding, 'Joint action on improving health through the home', along with several government departments, trade and professional bodies.
http://www.housinglin.org.uk/Topics/browse/HealthandHousing/HealthPolicy/Policy/?parent=8683&child=9425

INTRODUCTION

As part of the process of raising awareness of issues surrounding mental capacity and deprivation of liberty, and encouraging housing providers and others in the sector to engage with the Law Commission's consultation, the Housing LIN:

- published a range of material including key questions for housing providers to consider and respond to (http://www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/DoL/?parent=9529&child=9743)
- sent out e-mails seeking answers from providers on specific questions, in particular which providers in supported living settings put in place or implement restrictions, and experiences and views regarding signed vs unsigned tenancies
- took part in a range of discussions which helped to inform our thinking

This response from the Housing LIN takes as read Sue Garwood's (Housing LIN dementia lead) own early personal response to the Law Commission, and aims to build on that submission rather than repeating content. It seeks to give a view where possible on the questions and issues posed to colleagues in the housing sector.

COMPLEXITY

One message that has emerged very clearly from discussions and feedback about mental capacity and deprivation of liberty is the complexity both of the current law and the Law Commission's proposals, as well as the level of ignorance and misunderstanding amongst professionals across all sectors, let alone the public. Even those of us who have the time to devote to trying to understand find some aspects difficult. This may partly explain why front-line staff don't always implement the law properly. For this reason, it would be really helpful if the Law Commission, in its recommendations to the government, could do the following as far as possible:

- Define terms and concepts as clearly as possible, making it clear when terms are used generically or with a specific legal or formal meaning, e.g. advocate; "care and treatment"
- Minimise subtle distinctions and thresholds – e.g. the subtly different roles of advocates under different legislation, people's representatives and supporters in supported decision-making
- Where transitions and thresholds need to apply, to be as clear as possible about the criteria or trigger points for inclusion

CLARITY IN RELATION TO HOUSING WHEN FRAMING PROPOSALS

The language used in the Law Commission consultation paper reveals concerning assumptions about housing settings and how they are accessed. There are many different types of housing developments – for example, a housing with care village may have occupants with a wide range of care and support needs, from no needs at one end of the spectrum to some people with care needs at the other, whereas some local authority-commissioned housing with care schemes may target only those with high levels of need. For some, moving is a lifestyle choice while for others a move may be driven by a range of different needs. Either way, HWC schemes are housing, not care homes, and access to them is – or should be – controlled essentially by individual choice and housing nominations, not by local authority Adult Social Care departments or NHS "placement", even if local authorities do not always recognise this.

In the light of the above, we would like to see the differences between housing and residential care properly reflected in the language and future arrangements for mental capacity and deprivation of liberty in order to avoid any unintended consequences, for example, further muddying of the distinction between housing with care and care homes for registration purposes.

Furthermore, it is worth noting that within the housing sector there are landlords, housing-related support providers and care providers who may or may not be the same body as the landlord, as well as managing agents and many other "players". All have important, but different, roles to play in supporting adults who may lack the mental capacity to protect themselves. It seems important when making recommendations for

the future to recognise the key contribution the housing sector should make, while also recognising the different functions within the housing sector. Some of the Law Commission's proposals rightly apply to all those delivering services in supported housing, while others may be limited to specific roles.

USE OF THE TERM "CARE AND TREATMENT"

While there may be a good legal reason to use the term "care and treatment" as the gateway to accessing restrictive care safeguards, we are concerned that it is too narrow. Two things have emerged in discussions which support this view:

- It appears that sometimes it is a support provider, not a registered care provider who is restricting a person's liberty or even depriving them of it. This would suggest there may not be a care plan in place.
- It seems that it may sometimes be the landlord who installs potentially restrictive features either with that purpose in mind (e.g. out-of-reach door handles or exit sensors), or for other reasons but used for restrictive purposes (e.g. CCTV). In addition, it seems that it could be either the landlord or support provider monitoring or implementing restrictions instead of, or as well as, a care provider.

