

Mental Capacity (Amendment) Bill 2018 House of Lords Committee Stage

September 2018

The Law Society of England and Wales is the independent professional body that works to support and represent its 180,000 members, promoting the highest professional standards and the rule of law.

1. Introduction

The briefing outlines the views of the Law Society ahead of the Committee Stage of the Mental Capacity (Amendment) Bill in the House of Lords on 5 September. This Bill seeks to amend the Mental Capacity Act 2005 (MCA) in relation to procedures in accordance with which a person may be deprived of liberty where the person lacks capacity to consent, and for connected purposes.

2. Executive summary

- We agree there is an urgent need for simplification of the current system including the removal of unnecessary administration. However, the proposed statutory scheme in the Bill would weaken important safeguards provided under the existing Deprivation of Liberty Safeguards scheme (DoLS). We would prefer to work with government to achieve the intended improvements building on experience and lessons learned from the existing DoLS scheme rather than wholesale removal of the current protections.
- We acknowledge the resource constraints, but those constraints, inescapable as they are, are insufficient justification for not implementing fully the safeguards recommended by the Law Commission.
- The MCA 2005 has been in place for over a decade; replacement provisions are likely to be in place for at least as long and will affect tens of thousands of people. Getting those provisions wrong will come at a significant cost to vulnerable individuals and to the rest of society.
- Other than violating the right to life and the prohibition of torture there can be no greater interference with a person's fundamental rights than depriving them of their liberty. Any statutory scheme which permits the state to deprive someone of their liberty for the purpose of providing care and treatment must be robust and comprehensible. **As it stands, the Law Society does not believe the Bill has sufficient safeguards and is not fit for purpose in its current form. It requires serious re-consideration and extensive revision.**
- However, this could be achieved by building on what has been learned from the existing scheme rather than wholesale removal of the current protections.
- The new scheme must ensure the right of the person to object to and challenge the arrangement. If the person is unable to object, there must be a proper independent review of the need to interfere with their fundamental freedom, to confirm that necessary care and treatment cannot be delivered other than by depriving the person of their liberty.

- The Liberty Protection Safeguards (LPS) as currently proposed in the Bill do not satisfy those tests and will weaken important safeguards provided under the existing DoLS which they will be replacing.

For the Bill to be fit for purpose the Law Society recommends changes in the following areas:

- elevating the wishes and feelings of cared-for people so that they are at the centre of the decision-making process and their views given appropriate weight in all decisions
- ensuring that the Bill is underpinned by the guiding principles of the MCA 2005 and the United Nations Convention on the Rights of Persons with Disabilities (UNCPRD)
- reconsidering of whether it is appropriate for care providers to be given responsibility for assessment processes and whether the suggested process can guarantee the necessary independence to be legitimate
- addressing how the vital initial decision is made to remove someone from their home into a care home or to discharge them from hospital into a care placement where they are deprived of their liberty
- strengthening review processes for authorisations to ensure that cared-for people and those concerned with their welfare have the effective opportunity and support to challenge overly-restrictive authorisations
- careful consideration of how the Liberty Protection Safeguards (LPS) will apply to 16 and 17-year olds now that the government is reviewing its initial decision to exclude this important group

3. Principles of a new safeguarding framework

Any new safeguarding framework should follow these principles:

- the cared-for person being at the centre of the process in terms of consultation and facilitated engagement in the process of decision making throughout the process
- a requirement for robust evidence of mental capacity on the issue(s) /decision(s) to be taken
- independent overview as to the options available to ensure that deprivation of liberty is necessary, the least restrictive option, and in the cared-for persons best interests
- power to place conditions on any authorisation, as at present
- regular review of the authorisation (not less than annually) with updated evidence of capacity and best interests including independent oversight
- support for the cared-for person and those concerned with their welfare to seek a review of the decision from a suitable independent professional

- effective and supported access to the Court of Protection in cases of dispute, genuine uncertainty around capacity and/or best interests

We are concerned that this Bill does not meet these principles as it includes:

- an already overly complex scheme being further complicated by a replacement scheme which instead of placing the cared-for person at the centre of the process, significantly dilutes and even removes the existing protections for them
- the risk of increased burdens on local authorities who will bear ultimate responsibility for mistakes and poor implementation rather than building on the learning from the problems with DoLS and retaining those elements that have been effective whilst removing those which are unnecessary and bureaucratic
- the cared-for person will not be at the centre of the process but side-lined with decisions being made without proper or even basic protections
- the removal of the invaluable role of Best Interests Assessors and Relevant Person's Representatives would leave vulnerable people without protection from unnecessary detention.

Our analysis of the the Bill as drafted shows that it does not meet its stated objectives and would put cared-for people in a more vulnerable position than they are today under the DoLS regime. We recognise that the existing scheme is too burdensome but replacing it with something worse is not the way forward.

