

# DOLS: PREPARE EARLY FOR CHANGE

SIMON LINDSAY (PARTNER) AND RUTH ATKINSON-WILKS (ASSOCIATE), SPECIALISTS IN MEDICAL LAW AT BEVAN BRITTAN LLP, DISCUSS THE IMPLICATIONS OF THE NEW MENTAL CAPACITY LAW.

**A** new law is due to come into force in October aimed at giving better protection to people who face losing their liberty because they lack the mental capacity to make decisions about their care.

But concerns are growing that time is running short for the reforms to be introduced effectively, and that the health and care sector may not be fully prepared and ready.

The Mental Capacity (Amendment) Act 2019 mandates the end of the current Deprivation of Liberty Safeguards (DoLS) regime - and its replacement by new Liberty Protection Safeguards (LPS).

It will provide a welcome change for the way incapable, vulnerable individuals are cared for. It will balance their right to freedom and autonomy against the obligation to protect them from themselves and others; but it will only be welcome largely because the system it replaces was simply not fit for purpose.

However, the Act doesn't provide details as to how the new LPS will work in practice, and the Government is required to produce a Code of Practice alongside additional regulations before the Act can come into force.

The timeframe between issue of the Code (expected spring 2020) and the law coming into force will be short, giving the authorities little time to prepare.

The new regime will still require assessments that a person lacks capacity and has a mental disorder. In addition, the responsible body will need to assess that the measures taken are necessary and proportionate.

A broader range of organisations, now called Responsible Bodies, will be able to provide authorisations: NHS Trusts if the detention is proposed in a hospital; CCGs if the person is



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CHC funded; and local authorities for everything else.

The Responsible Body will need to demonstrate that it has consulted with a set list of persons regarding the arrangements, and it will need to have arranged a pre-authorisation review by a professional that is independent of the person's day-to-day care.

In certain situations, the pre-authorisation review will need to be completed by an Approved Mental Capacity Professional (AMCP). Once the Responsible Body is satisfied that the three assessments have been completed, consultation has taken place and there has been a pre-authorisation review, the Authorisation can be granted.

### What will be new?

- CCGs and NHS Trusts will have the power to authorise deprivations of liberty
- Authorisations can apply to any setting and be made for 16-17 year olds
- Care home managers could have a greater role in obtaining authorisations
- AMCPs will have a crucial role

Leaving aside the stress of having to catch up with legislation as it comes into force, there is a risk of a person's human rights being infringed if procedures are not implemented appropriately. When

the DoLS Authorisation regime came into force, several authorities were found wanting, with courts ruling that some individuals' human rights were breached when they were unfairly deprived of their liberty - despite the complexity and underfunding of the system.

The latest NHS figures (2018-19) show practitioners completed more than 200,000 DoLS applications but the backlog is continuing to grow, with more than 130,000 cases left unfinished.

Time is running short, so authorities - even on a preliminary basis - should be making early decisions on the roles of assessors and pre-authorisation reviews. Authorities will also need to appoint AMCPs and decide whether to buy in the services or appoint staff. Supervision and monitoring regimes may need to be developed to support care home managers.

With no statutory definition of deprivation of liberty within the Act, what is contained in the Code will be critical. Providers will have the opportunity to respond to the consultation document. There is still much debate about the increased responsibilities being placed on care home managers, and providers will want to ensure that the Code properly protects not only residents but also health and care professionals and staff. [CIP](#)