While we believe the above arrangements are not typical, we do not know how widespread they are. The key point is that it may be the combination of the living arrangements plus the care, support and treatment that constitute the restrictions, not only the care and treatment written in the care and support plan. If possible, we suggest that the threshold for the Restrictive Care safeguards should be "incapacity to agree to restrictions which are in individuals' best interests for the purpose of promoting their wellbeing and keeping them safe" – or something similar.

REFERRALS

In 6.44 the Law Commission asked: Are there people in supported housing settings who would benefit from Supportive Care safeguards because of capacity issues, but are not in receipt of care? Are referrals made to the GP or LA? What is the response?

As outlined above, it does appear to be the case that sometimes there is no care provider involved in supporting an individual with impaired capacity, although we are not able to say how widespread this is.

It is clear to us that it is quite common for housing providers to make referrals to local authorities to which there is little or no positive response, leaving the housing provider to deal with the situation as well as they can. With budget cuts and eligibility criteria for care being tightened, this is likely to continue. We do not have any information regarding referrals to GPs.

In the first instance, we think it should be a care provider's responsibility to make a referral for Protective Care. However, if there is no care provider involved and restrictions are in place or introduced by the landlord, support provider or private individuals to which the individual lacks the capacity to agree, there should be a requirement upon the provider to make a referral to the local authority for a capacity and best interests assessment. Making referrals a requirement may strengthen housing providers' hand although local authorities need also to be required to respond. These provisions could be in the Guidance rather than in the legislation itself.

REGULATION

Two issues particularly come to mind:

1. The CQC at present regulates care provision and care providers. It does not regulate the environment in housing settings. The latter is subject to Housing Law – for example, in relation to disrepair or environment health.
2. No regulators are directly responsible for inspecting the physical environment or support services in supported housing. However, these may be built into a contract management arrangement made between the provider and the commissioning authority.

Environment (no:1)

We consider it would be appropriate for CQC's remit to extend to all aspects of an individual's care, support and living arrangements if the individual is subject to Restrictive Care. This would not be to regulate the environment as such, but where restrictions are in place including environmental ones, to check that all steps have been taken to ensure that these are in the individual's best interests and proportionate. If an individual lacks the mental capacity to invite a CQC inspector into his/her property and there may be concerns about the state of it, a "best interests" decision could be made to allow CQC to enter the property. From a practical perspective, the challenge would be to identify where there are such concerns. Nor is it clear who should make the best interests decision in this scenario since we understand that CQC inspections are unannounced.

However, it also needs to be very clear what CQC's powers are in this scenario. For example, they should not, as happens sometimes now, mark a care provider down for an area which is not the responsibility of that care provider, so long as the care provider can demonstrate that they have been proactive in trying to get the issue resolved by those responsible. What enforcement route should the CQC take over areas that are not the responsibility of the care provider, such as issues with the building – reporting concerns to the Homes and Communities Agency? AMCP? courts? It is not appropriate for CQC to directly regulate the environment in housing settings, even in this scenario.

What needs to be avoided is setting in place arrangements that increase the risk of housing settings being treated or registered as "accommodation for persons who require nursing or personal care" if the person is genuinely living in their own home.

No registered care provider (no:2)

This issue seems much more difficult to address. One housing association manager has said that CQC should regulate supported housing. It is doubtful whether his view would be shared by others in the sector. Nor is it clear how someone under Restrictive Care would come to the notice of CQC if a care provider is not involved. One possibility is for the AMCP to be required to provide a list on a regular basis to the CQC. The alternative to CQC would be to extend the responsibilities of the HCA, but it currently has governance and finance focus, rather than a focus on people or even the buildings.

DEFINITION OF SUPPORTED LIVING

This issue is proving really difficult. The 2014 Care Act definition probably excludes supported living settings where only intensive housing management and/or housing-related support are provided, not personal care as a core element. Yet, it is sometimes in settings such as sheltered housing, retirement villages or assisted living in which occupants had the mental capacity to decide on the move when the decision was made, but whose capacity declines to the point where they become vulnerable and may require restrictions to which they lack the capacity to agree. It therefore seems important that these settings should not be excluded from the restrictive care safeguards. However, an alternative regulation-based definition, that of “specified accommodation” included in the Housing Benefit and Universal Credit (Supported Accommodation) (Amendment) Regulations 2014, would exclude retirement housing delivered by private providers. (See final bullet point under the next heading)

