

Local Government Association Briefing

The Mental Capacity (Amendment) Bill

Public Bill Committee: House of Commons

15 January 2019



Key messages

- Local government has long called for an overhaul of the current Deprivation of Liberty Safeguards (DoLS) process to:
 - ensure more effective protection of human rights
 - create a simpler and less bureaucratic scheme
 - reduce the resource impacts on councils
- We welcome the opportunity that the Bill presents to replace a system that is widely agreed not to be fit for purpose. We support the aim of the Bill to improve the lives of local people and the people that provide care and support for them, including:
 - the application to any setting, including domestic provisions
 - ensuring all referrals are subject to independent oversight, including the strengthening of the current Best Interests Assessor role to the new Approved Mental Capacity Professional (AMCP)
 - developing a whole system approach focussing on protecting people's liberty and ensuring all staff are trained and supported to do this
 - reducing the risk of people being unlawfully deprived of their liberty by tackling the current backlog of over 125,000 people
- We welcome the aim to reduce the current burden on councils, particularly within the context of increasing pressures on the adult social care, including:
 - The commitment to a revised impact assessment
 - The recognition of hospitals and Clinical Commissioning Groups (CCGs) as separate Responsible Bodies
 - developing clearer links between existing duties under the Care Act 2015 and the new Liberty Protection Safeguards
 - extending the safeguards to 16-17 year olds to create a consistent approach across social care that supports vulnerable people of all ages, aligns with the Mental Capacity Act and reduces the need to apply to the Court of Protection
 - mainstreaming the protection of some of the most vulnerable people in our society into social work practice

Support for further amendments

We recognise the concerns about the process to develop the Bill and with the initial draft. We feel that the amendments in the Lords, as detailed below, have significantly improved its provision. With further refinements undertaken in conjunction with key national partners, we hope the intended ambition of the Bill to improve protection to individuals can be achieved.

We have continued to support changes that ensure that the Bill does secure real change for people that use services, their families and for those that provide care and support, and that is fit for purpose and implementable in practice:

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- the final legislation needs to ensure that the rights of the cared for person are safeguarded, including being consulted and having access to information. This should ensure that people who lack capacity and their families and carers are placed at the heart of decisions made about their care.
 - we wish to continue to work with Government, Parliamentarians and national partners to ensure the Bill delivers the checks and balances needed. This should ensure that people receiving care and support, their families and carers, and the sector as a whole have confidence that there will be independent representation, advocacy and oversight and review of decisions when appropriate. We have welcomed the commitment to further clarify the role and responsibility of the AMCP via further amendments.
- Given our work on and commitment to the joint [Transforming Care](#) programme, we support amendment 19 from Barbara Keeley, Paula Sherriff, Thangam Debbonaire and Alex Norris that would mean that, where a person is accommodated in an independent hospital for the assessment or treatment of a mental disorder, then the responsible body will be the commissioner rather than the hospital. We welcome assurances that there is no connection to the hospital of anyone involved in any review, as there is now with care homes. This would avoid any conflict of interest.
 - We would support further consideration of the current definition of deprivation of liberty. It is important that the definition is right and meets the challenges of the current system in ensuring effort and resources are focused on upholding and safeguarding the rights of the individuals that most need them, but that any significantly changed scope must not run the risk of subsequent legal challenge, as we saw with the Cheshire West judgement. We welcomed the offer to work with stakeholders on the statutory definition of deprivation of liberty and remain keen to work with government and others on this.
 - We are aware of concerns about the changing role of care managers and have supported changes to the Bill which have sought to more reflect existing duties and to address concerns around conflicts of interest, independence and new burdens. Further Amendments for the responsible bodies to take on all functions relating to authorisation of deprivation of liberty in cases relating to care homes will have resource implications for councils and NHS partners, and will have to be resourced in full. We also would wish to see the focus remaining on streamlining and simplifying the current system.
 - We welcomed the commitment in the House of Commons to bring forward the development of a new Code of Practice via consultation with stakeholders. Given much of the detail behind the Bill will sit in the proposed Code of Practice, we would support the development of a 'live' code of practice and impact assessment that could change to reflect amendments. This would be helpful in outlining to Parliamentarians in more detail how the Bill would protect people's liberty and the changed roles and responsibilities for people that care for them or commission that care, and thus if any further changes to legislation are needed.

