



Department
of Health

From the Lord O'Shaughnessy
Parliamentary Under Secretary of State for Health (Lords)

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Dear Colleague,

24 JUL 2018

I would like to express my gratitude and thanks for your contribution to the second reading debate on the Mental Capacity (Amendment) Bill. As a House, we covered a huge amount during the debate, and I would like to take this opportunity to provide further details and to address points which were raised which I hope will provide reassurance on the impact of the Bill and how the new model will operate.

As I stressed during my speech, we have an opportunity here to bring about much needed change through reforming a system that is currently not fit for purpose. I think we will all agree on the importance of these reforms and the need to get them right. My aim is to ensure that the Bill is in the best possible shape to empower and protect some of the most vulnerable people in our society and provide necessary, fair and proportionate access to justice.

It is my view that this Bill and its associated work plans, including a new Code of Practice, reflect the evidence, analysis and recommendations put forward by the Law Commission. This report was a major milestone for Government and we subsequently worked closely with stakeholders to build on the work to further streamline and improve the proposed model. For further clarity, I enclose a detailed recommendation by recommendation response to the Law Commission set of recommendations at annex A, including for those recommendations where we are not proposing to exactly follow the Law Commissions proposals.

I now turn to the points raised in the debate.

The new model and further detail on how it will work

Empowering the cared-for person

The new model under the Bill will enhance protections for people, as well as ensuring that all applications are subject to an independent review *before* authorisation. An important aspect is that care home managers are not approving authorisations themselves; that role remains with Local Authorities, which will provide independent scrutiny and oversight. During my speech I indicated that I would like to reflect on the matter of how the model could fit with 16 and 17 year old young people.

Wishes and feelings

During the assessment process, the person's wishes and feelings *must* be identified through consultation with the individual and others who care for them. This consultation duty is more explicit than that currently required under the DoLS requirements and will rightfully place the views of the person and their families, or others who care, at the heart of the process and will ensure that the views of those who know the person best inform the Liberty Protection Safeguards process. In addition, we would expect that in most cases the three assessments should be undertaken with the full engagement of the person and their family via the consultation requirements.

Some family members and carers are also attorneys under lasting powers of attorney, or are court appointed deputies. The Bill provides that attorneys and deputies are central to the Liberty Protection Safeguards. Section 6(6) of the Mental Capacity Act already provides that a decision cannot be made which conflicts with a decision made by an attorney or deputy within the scope of their authority, and that will not be changed under the Bill. This would generally mean that authorisations could *not* be given if they conflicted with a valid decision by an attorney/deputy. The new duty to consult in the Bill is stronger, requiring specific consultation with any attorneys and deputies.

Best Interests

The issue of 'best interests' as part of decision-making for care and treatment was raised, with concerns that this had been lost. I can categorically state that this is not the case and apologise if I was not clear on this point in my closing speech. Best interests decision-making for care and treatment remains fundamental to the Mental Capacity Act; this Bill does not change that.

The Bill would work in the following way:

- First, a decision will need to be taken that the care or treatment is in the person's best interests in accordance with Section 4 of the Act.
- Second, if this care or treatment can only be provided through arrangements that give rise to a deprivation of liberty, then the new model will apply. In particular, an assessor must consider if the proposed arrangements for care and treatment which give rise to a deprivation of liberty are 'necessary and proportionate'. This necessary and proportionate stage becomes in effect a second stage test, which will follow the 'best interests' test about the need for that care and treatment.

Under the DoLS system, that second stage test is currently called the 'best interests' determination.

However, this is not the same as a 'best interests' decision under Section 4; it includes the additional criteria of whether the deprivation of liberty is necessary and proportionate. The Law Commission found that assessors often confused the 'best interests' requirement with the first stage clinical decision. Making the test 'necessary and proportionate' removes this confusion and will make the consideration clearer and more focused.



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Liberty Protection Safeguards process: Approved Mental Capacity Professionals, Independent Mental Capacity Advocates and Appropriate Person

The Bill sets out the roles of the Independent Mental Capacity Advocate (IMCA) and 'appropriate person'. Both of these roles are to represent and support the person through the assessment process and throughout the duration of any authorisation. Whilst IMCAs are already in place under the Mental Capacity Act and continue to play an important role in the new model, the new 'appropriate person' role serves to ensure that the person is properly empowered within the new system and can access justice.

