

Liberty Protection Safeguards (LPS)

News update: 18th July 2018

This news update is part of a series of resources from Edge Training and Consultancy to help inform health and social care staff, care providers, non-profit organisations and others about the progress of LPS as it moves through Parliament. If you have any comments or suggestions, please email: steven.richards@edgetraining.org.uk

A detailed table explaining LPS is available from: www.edgetraining.org.uk/news/

News update

On 16 July, the House of Lords held its second reading of the Bill introducing LPS (the Mental Capacity (Amendment) Bill [HL]). This provided the first proper opportunity for members to question parts of the bill. It is apparent many of the Lords had been sent briefings and letters from charities, professional bodies and individuals to help them understand the practical impact of the new legislation. The following are extracts from the debate.

The full transcript is available from: www.edgetraining.org.uk/news/ or www.parliament.uk

Lord Touhig: *'Overall, the lack of inclusion of best interests, the lack of interest in trying to ascertain what the individual wants and the removal of the rights of deputies or lasting powers of attorney is most definitely a backward step in putting the individual at the centre of any decision-making process.'*

'A pre-authorisation review is required in the Bill to agree to a deprivation of liberty. It says that this should be carried out by someone who is not involved in day-to-day care of the individual. However, the wording causes me concern. As drafted, it is not strong enough to secure independence...Even more astounding, there is no duty whatever for the person carrying out a review to have met the individual whose case this person is reviewing. This simply cannot be right.'

'All individuals and their appropriate person should be able to access support from an independent mental capacity ..[advocate] with the right skills to challenge unnecessary deprivation of liberty. This is currently not in the Bill.'

'There is much to be concerned about in this Bill. I really hope the Government are in listening mode.'

Baroness Barker: *'It is quite clear that the Government have gone through the Law Commission legislation and selectively picked pieces out of it..'*

'the new definition of "proportionate" does not adequately reflect the best-interest tests that were in the original legislation. That is a severe problem.'

'For those reasons, I conclude that the Bill before us is extremely flawed and deficient.'

Baroness Greengross: *'I have been contacted by a social worker and co-ordinator from south Wales who is concerned that the new scheme, with its significant increase in legally prescribed duties for [care home managers], has not been fully discussed with leaders in the care provider sector.'*

'I also share the reservations expressed by the charity VoiceAbility about the lack of weight given by the Act to the wishes, feelings and views of the cared-for person or their family and carers.'

'I share Age UK's concern that provision must be made to ensure that care home managers have the training and resources to be able to clear the significant backlog of assessments under the Bill's provisions.' **Note:** the financial impact assessment for the Bill provides money for a half day familiarisation course for care home managers.

Baroness Tyler of Enfield: *'I have real concerns about its timing and its interaction with the Mental Health Act, and because it is silent on some of the key recommendations of the Law Commission report.'*

'My main concern about the Bill is that, in rushing ahead to fix the clear deficiencies of the DoLS procedures, we are creating further complexity in an area already beset with confusion and complexity.'

'I am also concerned, as are others, that the focus of the Bill is on deprivation of liberty alone, rather than the wider amendments to the Mental Capacity Act proposed by the Law Commission. In particular, the important recommendation to put particular weight on a patient's wishes in any Mental Capacity Act best interests decision making process is absent..'

'As the Bill stands, there is a heavy burden on care home managers to manage the applications. An individual would be reliant on the motivation, knowledge and skill of the care home manager to identify deprivation of liberty and to take appropriate safeguarding steps.... As other noble Lords have said, a major training programme would be needed, as well as significant resources for implementation.' See editor's note above.

Unsound mind: *'This is dated terminology which is offensive and stigmatising and has no clinical value.'*

Baroness Browning: *'Although I understand the urgency to bring down this backlog and treat people individually, we must understand how some of these processes require very skilled people to carry out the assessment. They should be well-trained, experienced people, ideally who know the individual, although that is not always possible.'*

Note: in care homes, assessments will be carried out (or arranged) by the care home manager (no money allocated for carrying out assessments) with funding for a half day training course to complete the assessments.

Baroness Hollins: *'The responsibility for gathering the necessary proposed assessments, ... may be left to the same person: the care home manager. This puts a large responsibility on this individual and creates a potential conflict of interest. The person who may be responsible for the deprivation may also be responsible for assessing and gathering information. This hardly seems an appropriate way to balance the power differential, and I would like reassurance on this.'*

'...it seems that AMCPs will only be called upon if the individual objects. Who judges if the person is objecting? Even access to an independent review would need to be facilitated through the care home manager, as would access to advocacy. We need to think carefully about this.'

Baroness Murphy: *'I want to express my surprise and concern that some of the most farseeing and progressive parts of the draft Bill produced by the Law Commission have been omitted from the Bill before us.'*

'..a pie-in-the-sky, almost delusional, impact assessment of its likely costs if it is implemented as drafted.'

'The crucial thing for me is that the criteria for "deprivation of liberty" need to be changed before any new legislation is approved. It is pointless to wait to see what we can put into a code of practice. We cannot legislate on such a serious matter by leaving it to a code of practice; I simply do not think it will work.'

Baroness Thornton: *'I also thank the many organisations and individuals that have sent us their briefs and their views on the Bill..'*

'..the Bill we have before us today, while having the same title as the Law Commission's proposed scheme, appears to have removed most or some of the important safeguards it proposed..'

'How does the Bill ensure that the cared-for person and those representing them have access to the information they need to understand and exercise their rights?'

Note: Baroness Thornton also refers to the 'very helpful' DoLS coordinator who has written to her.

Several other issues were raised by members of the House including:

1. No definition of deprivation of liberty
2. Not including 16-17 year olds – something the Law Commission originally proposed
3. Moving to a Tribunal system rather than the Court of Protection
4. Advance consent to (the objective) deprivation of liberty – something the Law Commission originally proposed
5. Interaction with the Mental Health Act – remains complex and the bill has been drafted and progressed before the conclusion of the Mental Health Act review.
6. The No Refusals assessment has been removed, reducing the authority of attorneys, deputies and ADRTs.

What happens next? The Bill will be examined in detail at Committee Stage on 5 September. Any member of the House of Lords can take part and amendments can be made to the bill at this stage.

Comment: Individuals can write to members of the Lords and their local MPs to express their views on the bill and this can have an impact. The Lords and Baronesses listed above all have an interest in the bill and can be expected to ask for amendments in September however groups and individuals need to write to them well ahead of this.

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