A POSSIBLE AMENDMENT TO SUPPORTIVE CARE

We really appreciate the Law Commission’s attempt to introduce an approach which reduces the ”all-or-nothing” nature of the current deprivation of liberty safeguards (term used in generic sense), and also to focus genuinely on what is in an individual’s best interests. At the same time, we are aware of the following issues:

- Lack of clarity as to where sheltered housing, retirement villages and assisted living – i.e. developments where no in-built care – should sit within the Protective Care regime
- Lack of clarity in relation to trigger or transition points, and in particular in relation to supportive care where people had capacity to agree to living arrangements at the time of the move, and when restrictions under Supportive Care are significant enough to trigger Restrictive Care safeguards
- With local authority squeezed budgets and high demand for services, the risk of overburdening them if thresholds for inclusion in Protective Care safeguards are set too low

We propose the following which may help to address these matters to some degree:

- Supportive Care should apply only to those people who lack the capacity to agree to their living arrangements at the point of moving in.
- For those who had the mental capacity to decide on their living arrangements, safeguards should only kick in when one or more of the restrictions listed in the non-exhaustive list need to be applied for an individual's safety and well being, and the individual lacks the mental capacity to agree to the restrictions. At this point the Restrictive Care regime would be triggered.
- Although we would prefer for the full Restrictive Care safeguards to apply, if necessary for resource reasons, restrictive care which falls short of full deprivation of liberty could be defined in such a way that it is limited to the safeguards that have been outlined by the Law Commission under its Supportive Care proposals. In that case, AMCPs would only come into play where restrictions could amount to a deprivation of liberty, or there was disagreement about the person's best interests. The alternative to this would be for the Law Commission to clearly define the level of restrictions which would trigger the full Restrictive Care safeguards currently included in the consultation document.
- Supportive and Restrictive Care, however defined, should apply to any housing settings provided by local housing authorities, registered housing providers, housing charities or private providers where intensive housing management, housing-related support or care form part of the core offer, rather than having to be bought in separately.

In practice, it may turn out to be the case that few people fall into Supportive Care, but instead would qualify for Restrictive Care because, if people lack the capacity to consent to a move, it may be likely that some restrictions would also need to be in place.

TENANCIES

In connection with questions 6-8 and 6-9 in the Law Commission's consultation document, we asked the following question in an e-mail to mainly housing professionals and on the Housing LIN discussion forum.

If an applicant for a tenancy lacks the mental capacity to understand and sign a tenancy agreement, I would like to hear your experiences in both/either of the following scenarios:

1) Requiring the tenancy to be signed by someone legally authorised to do so, for example a donee of a Lasting Power of Attorney or a court appointed deputy (which would require an application to the Court of Protection)

2) Leaving the tenancy agreement unsigned and reaching a best interests decision that the applicant should be offered a home

1. What issues and problems have been faced by landlords, the individuals

themselves or local authorities? Or has it worked well for you and your customers?
2. With the current arrangements do you think the rights of both landlords and occupants are protected as well as they should be?

We received seven replies only but will summarise the issues based on these responses and our own experience.

Five out of the seven respondents expect and are in favour of tenancies being signed by an authorised person. One believes that landlords should not insist on tenancies being signed if the individual lacks the mental capacity to sign it. One recognises advantages and disadvantages to both positions. Points raised on either side were based on a mix of principle, practice and legal matters.

Signed occupancy agreement provides protection for occupants
The main point of principle was that a legally signed tenancy affords greater protection to both the landlord and the occupant as it sets out the rights and obligations of both. Without a legally signed tenancy, occupants may be at greater risk of unfair practices by landlords. One person made the point that while it is unlikely that a registered housing provider would act in an underhand way, it is discriminatory to let landlords and local authorities get away with poor practice that wouldn't be tolerated for people with capacity.

Insisting on signed documents is discriminatory
The person who favoured unsigned agreements argued the opposite: that to insist on a legally signed document is discriminatory. He argued that the tenancy agreement remains useful in "setting out the landlord's responsibilities" even if unsigned, suggesting that the landlord can be held to the terms of the agreement even if the occupant cannot.

