

## Mental Capacity (Amendment) Bill update

17/12/2018

**Private Client analysis: Following the Mental Capacity (Amendment) Bill's third and final reading in the House of Lords on 11 December, Tim Spencer-Lane, lawyer at the Law Commission for England and Wales, discusses the amendments that have been made to date and looks ahead to the next stage of its journey through Parliament.**

### What is the background to the Bill?

The Mental Capacity (Amendment) Bill (the Bill) was introduced in the House of Lords on 3 July 2018. It proposes to replace the heavily criticised Deprivation of Liberty Safeguards (the DoLS) under the [Mental Capacity Act 2005 \(MCA 2005\)](#) by introducing a new scheme to enable the deprivation of liberty of people who lack the relevant capacity in order to provide them with care and treatment. The new process is called the Liberty Protection Safeguards (the LPS) and unlike the DoLS, it would apply to any setting (including domestic and family settings) and enable multiple arrangements to be authorised. All referrals would be subject to an independent oversight—including by an Approved Mental Capacity Professional (AMCP), which is a new role created under the LPS. The Bill is largely based on a scheme put forward by the Law Commission in its [report Mental Capacity and Deprivation of Liberty](#).

### What key amendments have been made to the Bill by the government since it was first introduced to the House of Lords?

The government has made several amendments to the Bill in the House of Lords. It has, for example, extended the scheme to include 16 and 17-year-olds (in line with the Law Commission's recommendation). It has also amended the medical assessment under the scheme, which would now need to consider whether the person is suffering from a 'mental disorder' (replacing the term 'unsound mind' which had been widely criticised for being stigmatising).

Under the Bill, different arrangements apply if the person is to be deprived of liberty in a care home. The Bill originally required all care homes to arrange the relevant assessments that would be needed to justify any deprivation of liberty and provide these to the responsible body. However, in response to concerns about conflicts of interest and the capacity and capability of care home to undertake this function, the government amended these provisions to ensure that the responsible body in all cases will decide if the care home manager should make the necessary arrangements or whether it itself will do so. Assessments cannot be carried out by anyone connected to the care home.

Rights to advocacy have also been amended. If there is no 'appropriate person' to represent and support the person (such as a friend or family member), the Bill now creates what is in effect an assumption that an Independent Mental Capacity Advocate must be appointed, unless having an advocate is not in the person's best interests. This was intended to allay peers' concerns that rights to advance might be restricted under the Bill.

The government's 'whistleblowing amendment' was also passed, which confirms that any relevant person who identifies during the authorisation stage that a cared-for person is objecting to arrangements is empowered to raise the matter with the responsible body and can trigger a review by the AMCP. The Bill was also amended to require that medical and capacity assessments must be carried out by someone with the appropriate experience and knowledge.

### What have been the key amendments that the government has been defeated on?

The necessary and proportionate assessment is a key aspect of the LPS. It requires the assessor to determine whether there are any less restrictive alternatives for the person and considers what benefits would arise for the person and, in doing so, the assessor must have regard to the person's wishes and feelings. Peers successfully called a vote on an amendment that aimed to clarify the purpose of this assessment. The necessity and proportionality assessment must consider whether the arrangements are necessary to prevent harm to the person and proportionate in relation to the risk of harm. The government has confirmed it will not seek to amend or remove this amendment in the House of Commons.

The Bill was also amended by peers to place rights to information for the person and others on the face of the Bill. The amendment would require that, prior to an authorisation being given, the person must be fully informed of their rights and the Independent Mental Capacity Advocate must ensure the person understands certain matters, including right to make an application to the court. The responsible body would be required to ensure that cases are referred to the court where the person's right to a court review is engaged. The government has said it would 'carefully consider' this amendment.

## **How far do these changes go towards addressing concerns that the Bill focused too narrowly on the replacement of the DoLs with the LPS and failed to reflect the wider reforms recommended by the Law Commission?**

The Law Commission recommended certain wider reforms to [MCA 2005](#) with the aim of improving general decision-making generally under it. These included an amendment to the best interests checklist in order to give greater weight to the person's wishes and feelings and reforms to [MCA 2005, s 5](#) to require professionals to document that they had fully complied with it when making certain important decisions for the person. The Law Commission also recommended a new provision to allow people to consent in advance to a deprivation of liberty and to introduce a statutory tort of unlawful deprivation of liberty which would apply to private hospital and care homes. These recommendations have not been included in the Bill.

## **What further amendments are anticipated as the Bill passes through the House of Commons?**

The government has committed to bring forward an amendment to clarify the meaning of deprivation of liberty. This is in response to concerns raised by peers and stakeholders about the impact of the Supreme Court decision in *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council and another; P and Q (by their litigation friend, the Official Solicitor) v Surrey County Council* [\[2014\] UKSC 19](#), [\[2014\] 2 All ER 585](#). This decision gave a significantly wider definition of deprivation of liberty than had been previously understood. Since the judgment, the sector has struggled to cope with the 18-fold increase in numbers (the most recent figures show that 227,400 DoLS referrals were made from 1 April 2017 to 31 March 2018, compared to 13,715 before—and a backlog somewhere in the region of 125,630). Peers tabled a number of amendments aimed at narrowing the definition put forward by the Supreme Court.

The government has also agreed to put forward amendments to expand the oversight role of the AMCP. Under the Bill, the AMCP considers cases when there is a reasonable belief that the person is objecting to the arrangements. Objections might be raised for instance by the person themselves or by others on their behalf. The government has agreed to amend the Bill to provide that the AMCP must also consider all cases where the person is being deprived of liberty in an independent hospital as well as to consider whether the Bill should be amendment to expand the AMCP role to other cases.

On 6 December 2018, the Independent Review of the [Mental Health Act 1983](#) (chaired by Simon Wessely) published its final report, which included recommendations relating to the interface between the LPS and the [Mental Health Act 1983](#). The government confirmed it would not be 'rushing through' any amendments to give effect to the review's recommendations.

## **What is the anticipated timeline for the Bill to receive Royal Assent?**

This is not clear due to the uncertain nature of the parliamentary timetable at present. But the Bill is likely to receive Royal Assent by Spring 2019, with the implementation date pencilled in for 2020.

*Tim Spencer-Lane was responsible for the Law Commission's review of the deprivation of liberty safeguards under [MCA 2005](#). A final report, which included a draft Bill, was published in March 2017. Tim was previously in charge of the Law Commission's review of the regulation of health and social care professionals. This proposed a single legal framework for all the UK regulators including the GMC, NMC and HCPC. The final report, including a draft Bill, was published in 2014. Tim was also responsible for the Law Commission's review of adult social care. The final report*

was published in 2011 and formed the basis of the [Care Act 2014](#) and the [Social Services and Well-being \(Wales\) Act 2014](#).

*Interviewed by Kate Beaumont.*

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