Case study

P is discharged from hospital to a care home, instead of their own home. They are not happy but have not made specific objections as they have been told this is where they will live and that they cannot go home as a decision has been made that they are not safe at home.

If such a decision is made, there are no safeguards nor independent oversight to allow consideration of alternative arrangements such as a return home with a care package, assistive technology, and activities to provide support and oversight.

The care home manager will not have the knowledge or time to be able to explore alternatives, quite apart from the conflict issue. Even if a return home may not be feasible there are often cases where people are discharged to the only care home with a vacancy at the time, and it may be that another home is nearer to familiar places or relatives which was not taken into account at the time of placement.

Without someone to review the decision, it is likely that P will remain in the care home for years.

4. Putting the person at the centre of the Mental Capacity Act

Placing a stronger emphasis on the wishes and feelings of the cared-for person in best interests decisions was a central element of the Law Commission's proposals, that has not been reflected in the Bill.

We are disappointed that the Bill moves away from this, instead looking at whether an arrangement is 'necessary and proportionate' (set out in s11). Another important recommendation was to introduce a supported decision-making scheme into the MCA which would be consistent with international best practice.

To ensure that the person is at the centre of the Mental Capacity Act, the Bill should be amended in the following ways:

- Adopt the Law Commission's proposal which would reflect the direction increasingly taken by judges in the Court of Protection and the Supreme Court and would also be compliant with the United Nations Convention of the Rights of Persons with Disabilities (UNCPRD)
- Amend the best interests principle contained in the MCA 2005, supported by a revised Code of Practice. Currently there is no hierarchy of factors, which leaves the person's wishes and feelings as just one factor among others.

Although non-legislative measures may also assist here, legislative change would provide clarity for both the person concerned and those implementing the law.

This would be more effective than any educational campaign in ensuring that the wishes and feelings of the cared-for person are adequately and appropriately taken into account.

We recognise that there are legitimate concerns about the potential for abuse or undue influence, but the proposal at this stage is only to create a power to make regulations. This provides time to consult upon an approach to supported decision-making based, on existing strengths in England and Wales but also learning from the experiences of other jurisdictions that have fully fledged schemes.

Creating the power at this stage would keep that option open without requiring further parliamentary time.

5. Underpinning principles in the MCA 2005 and UNCPRD

The wishes and feelings of the person should be at the heart of the Bill, but this should not weaken safeguards for those who are unable to express their feelings or who do not challenge arrangements which may not be in their best interests.

To ensure that the principles in the MCA 2005 and UNCPRD are reflected in the Bill, the Bill should:

- Embed the principles that underpin the MCA 2005 and UNCPRD in the new scheme¹.
- Codify that the authorisation of assessments under the LPS conform to the MCA best interests principle so that they are MCA compliant and robust.
- Make amends that give guidance to a responsible body which will allow them to know if the arrangements are in the best interests of the person if best interests do not form any part of the assessment, contrary to the provisions of s4 of the MCA.

- Give sufficient detail on the test of ‘necessity and proportionality’. It is not clear to which aspects of an assessment the test of necessity and proportionality applies. We suggest the test should be in relation to:
 - the wishes and feelings of the person
 - the availability of alternative arrangements and;
 - the likelihood and seriousness of the risk of harm to the person.
- Provide statutory clarification so that arrangements cannot be authorised under the LPS scheme if they relate to care or treatment that has been validly refused by a deputy or attorney, or by the person themselves, in an advance decision refusing treatment.
- Amend the test of ‘unsoundness of mind’ to remove the stigmatising and derogatory language, We strongly encourage the use of a different test, such as whether the person has ‘any disorder or disability of the mind’ (the definition of ‘mental disorder’ in s 1(2) of the Mental Health Act 1983 (as amended).
- Remove the distinction between the ‘arrangements’ and ‘care and treatment’ as it will result in difficulties when applied in practice. For example, how would a person’s capacity to make medical treatment decisions or decisions about contact with others be distinguished from decisions about the ‘arrangements’ to provide that treatment or to prevent contact with others? It is essential that any provisions do not dilute the principle in s 2(1) MCA 2005 that capacity is assessed on a ‘decision specific’ basis.
- Include a requirement to consider alternatives to the arrangements proposed within the LPS and ensure there is the provision of information to enable this exercise to be undertaken.

Many people are deprived of their liberty simply because no or insufficient consideration has been given to alternatives which could ensure that the person remains ‘free’ and still has access to the care they need. We are concerned that in some cases, particularly care home arrangements, those charged with assessing mental capacity may not have information to hand about possible alternatives to share with the person at the centre of the decision. There will then be a very real risk that the resulting assessment of capacity will be flawed.

