

# Parliamentary Brief

## Mental Capacity (Amendment) Bill

House of Commons Second Reading  
18 December 2018

*The Law Society ('the Society') is the representative body for 180,000 solicitors in England and Wales. The Society negotiates on behalf of the profession, lobbies regulators, Government and others and has a public interest role in working for reform of the law*

### 1. Introduction

This briefing outlines the views of the Law Society ahead of the Second Reading of the Mental Capacity (Amendment) Bill in the House of Commons on 18 December 2018. This Bill seeks to amend the Mental Capacity Act 2005 (MCA) in relation to procedures under which a person may be deprived of their liberty when they lack capacity to object to that deprivation.

### 2. Executive summary

The MCA has been in place for over a decade – any replacement provisions are likely to be in place for at least as long and will affect hundreds of thousands of people in vulnerable circumstances. Getting it wrong comes at a significant personal cost to those individuals.

While attempting to simplify current arrangements, this Bill removes vital existing safeguards for cared-for people. We have already worked with Government to address these weaknesses and will continue to do so. The Bill should be amended to avoid the unlawful treatment of the vulnerable individuals who receive care and treatment under conditions of detention. Many changes have been made but there is still some way to go. There is a real risk that many of the flaws in the existing system will be duplicated and that the new system will replace one deficient system with another which removes existing safeguards for people.

The Law Society emphasises that:

- a. **Sufficient safeguards must be on the face of the Bill** - key legal obligations, powers and definitions should be dealt with on the face of the Bill rather than being left to secondary legislation or the Code of Practice which are not available for scrutiny.
- b. **There is a risk of litigation to address unlawfulness in the Bill** - the Bill as currently drafted could be exposed to legal challenge for failure to protect cared-for people to the standard required by domestic and European law. This is avoidable, the legal issues and flaws identified can still be easily resolved through amendments.
- c. **Lessons should be learnt from the existing system** - despite strong criticism, much can be learnt from the existing system of Deprivation of Liberty Safeguards (DoLS). Some of concerns, and proposed changes, come from the experience of legal, health and service user and relatives' groups that have experienced the existing system.

## **Areas of concern in the Mental Capacity (Amendment) Bill**

The Law Society has several concerns about the Mental Capacity (Amendment) Bill. Whilst we welcome many of the amendments made in the House of Lords, we still have the following concerns that should be addressed:

- **Putting the person's best interests at the heart of the decision**
  - Decisions to deprive a person of their liberty should only be made in the person's best interests and after considering less restrictive options and personal preferences. Loss of liberty must be a last resort.
  - Appropriate weight must be given to wishes and feelings of the person.
  - Formal conditions to authorisations are also vital and must form part of the cared-for person's care plan to limit the extent and the impact of the deprivation.
  
- **Right of the cared for person to object and challenge**
  - The Bill severely weakens the ability of the cared for person and those concerned with their welfare to object and challenge their arrangements.
  - Independent oversight is essential as cared for people may not be able to object in the formal sense.
  - Access to an Approved Mental Capacity Professional (AMCP) is currently only available in limited circumstances and this cannot be right. AMCPs must be made available in most cases.
  - Access to Independent Mental Capacity Advocates (IMCA) throughout the period of detention is vital in all cases and this access should not be conditional on a best interests test which would remove this important safeguard.
  
- **Role of the care home manager**
  - There must be absolute clarity about the role of care home managers and any task or role they undertake must be completely conflict free.
  - In particular care home managers should not be responsible for consultation with the cared-for person.
  
- **Limiting the length of authorisations**
  - Currently the Bill allows for the deprivation of someone's liberty to be authorised for up to three years without review. We believe that given the seriousness of the impact on the person, a deprivation of liberty without review should only be available for a maximum of one year.
  - The recent Mental Health Act review has recommended that current periods between review of detentions under that Act be reduced from 3 years to annually for those who lack mental capacity to bring their own challenge.
  
- **Safeguards for emergency authorisations**
  - The Bill gives wide ranging powers for depriving a person's liberty through emergency authorisations for unlimited periods of time where a "vital act" is deemed necessary. We believe this is unlawful.

