

Local Government Association Briefing

The Mental Capacity (Amendment) Bill

Second reading, House of Commons

18 December 2018



Key messages

- Local government has long called for an overhaul of the current Deprivation of Liberty Safeguards (DoLS) process to create a simpler and less bureaucratic scheme. The current system is unable to ensure adequate protection for human rights and we therefore support the introduction of the Mental Capacity (Amendment) Bill.
- The Bill provides a vital opportunity for long-awaited reform. It is important that this opportunity is not missed and that the Bill is passed as the current situation is not sustainable for councils and our communities. We are pleased that the Government has listened to concerns in order to ensure that the Bill is fit for purpose and implementable in practice.
- The underlying purpose of the Bill is to be enabling, highlighting both the rights of individuals to be consulted on decisions and ensuring that they, their families and carers, and the sector as a whole, have confidence that there will be independent oversight of those decisions when appropriate.
- It is positive to see the ongoing opportunities to involve the sector in the production of the proposed code of practice. We also welcome the commitment to revise the current impact assessment to take full account of the costs to local councils.
- We welcome a number of the changes to the Bill in the Lords which re-inforce the existing role of care home managers in identifying the need for, and arranging assessments, re-assessments and seeking reviews. Care home managers will not now be expected to undertake these reviews. This addresses concerns around conflicts of interest, independent oversight and new burdens.
- We welcome the strengthened focus on how best to protect peoples' liberty and the greater clarity on ensuring the rights of the cared for person are safeguarded. Individuals' right to information for is now on the face of the Bill. This should ensure that people who lack capacity, their families and carers are at the heart of decisions about their care. The development of the Bill and the commitment to introduce a Mental Health Bill provide the further opportunity for reducing complexity whilst still maintaining individuals' rights.
- We are pleased with amendments which clarify that the pre-authorisation review and the appointment of the Independent Advocates will be arranged by the responsible body such as councils, NHS organisations or Clinical Commissioning Groups, to ensure independent scrutiny. These responsible bodies can also take on a care home's role if it decided this would be necessary. We wish to continue to work with Government and national partners to ensure the Bill focuses on streamlining the system and delivering the checks and balances needed.

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Support for next steps

- The change in decision-making which will see deprivation of liberty assessments undertaken alongside care act assessments will have resource implications for councils. It will require some changes to existing requirements under the Care Act and training of staff in councils; and this will need to be co-produced and resourced. We welcome the commitment to bring forward in the House of Commons, the development of a new Code of Practice by directly consulting with stakeholders and support and training for all involved. In addition, we have welcomed the commitment to updating the current Impact Assessment as these costs must be fully funded.
- We welcome the offer to work with stakeholders on a statutory definition of deprivation of liberty to address some of the well-recognised challenges arising from the Supreme Court Judgement in 2014.
- Given our work on and commitment to the joint Transforming Care programme, we are particularly pleased to note the new requirement that all cases in independent hospitals must be referred to an Approved Mental Capacity Professional (AMCP). This is regardless of objection status, to ensure independent oversight and to hopefully ensure challenge where people are not moving to care and support within local communities.
- We would also wish to work with government on a managed and resourced transition to the new scheme. This should minimise the impacts on individuals, their carers, the workforce and local partners' resources.

Further information

Impacts on councils, providers and communities

There is long-standingⁱ recognition that the existing DoLS system is not fit for purpose. It is overly complicated and bureaucratic for both the care provider and the local authority and does not give enough regard to the needs of the cared for person.

It is also failing to provide vulnerable people with the protections they need. Councils have been working hard to protect the rights of the most vulnerable people since the well-documented increase in responsibilities following the 2014 Supreme Court Judgement. We therefore welcomed and were involved in the review by the Law Commission of the current Deprivation of Liberty Safeguards (DoLS) as a means to respond both to the far-ranging challenges arising from the Supreme Court Judgement in 2014 and the overly complex system that proceeded it.

After the 2014 'Cheshire West' Supreme Court Judgement, the number of assessments increased ten times, and it has increased every year since then. Although the number of DoLS applications that were completed is also increasing, there remains many more DoLS applications received than were completed. The reported number of cases that were not completed as at year end was 125,630 out of the 227,400 applications for DoLS received during 2017-18.ⁱⁱ This means over 125,000 people are not having their rights protected. The Bill therefore provides a long-awaited opportunity to give protection to the people who need it most.

Councils are currently experiencing significant pressures across adult social care budgets and the system is widely perceived as being in a state of crisis. Since 2010, councils have had to deal with a £6 billion funding gap in adult social care services and we estimate the service faces a funding gap of £3.56 billion by 2025. The costs of implementing the Bill must be met as otherwise we will see a worsening of the consequences of funding pressures we have seen to date.

Care providers are already facing significant challenges, both in terms of resources and

quality, and in relation to workforce recruitment and retention.ⁱⁱⁱ We estimate that there is an immediate and annually recurring funding gap of £1.44 billion (part of the £3.56 billion overall gap within social care by 2025); the difference between the estimated costs of delivering care and what councils pay. In more than 100 council areas residential care home and home care providers have ceased trading, affecting more than 5,300 people in the last six months. The funding gap has resulted in providers handing back contracts to more than 60 councils, impacting just under 3,000 people.

The transition to, and implementation of, the new framework, and its future implementation, must receive additional resources to reflect additional costs. This should minimise the impacts on individuals, their carers, the workforce and local partners' resources.

ⁱ The House of Lords Select Committee on the Mental Capacity Act, [2014](#)

ⁱⁱ Mental Capacity Act 2005, Deprivation of Liberty Safeguards (DoLS) [data](#) NHS Digital, October 2018