

Briefing: Mental Capacity (Amendment) Bill (HL)

Committee Stage – October 2018

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Introduction

The Second Reading of the Bill, along with the subsequent government response and additional appendices, has highlighted four key areas where Age UK believes amendments are required.

The focus of all health and social care, wherever and however it is delivered, must remain on enabling people to remain as independent as possible for as long as possible. The Bill proposes new frameworks which will have a profound impact on people's rights and autonomy, and it therefore deserves a commensurate level of scrutiny.

It is of particular significance to older people, as Deprivation of Liberty Safeguards (DoLS) are most often used in relation to 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 relating to these four areas, we believe the following themes should be considered in debate:

- 1) The roles, responsibilities and expectations placed on care home managers.
- 2) In relation to self-funders in care homes, there is a conflict of interest arising from the care home manager having a financial interest in the person residing in the care home. An independent external assessment must take place before the deprivation of liberty can be enacted.
- 3) Where cases are complex or disputed it should be possible for an independent reviewer to refer the issue directly to a court.
- 4) Establishing a definition of "Deprivation of Liberty."

Theme:

1. The roles, responsibilities and expectations placed on care home managers.

Amendment: HL Bill 117 (e) Amendment for Committee

Insert the following new Clause –

“Training for care home managers

- (1) The Secretary of State must by regulations made by the statutory instrument require local authorities to provide the requisite training for all care home managers who may be required to make statement under paragraph 13 of Schedule 1 to this Act.
- (2) The regulations may prescribe which bodies are to provide the training under the subsection (1), and the assessment to be used for the participants to complete the training.
- (3) A statutory instrument containing regulations under this section may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament.”

Explanation:

Care home managers will now be required to undertake assessments that are currently conducted by the responsible body, such as the local authority. Whilst some care home managers and staff will possess a significant amount of knowledge of procedures, the fact that they will now be required to carry out an assessment of whether someone’s liberty is being lawfully deprived and is in the person’s best interests requires a much deeper level of qualification.

At present there are no less than six assessments for a DoLS application, these include: *Age assessment; No refusals assessment; Mental capacity assessment; Mental health assessment; Eligibility assessment, and; Best interests assessment*. In order for care home managers to be able to conduct these assessments they are going to need the requisite qualification. In considering what is requisite, in order to become Best Interest Assessors, social workers must complete specific and complex training that is in addition to their university education.

In order to avoid the inadvertent authorisation of care and treatment arrangements that do not comply with the Mental Capacity Act 2007, the training must include in depth consideration of that Act and be of a depth that reflects the existing training Best Interest Assessors.

Theme:

2. In relation to self-funders in care homes, there is a conflict of interest arising from the care home manager having a financial interest in the person residing in the care home. An independent external assessment must take place before the deprivation of liberty can be enacted.

Amendment: HL Bill 117 (e) Amendment for Committee

Schedule 1, Page 11, line 1, leave out “in accordance with paragraph 18 to 20” and insert “by an Approved Mental Capacity Professional under paragraph 18(2)”

Page 11, leave out lines 3 to 8 and insert –

“(e) under paragraph 19, the Approved Mental Capacity Professional has determined that the authorisation conditions are met.”

Page 12, line 19, at end insert –

“() The assessment must be carried out by an individual who has attended and passed the accredited training authorised by the local authority under section (*Training for care home managers*)”

Explanation:

In respect of self-funders in private homes, there is an existing principle in mental health law that where an assessor has a financial interest in the decision to deprive someone of liberty there must also be an independent external assessor.

We believe a pre-authorised review by an Approved Mental Capacity Practitioner (AMCP) should be conducted. Without such a requirement, a significant conflict of interest for the care home manager is likely to arise.

The involvement of an independent assessor would protect the care home manager and their employer because it would ensure that there was no implication that a person had been deprived of their liberty in order to guarantee continued residence and financial security for the care home.

Theme:

3. Where cases are complex or disputed it is possible for an independent reviewer to refer the issue directly to a court.

Amendment: HL Bill 117 (m) Amendment for Committee

Schedule 1, Page 12, line 18, at end insert:

“(3) Where any interested party objects to the determination that arrangements are necessary and proportionate, an Approved Mental Capacity Professional (ACMP) must be engaged and the ACMP may, where they deem it necessary, refer disputes to the court.”

Page 13, line 30, at the end insert –

“(c) consider whether a referral to the court is required.”

Explanation:

We are particularly concerned that the rights of the cared for person should be at the heart of the Liberty Protection Safeguards. One way to ensure this is to provide an automatic referral pathway to an ACMP in cases of dispute, objection or disagreement that cannot be easily resolved. Providing the ACMP with the authority to refer to the court will provide an added level of reassurance that the interests and wishes of the cared for person are fully considered.

We believe that this will be of particular relevance in cases involving potential deprivations of liberty within the cared for person’s own home.

Although the Minister’s letter addressed after the Second Reading states that all applicants will be subject to an independent review before authorisation, the Bill in its current state does not reflect this, and further clarification on this point is needed.

Theme:

4. Establishing a definition of “Deprivation of Liberty”

Amendment: HL Bill 117 (m) Amendment for Committee

Schedule 1, Page 6, line 4, at end insert –

“() Arrangements that give rise to a deprivation of a cared-for person’s liberty occur when a responsible authority –

- (a) places the cared for person, P, under continuous supervision and control,
- (b) ensures that P is not free to leave, and
- (c) deems those arrangements to be in P’s best interests.”

Explanation:

To provide practitioners, families and the cared for person with an agreed definition that is unambiguous where authorisation of deprivation of liberty is enacted. A definition of ‘deprivation of liberty’ must be included in the Bill. This is particularly important where the authorisation of deprivation of liberty is being considered for someone living in their own home.

To date, two attempts have been made to establish a definition of Deprivation of Liberty, most recently by the Joint Committee on Human Rights which called for definition that ‘clarifies the application of the Supreme Court’s acid test and brings clarity to frontline professionals’¹. The Supreme Court’s ‘acid test’, referred to in the Committee’s recommendation, references Lady Hale’s case ‘P v. Cheshire West Council’ in 2014. In the ruling, Lady Hale noted that ‘the person concerned was under continuous supervision and control and was not free to leave.’²

The Bill seeks to authorise ‘arrangements’ that are necessary to deliver care and treatment, rather than the care and treatment itself. It is therefore highly likely that the issue of arrangements in domestic settings will arise.

At present, concerns about those deprived of their liberty in domestic settings are settled via the Court of Protection. Whilst this had drawbacks (expense, delays and families facing a potentially upsetting and onerous court process) it did provide the highest level of scrutiny. To change from this system, to one whereby the local authority (or CCG in some cases) approves such arrangements, is a substantial alteration.

¹ https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/890/89008.htm#_idTextAnchor013

² https://www.familylaw.co.uk/news_and_comment/p-v-cheshire-west-and-chester-council-p-and-q-v-surrey-county-council-2014-uksc-19#.W3067p3wYdU

A definition will provide practitioners, families and the cared for person with the best opportunity to understand whether care arrangements within a domestic home amount to a deprivation of liberty.

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