

# Acute Training Solutions

## Introducing the 'Liberty Protection Safeguards' - Latest on Reforming DoLS

### Summary

The Law Commission has today published its final report on recommendations for reforming the Deprivation of Liberty Safeguards (DoLS) system.

As at the time of its interim report on DoLS reforms last year, the Law Commission remains of the view that the current system should be replaced "as a matter of pressing urgency".

The name being suggested for the proposed replacement system is "Liberty Protection Safeguards".

In brief, the idea is that the proposed "Liberty Protection Safeguards" would apply to all care settings, with the current system of 'supervisory bodies' and 'managing authorities' being replaced by the body responsible for the patient authorising the deprivation if it is 'necessary and proportionate', plus a second tier of protection (via referral to an Approved Mental Capacity Practitioner) if the person is objecting to the proposed care arrangements.

It is worth remembering, however, that nothing will change any time soon. The next step will be for the government to respond to the recommendations and - despite the Law Commission's call for "pressing urgency", legislative change on this scale is likely to be a slow process.

### What is being proposed?

Based on the recommendations in the Law Commission's report, the new system would look quite different from the current DoLS regime.

We look at some of the key questions which providers and commissioners are likely to be asking about the proposed Liberty Protection Safeguards:

- **What settings would the safeguards apply to?**  
All settings, including hospitals, care homes, supported living arrangements and peoples' own homes.
- **What about age limits?**  
The proposed new system would apply to 16 and 17 year olds, not just those 18 and above as currently. (Interestingly, it is also recommended that the government should consider reviewing mental capacity law relating to all children, with a view to putting this into statute).
- **What would the authorisation cover?**  
Rather than just authorising the deprivation of liberty itself as currently, the proposed system would provide for authorisation of the care regime, including where the person resides and any transport arrangements.
- **Who would do the authorising?**  
There will no longer be 'supervisory bodies' or 'managing authorities' - instead the arrangements would be authorised by the 'responsible body', which would be NHS Trusts (for people in hospital), CCGs (for people in receipt of CHC funding) and local authorities (for all other cases, including self-funders).
- **Grounds for authorising?**  
It is proposed that there will be a list of 'conditions' that must be met in order for the responsible body to authorise arrangements which would give rise to a deprivation of liberty, including:
  1. The person lacks capacity to consent to the arrangements;
  2. They are of 'unsound mind';
  3. The arrangements are 'necessary and proportionate';
  4. The required consultation has taken place;
  5. An independent review has been carried out;
  6. In certain cases (see below) approval has been obtained from an Approved Mental Capacity Professional.

- **What would the process involve?**  
The 'responsible body' (e.g. NHS Trust, CCG or local authority, as explained above) would have to appoint an advocate/appropriate person and then arrange a capacity assessment, a medical assessment and a 'necessary and proportionate' assessment (with these three assessments provided by at least two assessors who are independent of each other, but it would be possible to rely on assessments provided on a previous occasion, depending on factors such as how long ago that was). Once the relevant people have been consulted, an 'independent reviewer' will review the assessments and decide whether the conditions set out above apply. The Law Commission report is somewhat vague about who this 'independent reviewer' would be, other than to say it should not be someone involved in the person's care, but it could be someone employed by the responsible body (but would not have to be). The responsible body should be required to produce an authorisation record specifying the detail of the arrangements authorised.
- **Will there be any additional protection for those objecting to their care plans?**  
Yes - the proposals include a second layer of protection in the form of a duty to refer to an Approved Mental Capacity Practitioner (equivalent of AMHPs in the mental health context) if it appears that the person is objecting to the plans for their residence/care or the arrangements are wholly/mainly for the protection of others.
- **How long would the authorisations last?**  
An authorisation would last for up to 12 months, to be renewed for a further period of 12 months and then for further periods of up to 3 years.
- **What about urgent authorisations?**  
'Urgent authorisations' would go under the proposed new system. Instead, there would be statutory authority to deprive someone of their liberty temporarily in urgent/emergency situations, but only to enable life-sustaining treatment or to prevent a serious deterioration in the person's condition.
- **What would the safeguards be?**  
Once residence and care arrangements are authorised, the person deprived of their liberty would be entitled to ongoing rights to advocacy (including appointment of an IMCA to represent and support the person if there is no appropriate person appointed), regular reviews and access to the courts. It seems no decisions have yet been made about whether challenges to authorisations for deprivations of liberty should continue to be heard by the Court of Protection or, instead, as part of the Tribunal system.
- **What happens next?**  
The next step will be for the Department of Health to respond to the Law Commission's recommendations, which should happen within 12 months.  
Depending on whether the Department of Health accepts, rejects or suggests modifications to the proposed system, the draft bill produced by the Law Commission alongside its report would then be scrutinised by both Houses of Parliament, as part of the usual legislative process. It is therefore likely that nothing will be changing any time soon.
- **Do you need to be doing anything?**  
In short - no. Unless and until these recommendations become law, commissioners and providers must continue to abide by the DoLS regime in its current form.