HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

Number CBP8466, 17 December 2018

Mental Capacity (Amendment) Bill

By Thomas Powell

Contents:

Contents

:

Summary

The *Mental Capacity (Amendment) Bill* was introduced to the House of Lords on 3 July 2018 and completed its Lords stages on 11 December 2018. It is due to have its Commons Second Reading on Tuesday 18 December 2018. The intention of the Bill is to reform the process for authorising arrangements which enable people who lack capacity to consent to be deprived of their liberty (for the purpose of providing them with care or treatment).

The new regime created by the Bill would replace the existing authorisation process, known as Deprivation of Liberty Safeguards (DoLS), which were introduced in 2009. Those arrangements have attracted significant criticism for being too complex and bureaucratic. Key court judgments have also widened the interpretation of those who should be recognised as having been deprived of their liberty, with significant implications for local authorities and others involved in administering the DoLS scheme.

In March 2017, the Law Commission published a report, *Mental Capacity and Deprivation of Liberty*, recommending an overhaul of the DoLS process. It recommended that DoLS are repealed and replaced by a new scheme called the Liberty Protection Safeguards, which would streamline the process for approving a deprivation of liberty.

The Government's final response, published in March 2018, broadly accepted the Law Commission's recommendations. The *Mental Capacity (Amendment) Bill* was introduced to the House of Lords on 3 July 2018. The Bill broadly follows the Law Commission's recommendations, with some changes.

While noting the shortcomings of the existing DoLS arrangements, Peers raised a wide range of concerns about the Bill during its passage through the Lords. These focussed on the following key areas:

- The definition of deprivation of liberty.
- The role of care home managers in carrying out assessments, with particular concerns raised about potential conflicts of interests in care homes and independent hospitals.
- The appointment and role of Independent Mental Capacity Advocates (IMCAs).
- Provisions relating to reviews by Approved Mental Capacity Professionals (AMCPs) and referral to the Court of Protection.

During the Third Reading debate on 11 December 2018 a number of Peers also asked how the provisions of the Bill would overlap with the recommendations of the Independent Review of the Mental Health Act review, which published its report in the previous week (on 6 December).

The Lords stages of the Bill saw number of important changes agreed, and two amendments were made following Government defeats on division. A revised version of the Bill (Bill 303) was published following completion of its Lords stages and the Department has produced updated Explanatory Notes.

The House of Lords Library briefing on the Bill (July 2018), and the Commons Library briefing on Deprivation of Liberty Safeguards, provide an overview of the current DoLS system, and policy background to the introduction of the Liberty Protection Safeguards system.

The Bill would apply to England and Wales only.

1. Overview of the Bill

The Bill amends the *Mental Capacity Act 2005*, which provides a statutory framework for people who lack capacity to make decisions for themselves (it would do this by inserting a new Schedule AA1 and repealing Schedules A1 and 1A).

The Bill is based on the recommendations of the Law Commission report *Mental Capacity and Deprivation of Liberty,* which was published together with the Law Commission's draft Bill in March 2017.[1] It recommended that DoLS are repealed and replaced by a new scheme called Liberty Protection Safeguards, which would streamline the process for approving a deprivation of liberty. The Law Commission model seeks to make use of existing mechanisms where possible, but to remove the features of DoLS they identified as being both inherently inefficient and actively detrimental to the interests of people deprived their liberty.[2]

The Government's *Mental Capacity (Amendment) Bill* would reform the process for authorising arrangements which enable people, who lack capacity to consent, to be deprived of their liberty for the purpose of delivering their care or treatment. This Government Explanatory Notes states this will include people with severe dementia, learning disabilities, head injuries and autistic spectrum disorder. Following the Law Commission's usage, the new scheme that the Bill would introduce is called Liberty Protection Safeguards (although this term does not appear in the Bill itself).

The Department of Health and Social Care provide the following useful summary of the Bill in a memoranda to the Joint Committee on Human Rights (JCHR) published on 29 October 2018:

> Clauses 1 to 5 make amendments to the MCA which are necessary for the operation of the new Liberty Protection Safeguard scheme. They make provision about restriction of liability when health and care professionals carry out arrangements under the new scheme; interim deprivation of liberty for the purpose of life-sustaining treatment in an emergency; and the powers of the Court of Protection in relation to the new authorisation scheme.
>
> Clause 1(4) and Schedule 1 insert Schedule AA1, which replaces Schedule A1 to the MCA (Schedule A1 is referred to as the "Deprivation of Liberty Safeguards", or "DoLS"). Schedule AA1 provides for a new administrative scheme for authorisation of deprivation of liberty.
>
> Under Schedule AA1, a responsible body (which in most cases will be either a hospital trust, clinical commissioning group, local health board, or local authority) will be able to authorise arrangements for care or treatment giving rise to a deprivation of

---

1 Law Commission, *Mental Capacity and Deprivation of Liberty*, March 2017

2 The Lords Library briefing on the Bill (July 2018) examines the Law Commission's recommendations and the provisions in the Mental Capacity (Amendment) Bill, and highlights any areas where they differ from the Law Commission's recommendations. This paper also includes the findings of the Joint Committee on Human Rights' examination of the DoLS scheme published in June 2018.