- A time limit of 14 days is essential to prevent abuse in accordance with case law and this should be accompanied by a facilitated right of access to court review.
- **Protecting the right of refusal**
  - Deprivation arrangements should not be authorised when refused by certain persons with special status (on behalf of the cared for person), for example where the person has made a Lasting Power of Attorney or has a Court appointed deputy to make decisions on their behalf.
- **Protecting the rights of those deprived of their liberty in private or independent hospitals**
  - Private hospital managers must not act as the responsible body in these circumstances.
  - All cared-for people in private hospitals should have an IMCA appointed and the authorisation must be carried out with AMCP oversight
  - We are pleased to see that the Government has indicated that the LPS procedure for this particularly vulnerable group of people will be reviewed and we would welcome the introduction of amendments.
- **The interface between mental capacity and mental health legislation**
  - Further scrutiny of the interaction between these two pieces of legislation is crucial
  - Professionals must be able to understand the differences in regime and be able to clearly decide which is most appropriate. This matter, along with the relevant recommendation of the Independent Mental Health Act Review should be considered further by the Bill team and as the Bill goes through the Commons.
- **16- and 17-year olds**
  - Proposals to bring 16-17-year olds in the LPS system were introduced at Report Stage. Further consultation with relevant stakeholders is required to consider how these proposals will apply to this age group in practice, in particular, how the LPS can be integrated into existing statutory frameworks relevant to looked after children, young people with special education needs and those requiring in-patient psychiatric care.
  - We are concerned that the current proposals significantly weaken the safeguards currently available to young people who are deprived of their liberty, as well as undermining parental rights.
  - Potential conflicts between the LPS scheme and the existing rights of young people and their parents under the Children Act 1989 must be addressed.

### 3. Law Society areas of concern for adults

#### 3.1 Putting the person's best interests at the heart of the decision

- A decision to deprive a person of their liberty should only be made after consideration of other less restrictive options and also the person's preferences - deprivation of liberty should be a last resort.

- This should include giving appropriate weight to the person's wishes and feelings and ensuring that formal conditions to the authorisation can be imposed which form part of a person's care plan to limit the extent and impact of the deprivation.
- 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 or cannot challenge arrangements which may not be in their best interests.
- Additional protective measures should be included for those people unable to express their feelings or who do not or cannot challenge arrangements. Many people are deprived of their liberty simply because no or insufficient consideration has been given to other alternatives which could ensure that the person remains 'free' or less restricted (yet still receive the care they need).
- Crucially, and unlike the DoLS, there is no power in the Bill for conditions to be placed upon a deprivation of liberty authorisation requiring, for example, review of, or amendments to the care plan. This removes an existing essential safeguard against overly restrictive arrangements.
- Under the existing DoLS scheme the power to impose conditions has proved to be an essential element of the independent overview of the person's detention, ensuring 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, or to engage in activities on a regular basis, are vital to ensure that arrangements are the least restrictive in accordance with the fundamental principles in s.1(6) MCA 2005.
- It is unclear at what stage of the process inclusion of and the nature of conditions must be considered, and by whom. It has been suggested that conditions will attach to the care plan, which is generally prepared by the care home. A care home manager may not be best placed to identify conditions which may reduce restrictions for the cared-for person but place greater burdens on the care home in terms of staffing or other resourcing. There is an inherent conflict of interest here.

To address these issues, we recommend the Bill is amended to:

- Make clear on the face of the Bill that depriving the person's liberty must be in their best interests and after consideration of less restrictive options.
- Give proper weight to the individual's wishes and feelings, recognising that many vulnerable people cannot express objections and need information and support.
- Ensure that there is an express power on the face of the Bill to attach conditions to a deprivation of liberty authorisation.

### **3.2 Right of the cared for person to object and challenge**

- The Bill removes existing formal provisions which support and enable the cared for person and others on their behalf to object to and challenge the arrangements. Many people who will be

subject to the new deprivation of liberty authorisations will not be able to 'object' in the formal sense, so independent oversight is essential.

- We are also concerned about the limited situations in which a cared for person has access to an AMCP to scrutinise the decisions made about the removal of someone's liberty – access to an AMCP should be available in the clear majority of cases (suggestions are made below) and the role of an AMCP should be defined.
- The Bill as currently drafted only allows for the pre-authorisation review to be carried out by an Approved Mental Capacity Professional in very limited circumstances. It is our view that the scrutiny of a skilled AMCP must be extended to include circumstances which render the cared-for person particularly vulnerable. These include where physical restraint or the use of sedating medication is in use, where there is a less restrictive option for the cared-for person's care or residence, where the cared-for person owns or has the right to occupy a different property to the property, or the cared-for person has the opportunity to live with family or friends.
- Measures which require a person to leave behind their own home or family to move into residential care are a significant life change and frequently an irreversible step. Without access to an AMCP in these situations before the person is placed in a care home or other institution the protection of the vulnerable person will be further eroded.
- Further, we believe it is important to recognise that the cared-for person may not be in a position to verbalise their objection to the arrangements, but nevertheless, they may be unhappy with the decisions being made on their behalf. This may be as a result of fear, communication limitations, a desire not to be seen as a trouble maker, or a sense of hopelessness about their situation. In all of these circumstances it is important that an objection or dissatisfaction is identified, and the responsible body is alert to the need to consider bringing the matter before the Court.

