Briefing:
Mental Capacity (Amendment) Bill (HL)

Second Reading – July 2018

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Introduction

The Deprivation of Liberty Safeguards (**DoLS**) are part of the Mental Capacity Act 2005. The safeguards aim to make sure that people in care homes and hospitals are looked after in a way that does not inappropriately restrict their freedom. The current Bill in the House of Lords is an amendment to the Mental Capacity Act 2005.

This Bill will have an impact on one of the most profound of our human rights, the right to liberty. It is important that it is fully scrutinised, and that the right level of resourcing is attached to its implementation.

It is of particular significance to older people, as DoLS are most often used by people receiving care. The Joint Committee on Human Rights, amongst others, has stated that the current DoLS system is broken and that urgent action is needed. This Bill is an opportunity to fix it.

Age UK has identified four areas of the Bill that require a high level of scrutiny, and four ways in which these areas could be improved

Areas of the Bill that can be improved:

1. The Bill's new proposals for DoLS in care homes (and their impact on the backlog of assessments currently under review which stands at over 100,000 referrals)
2. Deprivation of liberty in domestic settings
3. Funding and implementation
4. The need for definition of deprivation of liberty

Ways to improve them:

1. Provision must be made to ensure that care home managers have the training and resources to be able to clear the backlog of assessments under the provisions of the Bill
2. The Bill should set out a specific 'route' for authorisations within a person's own home
3. Recognition that the system set out in the Bill will not be tenable if sufficient resources are not allocated to meet the additional demand
4. A clear definition of what 'deprivation of liberty' means at a legal and practical level

Age UK believes the Bill has many positive features, these include person-centred care planning, attempts to reduce bureaucracy and the clarity it provides around the responsibilities for those closest to the delivery of day-to-day care.

The Mental Capacity Act 2005 introduced the role of the **independent mental capacity advocate** (IMCA). IMCAs act as a safeguard for people who lack the capacity to make some important decisions. The IMCA role is to support and represent the person in the decision-making process. Essentially they make sure that the Mental Capacity Act 2005 is being followed.

This Bill proposes that in addition to IMCAs, **approved mental capacity practitioners** (AMCP) **(Schedule 1, Part 4)** are also introduced. Age UK welcomes this role as it will enable a level of independent oversight in more complex cases.

1. Care Home Arrangements (Schedule 1, Part 2)

The Bill proposes a specific system for authorising arrangements which amount to a deprivation of liberty in a care home. In effect this means that there will be different routes for achieving authorisations and renewals. The care home 'route' will affect older people far more than any other demographic.

The bulk of the preparatory work, assessments and documentation for authorisations and renewals for an adult living in a care home would now be organised by the care home manager, with authorisation granted by a responsible body (a local authority, or a Clinical Commissioning Group in the case of continuing care funding).

It is positive that those providing day-to-day care will have an important role to play in authorisations and renewals, and this may reinforce more general care home responsibilities under the Mental Capacity Act. However there is a potential risk that there would be insufficient independent scrutiny of the arrangements in some cases, meaning that Article 5 duties were not fully met.

For renewals, the care home again plays a central role and will need to confirm that the conditions continue to be met. They will also need to confirm that it is unlikely there will be any significant change in the patient's condition which would affect those conditions over a renewal period which can last for up to three years. The role of reviews under the Care Act 2014 in such cases will be important, however there are concerns that annual reviews do not always take place. Care planning must be delivered more consistently than it currently is so that this new review process can work effectively and in the way it is intended to.

1.1 The backlog

The significant backlog of DoLS authorisations, which currently numbers over 100,000 referrals, continues to cause concern. If the Bill were to become law, the bulk of the assessment work required to clear the backlog would move from local authorities to individual care homes. Clarification is needed as to:

- How the backlog of cases will be tracked and monitored during the process of handover
- Whether there are sufficient IMCAs available to avoid further delays
- How quickly arrangements can be put in place to recruit and train AMCPs to an appropriate level
- How care home managers will be prepared and resourced to undertake their new role under the Bill

2. Domestic settings (Schedule 1, Part 2, Clause 16)

The Bill does not set out a specific 'route' for authorisations within a person's own home. However a local authority or clinical commissioning group would carry out the bulk of the assessments, unlike a care home setting. The area where there is likely to be contention is the condition that arrangements are 'necessary and proportionate', which is likely to lead to different methods of implementation, and in turn to varying outcomes for older people.

3. Funding and implementation

The system set out in the Bill will only work if truly person-centred, good quality care and support is in place. In the case of the Bill's proposals for authorisations within care homes this will be vital. Achieving this remains a significant challenge in the current environment, where in the past five years there has been a £160 million cut in total public spending on older people's social care[1], despite a rapidly increasing demand due to our ageing population. This has impacted on both the provision and quality of social care, resulting in older people being deprived of their liberty as care providers and carers struggle to provide the care that people need to enable them to live autonomously and independently.

The Bill positions access to advocacy as a key safeguard. While we strongly support this, current services would not be able to meet the additional demand without significantly increasing resources.

It is unclear what level of training the proposed Approved Mental Capacity Practitioner (AMCP) role will undertake, although we welcome the idea that Social Work England will regulate and quality assure this role.

Competence, system capacity and resource issues must be fully considered as the Bill progresses.

4. The need for a definition

[1] https://www.ageuk.org.uk/our-impact/campaigning/care-in-crisis/

The Bill does not define deprivation of liberty. Without a definition there is a very real risk of further confusion about the application of the Bill in practice. This leaves older people and their families, as well as responsible bodies, in the same position as before – facing uncertainty about how best to support people in their own homes and huge surges or declines in applications based on developing case law.

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