> a person's liberty. Unlike the DoLS, it does not matter where the arrangements will be carried out. Before a deprivation of liberty can be authorised, specified assessments must be carried out: a capacity assessment, a medical assessment of unsound mind and an assessment of whether the arrangements are necessary and proportionate. Full consultation must also be carried out with anyone with an interest in the person's welfare.
>
> Before an authorisation can be given, a pre-authorisation review must be carried out by a person who is independent from the people providing the care and treatment. In cases where the individual objects to the proposed arrangements, that review must be undertaken by an Approved Mental Capacity Professional who must meet with the person and determine whether the authorisation conditions are met.
>
> Once an authorisation has been given, the person will receive a number of safeguards, including regular reviews (undertaken by the responsible body) of the need for their care and treatment arrangements, and the right to challenge the authorisation before the Court of Protection. Schedule AA1 also imposes a duty on the responsible body to appoint an independent mental capacity advocate or an appropriate person to represent and support the person from the outset of the assessment process.
>
> The Bill also provides for an interface with the Mental Health Act 1983. Broadly speaking, patients in psychiatric hospitals cannot be detained under both the Mental Health Act and the Liberty Protection Safeguards. Patients who object to their mental health care and treatment in hospital are ineligible for the Liberty Protection Safeguards. In the community, however, a person could be the subject of dual authorisations.[3]

The Bill extends to England and Wales. Although health is a devolved policy area the Explanatory Notes to the Bill state that the subject matter of the Bill is "not within the legislative competence of the National Assembly for Wales". Accordingly, legislative consent is not being sought from the Welsh Assembly in relation to any provision of the Bill:

> The matters to which the provisions of the Bill relate are not within the legislative competence of the National Assembly for Wales, and do not alter the competence of the Welsh Government except in a way that is consequential, supplementary or incidental to the subject matter of the Bill. Accordingly no legislative consent motion is being sought in relation to any provision of the Bill. This position is subject to change. If there are amendments relating to matters within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.[4]

---

3 Mental Capacity (Amendment) Bill DHSC Memorandum for the Joint Committee on Human Rights, 29 October 2018

4 Explanatory Notes (Bill 303-EN)

1.1 Liberty Protection Safeguards

The Government have stated that one of the key aims of the Bill is to strengthen protections and rights for vulnerable adults who lack mental capacity and have their liberty deprived, and would:

- introduce a simpler process that involves families more and gives swifter access to assessments;
- be less burdensome on people, carers, families and local authorities;
- allow the NHS, rather than local authorities, to make decisions about their patients, allowing a more efficient and clearly accountable process;
- consider restrictions of people's liberties as part of their overall care package; and
- get rid of repeat assessments and authorisations when someone moves between a care home, hospital and ambulance as part of their treatment.[5]

In particular, the Bill aims to strengthen the safeguards for approving a deprivation of liberty – a brief overview of the these provisions of the Bill, as first introduced in July 2018, is provided below:

- The Bill would introduce three assessments to authorise a deprivation of liberty – these are (1) the person who is the subject of the arrangements lacks the capacity to consent to the arrangements; (2) the person is of unsound mind; and (3) the arrangements are necessary and proportionate;
- It would introduce a new duty for pre-authorisation independent review – from someone who is not involved in the person's day to day care – to determine whether the authorisation conditions are met;
- It would introduce a new requirement for an Approved Mental Capacity Professional (AMCP) to review cases where the person objects to the proposed arrangements;
- Once an authorisation has been given, there are also a number of safeguards put in place for the person receiving care. These include regular reviews of the authorisation by the responsible body or care home, and the right to challenge the authorisation before the Court of Protection;
- Additionally, there would be a duty to appoint an Independent Mental Capacity Advocate (IMCA) or an appropriate person to represent and support the person when an authorisation is being proposed and while an authorisation is in place.

---

5 See Department of Health and Social Care, New law introduced to protect vulnerable people in care, July 2018

2. Lords debate on the Bill

2.1 Summary

Labour, Liberal Democrat and crossbench Members of the House of Lords have broadly supported the aims of the Bill (which are largely based on Law Commission proposals) and there has been agreement amongst Peers and stakeholders about the serious deficiencies of the existing DoLS arrangements. However, both opposition and cross-bench peers have raised a wide range of concerns about the Bill. These have focussed on the following key areas:

- The definition of deprivation of liberty.
- The role of care home managers in carrying out assessments, with particular concerns raised about potential conflicts of interests in care homes and independent hospitals.
- The appointment and role of Independent Mental Capacity Advocates (IMCAs).
- Provisions relating to reviews by Approved Mental Capacity Professionals (AMCPs) and referral to the Court of Protection.

