

Legal Update

Law Commission review of the DoLS

Publication of the final report and draft Bill

16 March 2017

Executive summary

Thousands of vulnerable people with dementia and learning disabilities are being detained in hospitals and care homes without the appropriate checks, due to a law unfit for purpose according to the Law Commission. Since the landmark 'Cheshire West' case in 2014, which widened the definition of who was being deprived of their liberty, local authorities have been under increased administrative pressures. As a result, last year 100,000 people who required the authorisation of their deprivation of liberty did not receive it. In a new report published on 13 March, the Commission has proposed a replacement for the DoLS, the Liberty Protection Safeguards, designed to ensure that vulnerable people are no longer denied their rights.

In detail

The DoLS are a set of protections for adults who lack the mental capacity to consent to being accommodated in a hospital or care home for care or treatment. They are also intended as a means to challenge any such deprivation of their liberty, either by the family or the patient themselves.

In March 2014, the Supreme Court's decision in P (by his Litigation Friend the Official Solicitor) Cheshire West & Chester Council & anor [2014] UKSC 19 significantly widened the numbers of those vulnerable people considered to be deprived of their liberty. As a result, health and social care services have been unable to cope with the increase in cases and added administrative burden. Applications for authorisation went up dramatically with figures showing that hospitals and care homes in England made 195,840 DoLS applications in 2015–16, more than 14 times the 13,700 in 2013–14. An increasing number of DoLS referrals have also been left unassessed with statutory timescales routinely breached. In England, of the 195,840 DoLS referrals for 2015–16, only 43% were completed in the year and of those, just 29% were completed within the 21 day time limit prescribed.

The Department for Health responded to the situation by asking the Law Commission to review the law to ensure suitable protections were in place. Following public consultation, which concluded in November 2015 and in which Weightmans participated, the Law Commission is now recommending replacing the DoLS with a new scheme, called the Liberty Protection Safeguards.



Key aspects of the new scheme

The Commission's new Liberty Protection Safeguards are based around:

- enhanced rights to advocacy and periodic checks on the care or treatment arrangements for those most in need
- greater prominence being given to issues of the person's human rights, and of whether a deprivation of their liberty is necessary and proportionate, at the stage at which arrangements are being devised
- extending protections to all care settings such as supported living and domestic settings, thus removing the need for costly and impractical applications to the Court of Protection
- widening the scope to cover 16 and 17 year olds and planned moves between settings
- cutting unnecessary duplication by taking into account previous assessments, enabling authorisations to cover more than one setting and allowing renewals for those with long-term conditions
- extending who is responsible for giving authorisations from councils to the NHS if in a hospital or NHS health care setting
- a simplified version of the best interests assessment which emphasises that, in all cases, arrangements must be necessary and proportionate before they can be authorised.

Conclusions and implications

The report, put before Parliament on the day of its publication, refers to the DoLS as an 'administrative and bureaucratic nightmare' and claims that the new system would speed up checks and enable care workers to concentrate on those most at risk. The report includes a draft Bill (see Appendix A at page 198 of the report) and it is claimed that the Liberty Protection Safeguards would cost around £236 million per year, a saving of around £10 million.

Councils will appreciate the fact that the proposals acknowledge that they lacked the capacity to deal with the significant increase in applications following the 'Cheshire West' decision, whilst a spokesman for the Department for Health thanked the Commission for the report and said that the Government would be responding to the recommendations 'in due course'. In the meantime, the current system is, according to the Commission, failing those vulnerable adults who require its protection while at the same time creating an administrative nightmare and a huge resourcing headache for those involved in the provision of care services, who will no doubt be urging the Government to act on the Commission's plans sooner rather than later.

For further information about Weightmans LLP or to discuss any of the issues in this update, please contact:

- **Simon Goacher, Partner** on 0151 243 9582 or by email at simon.goacher@weightmans.com
- **Morris Hill, Associate** on 0151 242 7990 or by email at morris.hill@weightmans.com or
- **Ken Slade, Professional Support Lawyer** on 0151 242 7953 ken.slade@weightmans.com

To keep up to date with Brexit developments, please visit our [Brexit Hub](#) and subscribe to our updates

This update does not attempt to provide a full analysis of those matters with which it deals and is provided for general information purposes only. This update is not intended to constitute legal advice and should not be treated as a substitute for legal advice. Weightmans accepts no responsibility for any loss, which may arise from reliance on the information in this update. The copyright in this update is owned by Weightmans © 2017

Data Protection Act

Pursuant to the Data Protection Act 1998, your name may be retained on our marketing database. The database enables us to select contacts to receive a variety of marketing materials including our legal update service, newsletters and invites to seminars and events. It details your name, address, telephone, fax, e-mail, website, mailing requirements and other comments if any. Please ensure you update our marketing team with any changes. You have the right to correct any data that relates to you. You should contact James Holman, our Data Protection Officer in writing, at 100 Old Hall Street Liverpool L3 9QJ

Weightmans LLP is a limited liability partnership registered in England & Wales with registered number OC326117 and its registered office at 100 Old Hall Street, Liverpool L3 9QJ. A full list of members is available at the registered office. The term 'partner', if used, denotes a member of Weightmans LLP or a senior employee of Weightmans LLP with equivalent standing and qualifications. Authorised and regulated by the Solicitors Regulation Authority.