1.0 Introduction

The Law Commission’s review of DoLS began in 2014 following a request by the Department of Health and in response to a report by a House of Lords Select Committee report which concluded that the DoLS legislation was ‘not fit for purpose’. After a lengthy and detailed consultation, the Commission published its final report and draft bill on 13 March 2017.

The Law Commission is of the view that the current system should be replaced "as a matter of pressing urgency". The report argues that the DoLS are overly technical and legalistic and are not capable of dealing with the increased numbers of people considered to be deprived of their liberty following Cheshire West and requiring safeguards. It points to widespread reports of backlogs, breached statutory timescales and increased workloads for the public sector. The Law Commission proposes a simpler replacement system called "Liberty Protection Safeguards" which would mean:

1. Enhanced rights to advocacy and periodic checks on the care or treatment arrangements for those most in need
2. Greater prominence 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.
3. Extending protections to all care settings - therefore removing the need for costly and impractical applications to the Court of Protection
4. Widening the scope to cover 16 & 17 year olds and planned moves between settings
5. 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
6. Extending who is responsible for giving authorisations to NHS Trusts, CCGs as well as Local Authorities.
7. 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.

The report sets out 47 recommendations that cover not only deprivation of liberty but also reforms that aim to improve Mental Capacity Act decision-making more widely. This paper provides a brief overview, focusing on the salient points of the report for VoiceAbility.
2.0 Overview of the ‘Liberty Protection Safeguards’ scheme

What settings would the safeguards apply to?

All settings, including hospitals, care homes, respite centres, supported living arrangements and peoples’ own homes. In fact the new scheme is not limited to specific forms of accommodation or residence; it encompasses any situation where Article 5(1)(e) of the European Convention on Human Rights (ECHR) is potentially engaged.

What about age limits?

The proposed new system would apply to 16 and 17 year olds, not just those 18 and above as currently.

What would the authorisation cover?

Rather than just authorising the deprivation of liberty itself as currently, the proposed system would be ‘portable’ and provide for authorisation of the care regime, including where the person resides, arrangements that a person is to receive care or treatment in one or more particular places and any transport arrangements.

Who would do the authorising?

There will no longer be ‘supervisory bodies’ or ‘managing authorities’ - instead the arrangements would be authorised by the ‘responsible body’, which would be NHS Trusts (for people in hospital), CCGs (for people in receipt of NHS CHC funding) and local authorities (for all other cases, including self-funders).

Conditions for an authorisation?

It is proposed that there will be a list of ‘conditions’ that must be met in order for the responsible body to authorise arrangements which would give rise to a deprivation of liberty, including:

1. The person lacks capacity to consent to the arrangements (this can include fluctuating capacity, as long as capacity is only likely to be regained for a ‘short period’);
2. They are of ‘unsound mind’ (within the meaning of Article 5(1)e of the ECHR and confirmed following a medical assessment)
3. The arrangements are ‘necessary and proportionate’ (by having regard to the likelihood of harm to the person and/or other individuals if the arrangements were not in place and the seriousness of that harm);
4. The required consultation has taken place (for instance with friends/family);
5. An ‘independent review’ has been carried out

6. In certain cases (see below) approval has been obtained from an Approved Mental Capacity Professional, a new role which is intended to build upon the existing best interests assessor role.

7. The authorisation would not conflict with a valid decision of a donee or deputy as to where the person should reside or receive care or treatment

**What would the process involve?**

The ‘responsible body’ (e.g. NHS Trust, CCG or local authority, as explained above) would have to appoint an advocate or appropriate person and then arrange a capacity assessment, a medical assessment and a ‘necessary and proportionate’ assessment (with these three assessments provided by at least two assessors who are independent of each other, but it would be possible to rely on assessments provided on a previous occasion, depending on factors such as how long ago that was).

Once the relevant people have been consulted, an ‘independent reviewer’ will review the assessments and decide whether the conditions set out above apply. The ‘independent reviewer’ should not be someone involved in the person's care, but it could be someone employed by the responsible body (but would not have to be).

The responsible body should be required to produce an authorisation record specifying the detail of the arrangements authorised and the fixed dates or prescribed intervals for reviews. The responsible body is required to keep an authorisation under review generally. There would be a duty to hold a review:

- on a reasonable request by a person with an interest in the arrangements which are authorised;
- if the person becomes subject to the Mental Health Act; or
- if the responsible body becomes aware of a significant change in the person’s condition or circumstances.

**Will there be any additional protection for those objecting to their care plans?**

Yes - the proposals include a second layer of protection in the form of a duty to refer to an Approved Mental Capacity Practitioner (equivalent of AMHPs in the mental health context) if it is reasonable to believe that the person does not wish to reside or receive care or treatment at a particular place; or the arrangements are wholly/mainly for the protection of others. In all other cases there would be a power to refer cases to an Approved Mental Capacity Professional.

The Approved Mental Capacity Professional’s role is to determine whether or not to approve the arrangements. They must meet with the person, and can consult other key individuals. The written approval of the Approved Mental Capacity Professional would
enable the authorisation of arrangements by the responsible body. The Approved Mental Capacity Professional’s cannot be someone who is involved in the day-to-day care or treatment of the person. They would act “on behalf” of the local authority but would be independent decision-makers who could not be directed to make a particular decision.

**How long would the authorisations last?**

An authorisation would last for up to 12 months, to be renewed for a further period of 12 months and then for further periods of up to 3 years.

**What about urgent authorisations?**

'Urgent authorisations' would go under the proposed new system. Instead, there would be statutory authority to deprive someone of their liberty temporarily in urgent/emergency situations, but only to enable life-sustaining treatment or to prevent a serious deterioration in the person's condition.

