

Inclusion London's Briefing on the Mental Capacity Amendment Bill

About the Bill

The Mental Capacity (Amendment) Bill was introduced into the House of Lords in July 2018, and will amend the Mental Capacity Act 2005 (MCA)¹. The Bill will affect the human rights of over three hundred thousand citizens in England and Wales with conditions including dementia, learning difficulties, autism and brain injuries, as well as their families and supporters.

The Bill introduces a new scheme, the Liberty Protection Safeguards (LPS) to replace the heavily criticised deprivation of liberty safeguards (DoLS). It aims to provide the legal safeguards required by the European Convention on Human Rights (ECHR) for people who are considered to lack the mental capacity to consent to their care arrangements, and who are considered in law to be deprived of their liberty.

The government's stated objectives for the Bill are

1. To create a new simplified legal framework which is accessible and clear to all affected parties;
2. To deliver improved outcomes for persons deprived of their liberty and their family / unpaid carers;
3. To provide a simplified authorisation process capable of operating effectively in all settings.

To ensure that the Mental Capacity Act works as intended, by placing the person at the heart of decision-making and is compliant with Article 8 European Convention on Human Rights.

Summary of the main changes introduced by the Bill

- It will be possible to apply for an authorisation of deprivation of liberty in any setting. Current DoLS apply only to care homes and hospitals.
- There will be 2 different regimes: one for care homes and another for all other settings.
- At present for all cases of care home residents local authorities have to commission independent assessments to check whether the legal tests are met. The Bill proposes to give responsibility for arranging the assessments to care home managers in relation to people who are in a care home. The Bill allows existing assessments to be reused. All cases then will have to be reviewed. The review could be completed by a member of a care home staff as

¹ All documents related to the Bill can be found here <https://services.parliament.uk/bills/2017-19/mentalcapacityamendment/documents.html>

long as they are not involved in providing care to a person. A review from an independent Approved Mental Capacity Professional will only take place for cases of people who are believed to be objecting to the deprivation of their liberty. It is up to care home managers to decide whether or not a person is objecting. It is also up to a care home manager to decide whether it is in the person's best interests to have an advocate or another person who can help them challenge the decision.

- For all other settings, local authorities, hospital managers or CCGs will arrange the assessments and a review. An independent review from Approved Mental Capacity Professional will be available to those whose local authority, CCG or hospital believe them to be objecting. The advocate will be appointed if the local authority, CCG or a hospital manager believes it is in person's best interests to have one.
- Under the current system people can decide in advance who will make decisions for them and consequently those decision-makers can object to deprivation of liberty on their behalf. The Bill does not make it clear that those appointed people will be able to say no to any deprivation of liberty.
- Currently people can only be deprived of liberty to prevent them from causing harm to themselves and only if deprivation of liberty is in their best interests. The Bill will make it possible to detain people to prevent harm to others and there is no best interests test.

Our concerns

Weakening human rights protections for Disabled people

Inclusion London is seriously concerned about the impact this Bill will have on the human rights of Disabled people. Not only does the Bill go against all the principles in the CRPD, which the UK government signed up to, it will significantly weaken the few existing protections people have. We are also of a view that the proposed regime will not comply with very minimum requirements of article 5 of the European Convention on Human Rights. In the documents accompanying the Bill, the government says the opposite. However, this conclusion mainly seems to be based on the fact that a simplified system will significantly reduce the number of people who are de facto deprived of their liberty without an authorisation.

CRPD principles

The Bill goes against some of the key articles in the United Nations Convention on the Rights of Persons with Disabilities:

- No one should be deprived of their liberty because of their disability (Article 14)

- Disabled people’s personal integrity should be respected on an equal basis with others meaning for example no one should be forced to accept medical treatment they don’t want (Article 17)
- Disabled people should have the help and support they need to make decisions for themselves (Article 12).
- Disabled people should have support to live in the community and can’t be forced to live in a particular setting (Article 19).

In 2017, in its Concluding Observations for the UK Government, the UN Committee on the Rights of Persons with Disabilities confirmed that UK mental capacity legislation does not comply with the CRPD principles and recommended:

- A reform of Mental Health and Mental Capacity laws to ensure Disabled people have a right to supported decision making.
- Repealing legislation and practices that authorize non-consensual, involuntary, compulsory treatment and detention of Disabled people on the basis of actual or perceived impairment or any form of forced intervention or surgery.
- Eradicating the use of restraint for reasons related to disability within all settings.
- Allocating appropriate funding and setting up adequate support systems to enable Disabled people to live in the community in a place of their choice.

