

Written evidence submitted by Lucy Bright (MCAB37)

CONCERNS REGARDING MENTAL CAPACITY (AMENDMENT) BILL (2018)

Name: Lucy Bright

Qualifications: BA Honours (Oxon)

MA/Diploma Social Work

Profession: Registered Social Worker/ AMHP/ BIA/ Senior Lecturer in Health and Social Care

Interest: I am submitting these concerns in both a personal and professional capacity. I have been a practicing BIA since 2009 and have 24 years experience as a social worker with vulnerable adults. Since 2014 I have been employed by the University of Lincoln and have been delivering training for best interests assessors/Approved Mental Health Professionals and social workers, as well as undertaking research in relation to Mental Capacity. I have extensive knowledge of the MCA/DOLS both from an academic and practice perspective.

While I appreciate there is a need to reform the current system, I am extremely concerned by the way the government is rushing this bill through parliament at a time when so much else is happening. There appears to be no appetite to fully listen to the views of a wide ranging group of stakeholders and thus to give this bill the proper scrutiny it deserves, given it relates to the rights and protection of the most vulnerable in society. I would urge parliament to pause this bill to take stock of a piece of legislation designed to simplify the DOLS, which were themselves designed in haste, resulting in some of the difficulties faced today. It is always wise to try and learn from history...Aside this point, my specific concerns are as follows:

- 1 The limited role of AMCP: I believe the bill should be amended to increase the number of triggers for mandatory oversight by an AMCP, in particular when family or others are unhappy with the care arrangements, when a person is non-verbal and when a person is subject to intense restrictions such as covert medication. In the current bill an AMCP has to be involved when it is identified that a person is objecting to their care arrangements, but there is no clarity as to how objections will be identified and who will be responsible for identifying these. In my opinion this is dangerous, as I have assessed numerous situations as a BIA, where the care home or hospital state that a person is compliant, but the reality of the situation is entirely different. In particular family members often identify difficulties in care and treatment provision, when a person is unable to verbalise or explain this and therefore the oversight of an experienced and specifically trained professional is necessary in these situations to ensure the person's rights are upheld and their needs are comprehensively assessed.

People with limited communication skills often express their feelings/views through behaviours and these behaviours are often construed as a by-product of a person's condition and something that has to be managed in a medical way. For example I once assessed a man who had a diagnosis of dementia and who had been placed far from his original home in Cornwall in a care home in Lincolnshire. He was clearly objecting at the time of the initial assessment and had tried to abscond a number of times by using sheets as ropes to climb out of his bedroom window. Sadly in this situation there was no less restrictive alternative to the placement and it was necessary for him to be in 24 hour care. The danger arose when I went back to review the DOLS authorisation and was told by nursing staff that he was no longer objecting. What I found was that the man in question was asleep for most of the day and night and had been over sedated. At this point I was able

to intervene and safeguard this man using a condition to ensure that such sedation was reduced. The point is that it is all too easy for vulnerable and non-verbal individuals to be sedated to silence their objections and to make for smoother management for the care providers.

- 2 The reduced right to advocacy: Currently the bill envisages that a person will get an IMCA, when there is no one appropriate to consult and the care provider deems it is necessary for the person to have one in their 'best interests'. Advocacy never has and never should be about 'best interests', but is about ensuring a person's voice is heard, whatever the views of others about their best interests. It is a dangerous precedent to set to allow the care providers/detaining authority to decide whether it is in a person's best interests to have an independent advocate, who may challenge that same care provider. I believe the bill needs to be amended to incorporate the original proposals of the Law Commission where everyone was entitled to an advocate unless they opted out of having one. Such an amendment would be more in keeping with the proposed changes to advocacy in the Mental Health Act Review (Dec 18) where it is recommended advocacy is increased for those in psychiatric hospitals. Given that the plan in this bill is to allow much longer authorisations (up to three years) it is absolutely vital that independent advocacy is available to all who are subject to deprivation of liberty to ensure their rights are not abused.
- 3 The recently published definition of deprivation of liberty (10/1/19): While I welcome an attempt to define this contentious area of law, I believe the definition published will substantially 'muddy' the waters. In particular I am concerned by the way we are returning to a 'comparator approach' to identifying deprivation of liberty by stating that a person is not deprived if the deprivation is purely for the purposes of medical treatment and if the arrangements are the same as they would be for somebody else in that situation. The 'comparator approach' was thrown out as discriminatory by The Cheshire West judgement (2014) where it was recognised that what it means to be deprived of your liberty must be the same for everybody, not judged differently according to your disability and condition. The wording of the definition published to date is still open to wide and varied interpretation and couched in double negatives. I suspect it will only mean more case law as opposed to less.

