Policy Briefing

Consultation on Deprivation of Liberty Safeguards

Fiona Campbell, LGIU Associate

8 September 2015

Summary

The Law Commission has published a consultation paper on reform of the Deprivation of Liberty Safeguards (DOLS) under the Mental Capacity Act. The deadline for responses is 2 November 2015.

• The DOLS are widely considered not to be fit for purpose, a judgement endorsed by a House of Lords Scrutiny Committee.
• Since a Supreme Court judgement widening the definition of deprivation of liberty in 2014, local authorities have had to deal with 10 times the number of cases.
• The Law Commission proposes a new ‘protective care’ system that would provide safeguards for people who lack mental capacity living in a wide range of settings, many not currently covered by the DOLS.
• A new role of Approved Mental Capacity Professional (AMCP) would be created, replacing ‘best interest’ assessors and Mental Capacity Advocates and reducing the number of assessments an individual requires.
• Local authorities will need to consult widely with professionals and communities in responding to the Law Commission, to ensure that the proposals reduce unnecessary bureaucracy while retaining and enhancing safeguards which include respect for people’s rights to a family and home life.

Briefing in full

Background

© Local Government Information Unit, www.lgiu.org.uk, Third Floor, 251 Pentonville Road, London N1 9NG. Reg. charity 1113495. This briefing is available free of charge to LGiU subscribing members. Members are welcome to circulate internally in full or in part; please credit LGiU as appropriate. You can find us on Twitter at @LGiU
POLICY BRIEFING

The Mental Capacity Act aims to protect people who lack mental capacity. The Deprivation of Liberty Safeguards (DOLS) were set up under the Act to provide procedures for authorising the deprivation of liberty in a hospital or care home of someone who lacks the mental capacity to make decisions about their own care. The DOLS apply largely to older or disabled people. Involving six assessments of someone’s situation, the decision can be challenged through a review procedure of in the Court of Protection.

However, the DOLS have been subject to considerable criticism. They are thought to be overly bureaucratic and do not necessarily benefit the person whose liberty may be curtailed. They place significant burdens on the NHS and local councils and can create tensions between local authority commissioning and safeguarding functions. They are also narrow in focus. For example they do not safeguard respect for a person’s family or home life, they don’t protect people who don’t live in care homes or hospital, eg those in supported living settings, nor can they prevent someone’s needs from deteriorating to such an extent that deprivation of liberty becomes a necessity. Individuals face many practical obstacles in challenging decision-makers.

In March 2014 two events contributed to creating a crisis for the DOLS:

- A House of Lords scrutiny committee concluded that the DOLS were “not fit for purpose” and that they should be replaced.
- A Supreme Court judgement (known as the “Cheshire West ruling”) widened the definition of deprivation of liberty which meant that many more people should be made subject to DOLS.

Following the Supreme Court decision, the system has struggled to cope with the increased number of cases which grew tenfold in 2014-15. As a result, the Government asked the Law Commission to undertake a review. The objective was to consider how the DOLS can be replaced with a new scheme that achieves better, more appropriate outcomes for people with care and support needs and reduces unnecessary burdens on local councils and the NHS. They were also asked to consider safeguards that are necessary for those receiving care and treatment at home and in other family and domestic settings. The Law Commission has now developed proposals to replace the DOLS and is consulting on these proposals in a consultation paper, Mental Capacity and Deprivation of Liberty. There are over 100 provisional proposals and consultation questions. The consultation period ends on 2 November 2015 and it is proposed to publish a draft Bill before the end of 2016. Responses to the consultation should be sent:

- by email (the option preferred by the Law Commission) to: tim.spencer-lane@lawcommission.gsi.gov.uk
- by post to: Tim Spencer-Lane, Law Commission, 1st Floor, Tower, Post Point1.54, 52 Queen Anne’s Gate, London SW1H 9AG

The proposals
The Law Commission has concluded that the DOLS are “deeply flawed”. Its proposed reforms would do away with the DOLS and establish a new system of ‘protective care’. This would not have authorising deprivations of liberty as its central focus, but rather providing appropriate care and better outcomes for people who lack mental capacity and on helping their family and carers. The proposals are intended to remain rooted in the Mental Capacity Act, to be straightforward and non-elaborate, to be compliant with the European Convention on Human Rights, to be supportive of the UN Disability Convention and to be tailored according to different settings.

