

Briefing: Mental Capacity (Amendment) Bill (HL)

Report stage – November 2018

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Introduction

The Mental Capacity (Amendment) Bill proposes new frameworks which will have a profound impact on people's rights and autonomy, and it therefore deserves a commensurate level of scrutiny. It is of particular significance to older people, as Deprivation of Liberty Safeguards (DoLS) are most often used in relation to people who lack mental capacity to agree to their residential care arrangement.

The Joint Committee on Human Rights, amongst others, has stated that the current DoLS system is broken and that urgent action is needed. New analysis suggests for the third year in a row, more Deprivation of Liberty Safeguard applications were received than completed. The number of applications not completed at the end of the reporting period increased by 7% on 2015/16, from 101,740 to 108,545* which is over 108,000 vulnerable adults who may be being illegally denied liberty or the right to associate freely with their own families at the moment. Some older people may now have been sectioned under the Mental Health Act in hospital because the hospital managers are unsure how to keep someone safe and remain within the law ([Care Quality Commission](#)).

This Bill is an opportunity to fix a system that is not currently working for older people and ensure that their protection is central to the legislation it produces. However, to achieve this, amendments must be submitted and accepted to effectively address a number of outstanding areas in the Bill. If this is the case then it is Age UK's view that the legislation should go forward.

Age UK has identified three areas of the Bill that require a high level of scrutiny, and relating to these three areas, we believe the following themes should be considered in debate:

1. Authorisation of arrangements and the protection of self-funders;
2. Complex cases and the role of the Approved Mental Capacity Practitioner (AMCP);
3. Establishing a definition of 'Deprivation of Liberty'.

1. Authorisation of arrangements and the protection of self-funders

Under the Bill as it currently stands, care home managers will be required to undertake assessments that are presently conducted by the responsible body, such as the local authority. There is a fundamental conflict of interest with the role of care providers assessing arrangements within the services that they provide.

Schedule 1

BARONESS THORNTON

Page 7, line 17, at end insert—

““nominated body” means the body designated by the responsible body to carry out the following responsibilities in relation to the authorisation of care home arrangements—

- (a) determinations required by paragraphs 15 and 16;
- (b) consultation under paragraph 17;
- (c) decisions on whether paragraph 18(2)(a) or (b) applies;
- (d) preparation of the draft authorisation record in accordance with paragraph 21;
- (e) preparation of a statement in accordance with paragraph 29; and

Explanation:

This conflict of interest is recognised within mental health law, which states that where an assessor has a financial interest in the decision to deprive someone of liberty there must also be an independent external assessor. It must also be recognised in the Mental Capacity (Amendment) Act.

If care home managers retain the duty to undertake and arrange the relevant assessments required before a deprivation of liberty can be authorised then a pre-authorised review by an Approved Mental Capacity Practitioner (AMCP) must be conducted. Without such a requirement, a significant conflict of interest for the care home manager is likely to arise. The involvement of an independent assessor would protect the care home manager and their employer because it would ensure that there was no implication that a person had been deprived of their liberty in order to guarantee continued residence and financial security for the care home.

If the Bill is amended so that responsibility for undertaking assessments is returned to the responsible body, this would resolve the conflict of interest issue. However more consideration needs to be given to which role the responsible body will nominate as being responsible for undertaking the assessment, for example, will this amendment revive the Best Interest Assessor (BIA) role?

Training and support for Care Home Managers

Even if the responsibility for assessing and authorising the application is returned to the responsible body, care home managers will still be responsible for arranging the assessment and will retain an important coordinator function. In light of this, we believe that they should still receive sufficient training in order for them to carry this out. In order that decisions made by care home managers in this capacity comply with the Mental Capacity Act 2007, the training must include in depth consideration of that Act.

2. Complex cases

Where cases are complex or disputed it should be possible for an independent reviewer to refer the issue directly to a court, regardless of whether the duty to authorise lies with the care home manager or the responsible body.

Schedule 1

**BARONESS HOLLINS
BARONESS THORNTON
BARONESS JOLLY
BARONESS WATKINS OF TAVISTOCK**

Page 10, line 8, at end insert—

“Rights to information

11A(1) Prior to the authorisation process, the cared-for person must be fully informed of their rights.