During the Committee stage of the Bill a large number of probing amendments were put forward, and the Health Minister Lord O'Shaughnessy indicated at the start of the second day in Committee, on 15 October 2018, that the Government was proposing to address some of the issues raised with its own amendments:

> The first issue that was raised is extending the scope of the Bill to include 16 and 17 year-olds. I said in Committee that we would look at that and I can tell noble Lords that we will bring forward proposals to include that group in the scheme. I will also reflect on the points made by the noble Lord, Lord Hunt, and the noble Baronesses, Lady Thornton, Lady Finlay and Lady Barker, about the role of the cared-for person being front and centre. In fact, that was the one obligation to consult that was not translated from the Law Commission report into the Bill. Clearly, if we want to get the improvements that we want to see, it is essential that that person's wishes and feelings about proposed arrangements be at the heart of the model, so we will ensure that the Bill reflects this.
>
> […]
>
> As I said, we will make sure that the Bill reflects the need to consult the cared-for person. We have also taken on board the comments about the phrase "of sound mind", which is used in one of the amendments later on. That is one reason why we might want to reconsider it. I know that there is a great concern that the language is inappropriate and that creating a new definition might create a gap, but, having looked at this further, we think we would be able to change this language and carry out various other work to reduce the gap to a minimum. That is something that we intend to bring forward, so I hope that that will be welcomed by many people.[6]

[6] House of Lords Committee stage (day 2), 15 October 2018

The Joint Committee for Human Right's report, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, was published on 26 October 2018. The report identified several problems with the Bill. The Committee suggested a number of amendments to enhance the rights of cared for persons. For example:

- Many of those caught by the Cheshire West definition are not perceived by their family or professional carers as being 'deprived of their liberty'. The Committee calls to Parliament to consider including in the legislation a definition of deprivation of liberty in the context of mental capacity law, to clarify the application of the Supreme Court's 'acid test' whilst being mindful of the fact that any definition must comply with Article 5.
- Most significantly for those living in care homes, responsibility for undertaking or arranging the assessments required before a deprivation of liberty can be authorised would in future fall to care home managers. The Government has asserted that its proposals provide the assessment process with the degree of independence required by Article 5 case law. The Committee shares concerns expressed by disabled people, professional bodies, service providers and lawyers that in practice, care home managers will face conflicts of interest that will seriously hinder their ability to make objective assessments. The report proposes amendments to the Bill to enhance these safeguards.

While the Government has not made a formal response to the Committee a number of amendments have subsequently been brought forward at Report which aim to address concerns about the proper role for care home managers (see section below). The Government has also said it will consider the issue of defining deprivation of liberty during the Commons stages of the Bill.

During the Third Reading debate on 11 December 2018 a number of Peers also asked how the provisions of the Bill would interact with the recommendations of the Independent Review of the Mental Health Act review, which published its report in the previous week (6 December).[7]

2.2 Overview of changes to the Bill

During the passage of the Bill though the Lords a number of changes were agreed. The Government agreed to amend the Bill in a number of areas so that:

- The Bill will now apply to 16 and 17 year-olds as well as those aged over 18.
- Family, friends and staff will be able to trigger a review by an Approved Mental Capacity Professional (AMCP) if they identify the cared for person objects to the arrangements they are subject to.[8]

---

7 Modernising the Mental Health Act: increasing choice, reducing compulsion (December 2018) – final report from the independent review of the Mental Health Act 1983

8 This amendment relates to pre-authorisation reviews and the Minister, Lord O'Shaughnessy said the Government would return to this issue in the Commons to ensure the same provision to trigger AMCP reviews applied to the ongoing review process.

- The person completing assessments must have appropriate skills and knowledge, and their statements to the responsible body must be in writing and accompanied by an assessment that proposed arrangements are 'necessary and proportionate'.
- The Bill now prohibits pre-authorisation reviews being carried out by persons who have a prescribed connection with a care home (such as care home managers).
- The Bill no longer contains outmoded references to persons of "unsound mind".
- The cared-for person has been added to the list of those who must be consulted in assessments, to ensure their voice is heard in every case.
- There are stronger provisions around referring cases to AMCPs, and the appointment of Independent Mental Capacity Advocates (IMCAs).

There were a number of amendments to widen access to IMCAs. These included amendments, giving effect to the JCHR's recommendation, removing the requirement for care home managers to notify a responsible body whether an IMCA should be appointed.[9] Amendments also provided that appointment of IMCAs in care home cases is not contigent on notification from the care home. Finally, amendments introduced a presumption that an IMCA should be appointed where there is no other appropriate person to represent the cared for person (with the exception of cases where an IMCA would not be in the person's best interests).

There were two areas where the Government was defeated on division in the House of Lords:

- On an amendment on rights of information being provided to the cared for person about the authorisation of their care arrangements, and their rights to challenge the authorisation in court.
- On an amendment to specify that for care arrangements involving a deprivation of liberty to be authorised, these arrangements should be necessary and proportionate *in order to prevent harm to self*.

