

## COMMENT: MENTAL CAPACITY (AMENDMENT) ACT 2019 (UK)

\*LUCY SERIES

### I INTRODUCTION

The *Mental Capacity (Amendment) Act 2019* amends the *Mental Capacity Act 2005* of England and Wales, and replaces the heavily criticised deprivation of liberty safeguards (DoLS) with a new administrative framework for authorising deprivation of liberty, the Liberty Protection Safeguards (LPS).

### II BACKGROUND

The DoLS were inserted into the MCA to provide authorisation and safeguards for deprivation of liberty in care homes and hospitals following the ‘Bournewood case’. In *HL v UK*<sup>1</sup> the European Court of Human Rights had ruled that the informal admission of an autistic man to Bournewood Hospital was a deprivation of liberty in the meaning of art 5 of the European Convention on Human Rights (ECHR), notwithstanding that he had not actually attempted to leave the hospital. The DoLS administrative scheme was intended to satisfy the procedural requirements of art 5 ECHR. They included a process for formal assessment of mental capacity and whether it is in the person’s best interests to be deprived of their liberty, and mechanisms for review and appeal.

The DoLS have been heavily criticised since their inception; in 2014 a House of Lords Select Committee on the MCA described them as ‘poorly drafted, overly complex’ and ‘far from being used to protect individuals and their rights, they are sometimes used to oppress individuals’.<sup>2</sup> The Committee called upon the government to ‘start again’. In the same year, the Supreme Court adopted a definitive ‘acid test’ on the meaning of ‘deprivation of liberty’ for adults who are considered to lack the capacity to consent to their care arrangements in *P v Cheshire West and Chester Council and another; P and Q v Surrey County Council*.<sup>3</sup> If a

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<sup>2</sup> House of Lords Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post-legislative scrutiny* (HL Paper 139, 2014) 6-7.

<sup>3</sup> [2014] UKSC 19.

person is subject to continuous supervision and control and is not free to leave, then they are deprived of their liberty and require safeguards in accordance with art 5 ECHR.

Within a year of the *Cheshire West* decision the number of DoLS applications increased by a factor of more than ten.<sup>4</sup> Today it is estimated that as many as 300,000 people may be deprived of their liberty and require safeguards. The volume of applications is far beyond the capacity of the DoLS scheme; over 126,000 applications remain unprocessed by the end of 2018.<sup>5</sup> Furthermore, many of the places where the *Cheshire West* ‘acid test’ applies are not care homes or hospitals, including supported living accommodation and even private family homes. The government asked the Law Commission to review the scheme and make recommendations for reform.

### III THE LAW COMMISSION’S PROPOSALS

The Law Commission embarked upon a wide ranging consultation and made recommendations for a new scheme – the Liberty Protection Safeguards (LPS) – to replace the DoLS.<sup>6</sup> The new scheme aimed to be more ‘proportionate’, to reduce unnecessary ‘bureaucracy’, reduce duplication of assessments, and focus scarce professional resources where they were most needed.

Authorisations could be granted for any setting(s) where the arrangements to provide care and treatment give rise to a deprivation of liberty; a much more flexible approach than the DoLS. This extends the machinery of art 5 from settings that may more readily be associated with detention – such as hospitals and care homes – to include settings like supported living, or even care provided to a person living in their own home (including potentially by their family).

Under the new scheme ‘responsible bodies’ would be able to authorise deprivation of liberty provided there was medical evidence of ‘unsoundness of mind’, the person lacked the mental

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<sup>4</sup> NHS Digital, *Mental Capacity Act 2005, Deprivation of Liberty Safeguards (England), Annual Report 2015-16* (2016) < <https://www.gov.uk/government/statistics/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments-england-2015-to-2016> >.

<sup>5</sup> Department of Health and Social Care, *Mental Capacity (Amendment) Bill: Impact Assessment* (2018) < <https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/mental-capacity-IA.pdf>

<sup>6</sup> Law Commission, *Mental capacity and deprivation of liberty: A consultation paper* (Consultation Paper 222, 2015); Law Commission, *Mental Capacity and Deprivation of Liberty* (Law Com No 372, 2017).

capacity to consent to the ‘arrangements’ to deliver care or treatment, and the arrangements were ‘necessary and proportionate’ in relation to the risk to the person or to others.

Responsible bodies would be the hospitals, health bodies or local authorities that would in many cases be responsible for arranging or even delivering the person’s care and treatment. Although this potentially gave rise to conflicts of interest, it meant the LPS assessments could be ‘streamlined’ into existing care planning processes.

The LPS core assessments include an assessment of the person’s ‘mental capacity’ to consent to arrangements to deliver care and treatment that give rise to a deprivation of liberty. The Commission proposed a ‘medical assessment’ of whether the person is of ‘unsound mind’ in order to ensure strict compliance with the requirements of art 5(1)(e) ECHR. The Commission proposed a new ‘necessary and proportionate’ test, which aimed to comply with the requirements of art 5 ECHR. However, whereas its predecessor ‘best interests’ assessment under the DoLS only considered risk of harm to the person themselves, the Law Commission’s proposed expanding this to include risk of harm to others.

