

RECOMMENDATIONS FOR LIBERTY SAFEGUARDS

1. Revised mental capacity legislation should provide legal mechanisms, criteria, and procedures, to govern decisions involving the deprivation of liberty of people who lack capacity, referred to as “Liberty safeguards”,⁵³⁴ including:
 - a) a two-step authorisation process to, initially, identify a deprivation of liberty, and then to monitor an ongoing deprivation of liberty;
 - b) rules governing how such decisions are to be made, by whom, and under what process; when the liberty safeguards are to be used; their duration and discharge;
 - c) a standard stating that decisions should be made in the best interests (and according to the known will and preferences) of the person, when the liberty safeguards apply;
 - d) a speedy mechanism for the designated decision-maker, whether an independent individual (for example, the equivalent of the District Inspector under the MH(CAT) Act) or a public body that can provide independent oversight to authorise a deprivation of liberty, with ready access thereafter to review of the decision by a Tribunal or the Family Court;
 - e) a Code of Practice for health and social service providers to operationalise the liberty safeguards;
 - f) a publicly appointed and independent person or body to be available to act an advocate for people who lack capacity and who have no other suitable person to support and represent them in the liberty safeguarding process; and
 - g) options for ensuring the oversight and monitoring of compliance of these liberty safeguards by a public body or agency (such as a Public Guardian) established under the legislation.
2. A comprehensive review should be undertaken of legislative schemes regulating deprivation of liberty in comparable jurisdictions, including the proposed legislation and changes to the MCA to be recommended by the English Law Commission (due end of 2016).
3. Consultation with the health and disability sector in the development of the liberty safeguards that could be enacted that would have sufficient flexibility to cover the range of environments where deprivations of liberty occur, and could operate in the most effective and cost-efficient way.

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The term “liberty safeguards” is suggested as preferable to “deprivation of liberty safeguards”. According to the English Law Commission, the naming of the proposed new safeguards has provoked the most debate in the Law Commissions proposals to date. This is because some consultees understood the phrase “deprivation of liberty safeguards” to mean that people were being denied access to legal rights. The English Law Commission is consulting further on this aspect of its review of the legislation: Law Commission, Interim Statement, above n 225.