

AMENDMENTS TO THE MENTAL HEALTH AND MENTAL CAPACITY ORDINANCE

TO PROVIDE DEPRIVATION OF LIBERTY AUTHORISATIONS

Background

1. The majority of the residents at the Community Care Complex (CCC) lack the capacity to give informed consent to the restrictions upon their movement and autonomy that result from their residence there. When those restrictions mean that the person is not free to leave, in the absence of informed consent, it will amount to a deprivation of liberty and is only permitted in the circumstances provided for by s. 9 of the Constitution. This includes at s. 9(1)(i) a deprivation of the liberty of a person of unsound mind in order to care for that person.
2. Although using slightly different wording, Article 5 of the European Convention on Human Rights also permits a deprivation of liberty for that purpose. The case law with respect to that provision has established that (in order to prohibit arbitrary detention) the law must: (i) clearly define a process for determining whether a person may lawfully be deprived of their liberty; and (ii) provide an effective process for challenging the decision in court (*HL v UK* (2004) 17 BHRC 418).
3. To comply with human rights law, the process for authorising a deprivation of liberty requires the following minimum conditions and safeguards:
 - a. Objective medical evidence of a true mental disorder of a kind or degree warranting compulsory confinement and which persists throughout the period of confinement;
 - b. Consideration of less restrictive alternatives;
 - c. Independence between those providing the care and treatment and those authorising the deprivation of liberty; and,
 - d. The right to a speedy determination by the court of the lawfulness of the detention and, where the detention is found to be unlawful or no longer necessary, immediate release.
4. The Safeguarding Directorate raised the issue that Mental Health and Mental Capacity Ordinance lacks any specific provisions for such arrangements to be authorised or challenged with the Attorney General's Chambers on 7th June 2017. A meeting was held on 20th June 2017 and work then began on devising a proposal for amending the legislation to address this gap. The first stage in that work was for the Safeguarding Directorate to conduct a full assessment of each resident

and to complete a pilot Deprivation of Liberty Authorisation (DOLA) Form. It was agreed that the residents in “A Unit” (which is a locked unit) would be assessed first.

5. At that time, it was accepted that state authorities were entitled to a margin of appreciation in deciding how best to address the matter when it became known that the law failed to adequately protect fundamental rights and freedoms. Provided the pilot work was taking place to assess how the law should be amended, it was likely that in the event of a claim SHG would be afforded that margin of appreciation. However, the Supreme Court of the United Kingdom has recently considered the point further and concluded that tolerance of such a situation while the state sorted out how to deal with it could not be characterised as a legitimate aim justifying the continued breach of human rights (*R (Steinfeld and another) v Secretary of State for International Development* [2018] UKSC 32). As a result of that decision, SHG would no longer have that defence to a claim for unlawful deprivation of liberty and the urgency of amending the law to incorporate a compliant process has increased.

The Position in England and Wales

6. The Mental Capacity Act 2005 was amended with effect from 1st April 2009 to address the same deficiency in England and Wales. It implemented a very cumbersome and bureaucratic scheme (known as the Deprivation of Liberty Safeguards or DoLs) which has been the subject of universal criticism. Six separate assessments are required to determine whether a person may lawfully be deprived of their liberty (Mental Health, Mental Capacity, Age, Eligibility, No Refusals and Best Interests) and the authorisation must be made by the responsible local authority if all the requirements are met. There is a right to ask the Court of Protection to review an authorisation. The DoLs only applies where the person is detained in a care home or a hospital and does not object to the arrangement; where a person is deprived of their liberty in any other setting, an application must be made to the Court of Protection for approval even if there is no dispute. The local authority is required to refer the matter to the court in all cases where the person objects.
7. The situation was made much worse by the decision of the Supreme Court on 19th March 2014 in the case of *P v Cheshire West & Chester Council* [2014] UKSC 19 which held that anyone one who was subject to continuous supervision or control, even in their own home, was deprived of their liberty and that such arrangements required the authorisation of the court. A recent report by the Joint Committee on Human Rights states that there were 217,000 applications for DoLs authorisations in 2017.