In the main medical evidence and capacity assessments could come from existing sources – such as a patient’s GP or community care assessments, and would not necessarily require fresh assessments to be conducted for the LPS – reducing unnecessary duplication. However, it was unclear who would perform these assessments where care was arranged privately. The safeguard against potential conflicts of interest is provided via a desktop review by an independent person, of whether it is reasonable to believe the criteria for detention under the LPS are met. If the person is reported to be objecting to the arrangements, or the care and treatment, (estimated to be 25% of cases overall), an independent Approved Mental Capacity Professional (AMCP) would review the application. The AMCP would consult with the person and interested parties and take other appropriate actions to determine whether the arrangements should be authorised under the LPS, for example undertaking assessments themselves, exploring less restrictive options or seeking to resolve any disputes informally.

The Law Commission acknowledged that the DoLS offered weak safeguards where the person or those close to them objected – the appeal rate under the DoLS is under 1% suggesting serious problems with access to justice and rights of appeal. The Commission recommended expanding statutory independent advocacy to an opt-out scheme, so that most people would benefit from an advocate to help them understand and exercise any relevant

rights. Each person would also have an ‘appropriate person’ to support and represent them, typically this would be a friend or a relative.

The Commission also proposed wider ranging amendments to the MCA to bring it closer into alignment with the UN Convention on the Rights of Persons with Disabilities (CRPD). These included amending the MCA’s test of best interests to place ‘particular weight’ on the wishes and feelings of the person, and inserting into the MCA a power to make regulations to establish a statutory supported decision making scheme.

#### IV THE MENTAL CAPACITY (AMENDMENT) BILL

The government did not engage in further public consultation on the Law Commission’s proposals, but brought forward a Bill in July 2018.<sup>7</sup> The Mental Capacity (Amendment) Bill included substantial ‘adjustments’ to the Commission’s proposals for the LPS, but had not been subject to further debate. The Bill was widely criticised by an alliance of professional bodies, human rights and disability organisations, and care providers, and was described at one point in the House of Lords as ‘one of the worst pieces of legislation ever brought before this House’.<sup>8</sup>

There was concern that the Bill had been drafted hastily, contained what appeared to be mistakes in places, there had been no proper consultation, and was missing basic supporting information like an assessment of the Bill’s impact on groups with protected characteristics (particularly older and disabled people) and an easy read version of the Bill to enable stakeholders with cognitive impairments to participate in the discussions and debates. In short, the Bill bore all the signs of a civil service and government under strain, drafted and debated in the shadows of the political crisis that has engulfed the UK concerning Brexit. However, the Bill underwent substantial amendments following these criticisms, particularly in the House of Lords where the government was defeated on three amendments. Views are

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<sup>7</sup> Versions of the Bill, links to Parliamentary debates and supporting documentation can all be found on the Bill webpage: <https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html>.

<sup>8</sup> HL Deb 12 November 2019 Vol 794 Col 1247. Third reading of the Mental Capacity (Amendment) Bill 2018 [HL], comments of Baroness Barker.

still mixed on whether the LPS represent ‘progress’<sup>9</sup> or contain significant deficiencies from a human rights and practical perspective.<sup>10</sup>

The Bill did not include the Commission’s proposed wider amendments to the MCA, such as amending the test of best interests or a statutory supported decision-making scheme. Certain key safeguards proposed by the Commission were diluted; rights to independent advocacy were restricted, and by the government’s own estimates the rate of appeal would fall even further to 0.5%. Rights of challenged are significantly diminished. Despite these amendments there is still substantial unease about the Bill, and the relative dilution of safeguards for detained persons. Most people will no longer qualify for an independent assessment – it will depend on whether they are regarded as ‘objecting’.

Authorisations initially last up to 12 months, and may subsequently be renewed for 12 months, but then renewals may extend to periods of up to three years with very limited independent scrutiny. Similarly, the arrangements may be ‘varied’ with limited independent scrutiny.

The LPS retain an extremely complex interface with the *Mental Health Act 1983*, although this may be an area for future reform in a mental health bill.

However, the House of Lords did vote to insert rights to information in the Bill, which include new general duties upon responsible bodies to produce information about the LPS in accessible formats, as well as specific duties to give information to the person and their representatives about the grounds for the authorisation and their rights. Embarrassing omissions – such as an explicit duty to consult the person themselves about their wishes and feelings – were rectified.

The Bill initially contained controversial new ‘care home arrangements’, whereby care home managers would become responsible for the key assessments and would submit these to the responsible body for review. This was met by widely expressed concerns – including from care providers themselves – that care home managers would have financial conflicts of

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<sup>9</sup> e.g. I Finlay, *National Mental Capacity Forum: Chair’s Annual Report 2019* (HM Government, 2019) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815693/third-annual-report-of-the-NMCF.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815693/third-annual-report-of-the-NMCF.pdf).