### **3.3 Role of the care home manager**

- Whilst there have been a number of changes in the House of Lords, there remains a lack of clarity regarding the role and responsibilities of the care home manager as part of the cared-for person's journey through the LPS process.
- The Bill requires further amendment to remove all actual and perceived conflicts of interest, ensure qualified and experienced independent individuals undertake key assessments and consultations and any objection can be identified and acted upon.

Our main concerns about the role of the care home manager are:

- **Conflict of interest** - The amended Bill now precludes assessments being carried out by anyone with a "prescribed connection" with the care home, yet the choice of assessor may still lie with the care home, giving rise to a conflict. Requiring the care home manager to undertake the consultation exercise with the cared for person is deeply flawed. It is not difficult to envisage a vulnerable person being uncomfortable or reluctant to give an honest answer when questioned by the care home manager on their willingness to stay or their 'happiness' in the current placement.

- **Capacity within the care sector** - Recruitment and retention of care home managers is a challenge for the sector. Care home managers are already under pressure and will not have the time or resources to take on additional responsibilities such as commissioning reports and assessments, chasing these up to secure all the documentation necessary within an appropriate time frame. There is a very real risk that transferring responsibility to the care home manager over and above what is now required will not be effective.
- **Moving into care for the first time** - Ensuring assessments are robust, particularly in relation to whether the move is necessary and proportionate in the light of other possible options is essential. Safeguarding against a temporary move into care becoming permanent by default, as other options stay unexplored or fade through lack of proper consideration is also vital.

The Law Society would therefore recommend that following key responsibilities should clearly sit with the responsible body **and not the care home manager**:

- deciding whether the proposed arrangements do or do not deprive the person of their liberty;
- arranging all assessments;
- carrying out the consultation and keeping the consultation records;
- deciding if the person is excluded from LPS because their care should be managed under mental health provisions;
- deciding that all the LPS authorisation conditions are met
- identifying any changes to the cared-for person's care plan which are required to ensure that the authorisation conditions are met;
- obtaining and retaining written records of all assessments, and the care plan (including any changes).

### **3.4 Protections during the period of deprivation of liberty**

- People deprived of their liberty should have access to support throughout the period of deprivation of liberty. Without essential ongoing support and oversight, there may be a failure to identify the need to review and take appropriate action in relation to the deprivation of liberty, as the cared-for person's views, circumstances or condition, or the level or nature of the restrictions on them change.
- Access to an Independent Mental Capacity Advocate during the period of detention should be automatic in all cases. We recommend amending the Bill so that a cared-for person is provided with an Independent Mental Capacity Advocate (IMCA) in all cases where the person has no-one available or appropriate to support the person (removing the best interests test for access to an IMCA as provided for currently in the Bill).
- The responsibilities of an IMCA should also be defined including bringing a case before the Court of Protection if the circumstances so require.

- In cases where the cared for person has a relative or friend to act as ‘appropriate person’ during the period of detention, the role of the appropriate person should be defined, including the obligation to bring a case before the Court of Protection. The responsible body should also be required to confirm that the appropriate person is both willing and able to discharge the obligations that the role brings. It should not be assumed that just because there is a family member, they are necessarily able and willing to act.

### **3.5 Limiting the length of authorisations**

The maximum period of a first authorisation under the Liberty Protection Safeguards 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.

It is our view that the renewal of any authorisation should be limited for a period not exceeding 12 months. The obligations on the responsible body at renewal are not onerous particularly given the serious impact of depriving a person of their liberty. Within any 12 months period the condition or circumstances of the cared-for person may change significantly, as may the arrangements, and for a number of reasons, alternative and/or less restrictive arrangements may become practicably available.

### **3.6 Safeguards for emergency authorisations and ‘vital acts’**

We are concerned that as drafted, the Bill would allow indefinite deprivation of liberty for emergency cases and for ‘vital acts’ with no mechanism for speedy court review. This is inconsistent with existing caselaw which provides that emergency detention may be authorised administratively, but only for a very limited period (e.g. 14 days) and only when the cared for person is facilitated during that period to challenge the decision.

