Jess Flanagan
Senior Associate solicitor
Health and Welfare Court of Protection
Clarke Willmott

What follows is a brief summary of my concerns about the current system and how, on a practical basis, I cannot see how the new system will protect those that it intends to protect.

Having read the bill, and in particular the recent response from the government providing a statutory definition of what a deprivation of liberty is not, I am honestly at a loss as to how I would be advising my junior staff, my clients and advocate referrers when faced with a real life scenario. Which needs to be answered urgently.

I've practiced welfare law in the CoP for 10 years. I was amongst the first in our region to issue s21A applications where the RPR applied to be litigation friend. I pushed for the guidance provided by Baker J in the case of RD to clarify when an application needed to be brought on P's behalf. I present and write on the subject regularly.

The system we have is flawed, but we can now all just about follow it.

It doesn't always protect P. I have several clients who are DOL but not authorised. This is unlawful and the practical impact of this is that the individual is left without important safeguards. For my clients (usually P), this is usually lack of an advocate of RPR and the inability to apply to court promptly to challenge the DoL. This means they remain in a placement they hate, generally becoming more and more frustrated or worse, apathetic, risking losing their home to ensure their care is paid for, or becoming so deskilled or more quickly unwell, that the chance of moving home or elsewhere by the time the decision comes to be made has long passed.

The current system is broken. The government's proposed system will not work practically either. Whatever system to authorise a DoL is put in place needs to ensure that those 2 fundamental protections, along with everything else set out (following extensive research and consultation) by the Law Commission are given immediately. Not after a long and consulted decision making process to see if an individual doesn't meet the consulted set of criteria recently set out.

If professionals are faced with a complicated set of criteria to apply to determine when someone is NOT deprived of their liberty, mistakes are going to be made. Importantly and counter productively, that definition is going to set off another 10 years worth of litigation to work out what parliament intended. That cannot be right for our clients, those deprived of their liberty, because their cases and those of others will be stayed and decisions delayed whilst the people of the ground wait for the lawyers in this area to seek and provide clarity over something that has already been through every court in our land.

Listen to what the Law Commission first said. Listen to Lucy Series, to the Law Society and to Neil Allen. Listen to the advocacy groups, to the social workers who spend their days firefighting these types of cases and listen to how they are calling out for simplicity, not more complexity. Listen to people who feel really truly nervous that the prised system will not do the job it needs to do. Why would you fix a failing system with something worse. It makes no sense. It will cost far more to rush through a botched job because it will cost millions in court costs to fix it.

This new system has been called for to ensure that it is simplified. Any new system needs to be actually and practically capable of protecting the rights it strives to. Otherwise what on earth is the point?