Under the new model, IMCAs will be engaged at the earliest stages, before arrangements come into force and the assessments are being undertaken. The cared-for person will be able to access an IMCA, or if more appropriate, someone who cares for them can become the 'appropriate person'. Furthermore, an 'appropriate person' will also have access to an IMCA to help them provide support to the person.

All applications to deprive someone of liberty are subject to independent review before they are approved.

There is a duty in the Bill to identify whether or not the person has any objection to the arrangements proposed. Where a person objects, this review must be carried out by an Approved Mental Capacity Professional (AMCP) and a person may be supported in this by their advocate (IMCA) or appropriate person. The AMCP is required to meet with the person if appropriate and practical, and consult friends, family, IMCA, attorneys, deputies and others who know them best.

The role of the AMCP is a new one and key to the new model, although based on the best interests assessor role within DoLS (most of whom we expect will 'convert'). The reform will ensure that in cases where the cared-for person or anyone else on their behalf with an interest in their welfare objects to the arrangements being proposed, the AMCP reviews all the relevant information and determines whether the authorisation conditions are met. In other words, the AMCP can effectively veto proposed arrangements if that is their judgement. In those cases, the responsible body and/or care provider will need to reconsider the arrangements proposed.

Reviews

A responsible body, such as an NHS organisation, a Local Health Board in Wales, or a local authority is required to set out a programme of reviews (for example setting regular dates for a review of the authorisation to take place). There are also a number of further triggers to

review an authorisation. A request by anyone who has ‘an interest in the arrangements’, or any significant change in the person’s condition or circumstances, all trigger a review by the responsible body of any authorisation. In addition, if the person changes their mind and objects to the arrangements, that will trigger a referral to the AMCP for a determination of whether the conditions for an authorisation are met.

Finally, within the model, there is always access to challenge any authorisation in the Court of Protection, and legal aid will continue to be available on a non-means tested basis. Given the extension of the scheme beyond hospitals and care homes to community settings, availability for non means-tested legal aid will increase under the new model. I wrongly described access to legal aid as being means-tested in my closing speech, for which I apologise.

I have included with this letter an illustrative ‘journey’ of a person moving from home into residential care and then a hospital stay under DoLS and then under the new Liberty Protection Safeguards model (annex B). It highlights some of the key changes and improvements of the reform and as requested, I have also included at annex C a summary flow diagram, and at annex D a schedule showing how the Mental Capacity Act would look once amended by this bill.

Other issues raised during debate

Unsound Mind and Definition

A number of peers also raised the issue of the use of the term ‘unsound mind’ in the Bill. We have used this term in order to guarantee that no gap arises between the Bill and Article 5 of the ECHR. The Law Commission for example pointed to the gap currently between the notion of Mental disorder and unsoundness of mind which should be filled by an application to the Court of Protection. However, I am sensitive to the points made on this and subject to the need to consider the European Convention on Human Rights and the risk of creating a gap; I would welcome your views.

Recognising the helpful contribution to the debate by the recent report published by the Joint Committee on Human Rights on DoLS, many peers also raised the issue of a definition during the debate. Again, given there are disagreements about the way forward, I would welcome more detailed considerations on this matter from peers over the coming weeks.

Finally, I can advise colleagues that an Equality Impact assessment had been prepared, but has not yet been published. I have made arrangements for that to happen very shortly.

Implementation

Many peers, and indeed other stakeholders, have raised with me the importance of a carefully planned and appropriately-resourced implementation plan. It is absolutely essential that we work with delivery partners as well as others on this, as good implementation will be essential to achieving the aims of this reform and improving people’s



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access to necessary protections. I stress again my commitment to ensuring the success of this reform and can assure you implementation will be very carefully considered and planned.

As part of this, we will be considering very carefully the training required to ensure that all persons in the new system are supported and skilled for their role. For AMCPs we will also be considering regulations to prescribe criteria relating to their qualifications and training.