We would recommend that the Bill is amended to:

- Bring it in line with current established legal principles
- Limit an emergency authorisation to 14 days
- Ensure the cared for person and any person with an interest in the cared for person’s welfare is fully informed
- Provide that an application to the Court of Protection is made immediately if the person, their authorised attorney or deputy or any other person interested in their welfare objects to the deprivation of liberty.

### **3.7 Protecting the right to refuse: people with a special status**

It is the Law Society’s view that a deprivation of liberty should not be authorised where specific people with special status have refused or objected to the deprivation. We would recommend that the Bill is amended to provide that the responsible body may not authorise such arrangements if there is a valid decision of either a donee of a lasting power of attorney granted by the cared-for

person or a deputy appointed by the Court of Protection that the person should not live or receive care or treatment in the proposed place. .

### **3.8 Protecting the rights of those deprived of their liberty in private or independent hospitals**

- In the House of Lords, the Government has acknowledged that the LPS procedure for those in private and independent hospitals needs to be reviewed and will bring amendments in the Commons.
- We would be concerned if the Bill was not amended as it would place the cared for person at significant risk, should the responsibility for authorising their deprivation of liberty be placed into hands of the managers of the detaining private hospital. It is essential that the clinical commissioning group (CCG), local health board or relevant local authority act as responsible body in these circumstances. In each case, an AMCP must carry out the pre-authorisation review and retain oversight throughout the duration of the detention.
- Further, it is the view of the Law Society that all cared-for people detained in private or independent hospitals must have an IMCA appointed to provide an adequate safeguard. Family members do not always find they are fully apprised of their relative's needs and progress in these institutions and have their contact and access restricted. A professional advocate is necessary to ensure the cared-for person has the right level of support and representation.

### **3.9 The interface between mental capacity and mental health legislation**

- The interplay of these two jurisdictions is very complex under the existing regime and impenetrable for many legal practitioners. It is not feasible to expect care home managers to navigate this interface and reach a conclusion on whether an LPS will be excluded due to the operation of Part 7 of the Bill for many cared-for people.
- We believe that the opportunity to simplify this element of the scheme should not be missed. Further scrutiny is needed to ensure a clear and workable interaction is provided for in the Bill, which can be understood by professionals and cared-for people and their families alike. We note the straightforward recommendation made by the Mental Health Act review on this issue and propose that further consideration is essential as the Bill has its Second Reading.

## **4. Concerns about 16-17 olds under the Liberty Protection Safeguards**

Whilst the current system of Deprivation of Liberty Safeguards (DoLS) only apply to adults, amendments introduced by the Government at Report Stage in the House of Lords extend the LPS to 16-17-year olds. We are concerned that their application to this age group has not been considered fully, in particular, how they will work with existing statutory frameworks relevant to young people with special educational needs, looked after children and those in need of psychiatric care.

We are concerned that insufficient consideration has been given to the implications of extending the LPS to 16- and 17-year olds. Further consultation is required to give stakeholders the opportunity to review how the proposals in the Bill will apply in practice. It is necessary to consider whether the safeguards for young people are appropriate and proportionate, how to ensure that the LPS scheme

does not undermine young people's rights or parental rights and how the LPS can be integrated into existing statutory frameworks, such as those relevant to looked after children and young people with special educational needs.

Our overarching concern is that the effect of applying the administrative procedure for authorising a deprivation of liberty under the LPS scheme to this age group is that those young people falling within its scope have considerably less safeguards than those currently available to young people who are deprived of their liberty.

#### **4.1 Authorising a deprivation of liberty as an alternative to existing safeguards for 16-17-year olds**

The LPS do not fill a legal gap. Under current law, an under 18-year old's deprivation of liberty must either be authorised by:

- a court (depending on the circumstances this would be the Court of Protection exercising powers under the Mental Capacity Act (MCA) 2005, under section 25 of the Children Act (CA) 1989 (secure accommodation) or the inherent jurisdiction of the court); or
- (if the young person requires in-patient psychiatric treatment) by the Mental Health Act (MHA) 1983.

