

Mental Capacity Act (Amendment) Bill Briefing from Third sector Second Reading [Commons] Tuesday 18th December 2018

Organisations supporting this 3 page briefing

Mencap, National Autistic Society, Mind, Rethink Mental Illness, Alzheimer's Society, VoiceAbility, Disability Rights UK, POhWER, Parkinson's UK, BIHR, Sense, Liberty, Learning Disability England, the Disabled Children's Partnership and the Challenging Behaviour Foundation.

About the Bill

Introduced into the Lords in July, the Bill amends the Mental Capacity Act 2005. In particular, it replaces the Deprivation of Liberty Safeguards (DoLS) with a new regime Liberty Protection Safeguards (LPS).

DoLS are used to deprive someone of their liberty in order to provide care and treatment. They are used in hospitals and care homes and are applied where the individual lacks mental capacity to consent to the arrangements. Examples include:

- using locks to prevent people leaving a care home or hospital,
- restricting access to things which could be used for self-harm,
- physically stopping someone from doing something.

The impact assessment predicts that **300,000 people** will be affected including some of the most vulnerable in our society such as those with **dementia, learning disabilities, autism, mental illnesses and brain injuries**.

The Government's motivation for changing the regime is primarily to tackle the **backlog of DoLS applications** which have increased considerably following the 'Cheshire west' legal case which saw the definition broaden as to what constitutes a deprivation of liberty.

Liberty is precious, so it is vital there are robust safeguards to ensure that people who lack mental capacity to consent to their care arrangements receive the least restrictive care possible and that any restriction of liberty is genuinely in the person's 'best interests' with their wishes and feelings central to the process.

Break neck speed without adequate consultation and assessment of impact

We are deeply concerned at the 'break neck' speed with which the Bill is progressing and **urge a pause** for further consultation with the sector, families and advocates.

No equality impact assessment has been published.

The **impact assessment** (which was published), focused on the perceived costs and savings associated with the Bill. This is now completely out of date considering the raft of Government Amendments.

Furthermore, the under resourced care system is at breaking point and there is little information about where the money and workforce will come from.

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We urge the Government to pause the Bill and publish a new impact assessment together with a **robust appropriately resourced implementation strategy**.

Q: Does the Minister not agree that rushing this Bill through without time for proper consideration and assessment as to its impact puts vulnerable people's rights at risk, and threatens to create legislation that will be challenged by the courts?

No draft Code of Practice

Much of the debate has focused on what should go on the face of the Bill and what should go in the Code of Practice. We urge the Government to **publish a draft Code to aid MPs during debate**. This was done during the passage of the Mental Capacity Act 2005 and was invaluable to parliamentarians.

The Interplay with the Mental Health Act (MHA) review

Currently, the interface between DoLS within the MCA and the MHA is confusing in practice and often leads to delays and problems. This interface is not acknowledged or dealt with in the Bill.

Sir Simon Wessely's Independent Review was published on 6th December 2018 and the Government has committed to bringing forward legislation to reform the MHA.

Sir Simon's review proposes to redraw the dividing line between when a person should be detained under the MHA and when they might instead fall under the MCA.

The proposed dividing line is objection, so that if a person without capacity does not object to admission or treatment they should be placed under the MCA.

The proposed new dividing line of objection needs thorough and broad consultation, possible pilot testing, and pre-legislative scrutiny – none of which are possible under the timescales set by Government.

Q: Given that Sir Simon Wessely's review has only just been published, should the Minister not consider pausing the Bill to look at the interplay between this Bill and the recommendations around the Mental Health Act? Otherwise we risk creating legislation which fits together poorly.

Strengthening the Bill

The **Bill must be strengthened** in order to uphold key rights and protections for people who lack mental capacity and their families.

We **welcome the Government amendments** tabled in the Lords which tackle *some*, but not all of our concerns.

We welcome amendments voted in by Peers which oblige for **information on rights** to be given as a matter of course to the individual, their family and advocates.

Q: Does the Minister agree that the amendment introduced by Peers which ensures information on rights is provided to individuals, their family and advocates as a matter of course does much to improve the Bill?

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Any **conflict of interest** must be removed from the Bill. An example is that the Bill as drafted makes the care home manager responsible for carrying out consultation with the cared-for person, the main purpose of which is to ascertain their **wishes and feelings**. This is not appropriate. It is not only a conflict of interest but care home managers may well not be trained, qualified or resourced to do this.

Q: What reassurances can the Minister give that all conflict of interest is removed from the Bill so that the focus is firmly on what is in the person's best interests?

Appropriate advocacy must be available to all who need it; the new scheme must ensure the right of the person to object to and challenge arrangements if they wish and have the support and representation to do so (Article 5 ECHR).

The role of the **Independent Mental Capacity Advocate (IMCA)** and appropriate person (usually a family member) needs to be clarified.

If an appointed appropriate person is either unwilling, or unable to support and assist the individual in understanding and exercising their rights of appeal, or requesting a review from an Approved Mencap Capacity Professional (AMCP), then an IMCA referral should be compulsory.

Q: What reassurances can the Minister give that everyone who needs it - receives an appropriately trained advocate to support them?

As drafted the Bill would allow responsible bodies to **detain someone without renewal for up to 3 years** (previously it has been 1 year). We are concerned this will leave people deprived of their liberty for inappropriate lengths of time and believe it should be reduced back to one year.

Q: What is the rationale behind tripling the length of detention without review?

The inclusion of 16 and 17 year olds

In the Lords the Government amended the Bill to include 16-17 year olds. **We welcome this** but their inclusion has raised a number of concerns.

In particular, we are concerned that the new LPS regime may provide less safeguards than the current system for 16-17 year olds and it will not always be the appropriate framework to authorise interventions.

Little thought has been given as to how the LPS will interact with legal duties to protect and safeguard children and ensure parental involvement and rights.

On the face of it the LPS appears to undermine the Children Act 1989 which ensures that parents can object to the young person's placement and can remove their son or daughter should they deem appropriate.

Q: What reassurances can the Minister give that very careful thought and consideration will be given in the coming weeks with regard to the new clauses on 16-17 year olds so that these young people do not see their liberty restricted inappropriately?