Please note I have also submitted other statements of concern both to the House of Lords and to my MP, Karen Lee and I attach these as an appendix.

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Appendix: Email To Karen Lee (11/12/18)

. My main concern about The Mental Capacity (Amendment) Bill is that the government are trying to rush this through under the cover of the interminable Brexit debates and chaos engulfing parliament... This legislation should protect the rights of the most vulnerable members of our society but in its current format will not do this. It is being brought in to reduce the significant cost burden to Local Authorities associated with the Deprivation of Liberty Safeguards and some of the bureaucratic processes associated with these, but the current bill does this at the expense of the rights of individuals concerned.

This Bill was published very quietly in July and raised serious concerns amongst all stakeholders given its significant deviations from the Liberty Protection Safeguards proposed by the Law

Commission. Fortunately the House of Lords has got to grips with some of these problems in the last three months but there have been assurances and promises from the government without full amendments, which leaves me anxious as to whether these will be fulfilled.

It is difficult to convey all the details of my concerns around this bill without writing a book...but I will try to summarise the main points as follows;

- 1 Currently there is no mention anywhere of the duty to inform the person who is deprived of their liberty of their right of appeal- this means that the legislation is not compliant with Article 5 of The Human Rights Act (1998)
- 2 The right to an IMCA (Independent Mental Capacity Advocate) who can support a person to challenge decisions and help a person to bring an appeal to The Court of Protection is very limited- only where a person asks for one or where the care home manager believes it is in their 'best interests'. Given care homes are defacto the organisations detaining people, it seems likely to lead to abuses of power if the care home does not want the involvement of an advocate, challenging the way care and treatment is provided. Advocacy by its nature should be a basic 'right' as opposed to a best interests decision made by a substitute decision maker, who may have conflicting interests.
- 3 There is a lack of clarity about who will be responsible for carrying out the necessary assessments, which will then lead to the decision as to whether a person should be deprived of their liberty or not. The wording of the bill suggests that care home managers could be carrying out these assessments and this has rightly raised significant alarm bells from ADASS and the care home sector. After challenges in the Lords there has been an agreement that it will be professionals with the necessary skills and knowledge, but this needs further clarification and the process needs to be robust, accountable and transparent.
- 4 Currently under the DOLS, all people who are deemed to be deprived of their liberty are seen by two independent professionals with specialist training- a Best Interests Assessor and a Mental Health Assessor and this provides an important safeguard in itself, although can lead to a bureaucratic and burdensome process. Under the new bill a person would only be seen by an independent professional (Approved mental capacity practitioner or AMCP) where a person is deemed to be 'objecting'. It is unclear who will identify 'objections' and how they will be identified. In my many years of practice experience, people with learning disabilities or dementias can object by behaviours if they are unable to communicate verbally. If these behaviours are deemed to be 'challenging' to the care provider, then sedation can be used inappropriately to stop this and hence a person may not receive the necessary safeguard of independent scrutiny into the restrictions used in their care and treatment.

All of these concerns are within the bleak landscape of diminishing resources and support for the most vulnerable in our society. I appreciate that legislation cannot alone alter the amount of funding for health and social care and I truly believe 'austerity' to be a political choice. However, it is very important that the actual legislation being brought in to protect the rights of people who are deprived of their liberty, actually does this as opposed to doing the reverse. If the legal safeguards are not robust and meaningful, then we are truly lost as a society.

Email to House of Lords: July 2018

Dear Lady Hollins,

I am writing to you to express serious concern about the above bill. I understand you have taken an interest in this and have already expressed some reservations about its contents on the 16/7/18.

My background is as an Approved Mental Health Professional (AMHP) and Best Interests Assessor (BIA) since 2009, and I have been practising social work with vulnerable adults since 1993. I have been working as a Senior Lecturer in Health and Social Care since 2014, but have continued to practice as a BIA and AMHP. In conjunction with my colleagues at the University of Lincoln, I deliver training to BIA and AMHP students, often seeing up to 100 BIA students per year and 12 AMHP students. We have also been conducting research around Care Home Managers' knowledge of the DOLS regulations in 2011 and Mental Capacity Assessments in relation to DOLS authorisations (2018). As such I feel I have both a practical and academic understanding of some of the implications of the draft bill as it currently stands.

