Written evidence submitted by the National DoLS Leads Group (MCAB02)

1. Mental Capacity (Amendment) Bill – Evidence submission for the Public Bill Committee

1.1 This report is submitted from the Local Authority DoLS Leads representing each of the following regions of England.

- North East
- Yorks and Humber
- North West
- West Midlands
- East Midlands
- East of England Region
- South Ease
- South West
- London

We have contributed to the work of the Lords in improving the Bill and are keen to continue to do so.

We welcome the improvements made in the Lords which have turned an extremely poor Bill into a better but still problematic Bill.

2. Background

2.1 It is important to set a little context to the current situation. The current DoLS scheme was implemented in 2009 and the Impact Assessment was based on an assumption that at its height it would apply to 20,000 people but that by 2016/17 it would have reached steady state at around 7000. This was the basis of the funding Councils (and in the beginning PCTs) received.

2.2 In reality we have 200,000 people exactly ten times what was predicted and yet funding has not been increased to match this hugely expanded demand.

2.3 We know the reason for the increase numbers is down to a widened definition created by the Supreme Court decision known as Cheshire West.

2.4 Until this time the DoLS scheme was implemented successfully, on the whole. It may use difficult language and be hard to understand but it does work. The singular reason for the 125,000 backlog now, is inadequate funding.

2.5 DoLS as it is, could have been tweaked to become less bureaucratic and easier to operate and understand, but this option was rejected by the Law Commission.

2.6 The Law Commission Draft Bill was by no means perfect and significantly added a new burden to Councils carrying out social care assessments. However what it did achieve was to remedy the fatal flaw in DoLS which is that it stands alone and is intentionally separate from care management.

2.7 The new Bill as it is now written has become so confused it is operationally dysfunctional.

3. Comparisons

3.1 If we pause for a moment to set aside views, feelings and opinions there are some matters which are simply matters of fact. The table below indicates these and no matter whether we use different language; requirements or conditions instead of assessments, for example, these are facts.

DoLS	LPS
One Supervisory Body	Three Responsible Bodies
Six requirements in Two assessments	Six requirements in 3 assessments and in a statement
Age requirement	Age requirement
No conflict with LPA or Deputy	No conflict with LPA or Deputy
Confirmation of eligibility re overlap with MHA	Confirmation of eligibility re overlap with MHA
Capacity assessment	Capacity Assessment
Mental Health assessment confirms mental disorder	Medical Assessment confirms mental disorder
Best Interests Assessment (includes Necessary and proportionate consideration)	Necessary and proportionate assessment
Can be applied for up to 28 days in advance	Can be applied for up to 28 days in advance
Should be applied for in advance of an admission	Should be applied for in advance of an admission
2 distinct assessors	Lack of clarity as to who assesses
Consultation duty	Consultation duty
IMCA appointed from beginning if unbefriended	IMCA appointed at beginning if no appropriate person
Relevant persons representative appointed at the end of the process ongoing	IMCA or appropriate person continues ongoing
Assessments positive , duty to authorise	Conditions met, possibly a power to authorise
100% cases seen by Best Interests Assessor	Possibly 25% cases will be seen by AMCP
Supervisory body scrutiny and sign off	Responsible body pre authorisation review and sign off

3.2 In terms of process similar comparison is possible

DoLS	LPS
Form 1 is the referral and in some cases also Urgent Authorisation, sent to Supervisory body	Some kind of referral form will be needed to allow Responsible Body to decide which route to go down in care home cases
Assessors instructed	Screening of case to determine route in care home cases

IMCA instructed where necessary	IMCA instructed where necessary
Two assessments completed Form 3 and 4	Assessors to be commissioned (where from, who are they, lack of clarity)
Authorisation (Form 5) prepared	Statement to be prepared, confirmation of eligibility and of no conflict reports returned and collated, Draft authorisation record prepared
Scrutiny carried out and authorisation granted or not granted	Statement and supporting documents submitted for pre authorisation review along with Draft authorisation Record
Relevant Persons Representative appointed at conclusion of process – family member or can be paid professional	If objection is present pre authorisation review to be by AMCP which may include repeating assessments and will include meeting P and carrying out consultation again
	Authorisation signed off by responsible body
	IMCA or appropriate person continues in role

3.3 The DoLS process has clarity due to it being process driven and since the review of DoLS Forms is essentially two assessments by distinct assessors. Currently LPS lacks clarity in terms of process and has several different routes therefore it is potentially more bureaucratic and onerous than the current system.

3.4 There are at least four/five different routes; hospitals, CHC Funded placement, community and domestic settings and care homes with two options available. Due to the introduction of different routes this may result in "arbitrary decision making" albeit prescribed by law.

3.5 Whilst the basic idea of assessment, review and authorisation is sound and is welcomed, when it is examined it begins to be less clear.

3.6 Additionally LPS has not addressed the following issues of speedy access to challenge the detention nor the potential costs to the person nor the capacity of the current Court of Protection to manage as evidenced currently with the Schedule A1

4. Backlogs

4.1 There are currently 125,000 people (these are only those we know of, in care homes and hospitals. There are possibly thousands more in community and domestic settings) being unlawfully deprived of liberty. Many of these die whilst waiting with no protection at all.