6. Assessment processes

The Bill sets out a simplified process of assessment and review when compared with the current process under the DoLS. We welcome a clear and straightforward approach provided that it is workable in practice and provides a robust set of safeguards for cared-for people. Regrettably, the process set out in the Bill falls short of this.

We recognise that whoever has responsibility for a new system of authorisation will continue to have difficulty if they are not adequately resourced, and that the sheer numbers of authorisations required means that this simply is not likely to happen.

We believe that there is scope to limit the circumstances in which an authorisation would be required, in particular for family settings. We also believe that an extension to the duration of authorisations in such circumstances could be helpful in terms of the resource burden, where a person is well-supported. There is a discussion to be had around a longer authorisation period than

one year in those circumstances, but the Bill would have to provide for them as exceptions to the general rule.

Under the Bill, it will be care homes instead of local authorities who in future will have assessment responsibilities. We have the following concerns:

The **conflict of interest** that arises when the detainer is required to assess the detainee, particularly where direct financial interest is at play, is obvious and must be addressed if the proposals in the Bill are to be Article 5 compliant. 4.

- The significant burden of conducting or arranging assessments will fall on care homes (through the care home manager) and whether they will be able to conduct those assessments promptly and robustly, or with the **necessary objectivity and independent scrutiny**. Care home managers may not be best placed to judge the necessity or proportionality of the arrangements, given that they may not be aware of potential alternatives. This means that the preventative focus of the Law Commission's proposed scheme will be lost. The Bill's scheme risks becoming a confirmatory exercise rather than ensuring that a person is deprived of their liberty only when that is necessary and in their best interests, and there is no other option.
- Assessments also require **expertise** and it is not clear that these skills and resources will be readily available, given the pressures which care home managers are under.
- Placing the assessment process in the hands of care home managers means that the **limited safeguards** contained in the process will become available to the cared-for person at too late a stage in their journey. By the time a decision has been reached to place a person in a particular care home, or the person has already been placed, many of the most significant decisions affecting them will have already been taken.
- There is a clear risk that the **costs of conducting or arranging assessments** will ultimately be passed on to those paying for care home placements, including local authorities and care commissioning groups and, in self-funding cases, the cared-for person themselves.

We recommend that the Bill should provide for a standard form for use when conducting assessments for the LPS. The Bill does not propose that there be a standard form for use when conducting assessments for the LPS. We see merit in such a form being introduced to guide those involved in the process and to ensure that minimum standards are met across the board. The use of a standard form would also support effective audit of the assessment process, for example, by Care Quality Commission and other organisations. However, this should not prevent the use and consideration of other assessments where they have already been undertaken, as long as the evidence to support continued deprivation of liberty remains relevant at the time of the assessment.

7. Independent scrutiny and safeguards

All three assessments are to be carried out by one person although the Bill requires a pre-authorisation review to be undertaken by someone who is not involved either in the day- to -day care of the cared for person or their treatment.

In permitting all three assessments to be carried out by one person too great a reliance is placed upon a single individual, significantly weakening the safeguards for the cared-for person. **We are**

concerned that the review does not have to be conducted by someone independent of the responsible body or care home.

Independent review by an approved mental capacity professional (AMCP) is mandated only when the cared-for person is considered to be 'objecting' to the arrangements for their residence or care. This withholds a valuable safeguard from a potentially significant number of cared-for people (i.e. those not objecting) who may not express a view but need independent professional oversight before a decision is made to detain them. Importantly, whether a person is objecting is often a matter of interpretation and even when an AMCP is involved there appears to be no requirement to consult with the cared-for person.

There is no obvious means for the responsible body to learn about the person's objections if the care home manager does not inform them. The absence of explicit triggers for an independent review is highly regrettable and should be addressed.

Crucially, and unlike the DoLS, there is no provision in the Bill for conditions to be placed upon an authorisation requiring, for example, review of, or amendments to, the care plan. This removes an essential safeguard against overly- restrictive arrangements. The maximum period of a first authorisation under the LPS is 12 months. It may be renewed for up to a further 12 months, after which it may be renewed for up to a further three years on each occasion.

To ensure independent scrutiny and provide sufficient safeguards, the Bill should:

- Create an explicit duty to conduct independent assessments where a concern has been raised by a third party, where those close to the person are voicing concerns (whether or not the person themselves is) or where there are particularly restrictive measures involved, such as restrictions on contact with named persons.
- Remove the option to renew an authorisation for up to three years on each occasion and limit the maximum period for authorisation to no more than 12 months.
- Create a clear duty on the responsible body to refer cases to the Court of Protection when it is appropriate to do so having regard to the potential interference with the person's Article 5 and Article 8 rights.

