

Changes in Mental Health Law in England & Wales

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Overview

- Reforming the Mental Health Act
- Liberty Protection Safeguards
- Mental Health Units (Use of Force) Act 2018 ‘Seni’s Law’
- MHA / CA /MCA interface issues
- Competence, capacity and consent
- CQC

Reforming the Mental Health Act

- Unknown timescale
- Limited Child and Adolescent specific content in consultation, although broader significant change which will apply to CYP
- One specific question in consultation ‘Do you agree or disagree that someone under the age of 16 should be able to choose a nominated person (including someone who does not have parental responsibility for them), where they have the ability to understand the decision (known as ‘Gillick competence’)?’
- In Government response to consultation*
 - Proposal for greater clarity about assessment of decisional ability in CYP, and limits on role of those with parental responsibility to authorise admission, however many issues especially in relation to competence, capacity and the role of parents devolved to the next iteration of the Code of Practice
 - Placing current contractual requirements for rapid network meetings after admission onto a statutory footing
 - Resistance to reduction in time window for CQC notification from 48 to 24hs when CYP admitted to adult ward, but LA to be notified of OOA, Adult ward or admission >28 days
 - Rejection of recommendation all CYP admitted to hospital are considered ‘child in need’ S17 CA

(*didn't include Welsh responses)

Liberty Protection Safeguards (LPS)

- October 2022? E&W
- Will apply to all 16+, unlike the DoLS they replace, bringing 16&17 yo within their scope
- Awaiting Regulations and Code of Practice
- Application of LPS
 - The LPS apply in any setting to individuals who:
 - Are aged 16 and over
 - Lack capacity to consent to the arrangements ‘that enable their care and treatment’ and which give rise to a deprivation of liberty
 - And have a mental disorder
- Authorisation of the young person’s deprivation of liberty
 - The LPS provisions set out procedures to be followed by a ‘responsible body’
- Responsible bodies will be
 - Hospital managers: for arrangements in an NHS hospital
 - CCG or Local Health Board: in cases where a person is eligible for continuing health care
 - Local Authority: in all other cases, including independent hospitals

LPS

- The conditions
 - The conditions to be satisfied before arrangements can be authorised are as follows:
 - The cared for person (P)
 - lacks capacity to consent to arrangements
 - has a mental disorder
 - the arrangements are:
 - necessary to prevent harm to P
 - are proportionate in relation to likelihood and seriousness of harm to P
- Mental Health Act 1983 interface
 - Patients detained in hospital under Mental Health Act 1983 or who are objecting to being in hospital for Mental Health treatment cannot be made subject to authorisation under Part 7 of Schedule AA1.
 - However, it appears that an LPS authorisation can be provided for a patient detained pursuant to Mental Health Act 1983 in circumstances where arrangements which deprive a patient of their liberty is to provide physical intervention or treatment and the patient lacks capacity to consent.
 - P can be subject to authorisation and subject to Mental Health Act requirements insofar as they do not conflict. (CTOs).
 - We await further details of LPS but they do not provide legal authority for the provision of care and treatment. They may have a role in authorising a DoL that arises from such arrangements, but not the arrangements themselves

Mental Health Units (Use of Force) Act 2018

‘Seni’s Law’

- Coming into force ?November 2021
- England only
- (Selected) requirements set out in the Act are:
- section 2 – service providers operating a mental health unit to appoint a ‘responsible person’ who will be accountable for ensuring the requirements in the Act are carried out
- section 3 – the responsible person for each mental health unit must publish a policy regarding the use of force by staff who work in that unit. The written policy will set out the steps that the unit is taking to reduce (and minimise) the use of force by staff who work in the unit
- section 4 – the responsible person for each mental health unit must publish information for patients about their rights in relation to the use of force by staff who work in that unit
- section 5 – the responsible person for each mental health unit must ensure staff receive appropriate training in the use of force. Subsection 2 sets out what that training should cover
- section 6 – the responsible person for each mental health unit must keep records of any use of force on a patient by staff who work in that unit, which includes demographic data across protected equality characteristics
- section 9 – if a patient dies or suffers serious injury in a mental health unit, the responsible person must have regard to any relevant guidance relating to investigations of deaths or serious injuries
- section 12 – if a police officer is going into a mental health unit on duty to assist staff who work in that unit, the police officer must wear and operate a body camera at all times when reasonably practicable

MHA / CA /MCA interface

- Cases that lie ‘at the intersection of three different bodies of domestic law – mental health law, mental capacity law and family law – where judicial decision making is spread over a variety of courts and tribunals’ Sir James Munby
- Artificial division into ‘mental health’ or ‘behaviour’ of CYP with ‘highly complex welfare needs... who fall[s] through the gaps that exist between secure accommodation, regulated accommodation and detention under the mental health legislation’ Lancashire CC v G (Unavailability of Secure Accommodation)[2020] EWHC 2828 (Fam)
- Highlighted by complex cases where issues may relate to appropriate legal framework to employ (including the issue of detainability under the MHA) to authorise a deprivation of liberty, the lack of provision of secure accommodation and/or need for deprivation of liberty in a community setting, or of use of unregulated placements