The LPS introduces an administrative process as an **alternative** means of authorising a young person's deprivation of liberty. While arguably, there may be cases in which authorising a 16- or 17-year old's deprivation of liberty under the LPS scheme might be an appropriate and proportionate mechanism, this is dependent on the adequacy of the safeguards provided to that young person. For example, the LPS might be a proportionate safeguard in cases where the care arrangements are non-contentious due to the type of care provided, level of restrictions imposed and consensus on the suitability of the arrangements (the placement accords with the young person's wishes and has been made with the agreement of the young person's parents) – but only if there are sufficient safeguards. However, as noted above, we have significant concerns about adequacy of the safeguards under the LPS scheme. We set out below amendments that are needed to address specific concerns in relation to the application of the LPS to 16- and 17-year olds.

The Law Commission's report, *Mental Capacity and Deprivation of Liberty*, raised concerns that the existing mechanisms to authorise a young person's deprivation of liberty are not being utilised when such authority should be sought. If that is the case, the reasons for the failure to do so should be established. Extending the LPS to young people is unlikely to resolve problems such as a misunderstanding or misapplication of the law, especially when it will add another legal framework, to an area of law that is already regarded as overly complex and confusing.

While introducing the administrative process for authorising a deprivation of liberty under the LPS may address concerns about the cost of making applications to the courts, the LPS scheme must be properly resourced and young people and their families must be made aware of their rights to apply to the Court of Protection. Furthermore, there will be cases in which the scrutiny of the court will be required, for example, if the young person's parents object to the proposed care plan.

The MC(A) Bill could address one source of significant uncertainty in relation to under 18s by clarifying when a deprivation of liberty arises. Currently a parent may in certain circumstances consent to their child's confinement so that no deprivation of liberty arises – a crucial point given

that the LPS will only apply where there is a deprivation of liberty. This uncertainty may be resolved by the Supreme Court (its ruling on the question whether parents may give such consent where their child is 16 or 17 years old is awaited).

#### **4.2 Amendments to the Bill relevant to 16- and 17-year olds**

The following amendments are recommended:

- **An Approved Mental Capacity Professional must review the care arrangements for all 16- and 17-year olds subject to the LPS** – this reflects the need to have additional safeguards for this age group.
- **All 16- and 17-year olds subject to the LPS must have the right to an Independent Mental Capacity Advocate** – again this is to reflect the need for additional safeguards for this age group. Furthermore, we are concerned that the MC(A) Bill states that an IMCA should be provided unless an “appropriate person” is available. This is likely to mean that parents will be considered to fall into this category and therefore an IMCA will not be appointed for the young person. While most parents will be seeking to achieve the very best for their child, this is not a substitute for independent advocacy. Accordingly, we consider that young people who are subject to the LPS scheme should have an automatic right to an IMCA, with relevant training and experience in working with young people.
- **Clarify the rights of parents** – The Bill needs to be amended so that there is no suggestion of conflict with the Children Act 1989. The MC(A) Bill makes no reference to the role of parents in making decisions about the placement of their child, which is at odds with the Children Act (CA) 1989. For example, under section 20 of the CA 1989 parents can object to their child’s placement and can also remove their child from that placement. Whereas the Bill provides that certain people are consulted (para 20, Schedule 1), the main purpose of the consultation is to try to ascertain the cared-for person’s wishes or feelings in relation to the arrangements. It does not address the question of the parent’s views on the arrangements for their child. Thus, on the face of the Bill it would appear that the LPS provisions permit a local authority to make arrangements that deprive young people of their liberty without the agreement of their parents and to do so without the need to obtain a court order. This potential conflict needs to be addressed.

#### **5. Suggested questions for Second Reading**

- Will the Minister provide assurances that the decision to deprive someone of their liberty will include consideration as to whether deprivation of liberty is in the person’s best interests and will also consider alternative less restrictive options?
- Does the Minister agree with the Law Society’s recommendation that access to an Independent Mental Capacity Advocate should be available to all and not conditional on a best interests test?
- What will the Government do to provide further clarity on the role of care home managers and ensure there are no conflicts of interests?
- Will the Government agree that someone’s liberty should only be authorised for a maximum of one year without review?

- Will the Government agree that all cared-for people in private hospitals should have the authorisation of their deprivation of liberty overseen by an AMCP and that the responsible body should be a statutory authority and not the private hospital management?
- Will the Government consider the interaction between this Bill and the Mental Health Act as set out in its recently published review?
- Will the Government consider seeking further consultation on the application of the LPS scheme to 16 and 17 year olds?

**For further information please contact:**

Rebecca Goshawk (Public Affairs Manager)

E: [rebecca.goshawk@lawsociety.org.uk](mailto:rebecca.goshawk@lawsociety.org.uk)

T: 07854 968970