(2) The responsible body must take such steps as are practicable to ensure that the cared-for person and any appropriate person or Independent Mental Capacity Advocate representing and supporting them understand the possible outcome of the assessments, the reasons why the cared-for person may be deprived of their liberty and their rights—

- (a) to request an Approved Mental Capacity Professional’s assessment and review of the arrangements,
- (b) to advocacy, and
- (c) to challenge the authorisation in court.

(3) If an Independent Mental Capacity Advocate is appointed under Part 5, the advocate is to take such steps as are practicable to help the cared-for person and the appropriate person to understand the following matters—

- (a) the steps involved in the authorisation process,
- (b) the purpose, duration and effect of the authorisation,
- (c) any conditions to which the authorisation is subject,
- (d) the reasons why the cared-for person met the qualifying requirements in question,
- (e) the right to object to the authorisation and the right to request a review by an Approved Mental Capacity Professional,
- (f) the outcome of a review of the arrangements,
- (g) the relevant rights of the cared-for person,
- (h) how the cared-for person may exercise relevant rights.

(4) In this paragraph, “relevant rights” includes the right to make an application to the court to challenge an authorisation decision in court under section 21ZA and the right to request a review of the arrangements.

(5) The responsible body must ensure that cases are referred to court when the cared-for person’s right to a court review is engaged.”

Explanation:

We are particularly concerned that the rights of the cared-for person should be at the heart of the Liberty Protection Safeguards. One way to ensure this is to provide an automatic referral pathway to an AMCP in cases of dispute, objection or disagreement that cannot be easily resolved.

Providing the AMCP with the authority to refer to the court will provide an added level of reassurance that the interests and wishes of the cared-for person are fully considered.

Although the Minister's letter addressed after the Second Reading states that all applicants will be subject to an independent review before authorisation, the Bill in its current state does not reflect this, and further clarification on this point is needed.

3. Establishing a definition of “Deprivation of Liberty”

A definition of ‘deprivation of liberty’ that provides clarity deprivation of liberty in domestic settings be must be included in the Bill.

Schedule 1, paragraph 2,

BARONESS TYLER OF ENFIELD

Amendment 1

“Page 5, line 33, at end insert -

“(1) “For the purpose of paragraph (2)(1)(b), a cared-for person will only be deprived of their liberty if:

(a)the cared-for person is subject to confinement in a particular place for a not negligible period of time; and

(b)the cared-for person has not given valid consent to their confinement.

(2) For the purpose of paragraph (2)(2)(a), a cared-for person is subject to confinement where:

(a)the cared-for person is prevented from removing himself or herself permanently in order to live where and with whom he or she chooses; and

(b)the dominant reason is the continuous supervision and control to which the cared-for person is subjected, and not the underlying condition.”

Explanation:

A definition of deprivation of liberty must be included in the Bill. This would provide practitioners, families and the cared-for person with an agreed interpretation that is unambiguous where a DoLS is enacted.

To date, two attempts have been made to establish a definition of Deprivation of Liberty, most recently by the Joint Committee on Human Rights which called for definition that ‘clarifies the application of the Supreme Court’s acid test and brings clarity to frontline professionals’¹. The Supreme Court’s ‘acid test’, referred to in the Committee’s recommendation, references Lady Hale’s case ‘P v. Cheshire West

¹ https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/890/89008.htm#_idTextAnchor013

Council' in 2014. In the ruling, Lady Hale noted that 'the person concerned was under continuous supervision and control and was not free to leave.'²

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. As pointed out by the Joint Committee on Human Rights in their scrutiny of the Bill, it will also provide the cared-for people, their families and professionals with greater certainty about the parameters of the scheme and the ability to direct scrutiny and the necessary resources to where it is needed.³

² https://www.familylaw.co.uk/news_and_comment/p-v-cheshire-west-and-chester-council-p-and-q-v-surrey-county-council-2014-uksc-19#.W3067p3wYdU

³ <https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/1662/166203.htm>

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