I understand the pressing financial need to try and find an alternative system to DOLS, as the costs to local authorities are unmanageable, even more so in the light of ten years of austerity. I have to say, however, that in my experience the DOLS have provided a much needed safeguard for a very vulnerable group of people. There have been countless incidences over the years where I, my BIA colleagues, and/or BIA students have made use of these safeguards to ensure the rights of vulnerable people are upheld (inappropriate restrictions such as use of chemical sedation or physical restraints being stopped or reduced, or that a person has been listened to, when they are repeatedly saying they are miserable in a certain placement or have been separated from a long term partner and spouse). I understand there are a number of flaws with the DOLS regulations, but just wanted to highlight the fact that the current legal set of safeguards do have a number of strengths. I also want parliament to be mindful of the fact that the DOLS regulations were brought in somewhat in a rush, leading to the very flaws that have caused so much debate and criticism. To my mind it would be very foolish to create another unworkable set of safeguards by not paying adequate attention to the concerns of all those involved.

In light of the above general comments, my particular concerns about the draft bill are as follows:

- 1 The shift to making care home managers responsible for coordinating and sourcing the necessary assessments to authorise a deprivation of liberty. For me this creates a number of ethical and practical problems. Firstly there is a blatant conflict of interests here with care home managers unlikely to wish to draw attention to any difficulties in the care and treatment they are providing to residents. The DOLS rely on care homes making the initial referral for the current assessments to take place and it is generally acknowledged (CQC reports), there is a lack of knowledge in the care home sector about how and when they should be doing this. There is also evidence that those care homes, who do not welcome external scrutiny, are very unlikely to ensure the rights of their vulnerable residents. This is certainly true of my extensive experience as a BIA. It is worth remembering there were no DOLS authorisations sought or in place at Winterbourne View and therefore no external and independent scrutiny from BIAs or Mental Health Assessors. If the AMCP is only going to be asked to be involved where people are objecting, it must be remembered that care homes often sedate people so that they are 'not objecting'.

I think it is extremely unlikely that care home managers will welcome the increased responsibility involved with coordinating and sourcing the necessary assessments. There is also a cost implication not discussed here. Will care homes be given money by Local Authorities or CCGs to fund this or will they be charging the vulnerable people themselves for their Article 5 rights? How can the body that deprives a person of their liberty (defacto) be responsible for ensuring that their rights are upheld? Half a day's training will not resolve the knowledge issue for care home managers and their staff. I have delivered training to care home staff on the DOLS between 2009 and 2014 and found that two hour sessions were useful, but that knowledge was not retained due to the fact that staff often moved on, due to the challenges in this sector.

2 I am extremely concerned by the lack of reference to consulting with the person themselves in paragraph 17. This is absolutely vital if there is going to be any regard or thought given to the person who is subject to the deprivation of liberty.

Paragraph 17 (4) also carries a grave potential for misuse of the safeguards. Here there is a suggestion that there is no requirement to consult others (family members or friends, who take an interest in the person's welfare) if it is not 'practicable' or 'appropriate'. This will give care home managers opportunity potentially to avoid speaking with family members, who are strongly opposed to the care and treatment arrangements for a loved one, or whom the care home perceive to be 'troublesome' in some way. Many of the DOLS assessments I have been involved in are where there has been such conflict and a family member has not been listened too properly. It is acknowledged in recent case law (AB v HT & Ors [2018]) that best interests consultations should not necessarily preclude those about whom there are safeguarding concerns. Please also draw the attention of the House to the case of Stephen Neary, where he and his father's wishes were ignored.

There are a number of further points I could make about the interaction with the Mental Health Act, the loss of the No Refusals and Best Interests Assessments and the fact that the age remains at 18, as opposed to the 16 plus as proposed in the Liberty Protection Safeguards, but I do not want to write a novel. The two main points raised above are the most grave and pressing concerns I have. On reflection I am of the opinion that should the bill become law in its current form it would lead to a greater abuse of the rights of vulnerable people than if there were no legal safeguards in place at all.

Thank you for taking time to read this and please let me know if you feel able to raise some of these points or would like further information.