



May 2017

BRIEFING ON THE LAW COMMISSION MENTAL CAPACITY AND DEPRIVATION OF LIBERTY REPORT

Written by Sue Garwood, the Housing LIN's Dementia Lead

This briefing is based on the Law Commission report no: 372, [Mental Capacity and Deprivation of Liberty](#) which makes recommendations following extensive consultation on these matters in 2015. The briefing provides an 'at a glance' look at the key proposals for amending the Mental Capacity Act and replacing the Deprivation of Liberty Safeguards. If enacted, these will apply to the housing as well as health and social care sectors.

INTRODUCTION

The report proposes a new Bill, the Mental Capacity (Amendment) Bill. It introduces:

- A. Changes the some aspects of the Mental Capacity Act
- B. A replacement for the Deprivation of Liberty Safeguards

A. CHANGES TO THE MENTAL CAPACITY ACT

- 1) Change from a passive duty to consider the wishes and feelings of the individual to an active duty to ascertain wishes, feelings, beliefs and values and give them particular weight when determining best interests
- 2) Additional limitations to s5 protection of paid staff in relation to serious interferences with the autonomy of the person. Applies where:
 - A public body moves the person to long-term accommodation
 - A person's contact with others is restricted
 - Serious medical treatment is provided
 - 'Covert' medical treatment is provided
 - Treatment is given against the person's wishes

In these situations, s5 protection will only apply where a written record is kept of such things as:

- Steps taken to support the person to make their own decision
 - Steps taken to ascertain best interests, including consultation with family carers
 - Any duty to provide advocacy has been complied with
- 3) A proposal to give the Secretary of State and Welsh Ministers the power to develop regulations which introduce a supported decision making scheme to support people making decisions about their welfare or property and affairs.

B. REPLACEMENT OF DEPRIVATION OF LIBERTY SAFEGUARDS

1) Introduction of Liberty Protection Safeguards

- Applies to “arrangements” for enabling care and treatment that give rise to a deprivation of liberty, not the care and treatment itself
- Applies from age 16
- Applies in any setting or multiple settings
- Comprises:
 - Assessment of capacity to agree to arrangements and makes allowance for fluctuating capacity
 - Assessment to ascertain if person is of “unsound mind” – medical assessment
 - Assessment to ascertain if arrangements necessary and proportionate to prevent harm to self or others (replaces best interests assessment)
- Must be a minimum of two assessors who are independent of each other
- Requirement in Recommendation 15 to consult with – amongst others – anyone engaged in caring for the person or interested in their welfare, anyone named by the person and any LPA, EPA or court-appointed deputy, unless impractical or inappropriate to do so
- Following assessments and recommendation to authorise, an independent review by someone not involved in day to day care or treatment to ascertain whether:
 - Conditions for authorisation are met
 - Referral is needed to an Approved Mental Capacity Professional (AMCP)
- AMCP approval required where:
 - Person is objecting to arrangements
 - Main reason for the deprivation of liberty is based wholly or mainly on risk of harm to others
- Power to refer to AMCP subject to AMCP’s acceptance
- Where conditions met, authorisation of DoL by Responsible Body:
 - If in hospital, hospital manager
 - If continuing care, CCG
 - Elsewhere, the responsible local authority based on ordinary residence rules
- Approved Mental Capacity Professional
 - Replaces Best Interests Assessor – similar to Approved Mental Health Professional – checks proposed authorisation
 - Different from IMCA – IMCA advocates on behalf of the person or provides support to appropriate person
 - Must use own professional judgement, must meet the person if at all possible and can consult key individuals in the person’s life
 - Authorisation by the Responsible body can go ahead if the AMCP has given written approval

- Safeguards
 - Reviews – can be undertaken alongside review of care plan; timing should be specified in authorisation record but must take place in other specified circumstances
 - Advocacy from the start either directly for the person or for the appropriate person if one has been appointed
 - Right of legal challenge to be made by appropriate person or advocate – currently to Court of Protection; in the future, possibly tribunals. Advisable to refer to AMCP first if not previously involved

2) In addition

- No change in definition of deprivation of liberty – remains as set out in Article 5 ECHR to enable case law changes
- New proposal that people can give advance consent to being deprived of their liberty under specified circumstances thus avoiding the need for authorisation
- Holders of LPAs or deputies cannot consent to arrangements that give rise to a deprivation of liberty
- New tort of unlawful deprivation of liberty against private care providers (care homes and hospitals specified with provision for additional bodies to be specified in regulations)
- Likelihood of updated Code of Practice
- Proposal to amend Coroners and Justice Act 2009 so that authorised Deprivations of Liberty do not automatically require referral to coroner
 - But new arrangements have come into force from 3rd April anyway, as outlined in the words of the Ministry of Justice *“In these cases an inquest will still be required if the person died before Monday 3 April 2017. However, for any person subject to a DoLS authorisation who dies on the 3rd, or any time after, their death need not be reported to the coroner unless the cause of death is unknown or where there are concerns that the cause of death was unnatural or violent, including where there is any concern about the care given having contributed to the persons death.”*

3) No mention of tenancies

- Although views regarding capacity to sign tenancies or leave them unsigned were invited during the consultation, this area is not covered in the report.
- Court of Protection Guidance and other information on this matter may be found [here](#)

Note

The views expressed in this paper are those of the author and not necessarily those of the Housing Learning and Improvement Network. These bullet points are based on the author’s understanding of the proposals.

About the Housing LIN

The Housing LIN is a sophisticated network bringing together over 40,000 housing, health and social care professionals in England and Wales to exemplify innovative housing solutions for an ageing population.

Recognised by government and industry as a leading 'knowledge hub' on specialist housing, our online and regional networked activities:

- Connect people, ideas and resources to inform and improve the range of housing choices that enable older and disabled people to live independently
- Provide intelligence on latest funding, research, policy and practice developments, and
- Raise the profile of specialist housing with developers, commissioners and providers to plan, design and deliver aspirational housing for an ageing population

And to access further information and resources on the Mental Capacity Act, visit the Housing LIN's dedicated webpage at:

<https://www.housinglin.org.uk/Topics/browse/HousingandDementia/Legislation/MCA>

Published by

Housing Learning and Improvement Network
C/o EAC, 3rd Floor,
89 Albert Embankments
London SE1 7TP

Tel: 020 7820 8077

Email: info@housinglin.org.uk

Web: www.housinglin.org.uk

Twitter: @HousingLIN and @HousingLINews