Provision of information

The JCHR's October 2018 report on the Bill considered it essential that cared for persons and their appropriate representative are provided with information about rights of appeal.[10] Various amendments were introduced to give effect to the right to this information. At Report a vote took place on the insertion of a new clause into the bill entitled 'Right to Information'.[11]

---

9 Joint Committee on Human Rights, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, 26 October 2018

10 Joint Committee on Human Rights, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, 26 October 2018

11 Baroness Watkins of Tavistock moved amendment 29, in Schedule 1, page 10, line 8, at end to insert the new clause Rights to information.277 members voted in favour of the new clause and 192 voted against, and so the change was made.

In particular the new clause would ensure that prior to any authorisation of care arrangements, the cared-for individual - or their advocate - are fully informed of their rights, and the responsible body takes necessary steps to explain all possible outcomes and the reasons why the cared-for person may be deprived of their liberty.

The clause would also ensure:

- The Independent Mental Capacity Advocate (IMCA) takes necessary steps to assist the cared-for individual in understanding their care arrangements and rights.
- The responsible body takes responsibility for referring cases to court when the cared-for individuals exercises their right for judicial review.

At Third Reading the Minister Lord O'Shaughnessy said the Government will carefully consider the amendment on rights of information being provided to the cared for person.

Prevention of harm to the cared for person

The Bill as introduced set out three assessments to authorise a deprivation of liberty – these are (1) the person who is the subject of the arrangements lacks the capacity to consent to the arrangements; (2) the person is of unsound mind; and (3) the arrangements are necessary and proportionate.

At the first day of Lords Report stage on 21 November 2018, Members considered a change to the Bill which would ensure that the authorisation arrangements for care and treatments are necessary to prevent harm to the cared-for person.

An amendment, opposed by the Government, added to the last criterion that arrangements must be necessary "to prevent harm to the cared-for person". An accompanying amendment that the authorisation be proportionate "in relation to the likelihood and seriousness of harm to the cared-for person" was agreed without a division.[12] The revised wording restates part of the best interests requirement of an authorisation under the current DoLS system.

At Third Reading the Minister Lord O'Shaughnessy confirmed that the Government will not seek to change the amendment to specify that arrangements should be necessary and proportionate in order to prevent harm to self.

Summing up at Third Reading Lord O'Shaughnessy listed what he said were a number of important changes to the Bill:

> The Bill will now apply to 16 and 17 year-olds as well as those aged over 18. We have carefully designed a role for care homes while eliminating conflicts of interest and being clearer about their role in the system. We have been explicit that the person completing assessments must have appropriate skills and knowledge, and a statement to the responsible body must be written. The Bill no longer contains the outmoded and unwanted references to "unsound mind" and we have also strengthened the provisions around appointing IMCAs, including a presumption that they now will be appointed. I hope that in practice that deals

[12] 202 members were in favour of this amendment, with 188 against (see Lords Division Result for further information).

> with the concern just expressed by the noble Baroness, Lady Barker. We have also made sure that the cared-for person must be consulted so that their voice is heard in every case, and today we have amended the Bill to enable families and staff whistleblowers to raise concerns much sooner and for those concerns to be acted on.
>
> I should also say that the House has made its own opinion known in defeating the Government on the issue of specifying that arrangements should be necessary and proportionate in order to prevent harm to self, and I can confirm that the Government will not seek to change this position in the Commons. The Government will also carefully consider the amendment passed by noble Lords on rights of information being provided to the person.
>
> ... We have achieved a lot, and even if there is more that we wanted to achieve, the contributions of noble Lords have directly influenced the changes that we intend to make in the Commons. So, although it is for those in the other place to pass the amendments, noble Lords should be congratulated on their role in designing them. I hope that they will get support when we move them in the other place.[13]

Some further information on Lords debates and amendments concerning the role of care home managers is provided in the following section.

The role of care home managers

During the first day of Report stage, on 21 November, Lord O'Shaughnessy brought forward a group of amendments in response to concerns raised by Lords and stakeholders throughout the passage of the Bill about the proper role of care home managers. I have set out his introduction to these amendments, which were all agreed, below:

> I agree that we must be absolutely clear at this stage in legislation about what is the right role for those care home managers. I also agree that there should be no scope for any conflict of interest – not when we are talking about the safety and care of very vulnerable people – and that we should ensure that all assessments are completed by those with the appropriate experience and knowledge. Furthermore, people should always have confidence that they will have access to independent support and representation.
>
> (…)
>
> There has been a great deal of discussion about the role of care home managers in authorisation. I have strongly and deeply considered noble Lords' concerns in the context of what we know works now in the current system. There is a desire to make sure that the liberty protection system that we intend to introduce builds on what works and changes what does not. Under the current DoLS system, care home managers have the role of identifying that someone may lack capacity and need restrictions as part of their care. In practice, they must complete form 1, which brings together all of the current assessments for a person. This is then sent to local authorities, which appoint a best-interest assessor to conduct a further assessment ahead of providing the authorisation. This is an appropriate role for care home managers

[13] House of Lords Third Reading, 11 December 2018

to undertake, and is the role we are proposing and clarifying through our amendments.