**What would the safeguards be?**

Once residence and care arrangements are authorised, the person deprived of their liberty would be entitled to ongoing rights to advocacy (including appointment of an IMCA to represent and support the person if there is no appropriate person appointed), regular reviews and access to the courts.

**Right to legal challenge?**

Under the Liberty Protection Safeguards the right of legal challenge is to the Court of Protection. But the Law Commission further recommends that the Government should review this matter (as part of its existing programme of reform) and consider whether a tribunal might be more effective.

**Who will monitor the new Liberty Protection Safeguards?**

No decision has been made on this but the draft Bill gives the Government regulation-making powers to require bodies to monitor and report on the operation of the new scheme (such as the CQC and Ofsted).

**How does the Liberty Protection Safeguards interface with the Mental Health Act?**

The draft Bill provides that the Liberty Protection Safeguards **cannot be used:**

- to authorise arrangements carried out in hospital for the purpose of assessing or treating mental disorder, and
- to authorise arrangements which are inconsistent with any requirement under one of the “community powers of the Mental Health Act (such as guardianship or a community treatment order).
3.0 Overview of proposed changes to the Mental Capacity Act

The review proposals and draft bill includes wider reforms to the Mental Capacity Act. These reforms are intended to provide Article 8 of the ECHR rights and improve decision-making under the Mental Capacity Act – regardless of whether a person is being deprived of their liberty. The draft Bill contains three reforms in this respect:

- The best interests checklist in section 4 of the Mental Capacity Act is amended to require greater weight to be given to ascertainable wishes and feelings.
- The statutory defence under section 5 of the Act would not be available to professionals in respect of certain key decisions unless a written record has been prepared, which confirms a number of matters, for example that a formal capacity assessment has been undertaken and rights to advocacy have been given effect.
- The Government is given regulation-making powers to establish a supported decision-making scheme.

Unlawful deprivation of liberty

The draft Bill provides that where care or treatment arrangements are put in place by, or on behalf of, a “private care provider” which give rise to a deprivation of liberty (and have not been authorised), the person may bring civil proceedings against the provider. The provider would not be liable if it reasonably believed that the arrangements did not give rise to a deprivation of liberty or the deprivation of liberty was authorised.

Coroners

The draft Bill would amend the Coroners and Justice Act 2009 to provide that the duty to hold an inquest would not apply automatically to people subject to the Liberty Protection Safeguards. The Law Commission also recommends there be additional safeguards in place when a death is attributed to a lack of care.

Code of Practice

The Law Commission have recommended the publication of a new Code of Practice covering all aspects of the Mental Capacity Act, which should include the new Liberty Protection Safeguarding scheme.
4.0 The role of an advocate under the Liberty Protection Safeguards

Under the Liberty Protection Safeguards the ‘responsible body’ has a duty to appoint an IMCA or an ‘appropriate person’ to represent and support the person to whom the arrangements would apply unless the cared for person (formerly P) does not consent or, if the person lacks capacity to consent, unless the responsible body is satisfied that being represented by an advocate or the proposed appropriate person would not be in the persons best interests. This duty applies when the responsible body is proposing to authorise arrangements (see flow chart).

If an appropriate person is appointed for the cared for person, the responsible body must appoint an IMCA to support the appropriate person unless they do not consent. Thus it is intended that advocacy is provided automatically on an opt-out rather than an opt-in basis.

The role of the IMCA is to represent and support the person OR to support the appropriate person if one is appointed. The role of an appropriate person is imported from the Care Act and cannot be someone who is engaged in providing care or treatment to the person in a professional capacity or for remuneration. The Law Commission are not proposing to retain the relevant person’s representative role under the new scheme believing it to be essentially identical to the appropriate person’s role.

The draft Bill introduces new regulation-making powers as to how IMCAs and the appropriate person are to discharge their functions of representing and supporting the person. The advocacy duty is ongoing and continues throughout the period of authorisation. The ‘responsible body’ has a duty to keep under review whether the appropriate person or IMCA is undertaking their functions.

The Law Commission has sought to ‘tidy up’ some aspects of advocacy legislative provisions. In particular, the draft Bill amends s39 of the Mental Capacity Act (the duty to provide an advocate for long term accommodation decisions). This section will not apply if the accommodation is being provided under the Care Act as the adult will already be eligible, potentially, for an advocate under this legislation. Instead the duty under s39 would only apply if the accommodation is being provided under s117 of the Mental Health Act.

No amendments have been made to relevant regulations or guidance concerning the Mental Capacity Acts provision of a power to appoint an IMCA for safeguarding or review of accommodation but the Law Commission says it would expect the Government to make the necessary changes if the Bill is taken forward ie that these would both be covered by the Care Act advocate. Indeed, the Law Commission
believes that the power in Reg 4 (adult protection) of the Mental Capacity Act 2005 may be obsolete as it ties the power back to arrangements made under previous statutory guidance (which have now been repealed under the Care Act).

Finally, the Law Commission makes a strong recommendation urging the Government to review current levels of advocacy provision, not just under the Mental Capacity Act but also under the Care Act & Mental Health legislation.

5.0 What happens next?

The next step will be for the Department of Health to respond to the Law Commission’s recommendations, which should happen within 12 months.

Depending on whether the Department of Health accepts, rejects or suggests modifications to the proposed system, the draft bill produced by the Law Commission alongside its report would then be scrutinised by both Houses of Parliament, as part of the usual legislative process. Any changes are therefore not likely to happen quickly and unless and until these recommendations become law, commissioners, providers and advocates must continue to abide by the DoLS regime in its current form.