

Written evidence submitted by Colin Newland (MCAB17)

Dear House of Commons Public Bill Committee

Mental Capacity (Amendment) Bill

I have been following the recent debates in the House of Lords and am pleased to see that certain proposed changes have already been accepted. I am re-assured by the desire to get this legislation right.

Rather than list my various concerns, I wanted to make my appeal to you, personal – personal to P (sorry, I find ‘cared for person’ a bit cumbersome and patronising).

I have been a full-time DoLS Best Interests Assessor for 3 and half years and would like to think that in that time the DoLS assessment I have carried out has made a significant difference to many individuals, and I really believe that the same outcomes could not have been achieved, had their deprivation of liberty been considered under the Bill as it has been drawn up. The following are real life P’s who I have been involved in assessing.

1. P found to have capacity.

Consider the man in hospital who was awaiting a neurological rehab bed after being assaulted and sustaining a head injury. He was treated at a London hospital and assessed as lacking capacity to agree to hospital admission and treatment. He was transferred to his local hospital to await transfer to a specialist neurological rehab unit. He did not want this and told the local hospital so when he arrived. The hospital posted a security guard to stop him leaving. I found that not only did he have capacity to decide about remaining in hospital, he had also recovered to the point of not even needing in-patient rehab. Neither his capacity nor his overall functioning had been re-assessed since his arrival at the local hospital, as he was just awaiting the specialist unit.

Or the lady who was in a nursing home following a dense stroke. When she was first assessed for DoLS, she was found to have capacity and was agreeing to stay at the nursing home. Some time later though she seemed to be not co-operating with care, resulting in various restrictive measures. The nursing home requested DoLS authorisation, and as the restrictive measures were literally life and death matters, it was thought that she may have had difficulty using and weighing the information and that DoLS was now appropriate. The Supervisory Body ‘built in’ a Review to the Authorisation, and with the support of a Speech and Language Therapist, we were able to determine that the lady did in fact have capacity in this matter and communicated very clearly a wish to return home. (The stroke had removed her speech, but she was able to communicate her views with the right support.)

Consider the many P's who have regained capacity since first being admitted to the care home – usually, the care home has requested authorisation of DoLS on the basis that P lacks capacity.

Suggestions for inclusion in new bill:

- ensure P's capacity can be independently assessed.
- Do not allow detentions of longer than 12 months

2. **Protection of P's rights**

Consider the 95 year old lady who did not want to be in the care home, and certainly did not want her home to be sold. Yes, she may have signed something to say her son could act on her behalf, “but surely he's not allowed to just do that is he? What about my rights?” – her words, on being told that her house was in the process of being sold. (She also told me she was like a prisoner – again her words).

Or P who was duped into admission to a care home by being encouraged to visit a care home to see what he thought, and then he turned and those who had taken him there had disappeared. Those 'professionals' then told the care home that P lacked capacity so they should give themselves an Urgent Authorisation of DoLS to prevent P returning home.

I assure you this is an absolutely accurate account of what had occurred.

Suggestions for inclusion in new bill:

- Ensure independent scrutiny of care home placements.
- Ensure P can be facilitated to appeal against the deprivation of liberty.

3. **Best Interests**

Consider P who was funded by the CCG who decided that P *needed* to be discharged from hospital to a nursing home. P's wife was never actually asked what she thought P might want or how she felt about this enforced separation. It was not in P's best interests to remain in the nursing home and P and his wife could live their remaining years together in their own home.

(most nursing homes would have no difficulty saying that it had been *necessary* for P to live in the nursing home.)

In the previous calendar year, I have had four of my DoLS assessments challenged in court. I stand by my assessments – each would certainly have met the criteria for 'necessary to protect from harm', but it was much harder to state why it was in their best interests not to live in their own homes. I also stand by their right to challenge the decision – something presumably they would have less opportunity to do, without best interests.

Consider P who has all through their life preferred alternative remedies and rejected those prescribed by their GP. But now lacking capacity

with regard to medication, has medication crushed into the food and given to them covertly. This is easy to justify as necessary to protect from harm but is not taking into consideration previous wishes, and could be seen as assault, depending on the strength of feeling of P.

Suggestions for inclusion in new bill:

- Ensure there is consideration of best interests, not just that the hospital admission / care home placement is deemed necessary. This is fundamental to the Mental Capacity Act.

4. **Self-funding P**

Lasting Powers of Attorneys are really good, but are so easily abused – not just maliciously, but inappropriately. P referred to in number 2 lacked capacity (and almost certainly lacked capacity when she signed the LPA). Other P's have had capacity, but their Attorneys have made the decisions anyway.

Suggestions for inclusion in new bill:

- People self-funding their care home placements do not have any other form of checks, and a deprivation of their liberty should trigger independent scrutiny.

5. **Conditions**

Consider P who has been given anti-psychotic medication to control behaviour – very often going against NICE guidelines. It could be justified as necessary to protect from harm *to others*, but where is the independent scrutiny of this. The GP's will often prescribe this kind of medication if staff at the care home express difficulties managing the challenging behaviours. Not only is this kind of medication often inappropriate, it can have detrimental effects on P, and the care home may not feel the need to look for less restrictive ways of managing the situation.

I have come across many P's whose restrictions might be deemed necessary, but can hardly be considered the less restrictive or in P's best interests.

The option of attaching conditions to an authorisation can make significant differences to P's quality of life.

Suggestions for inclusion in new bill:

- Allow the option of attaching conditions, which as at present, are part of the legal status of the authorisation.

6. **Representation**

Many of the P's I have seen would most likely not have had representation either during the assessment, or after authorisation, under the proposed arrangements. Some do not object if their family have initiated the care home placement, and most families I have come across support the care home placement, so when *consulted* by the

care home it will not lead to a conclusion that an independent perspective is needed.

Many P's have not had family or friends to consult with, but may be quite settled and no-one has any concerns. Such P's are not likely to be offered representation. Under the proposals, Care Homes will decide if advocacy or an appropriate person is in P's best interests, but my question would be, "how can it not be?". Sadly, for many people ('decision makers') it is not so clear as that.

Suggestions for inclusion in new bill:

- Everybody being deprived of their liberty should have representation.

I am not at all saying DoLS was not in need of reform. Clearly the number of people unlawfully deprived is unacceptable. I am very worried though that without significant changes to the Mental Capacity (Amendment) Bill we are heading for a pre-Bournewood scenario, where the authorisation of the deprivation of liberty becomes nothing more than "we need to deprive you of your liberty because it is the right thing to do".

Just a few general points if I may.

- I find it very interesting and significant that under DoLS, P is the 'Relevant Person', whereas in the Mental Capacity (Amendment) Bill, the 'Relevant Person' seems to have become the person who deprives P of their liberty.
- It can not be right that private hospitals will be able to carry out all the required tasks including the authorisation.
- You will be aware that we are working with case law definition (Cheshire West) for deprivation of liberty, and this amendment is a good opportunity for a definition of deprivation of liberty to be in statute. I am concerned that the proposed timescale for this amendment will not allow the House to adequately discuss and decide a definition of deprivation of liberty.

Thank you for your time and for your work on this Bill. I have previously sent the 'P' examples to various peers and baronesses and a copy to my MP (Mr Gareth Thomas, Harrow West) whom I had contacted when I first saw the Mental Capacity (Amendment) Bill. I have also copied Mr Thomas into this amended version.

Many thanks
Yours sincerely

Colin Newland

Copy to Mr Gareth Thomas MP (Harrow West)

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