Deprivation of Liberty: The Liberty Protection Safeguards

October 2019

Alex Ruck Keene
Barrister, 39 Essex Chambers
Wellcome Research Fellow and Visiting Lecturer King's College London
Visiting Senior Lecturer, Institute of Psychiatry, Psychology and Neuroscience, King's College London
Research Affiliate, Essex Autonomy Project, University of Essex
alex.ruckkeene@39essex.com
@capacitylaw

39 Essex CHAMBERS

The Mental Capacity (Amendment) Act 2019 in one slide

- Body of the Act:
  - Revised s.4B – court approval, replacement for urgent DOLS and emergency
  - Provisions relating to Court of Protection
  - No statutory definition of deprivation of liberty – guidance in Code

- Schedule AA1: The Liberty Protection Safeguards
  - Setting neutral and more than one setting
  - From age 16 *(Re D)*
  - Authorisation by responsible body – NHS for CCG/hospitals, LA for all other cases (including self-funders and independent hospitals). Potential for delegation of some tasks to care home managers in some cases
  - Conditions: capacity, mental disorder and necessity and proportionality
  - Additional scrutiny by AMCP in 'objection' cases (and independent hospitals)
  - Representation and support by appropriate person/advocate (but latter on 'all reasonable steps' basis)
  - Provisions for variation, review and renewal (1 year, 1 year then up to 3 years)
  - (Broadly) the same division between the MCA and MHA as under DOLS

Deprivation of liberty: emergency and interim authority

- Section 4B to be amended so as to give authority to deprive of liberty:
  - Pending resolution by court of question of authorisation (as at present)
  - Pending authorisation under LPS
  - In emergency

- In <u>all</u> cases, contingent on
  - Reasonable belief in lack of capacity to consent (new)
  - Necessary to deliver life-sustaining treatment/carry out vital act

- No time limit - no more 'urgent' authorisation – (if follow Law Commission approach) intended safeguard advocacy/appropriate person

- Article 5(4) compliance?

The centrality of ‘arrangements’ (para 1)

- “Arrangements” – the LPS keyed to arrangements for enabling care and treatment of 16+ giving rise to a deprivation of liberty
  - Can be in any setting, or multiple settings
  - Can include arrangements for transport
  - Can include arrangements to ensure return of individual to particular placement(s)

Main arrangements which cannot be authorised

- (According to Government, but not on face of Act) arrangements conflicting with decision of attorney/deputy as to where the person is to live

- Nb ADRT 'no refusal' provision not carried forward

Essex CHAMBERS

Interface

- LPS cannot be used for
  - "Mental health arrangements" for in-patient treatment for mental disorder to which person objects (as with DoLS) (para 47) (but subject to LD exception)
  - Arrangements which conflict with "Mental Health Requirements" (e.g. s17 leave, guardianship, CTO, conditional discharge)

- LPS could be used for in-patient admission where patient does not object or where LD exception in MHA applies

- New: could have LPS alongside MH detention for additional deprivation of liberty to which patient subject for physical health treatment – e.g. *Dr A* case.

- (Independent Review of MHA recommended only LPS could be used where no objection to admission and person lacking capacity (but only if LPS also enabled deprivation of liberty on basis of risk of harm to others))

Responsible body (paras 6-13)

- If carried out mainly in an NHS hospital: the hospital manager (in most cases the trust that manages the hospital in England or the local health board in Wales)

- If carried out mainly through the provision of NHS continuing health care: the relevant clinical commissioning group in England or local health board in Wales

- Otherwise: the responsible local authority, identified (in most cases) on basis of OR, but physical location in the case of independent hospital

- NB, the RB identity can change (e.g. if person becomes eligible for CHC care) without necessarily ending authorisation – but limits to what new RB can do to vary authorisation

Process (para 17)

- Responsible body takes necessary steps to secure determination of conditions, consultation, advocacy/appropriate person support and pre-authorisation review (by AMCP where relevant)

- RB can outsource steps, except for pre-authorisation review, to care home managers where arrangements (for 18 plus) are in care homes

Conditions for authorisation (paras 18; 21-22)

- Determination on capacity assessment: lack of capacity to consent to arrangements (no express provision for fluctuating capacity)

- Medical assessment: person has a mental disorder (not limited on face to s.12 psychiatrists)

- Necessary and proportionate assessment: likelihood of harm to self alone (not to others), and express requirement to have regard to cared-for person's wishes and feelings

- Can make use of existing assessments for capacity/medical assessment, not for N&P

Consultation (para 22)

- By care home manager if RB has delegated to them, otherwise by RB
- With statutory list, including cared-for person
- Main purpose to try to ascertain the cared-for person's wishes or feelings in relation to the arrangements

Essex
CHAMBERS

Pre-authorisation review

- Reviewer not involved in day to day care and treatment of person, providing treatment to cared-for person or with prescribed connection to care home in case of care home arrangements

