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NHS Providers

Mental Capacity (Amendment) Act 2019

Briefing for members

NHS Providers is the membership organisation and trade association for the NHS hospital, mental health, community and ambulance services that treat patients and service users in the NHS. We help those NHS foundation trusts and trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate. NHS Providers has all trusts in membership, collectively accounting for £84bn of annual expenditure and employing more than one million staff.

Introduction

The Mental Capacity (Amendment) Bill entered parliament in July 2018 and gained royal assent on 16 May 2019. The act follows recommendations made by the Law Commission around mental capacity and deprivation of liberty and creates a new regime, Liberty Protection Safeguards (LPS). The LPS scheme replaces Deprivation of Liberty Safeguards (DoLS) as provided for in the Mental Capacity Act 2005. This briefing aims to help members make sense of the act and provide analysis of the most relevant provisions and their implications for NHS trusts and foundation trusts.

Background

DoLS was the legal framework designed to protect against the arbitrary detention (deprivation of liberty) of people in hospital or care homes who do not have the mental capacity to make their own decisions about their care. This could be, for example, people with dementia, learning disabilities or mental health issues. DoLS provided that local authorities must, on the application of a hospital or care home, determine whether it is necessary, proportionate and in a person's best interests to be subject to restrictions that amount to a deprivation of liberty. There were six assessments which had to take place before local authorities were able to decide whether or not to formally authorise any proposed arrangements.

The DoLS scheme was described in the House of Lords post legislative scrutiny of the Mental Capacity Act 2005 as being "poorly drafted, overly complex and bear[ing] no relationship to the language and ethos of the Mental Capacity Act".[1] The Law Commission carried out a review of DoLS in March 2017 and found that "the current regime is in crisis and needs to be overhauled".[2] The system has also been criticised for adding an administrative burden on an already over-stretched system and, according to hospital clinicians, DoLS offers no tangible benefits to a person's treatment plan and in fact often deflected resources away from the provision of care and treatment.[3]

[1] House of Lords Mental Capacity Act 2005 Committee, Mental Capacity Act 2005: Post Legislative Scrutiny, 13 March 2014, HL 139 of session 2013–14
[2] Law Commission, Mental Capacity and Deprivation of Liberty, March 2017
[3] *Ibid.*

The CQC has repeatedly expressed concern about widespread variations in the effectiveness with which DoLS is implemented, noting that providers across the health and adult social care sector often lack "effective practical understanding of how to apply aspects of DoLS legislation" and that very few local authorities are confident that they are adequately resourced to discharge all of their statutory duties under the scheme.[4]

Overview of the act

The Mental Capacity (Amendment) Act outlines reforms to the process for authorising arrangements which enable people who lack capacity to consent to be deprived of their liberty, for the purpose of providing them with care or treatment. The act is based on recommendations made by the Law Commission report *Mental Capacity and Deprivation of Liberty* published in March 2017.[5] The new LPS regime created by the act replaces the previous authorisation process, DoLS, as provided for in the Mental Capacity Act 2005.

Bill aims and provisions

The government stated that one of the key aims of the bill was to strengthen protections and rights for vulnerable adults who lack mental capacity and have their liberty deprived, and would:

- Introduce a simpler process that involves families more and gives swifter access to assessments
- Be less burdensome on people, carers, families and local authorities
- Allow the NHS, rather than local authorities, to make decisions about their patients, allowing a more efficient and clearly accountable process
- Consider restrictions of people's liberties as part of their overall care package
- Eliminate repeat assessments and authorisations when someone moves between a care home, hospital and ambulance as part of their treatment.[6]

In particular the bill aimed to strengthen safeguards for approving a deprivation of liberty. A brief overview of these provisions is detailed below:

- Three assessments to authorise a deprivation of liberty – these were (1) the person who is the subject of the arrangements lacks the capacity to consent to the arrangements; (2) the person is of unsound mind; and (3) the arrangements are necessary and proportionate.
- A new duty for pre-authorisation independent review – from someone who is not involved in the person's day to day care – to determine whether the authorisation conditions are met.
- A new requirement for an approved mental capacity professional (AMCP) to review cases where the person objects to the proposed arrangements.

[4] Care Quality Commission, The State of Health Care and Adult Social Care In England 2016/17
[5] Law Commission, Mental Capacity and Deprivation of Liberty, March 2017
[6] Department of Health and Social Care, New law introduced to protect vulnerable people in care, July 2018

- A number of safeguards for the person receiving care, once an authorisation has been given. These included regular reviews of the authorisation by the responsible body or care home, and the right to challenge the authorisation before the Court of Protection.
- A duty to appoint an independent mental capacity advocate (IMCA) or an appropriate person to represent and support the person when an authorisation is being proposed and while an authorisation is in place.

Changes made to the bill

A range of concerns were raised about the bill during its passage through parliament, namely around the role of care home managers in carrying out assessments, defining or clarifying the meaning of a 'deprivation of liberty', the appointment and role of Independent Mental Capacity Advocates (IMCAs), as well as provisions relating to reviews by Approved Mental Capacity Professionals (AMCPs) and referral to the Court of Protection. Parliamentarians also asked how provisions of the bill would overlap with the recommendations of the Independent Review of the Mental Health Act.[7]

Significant changes were made to the legislation as a result, however some stakeholders remain concerned over the level of safeguards and the adequacy of funding. Changes made to the bill are summarised below:

- The LPS has been extended to 16-and-17-year-olds, having originally only applied to those 18-years-old and over.
- The reference to a person being 'of unsound mind', one of the three original requirements that must be met before a person is deprived of their liberty, was removed from the bill and replaced with reference to the person having a mental disorder, in line with the wording of the Mental Health Act 1983.
- The statutory code of practice will provide guidance on what amounts to a deprivation of liberty, as opposed to a definition of what constitutes a deprivation of liberty being included on the face of the legislation.
- The proposed role of care managers under the LPS regime has been reduced, in the following ways:
  - local authorities have the option of giving responsibilities of the process to the care home manager or undertake the duties themselves.
  - care home managers cannot commission anyone with a "prescribed connection" to the care home to carry out assessments.
  - care home managers will no longer be responsible for notifying a local authority if an IMCA should be appointed.
- The role for AMCPs has been increased.
  - AMCPs will be practitioners with specialist training in the Mental Capacity Act whose role will be to provide an independent check, known as a pre-authorisation review, on whether the conditions for a deprivation of liberty under LPS have been met.

