

## LAW COMMISSION CONSULTATION ON DEPRIVATION OF LIBERTY

### KEY QUESTIONS FOR HOUSING PROVIDERS

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#### INTRODUCTION

In their consultation paper, [Mental Capacity and Deprivation of Liberty](#), the Law Commission proposes to replace current arrangements for authorising deprivations of liberty for those who lack the mental capacity to consent with a new scheme they have called “Protective Care”. Within “Protective Care”, they propose different levels of safeguards for people who lack the mental capacity to agree to certain things. These include “Supportive Care” for those who lack the capacity to agree to their living arrangements and “Restrictive Care and Treatment” for those who lack the capacity to agree to restrictive care and treatment. Within “Restrictive Care” there are three categories with slightly different safeguards and mechanisms: restrictive care based on a non-exhaustive list, deprivation of liberty in long term settings using the Supreme Court acid test, and deprivation of liberty in short-term settings such as hospitals and hospices. All the categories involve the appointment of someone to advocate on behalf of the adult. The three levels in long-term settings are proposed to apply in “supported living” settings while only the deprivation of liberty category will apply in family homes and ordinary housing. [Click here](#) for a tabular summary of the key features of each category.

The following are some of the key questions and issues that the housing sector should consider and respond to before the consultation ends on 2<sup>nd</sup> November. Questions in blue are those posed by the Law Commission. Those in green are the ones posed by the author of this paper.

#### KEY ISSUES AND QUESTIONS

##### 1) Scope and definitions

Under the Care Act, supported living is defined as: “accommodation in premises which are specifically designed or adapted for occupation by adults with needs for care and support to enable them to live as independently as possible; and accommodation which is provided in premises which are intended for occupation by adults with needs for care and support (whether or not the premises are specifically designed or adapted for that purpose), and in circumstances in which personal care is available if required; however, this does not include adapted premises where the adult has occupied these premises as their home before the adaptations were made.” Some have argued that this undermines the philosophy behind supported living, being that disabled people should be able to choose where they live and be provided with the appropriate support.

- a. Q4-2: “Is the definition of supported living provided under the Care Act 2015 appropriate for our scheme?”
  - Should it be called “supported housing” rather than “supported living”?
  - Aside from shared lives which is mentioned separately anyway, are there any settings that would be encompassed by “supported living” and not by “supported housing”?
- b. Is the idea of applying Supportive Care to supported housing settings a good one?
- c. Where should sheltered housing, assisted living, retirement housing etc fit – into the supported housing definition and therefore within the umbrella of all protective care, or as an ordinary domestic setting in which case only the restrictive deprivation of liberty safeguards would apply?

- d. For those already living in supported housing, whose cognition declines, at what point should an assessment for supportive care be made? In other words, what should they lack the capacity to agree to, assuming that on entry they had the capacity to consent to their living arrangements?

## 2. Tenancies

The Law Commission takes the view that common law arrangements such as unsigned tenancies pose few risks for landlords and that formal procedures such as insisting on a signature by a donee of an LPA, a deputy, or an application to the Court of Protection pose certain practical problems which are of detriment to disabled people in certain circumstances (See Ch 6 in general and 6.77 in particular)

- a. With regard to tenancy agreements, is there the right balance between the rights of landlords and tenants at present?
- b. Q6-8: “Are any changes needed to provide greater protection and certainty for people who lack capacity and their landlords in relation to tenancies?”
- c. Q6-9: “What difficulties arise when landlords [or local authorities] require tenancies to be signed by a donee or deputy and how might these be addressed?”

## 3. Referrals

The Law Commission in 6.44 notes that in some housing settings support is provided which is not regulated by the Care Quality Commission. The Commission assumes that where there is no family member or supporter, a housing provider would make a referral to the GP or local authority if concerned about the person’s welfare.

- a. 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?
- b. Should housing providers be required in law to make referrals for protective care?

## 4. Regulation

The UK is a signatory to various protocols and conventions necessitating oversight where the state agrees to depriving someone of their liberty. In this context, they propose that the DOLS regulators (the CQC in England) should be responsible for monitoring restrictive care and treatment, including in supported living settings (14.15).

- a. Should the Care Quality Commission be made responsible for monitoring restrictive care and treatment in supported housing settings?
- b. 14.19 “The need for proportionate and tailored forms of regulation may be particularly important in respect of supported living and other domestic and family homes. We would be interested in further views on the different regulatory approaches that might be adopted in this context.”

## 5. Charges

The Law Commission takes the view that it is unfair that a person who lacks capacity who is being deprived of liberty is also charged for that accommodation, particularly where the decision to place them in that accommodation is taken for them by the state. (15.71)

- a. Q15-9 “Should people be charged for their accommodation when they are being deprived of their liberty in their best interests....?” (question appears at present to apply to care homes only)
- b. What would the implications and possible knock-on effects be for supported housing if accommodation in care homes were to be funded by the state?

**Please note:** The Law Commission consultation paper is lengthy and complex. We have done our best to extract issues of key concern to housing providers while being as brief as possible. We make no guarantee that all the issues important to housing providers have been identified.