Review of the Deprivation of Liberty Safeguards

Nicholas Paines QC
Law Commissioner
What is the Law Commission?

- Set up by Law Commissions Act 1965
- Five Commissioners, chaired by senior judge
- Independent of government
- Tasked to review law of England and Wales and make recommendations for simplification and modernisation
- Projects conducted by teams under Commissioner supervision
- Over 200 reports in 52 years
Why this project?

**House of Lords PLS report 2014**
- the DoLS legislation is “not fit for purpose”
- “better implementation would not be sufficient to address the fundamental problems identified”

**Cheshire West [2014] UKSC 19**
- Expanded the definition of deprivation of liberty
- DoLS applications increased 14 fold in England (of which only 43% were completed)
- Lawful compliance would cost £2.2bn per year
The problems of the DoLS

- Limited reach – care homes and hospitals
- Consideration of justification for deprivation of liberty too late in decision-making process
- Paperwork-heavy process of six assessments
- “A thicket of legislative drafting”
- Complicated interface with Mental Health Act
The project

- Review of law in non-DoLS settings requested by DoH in 2014
- Expanded to complete replacement of DoLS
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<tr>
<th>Stage 1: Pre consultation</th>
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<tr>
<td>Summer 2014 – July 2015</td>
<td>Meetings with stakeholders and drafting of a consultation paper</td>
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<th>Stage 2: Public consultation</th>
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<tr>
<td>7 July 2015</td>
<td>Publication of the consultation paper with provisional proposals for reform</td>
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<td>7 July – 2 Nov 2015</td>
<td>Public consultation on the proposals</td>
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<td>25 May 2016</td>
<td>Publication of interim statement</td>
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<th>Stage 3: Final report and draft Bill</th>
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<td>13 March 2017</td>
<td>Publication of the final report (setting out our final recommendations and draft Bill), consultation analysis and impact assessment</td>
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Mental Capacity and Deprivation of Liberty: the Law Commission report and the draft Mental Capacity (Amendment) Bill
Better decision-making

- Amendment of s 4 best interests checklist to give ascertained wishes and feelings “particular weight”

- The s 5 defence not available to professionals making key decisions (eg moving P to long term accommodation or restricting P’s contact with others), unless a written record confirms (amongst other matters):
  - the steps taken to establish lack of capacity
  - The steps taken to help P make their own decision
  - The steps taken to establish the act is in P’s best interests
  - A description of P’s wishes and feelings (and explanation of an decision which conflicts)
  - Any duty to provide an advocate has been complied with
  - The act would not be contrary to an advance decision

- New tort of unlawful deprivation of liberty in private institutions (s 4C)

- Government power to establish a formal supported decision-making scheme
Emergency and interim deprivation of liberty

- Urgent authorisations abolished

- D can deprive P of liberty in 3 cases:
  - while a court decision being sought (as now)
  - pending assessment under LPS, or
  - in an emergency

- There must be a reasonable belief in lack of capacity to consent (new), and DoL must be necessary to deliver life-sustaining treatment or to carry out a vital act (necessary to prevent serious deterioration)
Liberty Protection Safeguards: authorising arrangements

- Arrangements enabling care or treatment of person aged 16+ which give rise to DoL
  - can be in any setting, or multiple settings
  - can include arrangements for transport
  - can include arrangements to ensure return of person to particular placement(s)

- Cannot authorise arrangements:
  ✓ for assessing or treating mental disorder in a hospital, or
  ✓ that conflict with any requirement under the MHA “community powers” (eg guardianship or CTO)
The bodies responsible for authorising arrangements

- if the arrangements are carried out primarily in a hospital, the RB is the “hospital manager” (e.g., the NHS trust).

- if the arrangements are carried out primarily through NHS CHC, the RB is the CCG or LHB; and

- otherwise the RB is the “responsible local authority” (in most cases this will be the authority that is meeting the person’s needs or in whose area the person is ordinarily resident).
Liberty Protection Safeguards: conditions for authorisation

- **Capacity assessment**: lack of capacity to consent to the arrangements
- **Medical assessment**: person is of unsound mind
- **Necessary and proportionate assessment**: risk of harm to self or others
  - Minimum of two assessors who must be independent from each other
  - Ability to rely upon previous/equivalent assessments where reasonable to do so
- **Consultation of carers/relatives etc**
Independent review

- Independent reviewer – not involved in the day to day care or treatment of the person

- The reviewer must determine if conditions for authorisation are met or (in certain cases) refer the case to an Approved Mental Capacity Professional

- Identity of the reviewer deliberately not set in the legislation
Approved Mental Capacity Professional

- **Duty** to refer in ‘objection’ cases and where N&P requirement met wholly or mainly on the basis of risk of harm to others.
- **Power** to refer in other cases (subject to acceptance by AMCP).
- AMCP approved by Local Authority.
- Duty to appoint a “head of service” to manage conduct and performance.
- Cannot be involved in day to day care or treatment of the person.
- Task to review information to determine whether conditions are met.
- Must meet person unless not practicable or appropriate, and may consult and take any other steps necessary.
Liberty Protection Safeguards: the authorisation

- Can have effect immediately or up to 28 days later

- Duty to provide authorisation record which can travel with the person and be amended if RB changes/revised if arrangements change

- Mandatory contents

- Effect of authorisation – defence to civil or criminal liability for acts done pursuant to the authorisation
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<td>1</td>
<td>Can last for up to 12 months, and renewed for up to 12 months and then for up to 3 years</td>
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<td>2</td>
<td>Power to renew authorisations rather than initiating fresh application</td>
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<td>3</td>
<td>No formal termination process – automatic cessation if RB knows or reasonably suspects that conditions no longer are met</td>
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<td>4</td>
<td>In cases of fluctuating capacity, the authorisation will not cease provided that periods of capacity are short lived</td>
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<td>5</td>
<td>Suspension for short term MHA admission</td>
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Safeguards

- Rights to regular reviews

- Rights to advocacy or an appropriate person (formerly RPR)
  - from the start of the assessment process
  - on an opt-out basis
  - rights to advocacy for the appropriate person

- Rights of legal challenge in Court of Protection (pending a Government review on the appropriate judicial body)

- Duty of prescribed bodies to monitor and report on the operation of the scheme
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