

For better or worse – an update on the Liberty Protection Safeguards

The strained relationship between providing appropriate and necessary care for some of the most vulnerable people in our society and protecting their liberty has given rise to some of the most complicated legislation in the social care sphere, namely, the Deprivation of Liberty Safeguards (DoLS).

Now they are on the verge of being replaced by the more positively named, Liberty Protection Safeguards (LPS). The aim is the same, to provide a process to satisfy Article 5 of the European Convention on Human Rights (the right to liberty). So, where have we got to in the process of replacement and will LPS be any better for social care providers than DoLS?

Regrettably, the first part of that question remains easier to answer than the second, but the signs are not good.

Where are we?

The Mental Capacity (Amendment) Bill, as the legislation is properly known, has just (24 April) finished the parliamentary process called “ping pong: being batted back and forth between the House of Commons and House of Lords to reach a final form that is agreed by both Houses. With no current talk of a general election it seems likely the Bill will receive Royal Assent from the Queen and become an Act in the near future.

The new Act will probably be implemented from April 2020. That has not been officially announced but the proposed Code of Practice is still in development and it is hard to see how anyone will be ready to use LPS earlier, yet the Government has pushed this legislation through remarkably quickly, given the amount of time taken up by Brexit, and will not want to delay. Changes of this type are often implemented at the start of the new government financial year.

At the time of writing the parliamentary agreement is so new that it has not been possible to see a final version of the Bill.

What is clear is that much of the detail of implementation and process will be in the Code of Practice and there is not even a draft of that available yet.

The impact on social care providers

The key points to note at this stage are:

- It appears a definition of deprivation of liberty has been dropped from the Bill and will, instead, be in the Code of Practice. It remains to be seen whether that brings any greater clarity to the question of who is, and is not, deprived of liberty.
- The Government clearly intended to make the whole process less burdensome on Local Authorities but has NOT been able to carry through the original intention of making care homes responsible for their own authorisations.



- Where service users are CHC funded the relevant CCG will be responsible for the LPS authorisation. In other cases it will be the relevant Local Authority.
- LPS will be wider than DoLS and will cover “arrangements” that can include different locations, transfers and settings that are not care homes or hospitals. This should remove the need to apply to court to authorise deprivations of liberty; but it is the challenges to authorisations which actually take the most time and effort. It should be noted that challenges to DoLS authorisations are, in fact very low, under 1% of authorisations, and the Government estimates they will be lower under LPS.
- The cared for person must be aged 16 or over, lack capacity to consent to the arrangements and have a mental disorder. The arrangements must be necessary to prevent harm and proportionate to the likelihood and seriousness of harm. The Code of Practice will no doubt expand on this but expect a lot of arguments about what this means in individual cases.

But perhaps the most important point is:

- Where care is wholly or partly in a care home and the cared for person is aged 18 or over the Local Authority must decide whether it should carry out the assessment process or whether that should be led by the care home manager. It is not hard to foresee Local Authorities pressing for care home managers to get themselves up to speed and ready to lead the assessment role.

The ultimate inducement may be that Local Authorities will not use homes if the manager is not up to that role. It is not at all clear that the shift in responsibilities would be accompanied by a shift in funding.

More analysis of the final Bill is needed. The Code of Practice will be essential but overall there will almost certainly be even more responsibility on care providers to facilitate LPS authorisations than there has been under DoLS.

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Stephen’s work covers some very technical legal areas but the overall theme is ‘dispute resolution’. He always looks for pragmatic solutions, without compromising your position. Where appropriate, Stephen’s advice on the law, options and risks will bear in mind any long term ongoing therapeutic relationship and that the resolution of acute problems needs to support, not undermine that.

In 2009 Stephen obtained his Master’s Degree in Mental Health Law. His final project brought together his mental health and capacity experience by considering the problems in developing the Deprivation of Liberty Safeguards.