8. The Law Commission was asked by the UK Government to make recommendations for the reform of the DoLs system. Its report and draft bill were published on 17th March 2017 and recommended a much simpler scheme (with an emphasis on avoiding deprivations of liberty where possible) to be known as the Liberty Protection Scheme. The UK Government published the Mental Capacity (Amendment) Bill on 3rd July 2018 in the House of Lords. It broadly accepted the recommendations made by the Law Commission but with some significant changes. That Bill is still at an early stage and so is likely to change significantly before it is enacted. The timescale for implementation is unclear at the moment and there are calls for these amendments to be delayed until the completion of work currently underway to review the Mental Health Act 1983 as the two Acts are very closely related.
9. In outline, the Liberty Protection Scheme (LPS) will permit 'arrangements' (i.e. a care plan) to be authorised by the responsible body where they impose restrictions on a person's liberty if:
 - (i) the person lacks the capacity to consent to the arrangements;
 - (ii) the person is of unsound mind¹;
 - (iii) the arrangements are necessary and proportionate;
 - (iv) the required people have been consulted; and
 - (v) a pre-authorisation review has been carried out by an independent person.

The responsible body is the hospital management where the person is in hospital, or the local authority otherwise. Where the person is in residential care, the care home manager may provide the responsible body with a statement confirming that the requirements have been met. There is also provision for the responsibility body to authorise the arrangements even if the person objects provided that the pre-authorisation review is conducted by an independent mental capacity professional.

The Pilot DOLA Form

10. The DOLA form used in the pilot was effectively a simplified hybrid between the current DoLs in England and Wales and the Law Commissions proposed Liberty Protection Scheme. It required:

¹ Whilst this terminology is considered outdated and unhelpful, it has been retained because that is the requirement in both the European Convention on Human Rights and in the St Helena Constitution.

- a. details to be given of the objective medical evidence demonstrating that the person was of unsound mind;
- b. an assessment of capacity;
- c. a care plan; and,
- d. a written record of the best interests decision.

The form would then be reviewed by a person not involved in the day to day care of the person before being authorised.

11. There was a considerable delay between agreeing how the pilot would operate and the completion of the first DOLA form. The first batch of authorisations highlighted a number of problems, particularly around whether there were other less restrictive options. The length of time taken to complete the form was a concern and so some simplification has been made to the form.

The Proposed Legislation

12. It is proposed to amend the Mental Health and Mental Capacity Ordinance to incorporate a human rights law compliant scheme for those whose liberty needs to be restricted in order to care for them. This will be done by inserting a new provision permitting a person to be deprived of their liberty where:
 - a. Authorisation for the care plan has been obtained in accordance with a new schedule to the Ordinance; or,
 - b. The care plan has been authorised by the court; that being either the Magistrates' Court or the Supreme Court.
13. There will also be a new provision giving a person who has been deprived of their liberty under a care plan that was authorised in accordance with the schedule to ask the court to review that decision. That right may also be exercised by another person if the court gives permission.
14. The schedule will permit the Director of Safeguarding to authorise a care plan which includes restrictions that amount to a deprivation of liberty where:
 - a. There is objective medical evidence that the person is of unsound mind;

- b. There is an assessment of capacity which has concluded that the person lacks the mental capacity to consent to the restrictions;
 - c. The person has a relative or close friend who is able to represent their wishes (with the assistance of an advocate if requested) or an independent advocate has been instructed to represent the person;
 - d. The person has not made a valid advance decision that is inconsistent with the care plan;
 - e. The deprivation of liberty is not for the purpose of treating a mental illness (in which case, the provisions under Chapter 1 of the Ordinance must be used);
 - f. The care plan is in the person's best interest having regard to the available options and resources; and,
 - g. There is no reason to believe that the person objects to the arrangements in the care plan.
15. The assessments and care plan will be completed by a social worker or social care officer and will be approved by a team manager.
16. Where there are reasons to believe that the person objects to the arrangements, it will be necessary to ask the court to authorise the care plan.
17. If this proposal is approved, a draft Bill will be prepared and public consultation will follow.

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