How the Mental Capacity (Amendment) Bill will improve the protection of vulnerable people

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The Mental Capacity (Amendment) Bill is the Government response to widespread recognition that the Deprivation of Liberty Safeguards (DoLS) scheme is not fit for purpose.

The Bill will replace the current DoLS scheme with a new system, known as Liberty Protection Safeguards (LPS). However, proposals to replace the safeguards are contentious and are attracting significant criticism.

Here, we look at the impact they will have on patients and health and social care providers.

The changes

The term LPS does not actually appear in the Bill, but is the name generally adopted by practitioners and commentators. LPS will apply to anyone over 18 who meets the relevant conditions. The Law Commission proposed that the new scheme apply to 16 and 17 year olds, bringing it in line with the general application of the MCA, but this has not been adopted, leaving a potentially problematic legal gap in relation to authorisation for young people. The LPS conditions will be that the patient:

- lacks capacity;
- is of 'unsound mind'; and
- deprivation is necessary and proportionate.

Impact

The LPS will apply to arrangements that give rise to a DoLS in any setting, with considerably wider scope than the current DoLS scheme; including 'arrangements', rather than simply authorising a DoLS in one specific setting. This will help with filling historic gaps in the regime, such as transport of patients, or moving an individual between placements.

The procedure will be more heavily embedded within the commissioning process, with responsibility for authorisations being obtained in advance of the DoL resting with the ‘responsible body’. The Bill also introduces a different process for those deprived of their liberty in care homes, involving the care home taking responsibility for completing a statement, which is then submitted to the responsible body for authorisation.

The authorisation process will involve assessments to establish that the conditions are met: consultation; a 'pre-authorisation' review process; appointment of advocates and an appropriate person; and referral to an AMCP (the newly created Approved Mental Capacity Professional) if the patient objects.

Authorisations can last up to 12 months in the first instance and are then renewable for three yearly periods thereafter. There will be a review process and a right of appeal to the Court of Protection. Existing assessments can be relied on (other than for necessity and proportionality). While there will be no 'urgent authorisation' equivalent, a DoLS can begin in certain circumstances if the authorisation process has started, or in an emergency.

The Bill appears to generally preserve the current interface with the Mental Health Act (MHA), so that a patient can only be authorised in hospital for treatment for a mental disorder if they don’t object. In the community, an individual may be subject to both the LPS and MHA provisions. How the LPS will work in conjunction with the MHA is potentially problematic, so will require consideration and clarification by the MHA review.

A lot of the detail is left for regulations and the new Code of Practice, meaning much is unclear, including who will carry out the assessments and who the AMCP will be.

Benefits

Concerns remain about the level of protection the Bill will actually afford in practice. Stakeholders suggest that the patient is not sufficiently placed at the centre of the process.

From a commissioner or provider perspective the application of LPS in any setting, together with the ability to rely on existing assessments, may reduce bureaucratic burden and long-term cost. However, any such benefits will need to be

balanced against the challenges of developing and implementing a robust new process, and managing the inevitable flurry of guidance.

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