

Law Commission unveils proposals for Deprivation of Liberty Safeguards replacement

Protective care scheme aims to cut bureaucracy and introduce more human rights protections into mainstream care management

By [Andy McNicoll](#) on July 7, 2015 in [Adults](#), [Deprivation of liberty](#), [Mental Health](#)

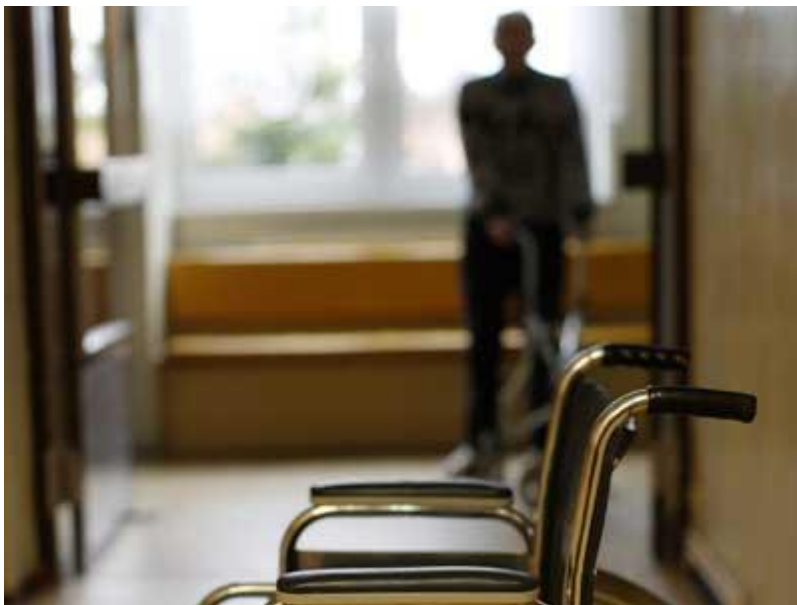


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The Law Commission has unveiled its much-anticipated proposals for a framework to replace the Deprivation of Liberty Safeguards (Dols) after concluding that the current system was “deeply flawed”.

[Draft proposals for a new framework](#) to protect the human rights of people in England and Wales who lack the capacity to consent to their care arrangements have been published for consultation today. If accepted by government they could see legislation to reform deprivation of liberty law introduced in the 2017-18 session of Parliament.

The government asked the Law Commission to design a new scheme amid concerns that the current system was not fit for purpose and was failing to cope with a [tenfold rise in deprivation of liberty cases](#) triggered by a Supreme Court ruling in March 2014.

The Law Commission's proposed umbrella framework, provisionally titled 'protective care', covers care homes, hospitals, supported living, shared lives and domestic settings. The nature and extent of the safeguards offered by the system vary according to the care setting and level of restrictions proposed.

The commission recommends that deprivation of liberty cases involving mental health patients should be handled separately by amending and extending the scope of the Mental Health Act.

The current system

Under the current system, any deprivations of liberty in care homes and hospitals must be authorised under the Dols. This process involves six assessments and is coordinated by best interests assessors (BIAs), who are typically specially trained social workers.

In order to authorise deprivations of liberty in other settings, such as supported living, local authorities must currently apply to the Court of Protection. This is often a complicated and costly process. Councils made just 1.6% of the court applications they believed may have been necessary to comply with the law in 2014-15, [research published last month by Community Care revealed](#).

The Law Commission found that there was a "compelling case" for replacing the current system. It concluded that the Dols was perceived as overly complex by practitioners and was not meaningful enough for service users and carers.

The commission proposes what it labels a more "straightforward" system that would remove unnecessary bureaucracy. The proposed scheme also aims to better integrate human rights protections into assessments and care planning undertaken as part of the Care Act, Mental Capacity Act and Welsh social care legislation.

In another significant change, the proposed replacement scheme would apply to people aged 16 and over. The Dols only covers people aged 18 and over.

A proposed two-tier system to cover social care

At the heart of the Law Commission’s proposed new system is a two-tier framework for safeguarding the rights of people in care homes, supported living and other community social care placements.

The first tier, known as ‘supportive care’, would place a duty on local authorities to offer baseline preventive safeguards. This would include the appointment of an independent advocate or appropriate person. ‘Supportive care’ would be triggered where a person is facing a move into one of the settings – or more restrictive care in an existing setting – and lacks the capacity to consent to this.