The Bill makes it easier to detain people. It removes independent assessments for the majority of cases, except when a care home manager or a local authority decides that the person concerned is objecting. The Bill does not require them to consult with the person concerned, give any weight to their wishes and feelings or even to inform them or their relatives about the decisions that are being made. There are no attempts to introduce elements of the supported decision-making system. The Bill restricts access to independent advocacy and does not improve in any way the person’s ability to challenge decisions that are made about them. The Bill does not make it clear that deprivation of liberty cannot be used when other less restrictive options, such as providing more support or looking at true reasons behind the person’s “challenging behaviour” could work to achieve the aim.

The lack of involvement of Disabled people and Disabled people’s organisation in the development of the policies behind the Bill

The UNCRPD requires meaningful involvement of Disabled people and their organisations in the development of policies which will have an impact on Disabled people’s lives. The Liberty Protection Safeguards scheme was originally recommended by the Law Commission after it undertook a consultation about the reform. However,

the government's proposal is significantly different to what the Law Commission had recommended. The Government claims that it has been refined during the stakeholder engagement, which included people who are currently subject to DoLs and their families. However, there was no open consultation and no documentation in accessible formats, such as easy read for example. It is therefore doubtful how this engagement could have been carried out.

Next steps

We believe the passage of the Bill should be paused to enable people who may be impacted by the proposed changes to respond to the proposals. We are disappointed the government failed to use this opportunity to reform the Mental Capacity law to ensure it complies with CRPD. We will raise our concerns with members of Parliament.

Inclusion London will work together with other DDPOs lawyers and academics who are concerned about the implications of the Bill on the rights of Disabled people to oppose the Bill in its current format and secure amendments that will make it more compliant with the UNCRPD and the ECHR. We believe that amendments are needed in the following areas but would like to know your views:

- Ensure everything is done to promote people's liberty: sufficient support, the manner of which the support is given etc. So deprivation is the last resort
- Make it easy to challenge decisions including: ensuring everyone has a right to an advocate of their choice, duty to refer cases to the Court of Protection when there is a dispute
- Ensure significant weight is given to people's wishes and wants when decisions are made, including a choice of a person who will support people to make decisions or makes decisions for them;
- Prevent deprivation of liberty for the purpose of protecting others
- Ensure effective participation of the person in the process: they should be consulted, informed in accessible way, asked if they want to challenge and helped to do it if they want to
- Put in place effective safeguards to ensure people are not deprived of their liberty unnecessarily.

What you can do

- Let us know if you want to be kept up-to-date with the Bill's progress and to receive template briefings to send to your MPs. Support Disabled people especially those who are or may be affected by these changes to let us know what they think. Attached is a briefing in easy read with some questions for discussion.
- Sign a letter to the Joint Committee on Human Rights expressing our concerns over the compliance with existing human rights standards.
- You can also raise concerns with your MP and support other Disabled people to do so.

This briefing was prepared by Inclusion London's Disability Justice Project

- Sign up to proposed amendments which we will be putting together based on your views and the changes you think are most important to push for if the bill does go through.

More information

The text of the Bill and all the supporting documents are available here <https://services.parliament.uk/bills/2017-19/mentalcapacityamendment/documents.html>

Preliminary legal analyses of the Bill from the barristers at 39 Essex are available here: <http://www.mentalcapacitylawandpolicy.org.uk/mental-capacity-amendment-bill-published-headlines/>

Dr Lucy Series wrote several posts analysing the impact of the Bill on the rights of people concerned <https://thesmallplaces.wordpress.com/2018/07/05/reading-the-mental-capacity-amendment-bill-on-the-train/> and <https://thesmallplaces.wordpress.com/2018/07/10/more-notes-from-the-train-on-the-mental-capacity-amendment-bill/>

The detailed comparison of the existing and proposed systems are available here <http://www.edgetraining.org.uk/wp-content/uploads/2018/07/DoLS-and-LPS-comparison-table-July-2018-final-v1.pdf>