- Task to review information and decide whether reasonable for RB to conclude authorisation conditions are met

Essex
CHAMBERS

AMCP pre-authorisation review (paras 24-25)

- Review:
  - In ‘objection’ cases
  - In independent hospital cases
  - Where RB referred to AMCP and AMCP accepted
- AMCP to be provided by LA (para 39)
- Cannot be involved in day to day care/treatment of individual
- Task to review information to determine whether conditions are met
- Must meet individual if appears practicable or appropriate, and may consult and take any other steps necessary

Authorisation

- Where conditions met (including pre-authorisation review by AMCP if required and preparation of draft authorisation record) RB <u>may</u> authorise (para 17)

- Government intention that will be authorisation in advance of arrangements (up to 28 days) (para 28(2))

- Then creation of authorisation record (para 27) – including programme for review

- Effect of authorisation – defence to liability to acts done pursuant to authorisation (not acts of care and treatment themselves) (new Section 4C)

Essex
CHAMBERS

Duration, termination, and variation

- Can be renewed, on first occasion for up to 12 months, and on second and subsequent occasions for up to 3 years (para 32); can delegate requirements to care home manager in care home case

- Can be terminated by RB, and will cease to have effect if automatic cessation where RB determines it should or where believes or ought reasonably to suspect that authorisations conditions no longer met (para 29)
  - Protection for those acting on basis of authorisation if no reason to believe that has come to an end (para 31)

- Can be varied after consultation and where reasonable (but Government view cannot vary to cater for entirely new arrangements e.g. after emergency admission to hospital) (para 37)

Safeguards

- Reviews – RB unless delegated by RB to care home
  - Also where variation of conditions (para 38)

- Representation and support by appropriate person, on an opt-in basis where have capacity and where would be in BI where lack capacity (para 41)

- Where no appropriate person, "all reasonable steps" to provide advocate on opt-in basis with capacity, and unless provision not in BI where lack capacity (para 41)

- Appropriate person eligible for advocacy support as well on "all reasonable steps" opt-in basis (para 42)

- Right of access to court
  - S.21A replaced with s.21ZA – and non-means-tested legal aid
  - Section 16A abolished (eligibility fetter on Court of Protection)

LPS: key changes from DoLS

- Wider scope – any location, 16 +
- Responsibilities lying with NHS bodies in some cases where do not at present
- The (unlikely) potential for greater role for care home managers
- No more urgent authorisations
- No more conditions (at least expressly, but in practice implicit)
- Necessity and proportionality rather than best interests requirement (but in practice proportionality encompasses same considerations)
- No more RPRs – appropriate person and advocates (and watering down of advocacy duty to 'all reasonable steps')
- Different level of scrutiny dependent upon 'objection'
- Renewals

Where next?

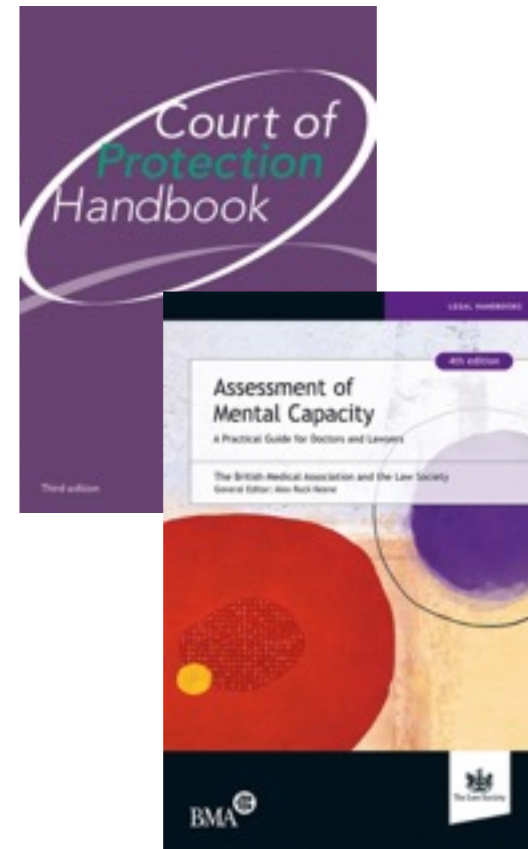
- Implementation day 1 October 2020
- Regulations required – e.g. as to knowledge and experience required for assessors
- Code of Practice – in parallel or as part of new single Code (main Code also under review)
- Transition arrangements – including backlog

Essex
CHAMBERS

Keeping yourself up-to-date

- http://www.39essex.com/resources-and-training/mental-capacity-law/
- www.mentalhealthlaw.co.uk
- http://www.scie.org.uk/mca-directory/
- http://www.mentalcapacitylawandpolicy.org.uk/
- www.courtofprotectionhandbook.com

@capacitylaw



Essex
CHAMBERS