The second tier, known as the ‘restrictive care and treatment scheme’, would kick in when people are subject to “sufficiently intrusive or restrictive care”. Cases meeting this criteria would trigger an extra layer of safeguards, including strengthened rights of appeal through a tribunal system.

The ‘restrictive care and treatment’ scheme would provide the legal authority to deprive a person of their liberty. In this regard, it is the direct replacement for the Dols. However, the scheme will also cover cases where restrictions fall short of the ‘deprivation of liberty’ threshold so it effectively extends safeguards to a broader group of people than the Dols. The scheme could also be used to authorise a deprivation of liberty in family and other domestic settings.

Approved mental capacity practitioners

The Law Commission recommends that the ‘restrictive care and treatment scheme’ is overseen by a new approved mental capacity professional (AMCP) role. This would be a revised and expanded version of the current BIA role.

The AMCP role is designed to reflect an “equivalence of skills and knowledge” in the Mental Capacity Act to that of the approved mental health professional (AMHP) – the group of practitioners – mostly, but not exclusively, social workers – trained to coordinate Mental Health Act assessments. Like the AMHP role, the AMCP would act as independent decision-makers on behalf of a local authority.

If the AMCP recommendation was taken up by government, transitional provisions should be made to enable BIAs to become AMCP assessors “without significant administration or expense”, the commission said.

What would the scheme mean for social workers?

The ‘supportive care’ part of the Law Commission’s framework would come into effect if

you held a case where someone was facing a move into a care home or community placement – or more restrictive care in an existing placement – and they lacked the capacity to consent to this.

The social worker's job would be to ensure that preventive safeguards were in place, notably that the person had access to an independent advocate or appropriate person in order to make sure that their case could be reviewed. There would be no requirement for an independent assessment and in most cases the preventive safeguards would form part of existing assessments under the Care Act or the equivalent legislation in Wales.

The social worker would also have to consider whether the level of restriction being proposed for the new care placement could require a referral for the 'restrictive care and treatment' scheme, which comes with additional safeguards. If the social worker believed that the person may meet the threshold for 'restrictive care and treatment' they would refer the case to an approved mental capacity practitioner (AMCP).

The AMCP would then be required to undertake an assessment themselves or to arrange and quality assure an assessment to be undertaken by a professional involved in the person's care, such as the case-holding social worker, to check if the person met the criteria. This would be done by checking a 'non-exhaustive' list of restrictions, such as whether the person was under 'continuous or complete supervision and control' or 'free to leave'.

The AMCP would also be required to make sure that care arrangements complied with the Care Act, or equivalent Welsh legislation, and Mental Capacity Act. They would have a duty to ensure that regular review meetings took place, involving the family, and an advocate or appropriate person was involved in the person's care.

The AMCP would also have the power to recommend that conditions should be included in the care plan. The 'restrictive care and treatment' scheme would also include the right for the person, the AMCP, family members, advocates or an appropriate person to seek reviews of the care plan and apply to a First-Tier Tribunal to appeal their case. There would also be a right to appeal any decision of the tribunal to an Upper Tribunal or Court of Protection.

Arrangements for health and mental health settings

The Law Commission proposals also include separate arrangements for authorising deprivation of liberty cases involving hospitals or mental health patients.

A 'hospital settings scheme' would apply to patients in hospital and palliative care settings. This would allow for a person to be deprived of liberty for up to 28 days in hospital based on the report of a doctor. Any further authorisation for deprivation of liberty would require a referral to an AMCP. This scheme would focus on deprivation of

liberty rather than the broader 'restrictions' focus of the framework to cover social care settings.

The Law Commission also concluded that practitioners found the relationship between the Dols and the Mental Health Act confusing. It proposes amending the Mental Health Act to create a new mechanism for handling deprivation of liberty cases involving mental health patients.

The underlying principles

The commission's proposed scheme is underpinned by a number of key principles. These include that the system should be rooted in the Mental Capacity Act, should be straightforward and non-elaborate, should be aimed at delivering improved outcomes for people, their families and carers, and is compliant with the European Convention on Human Rights.

The commission has stressed that today's proposals represent an initial view for law reform and it is keen to hear feedback from social workers on the proposed scheme. The consultation period will last four months. A report with final recommendations and a draft bill outlining a new scheme will be produced for ministers by the end of 2016.