8. Review processes

We recognise that there is a balance to be struck between ensuring proper safeguards for the cared-for person and reducing the bureaucracy of repeated and unnecessary assessments.

Clause 26 permits there to be no proper review for a three-year period which could be repeated, and without up- to -date assessments being undertaken. This is not sufficient to secure a person's right to review or to take account of changes in the person's health and mental state over what is plainly a very long period in the context of many care home placements (most are for less than three years). The current proposals are not fit for purpose in that they would allow detention to continue for years without any formal or up- to- date evidence being required.

To improve the review process, the Bill should:

- Include a requirement for an annual review which should be based on up to date assessments including consideration of the options that might be available for the person in a less restrictive setting. A simple form could be devised prompting the assessor to ensure each of the authorisation conditions are met and options considered. They should also obtain a short, updated capacity assessment as well as consider the person's best interests.

9. Removal of the power to place conditions on authorisations

Under the existing scheme the power to impose conditions has proved to be an essential element of the independent overview of the person's detention and to ensure that measures are not unnecessarily restrictive. Conditions which, for example, provide for the person to be able to sit in the care home's garden every day, or to be taken out once a week are vital to ensure that decisions are the least restrictive in accordance with the fundamental principles in s.1(6) MCA 2005.

The Bill should:

- Include the power to impose conditions to ensure that decisions are the least restrictive in accordance with the fundamental principles contained in s.1(6) MCA 2005. This would mean replicating the power set out in MCA 2005 Schedule A1 Part 4 paras 51-53

10. Challenging authorisations

There are no adequate measures in the Bill to support cared-for people in querying or challenging authorisations. There appears to be no provision which requires the cared-for person to be provided with a copy of the documentation which relates to their detention and rights of appeal. Nor does there appear to be a duty to record decisions.

The removal of independent oversight by the Best Interests Assessor, and also the independent role of the Relevant Persons Representative leaves the cared-for person without any protection or support.

Cared-for people who may be deprived of their liberty, are, by definition, vulnerable and in many cases, they will not be able to actively seek help. The proposed scheme will remove crucial safeguards and provide a barrier to external agencies supporting the cared-for person in cases where restrictions and deprivation of liberty are unlawful.

To allow for a cared-for person to challenge authorisations, the Bill should:

- Insert a duty for decisions to be recorded and for documentation to be obtainable by the cared-for person when related to their detention.
- Provide additional support and safeguards, not fewer, to ensure that arrangements are necessary, proportionate and also in the best interests of the person, and the least restrictive option in the circumstances as the cared-for person will in many cases be lacking mental capacity.

11. Application of the LPS to 16 and 17-year olds

As currently drafted, the LPS proposals apply only to individuals aged 18 and over. We welcome the government's willingness to review its decision to exclude young people aged 16 and 17 from such safeguards. When reviewing this decision, we would recommend the Government considers the following points:

- **Clarity on when the safeguards for the authorisation of a deprivation of liberty will be engaged** - Specifically the role of parental consent when determining whether a deprivation of liberty has arisen (the appeal against the Court of Appeal's decision in *Re D (A Child)* [2017] EWCA Civ 1695 is to be considered by the Supreme Court in the Autumn).
- **Co-ordinated approach** - Considering the application of the proposed safeguards in the context of: (a) the Mental Capacity Act (MCA) 2005 - for example, only individuals aged 18 and over can appoint attorneys (lasting powers of attorney) and make advance decisions to refuse treatment; and (b) existing legal frameworks that are applicable to under 18s – in addition to considering other legal mechanisms for authorising a deprivation of liberty (e.g. section 25 of the Children Act 1989), it will be necessary to consider how the Bill's proposed model dovetails with legal frameworks for the provision of care and support, e.g. Education, Health and Care (EHC) plans under the Children and Families Act 2014 and the procedures for the care planning of looked after children under the Children Act 1989.
- **Consideration of the role of parents and others with parental responsibility** - for example, in relation to the consultation provisions (Schedule 1, para 17 of the MCA Bill).
- **Identifying specific points for implementation** - In its report, Mental Capacity and Deprivation of Liberty Safeguards (March 2017), the Law Commission noted the poor knowledge amongst health and social care professionals about how the MCA 2005 applies to 16 and 17-year olds. There are likely to be a range of issues that are specific to young people that will need to be included in guidance and/or codes of practice. Dedicated training for professionals working with this age group will also be required (for example children's services, mental health services, children and adolescent mental health services and adult mental health services) as well as schools, in particular residential schools, as well as the judiciary, such as members of the First Tier (Special Educational Needs and Disability) Tribunal.

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ⁱThe principles from s1 of the MCA are:

- A person must be assumed to have capacity unless it is established that he lacks capacity.
- A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.