

Local Government Association Briefing

The Mental Capacity (Amendment) Bill

Committee stage, House of Lords

5 September 2018



Key messages

- We have been calling for an overhaul of the current Deprivation of Liberty Safeguards (DoLS) process to enable councils to work with their partners locally to ensure people who lack mental capacity are placed at the centre of decisions made about their care.
- We therefore support the aim of the Mental Capacity (Amendment) Bill which seeks to create a system which is simpler and less bureaucratic. We look forward to working with Government on the development and implementation of a reformed, fully-funded scheme which ensures there is adequate protection for human rights, including any guidance to support the Act.
- 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. Despite this, local government has continued to prioritise those most in need. Even with an 11 per cent increase in applications from 2015/16 to 2016/17, the number of DoLS applications completed in 2016/17 increased by 45 per cent.¹

Amendment statements

- We support the amendment tabled by Baroness Thornton relating to provisions to extend the safeguards to 16-17 year olds. It is vital that there is a consistent approach across social care that supports vulnerable people of all ages. This Bill is an opportunity to introduce this recommendation, and would align with the Mental Capacity Act.
- Any failure to provide sustainable funding for adult social care for transition to, and implementation of the Bill, will have a damaging impact on the crucial council services on which people rely. We support the amendment tabled by Lord Touhig which requires the Secretary of State for Health and Social Care to report on the impact of the Act on responsible bodies and others, no later than two years after Royal Assent. This will help consider the impact on cost pressures on council budgets.
- It is also important that the Government recognises that the new provision relating to care homes will create additional responsibilities, and therefore financial pressures, for the care home provider market and for local authorities as the responsible body, as they will be liable for any legal challenge. This is at a time when the sector is already facing significant challenges, both in terms of resources and in relation to their workforce recruitment and retention. The review proposed by Lord Touhig should include an assessment of the impact of the legislation on the provider market.

Information on existing clauses

The new framework being brought forward through this Bill should be aligned to current adult social care practice to avoid the new scheme being as complex as the present one. We would welcome further clarity from the Department in relation to Clause 10, paragraphs

Briefing

2 and 5. These seek to outline responsibilities in relation to ordinary residence which are currently contradictory and not in line with current frameworks.

We welcome the Bill's focus on how best to protect people's liberty. We would also welcome further clarity in Clause 17, paragraph 2 as to whether the cared for person also must be consulted to ascertain hers or his wishes or feelings in relation to the arrangements for their care. We are also seeking further information as to whether there are any other circumstances that pre-authorisation review could receive the oversight of an Approved Mental Capacity Professional other than circumstances outlined in Clause 18, paragraph 2 a and b.

Further information

The transition to the new framework, and its future implementation, must receive additional resources to reflect additional costs. This includes those associated with the ongoing need to train and equip the workforce with the understanding and the skills they will need.

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Council funding

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. This must be closed as a matter of urgency. If it is not, we will see a worsening of the consequences of funding pressures we have seen to date.

Provider sector issues

Care providers are a vital part of the social care landscape. But the scale of the funding challenge facing adult social care is putting providers under impossible pressure. 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.

Some providers are having to reduce the amount of their capacity used by local authorities because it is not profitable. The impact is a loss of capacity for local authorities and a knock-on impact on their customers and the NHS.

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.

¹ Further information available at: <https://digital.nhs.uk/data-and-information/publications/statistical/mental-capacity-act-2005-deprivation-of-liberty-safeguards-assessments/mental-capacity-act-2005-deprivation-of-liberty-safeguards-england-2016-17-official-statistics>