The proposals include the following.

• People who lack capacity and are living in care homes, supported living and ‘shared lives’ accommodation would be given safeguards intended to ensure that their accommodation and care and treatment are right for them. This system would be known as ‘supportive care’ and would be one element of the wider scheme of protective care. The number of assessments required would be reduced. There would be no requirement for an ‘independent assessment’ in the DOLS sense. The assessment could be undertaken by anyone that the local authority thinks is appropriate, including social workers or nurses already working with the person.

• Additional safeguards would apply if someone living in one of these settings requires restrictive forms of care or treatment. This would be authorised by an independent professional to be known as an Approved Mental Capacity Professional (AMCP). AMCPs would be in the same position legally as Approved Mental Health Professionals (AMHPs). The AMCP would be required to ensure that:
  - the decision-making processes and care arrangements continue to comply with the Care Act, Mental Capacity Act and continuing health care regulations;
  - regular review meetings take place (involving the family); and
  - an advocate or appropriate person, and representative have been appointed.

• A separate scheme of safeguards would apply for those accommodated in hospital settings and palliative care, and would be tailored to recognise that people’s accommodation in these settings is usually temporary.

• Safeguards would also apply for those deprived of liberty in family homes or other domestic settings and would recognise the “special sensitivities that surround a person’s own home”.

• The provision of advocacy would be streamlined and consolidated across the Care Act and Mental Capacity Act (in its entirety, not just those sections dealing with DOLS) so that the existing Independent
Mental Capacity Advocates would be replaced by a system of Care Act advocacy and appropriate persons. Anyone subject to the protective care scheme would be provided with an advocate to represent their views and wishes, and any restrictive treatment and care decisions would be challengeable in a specialist tribunal, rather than in a court.

- Protective care would not be capable of being used to authorise the detention in hospital of incapacitated people who require treatment for a mental disorder. Instead, the Mental Health Act would be amended to establish a formal process and safeguards for such people, including an independent advocate and a requirement for a second medical opinion.

- In emergencies, rather than self-authorisatoin by care providers, the first recourse of the care provider would be to an AMCP who would be able to give temporary authority for care and treatment pending a full assessment.

Comment

The proposal to reduce the requirement for six assessments in each case and create the role of approved mental capacity professional has provisionally been welcomed within local government as a means of reducing the layers of bureaucracy developed by councils to sign off DOLS decisions. Councils will wish to consult service users, families and carers and voluntary sector organisations representing the interests of service users who may be considered to lack capacity and therefore be subject to these proposals. They and local authority and NHS professionals will want to be sure that the proposals are less bureaucratic than currently, but not at the expense of reduced clarity about procedures or, even more importantly, of greater restriction and reduced options for those who are considered to lack capacity and their families. For this reason, it will be important to seek the views of professional and legal staff currently administering the system, including people acting as best interest assessors.

The role of the AMCP, if created by new legislation, will be a crucial one. Stakeholders, including local authorities, will need to consider whether this role, as proposed, would provide sufficient safeguards while reducing bureaucracy and what capacity there may be locally to take on the role.

The Law Commission asks a number of questions in the consultation document, including questions about how a new legal framework might encourage greater joint working between the various health and social care bodies and regulatory schemes and alternative forms of regulation. Discussion of how to respond to the consultation will provide an opportunity for councils and their health and wellbeing boards to consider the proposed changes in the light of their overall mental health strategies and to respond accordingly.
The Law Commission reports that the most frequent and consistent criticism made to it about the DOLS has concerned the terminology the scheme uses. In particular, the term ‘Deprivation of Liberty Safeguards’ is thought to be unhelpful and appears to have put professionals off the scheme. The proposed new scheme of ‘protective care’ puts the procedures in a more positive light. It remains to be seen whether this terminology will be welcomed by those concerned with the wellbeing and rights of people subject to the scheme or whether it will be seen as an unacceptable euphemism, since whatever it is called, the scheme is still partly about providing for people to be deprived of their liberty. This is not to say that such a scheme should not exist, but perhaps it is better for ‘what it says on the tin’ to reflect reality.


House of Lords report on Mental Capacity Act

For more information about this, or any other LGiU member briefing, please contact Janet Sillett, Briefings Manager, on janet.sillett@lgiu.org.uk