Necessary steps prior to implementation

In order for the Bill to achieve its ambitions and to minimise the impact on councils and communities:

- the revised impact assessment must take full account of the costs to councils and their partners locally. The transition to, and implementation of, the new framework, and its future implementation, must receive additional resources to reflect additional costs.
- 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 would also wish to work with government on a managed and resourced transition to the new scheme, including addressing the current backlog. This should reduce the impacts on individuals, their carers, the workforce and local partners' resources.

The need for reform - current impacts on councils, providers and communities

There is long-standing recognition that the existing Deprivation of Liberty Safeguards (DoLS) system is not fit for purposeⁱ and the Bill therefore provides a crucial and long-awaited opportunity to give protection to the people who need it most.

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. We therefore welcomed and were actively involved in the review by the Law Commission of DoLS as a means to respond both to the far-ranging challenges arising from the Supreme Court Judgement in 2014. The Law Commission final report and draft Bill in March 2017 recommended that the DoLS be repealed with pressing urgencyⁱⁱ.

As well as being overly complex and bureaucratic, it is also failing to provide vulnerable people with the protections they need. After the 2014 'Cheshire West' Supreme Court Judgement, the number of assessments increased ten times, and it has increased every year since then, it now represents an 18 fold increase. Councils have been working hard to protect the rights of the most vulnerable people and the number of DoLS applications that were completed is also increasing. There remains however, many more DoLS applications received than 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 2017-18ⁱⁱⁱ. This means over 125,000 people are not having their rights protected^{iv}.

The Care Quality Commission have identified; "variation in how Providers implement DoLS;" a variation that, "can lead to poor practice and having a negative effect on people using services". Lack of training and the complexity of the current system were concluded to be key contributors to this^v.

The need for wider system reform

Many of the concerns surrounding the Bill stem from wider issues in the care and support system as a whole. We have reflected many of these experiences and consequences in the response to the consultation on our own Green Paper^{vi}. Current resource and workforce capacity issues will obviously impact on the Bill's implementation but the Bill on its own cannot address these pressures. Our support for reform of DoLS therefore runs in parallel with our call for recognition of both the importance of adult social care and that the system is unsustainable in its current form.

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.

Care providers are already facing significant challenges, both in terms of resources and quality, and in relation to workforce recruitment and retention. 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 current framework is unsustainable for councils and communities in this context and neither councils nor care providers can be expected to continue to provide 'more for less'.

Alongside their role in implementing the legislation and in providing challenge to any part of the system that is not understanding or implementing its responsibilities under it, providers, commissioners and regulators all have and will continue to have a role in ensuring people receive safe and high quality care. They and local communities will also have key role in ensuring that those who are most isolated and most in need of the protection that the safeguards offer have access to them. These will always remain challenges, particularly in a system under strain, but these are wider issues than the ones that the Bill seeks to or can address.

Amendments so far

We are pleased that the Government has listened to our concerns. We will continue to work with government, parliamentarians and national partners to further strengthen the Bill and support its implementation. In particular we have supported 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' rights to information about their care is now included on the face of the Bill.
- re-enforcement of 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 amendment addresses concerns around conflicts of interest, independent oversight and new burdens.
- clarification that 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.
- the 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. Also as above, we would support further work to ensure that the rights of individuals in these hospitals are safeguarded in the Bill.

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

ⁱⁱ Review of the Mental Capacity Act and the DoLS, [Law Commission](#), March 2017

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

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

^v State of Care 2017-18, [CQC](#), October 2018

^{vi} The Lives We Want to Lead consultation [response](#), November 2020