Terminating the tenancy in the case of breaches
Whether the tenancy agreement is legally signed or not makes little difference to whether the individual abides by the terms of the agreement over which the signatory has no control.

With the policy direction of travel being to accommodate in housing settings adults who have mental capacity issues, sometimes accompanied by challenging behaviour over which they themselves have no control, landlords are in a difficult position. Landlords have obligations towards the individual and other occupants. Yet as we understand it, if the landlord had express or implied knowledge of the tenant's incapacity when taking on a tenancy, the landlord may not be able lawfully to evict for breach of the contract if a tenant cannot help causing nuisance or annoyance – that could count as disability discrimination. This might be argued to be an imbalance in favour of the occupant rather than the landlord. If an LPA has signed the tenancy, they may or may not agree to terminate it. On the other hand, an unsigned tenancy may make it easier to terminate the arrangement whether or not it is in the individual's best interests; i.e. the balance may be weighted in favour of the landlord.

Terminating occupancy agreements where individual loses capacity
While clearly it is difficult to legislate for fluctuations in mental capacity, there need to be lawful arrangements in place for terminating tenancies and leases where individuals had the capacity to enter into the contract but do not have the mental capacity to terminate it, and can no longer be appropriately supported where they are. This is a situation that is quite common in housing settings for older people who have or develop dementia.

Legal process may ensure best interests
A couple of people made the point that going through the legal process improved practice and therefore served the best interests of the individual better. One person in the learning disability field argued that a person unable to agree to a move and sign the tenancy is also likely to require restrictions, possibly amounting to a deprivation of liberty, and that going through the legal process ensures that the person's best interests have been served. That said, while this MAY be the case in an application to the Court of Protection, a signature by a Property and Affairs LPA does not necessarily ensure that the move is in the individual's best interests. Whether signed or unsigned, Protective Care safeguards – if properly implemented – should address this issue.

Legal process may incentivise good practice by earlier engagement
Another respondent's experience was that without going through due process, local authorities tended not to be as careful as they should about ensuring the individual's best interests with regard to the suitability of the accommodation and their subsequent liberty and choice around care and support. If local authorities know that applications needs to be made to the Court of Protection in the absence of an LPA, they may be more likely to engage earlier with people who have progressive cognitive decline while they still have the capacity to make key decisions about where to live, future care, appointing an LPA etc. This is not only legally advantageous, there is a consensus that the outcomes for individuals are better if people move to a supported housing setting when they still have the mental capacity to agree to the move, learn their surroundings and feel part of the community. They may also be more likely to support the individual to make his/her own capacitated decision. On the other hand, with no-one advocating on behalf of the individual, local authorities may simply take the easiest route and place the person in a care home at crisis point. Practice varies.

Process of applying to the Court of Protection creates problems
It is also clear however, that if there is no LPA, the process for getting a legally authorised person in place currently creates its own practical problems. It creates delays, particularly because some local authorities apparently submit applications to the Court of Protection in batches so there may be a 6-month delay. Applying to the Court of Protection is also time-consuming and costly. It appears that to avoid void losses, the practice is for people to move in pending appointment of a deputy. Housing Benefit departments vary in the way they deal with these applications, and sometimes there is also no suitable appointee to handle the benefits for the individual. Arrears can build up for which the tenant is legally responsible.

No-one reported such issues or problems where a donee of a Property and Affairs Lasting Power signed the tenancy. The only issue raised was they may fulfil their legal responsibilities but may not help with practicalities such as assisting with the move, but this cannot be seen as result of the tenancy agreement having been signed – or not.

Unsigned tenancies and registration category with CQC

On the issue of whether tenancies should be signed or not, a key concern with tenancies that are not lawfully signed is the risk that the premises would not be treated as the person's "own home" and that the package being provided would be more likely to be seen as providing care together with accommodation, hence triggering registration as a care home.

