

January 2019

**SUBMISSION TO HOUSE OF COMMONS PUBLIC BILL COMMITTEE
ON THE MENTAL CAPACITY (AMENDMENT) BILL**

BY IRWIN MITCHELL SOLICITORS

Overview

We have had the opportunity to consider in draft the submission prepared by the Court of Protection Practitioners Association (“CoPPA”) and we broadly support the submissions made by CoPPA. In this document we therefore set out only our broad comments on the Mental Capacity (Amendment) Bill in its current form.

Background

Irwin Mitchell (“IM”) is one of the largest law firms in the United Kingdom, employing over 2,000 people and with offices in Birmingham, Bristol, Cambridge, Glasgow, Leeds, London, Manchester, Newcastle, Sheffield, Gatwick, Chichester, Newbury and Southampton. IM’s national Court of Protection and Public Law departments are widely regarded as the leading teams in the field of Mental Capacity law and are ranked as such in the main legal directories. In 2014 IM partners Julia Lomas and Alex Rook were the only practising Court of Protection solicitors to be invited to give evidence to the House of Lords Select Committee on the review of the workings of the Mental Capacity Act 2005. IM’s Mathieu Culverhouse is a founding member of CoPPA’s national committee and a number of other IM solicitors sit on CoPPA’s regional committees. IM’s public law specialists have acted in a number of the leading Court of Protection cases concerning deprivation of liberty, including *G v E* [2010] EWCA Civ 822, *P v Cheshire West and Chester Council and P v Surrey County Council* [2014] UKSC 19, *Re X (Court of Protection Practice)* [2015] EWCA Civ 599, *Bedford BC v C* [2015] EWCOP 25 and *Re NRA & Ors* [2015] EWCOP 59.

Introduction

We are broadly supportive of the aims of the Bill. We consider that there is a strong case for reform of the existing DoLS regime. We consider that the current DoLS regime is too cumbersome and bureaucratic. Furthermore, under the current regime many vulnerable people do not benefit from the necessary procedural safeguards, either because they fall outside of the current scheme (as a result of their age, or the nature of their care arrangements), or because the current scheme has not been fully implemented as a result of a lack of resources.

We are concerned that the Bill as currently drafted does not sufficiently protect the Article 5(4) rights of cared-for persons, but we believe that if the points of concern set out below can be addressed, the Bill is capable of introducing a new scheme which will provide the requisite protections for cared-for persons more efficiently and proportionately than the current DoLS regime.

Statutory definition of Deprivation of Liberty

We do not consider that a statutory definition of deprivation of liberty is necessary or appropriate. We consider that the ‘acid test’ contained in the Supreme Court’s judgment in the *Cheshire West* case has proven to be a clear and workable definition. We consider that any attempt to set out a further definition in statute is likely to increase, rather than decrease, the risk of confusion, and is likely to lead to more litigation on this issue.

With regard to the proposed wording of the statutory definition of deprivation of liberty, we endorse the submissions made by CoPPA.

Objections and role of care home manager

We have significant concerns about the role of care home managers in identifying whether a cared-for person is objecting to their care arrangements. We believe that the determination of whether a cared-for person is objecting must be carried out by an independent person.

Assessments by unqualified persons

Under the Bill as currently drafted medical, capacity and “necessary and proportionate” assessments may be carried out by a person who appears to the care home manager or responsible body “to have appropriate experience and knowledge”. This represents a significant watering down of the protections contained within the current DoLS regime, which sets out the required professional qualifications of the persons carrying out the equivalent assessments. Given that these assessments are central to the protections contained in the proposed new scheme, we consider it vital that those carrying out these crucial assessments are suitably qualified, and would urge that the Bill be amended to allow for the necessary qualifications to be set out in regulations.

Pre-authorisation reviews by unqualified persons

We are concerned that under the Bill as currently drafted, there is the possibility that in some cases, in addition to the assessments referred to above being carried out by unqualified persons, the pre-authorisation review may be carried out by a person who is not an AMCP. The Bill does not set out any minimum professional qualifications for non-AMCP reviewers, merely that they must not have a “prescribed connection” with the care home, or be involved in the “day-to-day” care of the cared for person. We would suggest that

this could be remedied by requiring the person carrying out the “necessary and proportionate” assessment to have certain specified professional qualifications, as set out above.

Independent Mental Capacity Advocates

We agree with those commentators who have expressed concern about the appointment of an IMCA being determined by a best interests assessment. We consider that, given the importance under Article 5(4) of ensuring that the cared-for person is enabled to exercise their right to challenge their detention, advocacy must be provided on an “opt-out” rather than an “opt-in” basis.

Duty on responsible body to refer cases to court

We agree with COPPA’s submission that paragraph 13(5) of the Bill should be retained. This would place a duty on the responsible body to refer cases to court where the cared-for person’s right to a court review is engaged. We frequently encounter cases where it has been clear for a considerable time that a cared-for person’s right to review was engaged and where there has been a significant delay in the matter being brought to the court because the public authority expected other parties, such as the cared-for person’s representative, to bring the matter to court. It is not unusual for cases to take several months to reach court in such circumstances.

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