4.2 The singular reason for this is that Councils do not have adequate funds to process them all. At an estimated £600 per assessment the backlog would cost £75 million to process. This is the stark reality. In addition there is a mathematical reality to factor in which is that each case must be processed again, in full, each year, under DoLS. So the numbers increase year on year on year and Councils are unable to continue to meet demand (See Judicial review https://www.39essex.com/cop_cases/liverpool-city-council-nottinghamshire-county-council-lb-richmond-upon-thames-shropshire-council-v-ssh/)

4.3 Despite suggestions to the opposite, there is no transition plan to deal with this backlog and no clarity of policy which will prevent it continuing to be the case.

5. Issues after amendment to the Bill

5.1 The policy intention of DoLS was that applications would be made in advance. This simply did not happen and most cases were accompanied by an Urgent Authorisation with the person in situ. This intention is repeated numerus times through the accompanying Code of Practice and case law has confirmed the need for authorisation in advance, yet it still does not happen. Simply restating that the intention of LPS is that it will happen in advance, will not make it happen in advance. There are operational reasons why this remains unlikely.

5.2 Assessor's roles are clear in DoLS (A Best Interests Assessor and a Mental Health Assessor) so provided there is the budget, it is relatively simple to commission the assessors. With LPS there is a wider option, knowledge and expertise, which on the one hand is positive but it requires much greater co-ordination.

5.3 Removing the gatekeeping role for care home managers is welcome but given the restrictions on conflict of interests, we feel it is impossible to see how care home managers could commission and collate assessments. We do not see where they would commission these or how, unless they are funded to do so. If they are funded to do so then it seems more logical to fully fund local authorities to do what they are good at doing and retain clarity and cohesion.

5.4 We feel the role of AMCP is central to any scheme and have always made clear our position that objection alone is inadequate as the route to referral. We feel some conditions are so complex that they require the skills of an AMCP, this might be; alcohol related dementias, brain injury and autism for example. We welcome what appears to have been added to Part 2, paragraph 13 (2) (a) that the cared for person has the right to request an AMCPs assessment and review of the arrangements. However we find no further amendments to support this in the AMCP role. We are concerned that this is a drafting error rather than a new direction.

5.5 Our concerns may be allayed to some extent by the production of a revised Impact Assessment as currently the Impact assessment has zero cost for assessments and zero cost for obtaining medical evidence. Our experience of Judicial DoL applications to the Court of Protection is that GPs are very reluctant to provide such evidence either because they do not feel skilled to do so or because they require payment ranging from £35 to £100.

5.6 We are committed as professionals to continuing to make a difference for the lives of very vulnerable people. Whether this is simply by finding out that Ps favourite singer is Jim Reeves after months of no communication, or by discovering that the woman who insists on going out in the snow used to measure snowfall for the meteorological office or by moving the young woman with good communication skills from sharing a bungalow with two nonverbal males to her own accommodation. There are numerous stories of success, we can describe.

6. Summary of Current concerns

6.1 As a group our concerns are as follows

- Several different routes to authorisation will exist. This results in an unequal provision and inequality for different service user groups. Fr example older people are more likely to be in care homes, younger people are more likely to be in supported living.
- It is unclear on what basis decisions would be made in relation to care home applications and therefore geographical differences in application are much more likely.
- It is unclear who could ever carry out assessments on behalf of care home managers. Who these people would be and more importantly who would pay for them
- It is unclear if the RB decide that it will commission and collate assessments relating to care homes, who will produce these assessments and who will pay for them.
- We question whether there is any merit in retaining two different routes which will confuse families and carers, be harder to monitor and to quality assure and even harder to bench mark and audit
- We welcome the reduction of the role of care home managers but feel that the position in which the Bill has left the Lords has removed a concern but added another, which now needs to be debated.
- We remain extremely concerned about huge backlogs. There is no provision to reduce/remove these before the implementation of the Bill. To date all measures to deal with backlogs have come from the sector itself, working together.
- There is nothing in this Bill to prevent similar backlogs continuing as the Bill team have failed to look at lessons from implementation of DoLS. For example the over use of Urgent authorisations. We see no reason why this will change with LPS. Simply saying that requests should be made in advance will not make it happen.
- We would like greater clarity about the role of AMCP, clarity that their opinion as an Independent professional is final and cannot be overturned by the RB.
- We also wish to see wider referral to AMCP and welcome the addition found in the new section of Rights stating the person has a right to request an assessment and review by an AMCP. Although we are concerned this is not mentioned elsewhere in the Bill.
- We are confused about why two provisions are in place regarding RB responsibility, ordinary residence in some cases and geographical location on other cases.
- We are concerned that we will now have to screen every single care home case to determine which route to go down and who will assess. This is an additional task not currently undertaken and the identity of assessors is unclear.
- We welcome the strengthening of the persons rights but remain concerned about those in domestic settings and a lack of attention and detail during previous debates (due to lack of time) about when LPS will apply in domestic settings

7. Conclusion

7.1 As a group we would welcome the opportunity to contribute to the debate further and to a debate on a definition of deprivation of liberty for care and treatment.

7.2 We feel that we are best placed to contribute operational information to support the ongoing debate.

7.3 We would rather see one route for all cases and consider the Bill should be further amended to remove any separation for care home cases, as we would prefer that everyone is treated the same regardless of where they are deprived of liberty.

7.4 We consider a greater number of people should have access to an AMCP and so amendments should be brought forward which include complex conditions and the right to request a review by an AMCP. Ultimately that any scheme concerning the most vulnerable members of society should be adequately funded to make it operationally viable.

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