

# Local Government Association Briefing

## The Mental Capacity (Amendment) Bill

### Report Stage, House of Lords

21 November 2018



#### Key messages

- Local government has long called for an overhaul of the current Deprivation of Liberty Safeguards (DoLS) process to create a simpler and less bureaucratic scheme. The current system is unable to ensure adequate protection for human rights and we therefore support the introduction of the Mental Capacity (Amendment) Bill.
- The Bill provides a vital opportunity for long-awaited reform. It needs to be passed as the current situation is not sustainable both for councils and for our communities. We are pleased that the Government has listened to concerns in order to ensure that the Bill is fit for purpose and implementable in practice.
- Any proposed changes should underpin the Bill's purpose which is to be enabling. The final legislation needs to highlight the rights of individuals to be consulted in decisions and ensure that they, their families and carers, and the sector as a whole, have the confidence that there will be independent oversight of those decisions when appropriate.
- Greater detail will be included in the proposed code of practice and we welcome ongoing opportunities to involve the sector in its production and as part of the implementation of the Bill. We also welcome the commitment to revise the current impact assessment to take full account of the costs to local government, given the changes proposed by the amendments at Report stage.

#### Amendment statements

##### *Registered managers in care homes*

The Bill will now seek to re-inforce the existing role of care home managers in identifying the need for, and arranging assessments, re-assessment and seeking reviews. However, care home managers will no longer be expected to undertake these reviews. This should address concerns around conflicts of interest, independent oversight and new burdens.

- We support the Government's amendments which ends the proposed role for care home staff for completing assessments. Care homes will now arrange assessments and the responsible body will authorise them. The medical and capacity assessments must be conducted by someone who has appropriate experience and knowledge, but with no connection to the care home. The amendments ensure the provisions are more in line with the existing Deprivation of Liberty Safeguards (DoLS) system and Care Act 2014 duties. It should also minimise the risk of conflict of interest. The Care Quality Commission has flagged variations in the understanding and implementation of the current system<sup>1</sup> and this ongoing key role of care homes therefore should be reinforced by appropriate training and support funded by Government.
- The Government's amendments also provide clarity that the pre-authorisation review will be arranged by the responsible body such as councils, NHS organisations or Clinical Commissioning Groups, to ensure independent scrutiny of applications. These responsible bodies can also arrange the assessments if, for example, there

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are concerns around performance in a specific care home or if it makes more sense for the social worker responsible for an individual's care plan to do so. Whilst we welcome these amendments as delivering the checks and balances needed, we wish to continue to work with government and national partners ensure that the Bill continues to focus on streamlining the system.

- To avoid the new scheme being as complex as the present one, the Bill should be aligned to current adult social care practice. We would welcome further clarity from the Government in relation to Clause 10, paragraphs 2 and 5. These seek to outline responsibilities in relation to ordinary residence which are currently not in line with the Care Act 2014.
- The changed role of councils and this transfer of decision-making back to the responsible body will have resource implications for councils. It will require some changes to existing requirements under the Care Act and some training of staff in councils; and this will need to be co-produced and resourced. We welcome the commitment to updating the current Impact Assessment as these costs must be fully funded.

### *Person centred approach*

We welcome the Bill's focus on how best to protect peoples' liberty. We therefore welcome the greater clarity on ensuring the rights of the cared for person are safeguarded. This should ensure that people who lack capacity and their families and carers are placed at the heart of decisions made about their care.

- The proposed Government amendment No 63 provides greater clarity that the cared for person must be consulted to ascertain their wishes or feelings, including that these must be considered as part of the necessary and proportionate assessment. This will now run alongside the existing requirement to consult with anyone with an interest in the welfare of the person such as family or carers.
- The appointment of an Independent Mental Capacity Advocate (IMCA) now will not depend on notification from the care home, given concerns that this placed care homes in a 'gatekeeper' role. An IMCA will now automatically appointed by the responsible body, unless there is an appropriate person or it is not in the person's best interests.
- We welcome Government amendment No 5, tabled by Lord O'Shaughnessy relating to provisions to extend the safeguards to 16-17 year olds. This ensures a consistent approach across social care that supports vulnerable people of all ages and it also aligns with the Mental Capacity Act. Again, we welcome the recognition of the resource implications for councils and local partners of this change.

### **Further information**

#### *Impacts on councils, providers and communities*

There is long-standing<sup>ii</sup> recognition that the existing DoLS system is not fit for purpose. 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.

It is also failing to provide vulnerable people with the protections they need. 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. We therefore welcomed and were involved in the review by the Law Commission of the current Deprivation of Liberty Safeguards (DoLS) as a means to respond both to the far-ranging challenges arising from the Supreme Court Judgement in 2014 and the overly complex system that proceeded it.

Post the 2014 'Cheshire West' Supreme Court Judgement the number of assessments increased ten times, and it has increased every year since then. Although the number of DoLS applications that were completed is also increasing, there remains many more DoLS applications received than were 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 2017-18.<sup>iii</sup> This means over 125,000 people are not having their rights protected. The Bill therefore provides a long-awaited opportunity to give protection to the people who need it most.

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. The costs of implementing the Bill must be met as otherwise we will see a worsening of the consequences of funding pressures we have seen to date.

Care providers are already facing significant challenges, both in terms of resources and quality, and in relation to workforce recruitment and retention.<sup>iv</sup> 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 transition to, and implementation of, the new framework, and its future implementation, must receive additional resources to reflect additional costs. This should minimise the impacts on individuals, their carers, the workforce and local partners' resources.

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<sup>i</sup> The State of Health Care and Adult Social Care in England 2017-2018, CQC, October 2018

<sup>ii</sup> The House of Lords Select Committee on the Mental Capacity Act, [2014](#)

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