I recognise that this model brings about a change for the role of care home staff, but the opportunity to ensure that the workforce plays a full role in the care and treatment of people, and any associated deprivation of liberty, is too important to miss. The current DoLS model does not incentivise the ownership of mental capacity and deprivation of liberty within all care providers and workforce, as the local authority best interest assessors are seen as responsible for it instead. This divorces deprivation of liberty considerations from care and care planning, and often occurs as a post-decision rubber stamping exercise. Bringing the consideration of these issues at the point of care planning tackles a major shortfall of the current system and champions the perspective of the person or others who care for their welfare.

Peers also raised interest in the Code of Practice, which is rightly recognised as a core component to successful implementation. We will develop a new Code working with a wide range of stakeholders and delivery partners to ensure that it helps support innovation and good practice. In addition it will set standards and provide other detail for practice underpinning the Bill, such as provision of information to the person. We see the Code as being particularly important in addressing the change in culture and behaviour needed to deliver on some of the Law Commission recommendations which are not included in the Bill, such as advance consent, supported decisions making (as already required under Principle Two of the Mental Capacity Act) and qualifying the defence to health professionals under Section Four of the Mental Capacity Act. Unlike DoLS, this Bill will enable us to use the statutory Code of Practice to address evolving practice, innovation and increasing standards more easily through updates and refreshes. Given its importance, and the benefits of co-production with the sector, we expect this to take at least 12 months and have started to collate issues now, so we are ready to start this work in Autumn.

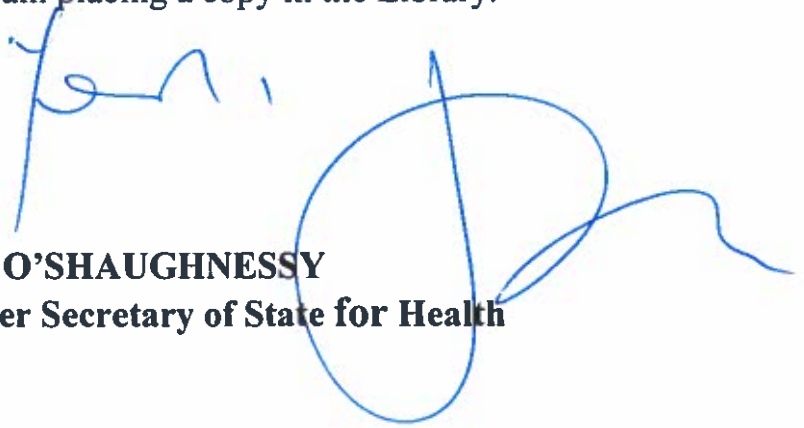
There was also reference to monitoring and oversight of the new system. The Bill includes regulation-making powers for bodies to monitor and report on the new system. In England we would be looking for CQC to play this vital role, and in Wales the Welsh Government will be looking to CIW/HSIC in Wales to ensure compliance with the new model as they currently do for DoLS and the Mental Capacity Act.

So, to conclude, I return to our objectives and the shared sense of urgency for reform, This Bill is about increasing access to justice, delivering greater protection to individuals and improving the experience of those who care for them. Last year over 108,000 vulnerable people were in the DoLS backlog, deprived of their liberty and not under any authorisation. This reform is essential if we want to remedy that.

This is not a Bill driven by saving money and we absolutely recognise that the new system will need to be appropriately resourced to ensure it is implemented and delivered effectively. Any efficiencies and subsequent savings will stay in the adult social care system to help fund better care. This can only be a good thing.

I hope that this letter has addressed a number of points made during the debate and has clarified the process and what we seek to achieve. This, however, is by no means a straight forward Bill; it is complex, detailed and, above all, central to human rights. This is why your continued engagement is so vital. I welcome any further points, questions and challenges you may have over the coming weeks that can helpfully inform the model and its implementation. I have asked my officials to contact you directly to discuss the matters set out in this letter, or indeed any other issues you wish to raise. I hope that you will find that helpful, and I know that they will.

I have copied this letter to all Peers who spoke during the second reading debate on the Mental Capacity (Amendment) Bill and am placing a copy in the Library.



JAMES O'SHAUGHNESSY
Parliamentary Under Secretary of State for Health