Amendment 30 requires the responsible body to make a decision on whether it is content that it is appropriate for the care home manager to carry out the relevant functions prior to authorisation, including arranging assessments and carrying out consultation. Amendment 90 applies this decision to reviews as well. This is an important change because it provides additional protections in cases where there may be concerns about a particular provider and its capability for conducting its role, and it allows responsibility to take on all the relevant functions in these cases. There may also be cases where there are no concerns about quality of care, but there may, for example, be particularly strong social worker involvement and it may make sense for them to take on those functions.

This power to remove the care home manager from the process can be enacted at any point, and we would expect it to be done at the earliest possible point, particularly if there are concerns. We will use the code of practice to set out the detail so that it is applied consistently by different local authorities, with clear criteria for the responsible body to make a decision on whether to retain responsibility for the relevant functions. In the case of care home residents, this significantly strengthens the role of local authorities in terms of oversight, intervention and supporting the quality of the operation of the scheme. If the responsible body has decided that the care home manager should be responsible for providing the statement and carrying out the other functions, the care home manager will bring together the information, evidence and assessments needed for the responsible body to make a decision on whether to authorise the liberty protection safeguard. In many cases, this will bring together recent valid assessments that can be used for this purpose.

As has been said previously, care needs change over time. We recognise that putting hard and fast rules on the validity and timeliness of assessments would not recognise the reality of what happens. That is why we will set out in the code of practice what we would expect to see in terms of valid and up-to-date assessments. The Bill also enables the responsible body to step in, if they are not confident in the validity of the assessments, by refusing to authorise the arrangements. Let me be clear that all the assessments would involve consultation with the person. In addition, the Bill will require the care home manager, or the responsible body, to complete the consultation with the person and other interested persons.

Some noble Lords have stated their concern that there is a potential conflict of interest if care home managers were to conduct assessments. The Government agree that there is a potential financial conflict if care home managers were to complete assessments for people in their own care homes, particularly when it comes to considering whether there are less restrictive alternatives. Amendment 52 explicitly excludes care home managers or people from undertaking the assessments if they have a specified connection to the care home, in particular if there is a financial connection. This will be set out in regulations. We will use the regulations to ensure, in England, that care home staff are not able to conduct assessments where they have a potential financial conflict of interest and the Welsh Government will have the power to do the same. Doing this in regulations allows us to provide the necessary detail, given the complexity of

> the care home sector, to ensure that there are no loopholes. For example, we would not want someone who works in another care home run by the same company to conduct the assessments.[14]

On the second day of Report the Lords considered another group of Government amendments which aimed to address concerns from stakeholders and Peers. These included amendments to ensure that only responsible bodies can arrange the pre-authorisation review and that care home managers will be explicitly excluded from completing the pre-authorisation review. Lord O'Shaughnessy noted that "This is important because pre-authorisation should not confirm poor care planning or perpetuate a system where someone is receiving care in an inappropriate setting". The Minister said the amendments would:

> …deal with on the second day will counteract any incentive the care home manager might have to ensure that a resident stays in a care home inappropriately. We are also determined to make sure that the care home manager cannot act as a gatekeeper to the IMCA appointment, and we have laid amendments accordingly.[15]

The Minister also committed to the Government considering a number of other issues in the Commons, and some of these are outlined in the section below.

2.3 Other issues raised during Lords stages

A number of other issues were raised during the Lords stages that are likely to be returned to in the Commons.

Speaking for the Labour frontbench at Third Reading, Baroness Thornton noted a number of outstanding issues that the Commons would need to address to improve the Bill further:

> …it needs to consider length of renewal periods, the interface with Simon Wessely's review [the independent review of the Mental Health Act published on 6 December], the role of IMCAs, remaining conflicts of interest, impact assessments and implementation, and indeed, the issue of the definition of deprivation of liberty, which the Minister has undertaken to tackle. It also needs to discuss money, budgets and so on, as we have not done so during the passage of the Bill.[16]

Definition of deprivation of liberty

In its 26 October 2018 report, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, the JCHR concluded that it is important to include a definition of 'deprivation of liberty' on the face of the Bill in order to give cared-for persons, their families, and professionals greater certainty about the parameters of the scheme. The Committee acknowledged that any definition in statute may be revised or refined by future case law but, the Committee took the view that it was not possible to design

14 House of Lords Report stage (day 1), 21 November 2018
15 *Ibid.*
16 House of Lords Third Reading, 11 December 2018

and implement an effective system of safeguards without having a clear sense of to whom it should apply.[17]

Committee Chair Harriet Harman MP said:

> We must give cared-for people, their families and professionals greater certainty by providing a clear definition: the Bill must be changed if it is to do that.[18]

In a briefing published ahead of the Lords Committee stage Age UK highlighted why this is important for people receiving care in their own homes in particular:

> To provide practitioners, families and the cared for person with an agreed definition that is unambiguous where authorisation of deprivation of liberty is enacted. A definition of 'deprivation of liberty' must be included in the Bill. This is particularly important where the authorisation of deprivation of liberty is being considered for someone living in their own home
>
> (…)
>
> The Bill seeks to authorise 'arrangements' that are necessary to deliver care and treatment, rather than the care and treatment itself. It is therefore highly likely that the issue of arrangements in domestic settings will arise.
>
> At present, concerns about those deprived of their liberty in domestic settings are settled via the Court of Protection. Whilst this had drawbacks (expense, delays and families facing a potentially upsetting and onerous court process) it did provide the highest level of scrutiny. To change from this system, to one whereby the local authority (or CCG in some cases) approves such arrangements, is a substantial alteration.
>
> A definition will provide practitioners, families and the cared for person with the best opportunity to understand whether care arrangements within a domestic home amount to a deprivation of liberty.[19]

This issue was raised during the Lords stages of the Bill, with Baroness Tyler and Lord Woolf bringing forward different probing amendments to address this. The Health Minister Lord O'Shaughnessy acknowledged that there was confusion on the ground amongst practitioners owing to the problem of definition. The Minister stated that the Government had given this a great deal of thought and had decided that 'deprivation of liberty' should be clarified in statute. During the Lords Third Reading on 11 December 2018 Lord O'Shaughnessy confirmed that the issue of definition is something that the Government "intend to deal with in the Commons".[20]

The dividing line between the Mental Capacity Act and the Mental Health Act

During the Lords Third Reading of the Bill on 11 December 2018, crossbenchers Baroness Hollins, Baroness Murphy and Baroness

---

17 Joint Committee on Human Rights, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, 26 October 2018

18 JCHR press release, 26 October 2018

19 Age UK Briefing: Mental Capacity (Amendment) Bill (HL) Committee Stage – October 2018

20 House of Lords Third Reading, 11 December 2018

Meacher raised concerns about cases where it is not clear whether a person should be detained under the *Mental Capacity Act* or the *Mental Health Act* (for example, where a person with a learning disability, autism or dementia also has a mental illness). A number of Peers noted the publication of the *Independent Review of the Mental Health Act* on 6 December, which set set out recommendations for government on how this Act and associated practice needs to change. One part of the report of the independent review addressed the dividing line between the two Acts. In particular, the review recommends that the law should be amended so that only the *Mental Capacity Act* framework (currently DoLS, in future LPS) can be used where a person lacks capacity to consent to their admission or treatment for mental disorder and it is clear that they are not objecting.

The review concluded that "objection" is the right dividing line between the two Acts and agreed with the statutory definition for 'objection' in the *Mental Capacity Act* (which will be maintained in the Bill). The review also noted that amendments to the *Mental Capacity Act* contained in the Bill would make implementation of its recommendations easier in two ways:

> The first is because, unlike DoLS, the key decision-makers for authorising deprivation of liberty under the LPS could be the same as those for detentions under sections 2 or 3 of the MHA. We hope that means the new LPS process will no longer be seen as more of an administrative burden to complete than the MHA.
>
> The second is through the way in which the LPS would work to authorise the deprivation of a person's liberty. Amendments to section 4B of the MCA would mean that a person with impaired capacity can be lawfully deprived of their liberty in order to give life sustaining treatment or carry out vital action, either in an emergency, or where the process to get an authorisation under the LPS has been started and the person needs to be deprived of their liberty where they are until it is completed.[21]

However, the report of the independent review acknowledged the difficulty in including its recommendations in the current the Bill:

> …our recommendations here had been drawn up on the basis that they would be included in future legislation, rather than the current Bill. We anticipate that some time will be needed to 'bed down' the new LPS arrangements before they could be used to authorise a deprivation of liberty for non-objecting patients lacking capacity. The Government will need to consider the practical implications of the new dividing line between the MCA and MHA, including testing guidance for the Code of Practice, perhaps in pilot areas. That would make it problematic, even if it were possible, for the Government to introduce our proposed objection interface in their current Bill.
>
> We should make clear that our proposed MCA and MHA dividing line will only work if the Government's proposals in the Bill, that an MCA deprivation of liberty can be authorised on the basis of risk of harm to others, are enacted136. Otherwise, it would not be possible to use the MCA in the inpatient setting for someone

[21] Modernising the Mental Health Act: increasing choice, reducing compulsion (December 2018) – final report from the independent review of the Mental Health Act 1983

> who has impaired capacity, who needs treatment to prevent the risk of harm to others, but who is not objecting to being admitted and/or treated.[22]

At Report, Health Minister Lord O'Shaughnessy referred to the Mental Health Act review:

> Perhaps I may mention the Mental Health Act review before I finish on the amendment and move on. Clearly, it is an important piece of work. There are 152 recommendations and it is right that we take time to consider the right way to respond to them. The Government have already taken on board two of those recommendations, but there are many more to consider. One of the questions in front of us, which we have talked about to some degree during the stages of the Bill—and which will clearly come to the fore in the Commons stages—is: what is the right vehicle to deal with the interface between the suggestions that Simon Wessely has made?
>
> There is a difference of opinion in this House about how that should be done. The noble Baroness, Lady Meacher, and others have a contrary view, but we need to solve the problem in front of us—which is that the deprivation of liberty safeguard system is not working—and then, when we have decided what the right thing to do is, to improve the Mental Health Act and its interface with the Mental Capacity Act at that point. It would be precipitous to try to do that now, before we have had an opportunity to consider it properly. In saying that, I do not mean it is not important—quite the opposite. It is so important to get it right that rushing through it could store up problems of a kind that we do not want.[23]

Advance consent

During the Lords Committee stage Peers considered the issue of cared for persons providing advance consent to care and treatment, which had been raised by the Law Commission's proposals for reform in 2017. Baroness Thornton tabled an amendment that would provide for this in the Bill. Responding for the Government, Lord O'Shaughnessy noted that while he recognised the laudable aims of the Law Commission in proposing this approach, the Government were concerned about safeguards for individuals. However the Minister noted he would be keen to understand more about previous discussions of this topic and:

> …whether there are other ways to provide that sense of agency for the person who will be cared for without producing undue pressure on them or legal force in a way that would go against their interests and, in legal terms, their human rights.[24]

Independent hospitals

The application of LPS to independent hospitals was raised a number of times during the Lords stages. At Third Reading, Labour frontbencher Baroness Thornton and crossbenchers Baroness Meacher and Baroness Watkins of Tavistock, asked that assurances that work will be done in preparation for the Commons stages. Baroness Watkins noted that as

---

22 *Ibid.*
23 House of Lords Third Reading, 11 December 2018
24 House of Lords Committee stage (day 3), 22 October 2018, c737

responsible bodies, independent hospitals will have a conflict of interest in authorising deprivations of liberty of people in their care.[25]

What should be covered in the code of practice?

There was some debate about what is appropriate to include on the face of the Bill and what should be set out in the Code of Practice at the Bill's Lords Second Reading in September.[26] During the Third Reading debate Liberal Democrat Baroness Barker commented on this:

> Perhaps the Bill's biggest deficiency, and one we have not discussed much, is that practically nothing is in regulation; large swathes of it will be left to a code of practice. If one goes back to the Mental Capacity Act, however, one finds regulations that relate primarily to those who will be enacting this legislation. Regulatory conditions are applied to those who can be an AMCP, and to what their training has to be, and to those who can act as an IMCA, and to their ongoing duties to maintain contact when people move and to step in when the appropriate person, for some reason or another, ceases to fulfil the obligations it was initially assumed they would.[27]

25 House of Lords Third Reading, 11 December 2018
26 Lords Second Reading debate, 5 September 2018, c1875
27 House of Lords Third Reading, 11 December 2018

3. The current DoLS regime

Deprivation of Liberty Safeguards (DoLS) were introduced in 2009, and form part of the *Mental Capacity Act 2005.* The provisions are set out in sections 4A and 4B of, and Schedules A1 and 1A to the *Mental Capacity Act 2005* (added by the *Mental Health Act 2007*, and coming into force in 2009). The 2005 Act provides a statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves.

DoLS provide a framework for approving the deprivation of liberty for someone who lacks the mental capacity to consent to necessary treatment in a hospital or care home.[28] The safeguards are intended to ensure that someone is only deprived of their liberty in a safe and correct way, and that this is only done when it is in the best interests of the person and there is no other way to look after them.

DoLS legislation sets out when and how deprivation of liberty may be authorised, and it provides a statutory assessment process with designated professionals and responsible bodies. It also details arrangements for renewing and challenging a deprivation of liberty.

To authorise a deprivation of liberty the hospital or care home must identify those at risk of deprivation of liberty, and request authorisation from the supervisory body (the NHS Trust, local authority or local health board). The supervisory body must arrange a series of six assessments. These assessments must be completed within 21 days. An Independent Mental Capacity Advocate (IMCA) must also be instructed for anyone without other representation.

The person and/or their representative can request a review of the deprivation of liberty at any time. The managing authority also has a duty to monitor the case to see if the person's circumstances change and if they no longer need to be deprived of their liberty.

The person and their representative also have a right to apply to the Court of Protection, which has powers to terminate authorisation or vary the conditions of the deprivation of liberty.

These DoLS provisions are supported by a Code of Practice on the Mental Capacity Act 2005 (the 'main Code', which provides guidance on the statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves) and a separate Code of Practice on DoLS. The DoLS Code of Practice was published in 2008, to add to the main Code, which was issued in 2007 (both Codes are intended to be used in conjunction). Although DoLS were mentioned in the main Code, they were not covered in any detail because, at the time the main Code was published, the DoLS provisions were still going through the Parliamentary process as part of what became *the Mental Health Act 2007*.

