

Committee: Safeguarding Sub-Committee	Dated: 10/10/2022
Subject: Liberty Protection Safeguards, Mental Capacity (Amendment) Act 2019	Public
Which outcomes in the City Corporation's Corporate Plan does this proposal aim to impact directly?	1,2,3
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Summary

The Mental Capacity (Amendment) Act 2019 has replaced the Deprivation of Liberty Safeguards (DoLS) with the Liberty Protection Safeguards. The safeguards are intended to ensure that people who lack the capacity to make decisions about their own care and treatment are not unlawfully deprived of their liberty. The amendment increases the scope of the safeguards to include people in community settings and is applicable to 16- and 17-year-olds as well as adults.

The Government postponed the implementation of the Liberty Protection Safeguards due to the COVID-19 pandemic and have yet to announce a new implementation date. A Liberty Protection Safeguarding Board has been set up to oversee the implementation for the City of London, and to engage with relevant external partners.

Recommendation

Members are asked to: Note the report.

Main Report

Background

1. The Mental Capacity Act (2005) is designed to protect and empower people who may lack the mental capacity to make their own decisions about their care and treatment. It applies to people aged 16 years and over.
2. The DoLS were a 2007 amendment to the Mental Capacity Act, outlining a process aimed at ensuring that adults are not unlawfully deprived of their liberty.
3. The 2007 amendment applied only to adults aged 18 and over who are in residential homes, nursing homes or hospitals, and gave local authorities sole responsibility for authorising deprivations of liberty and ensuring that all relevant

assessments and safeguards are in place. It did not give a definition of what constitutes a deprivation of liberty.

4. A 2014 Supreme Court ruling provided case law which gave a much wider definition of a deprivation of liberty than local authorities had been working to. In her judgement, Lady Hale made the point that the quality of the care arrangements should not be confused with whether someone was being deprived of their liberty, stating 'a gilded cage is still a cage'.
5. The subsequent years saw an unprecedented year-on-year increase in requests for authorisations leading to many local authorities facing backlogs of cases and a substantial increase in costs. The City of London receive between 35 and 45 requests for authorisations each year, but have implemented processes and identified resources to meet the demand within timescales without a backlog of cases.
6. Concerns over the limitations of the amendments and pressure on the system nationally contributed to a Law Commission review of the DoLS which made recommendations to replace them with the retitled Liberty Protection Safeguards (LPS).
7. The Mental Capacity (Amendment) Act 2019 was drawn up from Law Commission recommendations, and was originally due to come into force on 1 October 2020. However, implementation was postponed due to the COVID-19 pandemic.

Current Position

8. On 17 March 2022, the Government opened a 16-week public consultation on proposed changes to the Mental Capacity Act Code of Practice, including guidance on the new LPS. The Government is now considering the responses and the text of the Code will go back to Parliament for ratification. Following publication of the final Code of Practice, there will be a period of at least six months prior to implementation.
9. The LPS will bring in the following key changes:
 - It will apply to 16- and 17 year-olds as well as adults.
 - It will be applicable to community settings, such as people's own homes, in addition to residential homes and hospitals
 - A new role of Approved Mental Capacity Professional will be created, with local authorities responsible for their training, development, and procurement.
 - The 'commissioner or funder' of care will become the Responsible Body for authorising deprivations of liberty. This means that Hospital Trusts and

Clinical Commissioning Groups will become Responsible Bodies along with local authorities.

- Authorisations were previously up to 12 months, but can now exceed 12 months in certain defined circumstances.

10. The LPS do not include a definition of what constitutes a deprivation of liberty, therefore the Supreme Court 'acid test' remains the foremost legal guidance in this respect. The 'acid test' applies where a person lacks capacity to consent to their care arrangements and asks,

- Is the person free to leave?
- Is the person subject to complete or continuous supervision and control?

11. A project manager has been appointed to drive the implementation and to engage with wider partners including health agencies and other local authorities.

12. A City of London Liberty Protection Safeguards Board has been set up to oversee implementation of the legislation. The board has representation from Adult Social Care, Children's Social Care, Education and Early Years (including Special Educational Needs and Disabilities), and Commissioning. The LPS Board will report into the Transformation Programme Board which has been set up to oversee a wider programme of Adult Social Care reform.

13. The City and Hackney Safeguarding Adults Board have identified the LPS as a priority. The City of London are working with the board to support preparations across the safeguarding partnership.

Corporate & Strategic Implications

14. **Legal implications:** This is a legislative change crossing the services of Adult Social Care, Children and Families, Education and Early Years alongside commissioned providers. City of London will need to ensure that there is legislative compliance.

15. **Financial implications:** There is concern across the Adult Social Care sector that the implementation of LPS will lead to an increase in ongoing costs for local authorities due to the additional costs for 16- to 17-year-olds, independent hospitals, community authorisations, and the training, development, and procurement costs of Approved Mental Capacity Professionals.

16. **Risk implications:** An initial impact assessment for the City of London indicated that the City may not be subjected to the same level of increased costs as other local authorities are predicting. However, the detail in the Code of Practice, once published, will be key to informing a deeper understanding any financial implications. Risks will need to be viewed within the context of a wider body of Adult Social Care, including the Health and Care Act (2022) and the introduction of the Fair Cost of Care ('Care Cap').

17. Resource implications: N/A

18. Equalities implications: N/A

19. Climate implications: N/A

20. Security implications: N/A

Conclusion

21. As a local authority, the City of London has a responsibility to fulfil its legal requirements under the new legislation. The City of London will be working with partners to ensure that arrangements are in place to safeguard residents and service users. There is high confidence that the City of London is currently well placed to implement legislation within timescales, although the Government publication of the Code of Practice remains integral to implementation timescales.

Appendices

- None

Background Papers

- [Mental Capacity \(Amendment\) Act 2019](#)

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