<sup>10</sup> E.g. V Butler-Cole V and A Boukraa, *LPS – challenges and criticisms* (39 Essex Chambers, 2019) <https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2019/04/Liberty-Protection-Safeguards-the-new-law-Criticisms.pdf>; Edge Training, *Liberty Protection Safeguards - Funding Issues* (2019) [http://www.edgetraining.org.uk/wp-content/uploads/2019/04/LPS\\_funding\\_sheet\\_April\\_29\\_2019\\_final.pdf](http://www.edgetraining.org.uk/wp-content/uploads/2019/04/LPS_funding_sheet_April_29_2019_final.pdf).

interest, would lack the skills and expertise to conduct the key assessments, had no available resources to undertake the assessments, and would lack knowledge of less restrictive alternatives to the care home placement. Under pressure in the House of Lords, this aspect of the Bill was amended to state that responsible bodies must decide whether they or the care home should take responsibility for arranging the key assessments. If the care home did, then new ‘conflict of interest’ regulations would prohibit reliance on assessments by anyone with a ‘prescribed connection’ to the care home. This raises questions – still unanswered – as to who will conduct these assessments.

Other elements of the Bill that had been proposed by the Law Commission but not consulted on – such as replacing the test of ‘mental disorder’ with a test of ‘unsoundness of mind’, and removing the ‘best interests’ test, also gave rise to controversy. The terminology of ‘unsoundness of mind’ was judged outdated and offensive and replaced during the Parliamentary process with the same ‘mental disorder’ test employed by the *Mental Health Act 1983* and the DoLS. The Bill as initially introduced by the government did not actually specify what the detention should be ‘necessary and proportionate’ in relation to; it was only confirmed in passing that the government intended to expand the grounds of detention as the Law Commission had proposed to include risk of harm to others. The Lords voted through an amendment that only ‘risk of harm to the person’ themselves formed part of this test, and the government did not contest this.

Many stakeholders, and the Parliamentary Joint Committee on Human Rights (JCHR), had called for a statutory definition, some seeking clarity, others concerned about the impact of the extension of detention safeguards into private family based care settings, and others perhaps hoping to stem the tide following *Cheshire West*. The difficulty is that it would be very hard to introduce a statutory definition of deprivation of liberty that restricts the *Cheshire West* acid test, without in effect setting up a constitutional conflict between the definition of ‘deprivation of liberty’ adopted by Parliament and the courts. Towards the very end of the Parliamentary passage, the government introduced a new statutory definition of ‘deprivation of liberty’, ostensibly to ‘clarify’ the meaning of deprivation of liberty. However, this particular statutory definition did not reflect the JCHR’s proposed definition and conflicted with elements of the *Cheshire West* decision and wider jurisprudence on art 5 ECHR.<sup>11</sup> The Lords then inserted their own amendment, which also gave rise to concerns

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<sup>11</sup> For a review of the concerns, see the written submission of Doughty Chambers to the Public Bill Committee: <https://publications.parliament.uk/pa/cm201719/cmpublic/MentalCapacity/memo/MCAB68.htm>.

about a lack of correspondence with art 5 ECHR. Ultimately, the government withdrew all definitions and the final position is that the Code of Practice will provide guidance on the meaning of ‘deprivation of liberty’ based on art 5 jurisprudence. This does not satisfy stakeholders hoping to reverse *Cheshire West* or limit its scope, but does address the potentially very serious legal complications of requiring the courts to cope with conflicting legal definitions.

## V DISCUSSION

The main goals in reforming the DoLS were to strengthen the safeguards available to detained people, to reduce the complexity of the process and legislation, and to ensure a more ‘proportionate’ use of resources. The 2019 amendments will almost certainly weaken the safeguards available to people in care homes and hospitals, but may provide better protection to people in settings such as supported living who for the most part have no formal safeguards at all under the DoLS. The LPS schedules are shorter than the DoLS, but word count is not an indicator of simplicity – the government has stripped out many provisions included by the Law Commission that could have clarified how they should operate, and there is considerable uncertainty over key questions such as *who* is responsible for conducting the key assessments. It is likely that many elements of the LPS will be litigated.

It is extremely hard to say whether the LPS will make substantial savings; in theory many of the measures may reduce duplication and limit involvement of scarce professional resources to cases where there is greater need. In practice, many elements of the impact assessment are dubious – including the suggestion that a person’s GP may assess their capacity<sup>12</sup> or that the administrative requirements placed on care homes will have zero impact on their resources. These are additional burdens on a health and social care system that is increasingly fragile and under strain, and it is quite possible some charges will be passed onto the detained person themselves.

Work is already underway on new Codes of Practice and secondary regulations. It is hoped by the government that the LPS will be operational by autumn of 2020.

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<sup>12</sup> Department of Health and Social Care, *Impact Assessment: Mental Capacity (Amendment) Bill* (Revised IA, dated 31/01/2019, 2019) at para 8.6.