[28] If a person's liberty needs to be deprived in other settings, an authorisation must be obtained from the Court of Protection.

3.1 Background to reform

In March 2017, the Law Commission published a report and Draft Bill recommending an overhaul of the DoLS process. It recommended that DoLS are repealed and replaced by a new scheme called Liberty Protection Safeguards, which would streamline the process for approving a deprivation of liberty.[29]

The Government's final response, published in March 2018, broadly accepted the model recommended by the Law Commission. Care Minister Caroline Dinenage confirmed that the Government would "bring forward legislation to implement the model when parliamentary time allows."[30]

The *Mental Capacity (Amendment) Bill* was introduced to the House of Lords on 3 July 2018. As noted previously, the Bill broadly follows the Law Commission's recommendations, with some changes. The House of Lords Library briefing on the Bill provides the following overview of the policy background to the Bill and the proposals to replace DoLS:

> The intention of the Mental Capacity (Amendment) Bill is to reform the process for authorising arrangements which enable those who lack the capacity to consent to be deprived of their liberty for the purposes of providing them with care or treatment. The new regime created by the Bill would replace the existing authorisation process, known as the Deprivation of Liberty Safeguards (DoLS), which is provided for by the Mental Capacity Act 2005. Those arrangements have attracted significant criticism, including from the House of Lords Mental Capacity Act 2005 Committee in 2014, and at the same time key court judgments have widened the interpretation of those who should be recognised as having been deprived of their liberty, with significant implications for the public sector bodies charged with administering the DoLS scheme.

In particular, the 2014 Supreme Court judgment, known as "Cheshire West" significantly widened the definition of deprivation of liberty, meaning more people were subsequently considered to have their liberty deprived and to require safeguards. The Court held that the key feature is whether the person concerned is under continuous supervision and control and is not free to leave. This means that, when a person is unable to consent because they lack capacity, their admission to hospital for assessment or treatment is much more likely to be considered a deprivation of their liberty. Official data has shown a tenfold increase in DoLS applications between 2013-14 and 2014-15, the period following the Supreme Court Judgement.[31]

The Law Commission found that the increase in DoLS applications has led to substantial processing delays and financial costs:

> The implications for the public sector have been significant.

---

29 Law Commission, *Mental Capacity and Deprivation of Liberty*, March 2017

30 Final Government Response to the Law Commission's review of Deprivation of Liberty Safeguards and Mental Capacity:Written statement - HCWS542, 14 March 2018

31 NHS Digital, Mental Capacity Act (2005) Deprivation of Liberty Safeguards (England) England 2015-16 National Statistics, 28 September 2015

> […]
>
> Many responses [to the Consultation] (particularly from NHS bodies and local authorities) pointed to the practical and financial impact of Cheshire West, such as the increasing backlog of cases, referrals for authorisation being left unassessed, the legal timescales for authorisations being frequently breached and shortages of people qualified to perform roles under the DoLS provisions.[32]

In addition, the House of Lords Select Committee on the Mental Capacity Act found in its 2014 post-legislative scrutiny report that the DoLS were "frequently not used when they should be, leaving individuals without the safeguards Parliament intended" and care providers "vulnerable to legal challenge". The Committee concluded that "the legislation is not fit for purpose" and recommended its replacement.[33]

Criticism of DoLS for being too complex and bureaucratic, together with the consequences of the *Cheshire West* judgement, led to the Government commissioning the review by the Law Commission. The Law Commission reported in 2017 and found the DoLS scheme, was overly technical and often failed to achieve any positive outcomes for the person concerned or their family. The Law Commission recommended that the DoLS scheme be replaced with a new regime which it termed the Liberty Protection Safeguards. As noted in the Lords Library briefing the Law Commission model seeks to make use of existing mechanisms where possible, but to remove the features of DoLS they identified as being both inherently inefficient and actively detrimental to the interests of people deprived their liberty.[34]

The Commons Library also has a briefing on Deprivation of Liberty Safeguards which provides an overview of the current DoLS system.

---

32 Law Commission, *Mental Capacity and Deprivation of Liberty*, March 2017

33 Select Committee on the Mental Capacity Act 2005 - Report: *Mental Capacity Act 2005: post-legislative scrutiny* (February 2014)

34 https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2018-0077

BRIEFING PAPER
Number CBP8466
17 December 2018

About the Library

The House of Commons Library research service provides MPs and their staff with the impartial briefing and evidence base they need to do their work in scrutinising Government, proposing legislation, and supporting constituents.

As well as providing MPs with a confidential service we publish open briefing papers, which are available on the Parliament website.

Every effort is made to ensure that the information contained in these publicly available research briefings is correct at the time of publication. Readers should be aware however that briefings are not necessarily updated or otherwise amended to reflect subsequent changes.

If you have any comments on our briefings please email papers@parliament.uk. Authors are available to discuss the content of this briefing only with Members and their staff.

If you have any general questions about the work of the House of Commons you can email hcenquiries@parliament.uk.

Disclaimer