[7] Department of Health and Social Care, Modernising the Mental Health Act – final report from the independent review, December 2018

  - an AMCP will not be required in every case and originally will only be required where there is a reasonable belief that the person is objecting to the arrangements.
- Responsible bodies are required to consider the views of any 'relevant person' – someone engaged in caring for the cared-for person or interested in the cared-for person's welfare – in considering the wishes of the cared-for person, and in determining whether they were objecting to arrangements. Consequently, any family member or care worker who identifies that a cared-for person is objecting to their care arrangements can raise the matter with the responsible body and trigger a review by an AMCP.
- In all cases where a person is receiving care mainly in an independent hospital, an AMCP must review the case. Independent hospitals will not have responsible body status, with this role passing to the relevant local authority in such cases.
- A copy of the authorisation record should be given or sent without delay to the person who is to be deprived of their liberty and their representatives once the deprivation of liberty has been authorised. If it has not happened within 72 hours, the responsible body must review and record why not.

Next steps

Implementation and commencement

The intention is for the new LPS system to come into force on 1 October 2020. The government has said it is committed to working with the sector on the implementation planning that now needs to happen.

There will still be people who have an authorisation in place under the current DoLS system on the date the new system comes into force. The government has said it will work with delivery partners and stakeholders on developing transitional arrangements, but the expectation is that such people will remain under their existing authorisation until it expires.

Fact sheets and explanatory documents

The Department of Health and Social Care (DHSC) is in the process of completing fact sheets and explanatory documents about the new LPS system. These are expected be made available in summer 2019 in order to help partners in the system with their preparations. We will make members aware of these resources once they are published.

Training

The government is also in the process of developing training to support staff in the sector with the change to the new system, and to approve people to become Approved Mental Capacity Professionals.

Accompanying regulations and code of practice

The government will draft a series of regulations and a code of practice, which will be subject to consultation, setting out the detail of how the LPS will work.

Regulations will cover a range of areas such as transitional arrangements from DoLS to the new LPS system, as well as who is allowed to complete assessments, become an AMCP, and 'prescribe connection' to a care home. There will be engagement with the sector on the development of the regulations and DHSC expects the regulations to be laid before parliament in spring 2020.

DHSC is currently working with stakeholders to produce a code of practice for the new system. Initial outputs from the working groups are expected by summer 2019. DHSC has committed to a full public consultation on the code following this. DHSC expect the final draft of the code to be laid before parliament in spring 2020. The code will be reviewed within three years of the act coming into force, and then subsequently every five years.

How this law will work in practice will rely heavily on what is included in the accompanying guidance. We are linked in to DHSC's work on the LPS and code of practice and will keep members updated on opportunities to feed into the drafting process.

NHS Providers' view

We welcome these reforms as, under the new safeguards, deprivations of liberty need to be authorised in advance by the 'responsible body', which for hospitals will usually be a manager in the trust that runs the hospital. This provision will allow the NHS, rather than local authorities, to make decisions about patients and service users, resulting in a more efficient and clearly accountable process because patients are most likely to be onsite or in touch with NHS services at the time they require these provisions.

However, there remain a number of areas we identified during the bill's passage through parliament where further clarification is required:

- We would have liked to see the reforms combined with the Mental Health Act review. Contrary to the Law Commission's recommendations, the act reproduces the notoriously complex[8] and poorly understood[9] interface between DoLS and the Mental Health Act. Whereas disputes over that interface currently take place within a local authority, under LPS, the same dispute would arise between a hospital manager and a local authority. Clarity is needed around who would resolve such disputes, and how, if they occur under the new system.
- The authorisation procedure involves three assessments and a pre-authorisation review, usually all conducted by staff from the same organisation. Clarity is needed as to whom organisations should delegate these duties, and how to ensure that the pre-authorisation review constitutes a meaningful safeguard for patients.
- It may be that the new provisions result in additional costs for trusts and if this is the case, how national bodies will ensure providers are appropriately resourced to deliver them needs to be confirmed.

[8] Law Commission, Mental Capacity and Deprivation of Liberty, March 2017
[9] Care Quality Commission, The State of Health Care and Adult Social Care In England 2016/17

NHS Providers supports policy and legislative measures which better enable trusts to apply the Mental Health Act and the Mental Capacity Act in a consistent and transparent way that protects patients' and services users' rights and supports high quality care.

It is of paramount importance that the reforms implemented by this act are in step with the wider transformation work underway within the NHS – namely the move to system working at pace and scale which will see NHS and local authority organisations working in greater partnerships at 'place' level to deliver services – as well as policy developments to come, such as those stemming from the Mental Health Act review which is likely to lead to further mental health legislation that will directly impact this act.

Useful links for further information

- Mental Capacity (Amendment) Act 2019
- Mental Capacity (Amendment) Bill 2017-19 documents
- Independent Review of the Mental Health Act 1983 final report December 2018
- Care Quality Commission, The State of Health Care and Adult Social Care in England 2016/17
- Law Commission, Mental Capacity and Deprivation of Liberty report March 2017

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