MHA / CA /MCA interface

- Series of high profile cases
- Re X (A Child)(No.3) [2017] EWHC 2036 (Fam) ‘ the disgraceful and utterly shaming lack of proper provision in this country of the clinical, residential and other support services so desperately needed by the increasing numbers of children and young people afflicted with the same kind of difficulties as X is burdened with’
- Re M (A Child: Secure Accommodation) [2017] EWHC 3021 (Fam) It is profoundly depressing that having analysed the case in the way I have, the Local Authority has not ultimately been able to find a unit that is prepared to accommodate M. Thus I find myself, once again, in a position of considering the needs of a vulnerable young person in the care of the State where the State itself is unable to meet the needs of a child which they themselves purport to parent
- Re S (Child in care: Unregulated placement) [2020] EWHC 1012 (Fam) ‘Samantha's case is depressingly all too familiar to those working in the Family Court, and is I believe indicative of a nationwide problem. There is currently very limited capacity in the children's social care system for young people with complex needs who need secure care’
- Re Wigan BC v Y (Refusal to Authorise Deprivation of Liberty)[2021] EWHC 1982 (Fam) ‘a scenario now depressingly familiar to those in the habit of reading on BAILII judgments given by High Court judges and Deputy High Court judges in cases of this nature, and within the context of acute emotional and behavioural difficulties consequent on past abuse, Y has been assessed as not meeting the relevant criteria for detention under ss.2 or 3 of the Mental Health Act 1983 as he is not considered to be suffering from a mental disorder. At the same time, the therapeutic treatment within a restrictive clinical environment for acute behavioural and emotional issues arising from past trauma that he does urgently require is simply unavailable.’

Although not all cases are about lack of availability of Local Authority secure accommodation

- Re X (A Child) (No 3) [2017] EWHC 2036 (Fam) ‘If...we, the system, society, the state, are unable to provide X with the supportive and safe placement she so desperately needs, and if, in consequence, she is enabled to make another attempt on her life, then I can only say, with bleak emphasis: we will have blood on our hands’ in regard to availability of secure mental health provision (LSU)

MHA / CA /MCA interface

How to authorise for a deprivation of liberty for CYP outside of a hospital setting? The MHA will not be applicable outside of hospital, as a CTO cannot authorise a DoL. Options are S25 CA 89, an order from the Court of Protection for 16-17 yo who lack capacity or via the inherent jurisdiction of the High Court.

Are local authorities, schools, general hospitals etc aware a DoL is occurring and if it is, how is it being authorised?

- A London Borough v X, Y and Z [2019] EWHC B16 (Fam) There remained a dispute however as to whether or not Z was deprived of his liberty in the family home. It was agreed that his living arrangements (in which he was under constant supervision and not able to go out on his own) were a restriction on his liberty when compared to others of his age. However, the local authority argument that the objective criteria was not met was rejected, and a DoL was occurring which was imputable to the state.
- Hertfordshire CC v NK and AK [2020] EWHC 139 (Fam) declined to make a DoL order in respect of a 16 year old, on the basis that he did not consider that the child's current circumstances amounted to a deprivation of his liberty. 'An anticipatory order could be made in principle, it was an exceptional remedy and one to be used sparingly.' 'The current use of DOL orders to restrict the liberty of children in residential placements is a remedy that sits outside the statutory regime established by Parliament, after due consideration and debate, for the secure accommodation of children pursuant to s 25 of the Children Act 1989'
- Re B (Secure Accommodation Order) [2019] EWCA Civ 2025. 'I am increasingly concerned that the device of resort to the inherent jurisdiction of the High Court is operating to by-pass the important safeguard under the regulations of approval by the Secretary of State of establishments used as secure accommodation.'

Recent case law - competence, capacity and consent

- 'The Conventional Wisdom Prevails'. In the matter of X (A Child) (No 2) [2021] EWHC 65 (Fam) nothing has changed and the law remains as was: i.e. where a Gillick competent child refuses to consent to medical treatment, the court may, in the exercise of its inherent jurisdiction, override the child's wishes in the child's best interests and give its consent to his or her treatment.

Recent case law - competence, capacity and consent

- Bell Vs Tavistock [2020] EWHC 3274. “highly unlikely” <13 and “doubtful” 14 and 15 yo would be competent to consent to puberty blockers.
- Bell Vs Tavistock [2021] EWCA Civ 1363. Court of Appeal
 - “The case of Gillick v. West Norfolk and Wisbech Health Authority had decided that it was for doctors, not judges, to decide on the capacity of under-16s to consent to medical treatment. It had been said in R (Burke) v. General Medical Council there were great dangers in a court grappling with issues which were divorced from the factual context that required their determination. The court should not be used as a general advice centre”.
 - “the Divisional Court was not in a position to give guidance that generalised about the capability of persons of different ages to understand what was necessary for them to be competent to consent to the administration of puberty blockers. The guidance would require applications to the court when there was no legal obligation for such an application to be made”

CQC

- ‘We intend to focus more clearly on the human rights aspects of the working of the MHA during MHA monitoring visits’ CQC 2020
- Of particular relevance to mental health practice
 - Article 2: Right to life
 - Article 3: Freedom from torture and inhuman or degrading treatment
 - Article 5: Right to liberty and security
 - Article 8: Respect for private and family life, home and correspondence
 - Article 14: Protection from discrimination in respect of these rights and freedoms