You will be aware that the CQC has recently issued new Guidance in which they say: "Supported living accommodation is sometimes occupied under an unsigned occupancy agreement. This can be appropriate when a person does not have an LPA or court deputy, and arranging legal authority is going to take too long to secure an appropriate placement. The Office of the Public Guardian has advised that this is acceptable so long as valid legal authority is applied for as soon as possible...." (p8)

Appendix 3 says something similar to what was said in the Court of Protection 2012 guidance: "Some landlords will accept an unsigned occupancy agreement. In these circumstances, where there is a dispute or it is unclear whether the occupancy agreement is in a person's best interests it would be appropriate to make an application to the Court of Protection." In other words, only apply in specific circumstances. However, in section 11 under "What evidence can support a judgement about whether a regulated activity is being provided, and which it is?", the Guidance seems to make a legally signed agreement one such criterion (see top of page 13). Thus, the position of unsigned occupancy agreements in relation to the risk of registration as a care home remains ambiguous and unclear.

Conclusion

In response to question 6-8, then, we are of the view that changes **are** needed to provide greater protection and certainty both for people who lack capacity and their landlords in relation to occupancy agreements. We do not come down cleanly on one side or the other with regard to whether tenancies should be signed or not. Our views are:

1) Whether signed or unsigned, better safeguards are needed to ensure that:

- the individual's best interests, including their wishes and feelings are the primary driver in securing the most appropriate living arrangements. Ideally this needs to apply not only where local authorities are involved in the arrangements but also in the case of self-funders who may not go through the local authority. Supportive Care may suffice if properly implemented.
- once in situ, individuals' rights are protected but are balanced with landlords' responsibilities to other tenants and appropriate mechanisms are in place to terminate the occupancy if other occupants' rights are being severely compromised

2) The mechanism for seeking legal authority to set up or terminate specific living arrangements in housing settings needs to be more straight forward and speedy in order to iron out the current problems with it. We do not feel strongly about the nature of this legal authority so long as the process is clear:

- whether the first port of call in these cases should be an independent advocate, an AMCP, a tribunal, or the Court of Protection
- whether it involves signing an occupancy agreement or authorising a mental capacity assessment and best interests decision.

3) The circumstances under which legal authority must to be sought should be clearly spelt out:

- Should an unsigned occupancy agreement be a temporary arrangement only, pending legal authority?
- Or can it be a long-term arrangement as long as there are no disputes or concerns about the suitability of the accommodation, or what is in the individual's best interests?

4) There needs to be greater clarity. If the Law Commission favours an approach where it is acceptable for occupancy agreements to remain unsigned this needs to be clearly stated as compliant with the law so that the CQC does not see this as an indicator of a sham arrangement.

CHARGING FOR ACCOMODATION

We are not sure whether the suggestion of state funding the accommodation costs of people deprived of their liberty for their wellbeing (or, in Law Commission terminology, for the purposes of care and treatment) was intended to apply only to care homes or also to supported living settings. In addition to the objections and issues raised in Sue Garwood's original response to the consultation document, there is currently a lot of uncertainty in relation to funding supported housing. As part of welfare reform and implementation of Universal Credit, the Department of Works and Pensions is looking at the mechanism for funding supported housing in the future. The outcome of this exercise is unknown. And, further to the July 2015 Budget, we also do not know to which supported housing categories the 1% rent reduction will apply. This context makes changing the funding arrangements where state deprivation of liberty applies even less desirable than it would be for the reasons previously outlined.

IMPLEMENTATION

We are concerned that, however good and well thought out the replacement arrangements are for authorising deprivations of liberty, there may be a failure to implement them properly, partly due to inadequate understanding of what is required and partly due to demand pressures on all concerned. We appreciate that enshrining a

requirement in law cannot and does not ensure effective and correct implementation, but it does help. Thus while we accept there is a need to make requirements as straightforward and non-onerous as possible, they must also be sufficient to protect the rights and interests of adults with impaired capacity to consent to infringements of their rights, and should be enshrined in legislation or statutory guidance. To this end we take the view that:

- professionals should be required to ensure that appropriate referrals have been made if significant infringements of human rights are witnessed
- such referrals made to local authorities must be appropriately responded to
- AMCPs must be able to act independently and delegation to the local authority should not be their default position.

AND FINALLY...

We thank you for the opportunity to be involved in this work. We would be pleased to answer any queries and take part in any further consultation on this matter.

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