

# Mind's Consultation Response to Public Bill Committee on the Mental Capacity (Amendment) Bill

## About Mind

We're Mind, the mental health charity for England and Wales. We believe no one should have to face a mental health problem alone. We provide advice and support to empower anyone experiencing a mental health problem. We campaign to improve services, raise awareness and promote understanding.

For more information, please contact Will O'Leary at [w.oleary@mind.org.uk](mailto:w.oleary@mind.org.uk).

## Overview

1. We welcome the opportunity to respond to the Public Bill Committee's call for evidence on the Mental Capacity (Amendment) Bill.
2. We support the aims of the Bill and the case for reform. The Deprivation of Liberty Safeguards (DoLS) have been widely criticised, amongst other reasons, for being administratively cumbersome resulting in substantial delays to the authorisation process and associated breaches of human rights. The Liberty Protection Safeguards (LPS) introduced by the Bill seek to slim the authorisation process to ensure compliance with the law and to put the cared-for person at the heart of the decision making process.
3. However, whilst Mind acknowledges the need for action and change in this area, we have fundamental concerns that the make-up of the current bill will result in far fewer safeguards for cared- for persons under LPS. It is crucial that these are addressed to ensure that the legislation achieves its stated aims.
4. The potential impact of this Bill cannot be overstated. In 2017/18, there were 227,400 DoLS applications in England alone<sup>1</sup>. The scope for LPS will be even wider as the Bill will also cover arrangements in supported living settings and authorisations for 16 and 17 year olds.

## Summary of concerns

5. This submission calls on the Public Bill Committee to consider changes relating to three key areas which we believe the Government has failed to acknowledge and address thus far in the development of the Bill:
  - **Two tiered system of review** – The current Bill creates a two-tiered system of review whereby unless a cared-for person objects or, someone raises an objection on their behalf, they will not have access to the additional safeguards and independence provided by an Approved Mental Capacity Professional (AMCP).
  - **No conditions in LPS** – The current Bill makes no provision for required conditions within the arrangements being authorised. Where an authorisation is subject to conditions, such as contact with family or requirements relating to a person's culture, the managing body must ensure that they are complied with, and non-

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<sup>1</sup> [Mental Capacity Act \(2005\) Deprivation of Liberty Safeguards \(England\)](#), NHS-Digital, 2 October 2018

compliance may trigger a review. We believe that having conditions puts matters of particular importance to the cared-for person at the centre of the authorisation process and, if they are not met, provides clear grounds for challenging the arrangements.

- **No special regard to wishes and feelings of cared-for person** – The current Bill does not require decisions makers to have special regard to the wishes and feelings of the cared-for person. We believe that the views of the cared-for person should have special consideration and they should be empowered to be involved in the decision making process and have their decisions respected.

6. We also support the following amendments which have been put forward:

- **Reduction in renewal period from three years to one year** - We believe that the maximum renewal period for all authorisations should be one year. The Independent Review of the Mental Health Act has called for reductions between the periods of renewal under that Act and we support this principle generally, including under the LPS.
- **Universal right to advocacy** - We believe there should be a presumption that an IMCA is appointed for all cared-for persons subject to LPS. Access to good-quality advocacy will ensure that the cared-for person's wishes and feelings are at the centre of decision making.
- **Right to information clause requiring the cared-for person to be given information about their rights under the LPS** - Access to information about your deprivation of liberty, including how to challenge it, is a fundamental rights and we believe it should be enshrined in the Bill.
- **Special consideration for people with fluctuating capacity** - We believe that the Bill should recognise that some people, for example those with bipolar disorder, can have fluctuating capacity and may regain capacity for periods of time. There should be a requirement for an assessment of whether the cared-for person's capacity is likely to fluctuate included within the initial assessments.
- **Reduced role for care home managers in authorising arrangements** - We are concerned that there is a conflict of interest for care home managers and staff being involved in authorisation arrangements under the LPS. We believe that the role of the care home managers in authorising arrangements should be significantly reduced or removed altogether.
- **A statutory definition of Deprivation of Liberty** - The meaning of Deprivation of Liberty has never been defined in law. We believe that a carefully constructed definition would provide clarity in this area for professionals and members of the public.

7. We are also concerned that this Bill was drafted without sight of the Independent Review of the Mental Health Act despite the considerable overlap the two Acts have. If the recommendations of the Independent Review of the Mental Health Act are followed, approximately 20,000 patients who are not objecting to their treatment, will be moved from the Mental Health Act to the Mental Capacity Act. Clearly this interface will need careful future consideration.

## Two-tiered system of review

8. One of the core principles from *Cheshire West and Chester Council v P*<sup>2</sup> Supreme Court judgement in 2014 was that there should not be lesser safeguards for those who do not object to the DoLS arrangements. This recognises that some people do not object due to the level of their disability or vulnerability.
9. Under the current draft Bill, only those who object (either themselves or through friends, family or staff) will be referred to an Approved Mental Capacity Professional (AMCP) for a pre authorisation review. A pre-authorisation review completed by an AMCP will have a significantly higher level of review: an AMCP must meet with P and consult relevant parties; they will have minimum training and experience requirements (these will come later in regulations); and will likely be more independent.
10. This creates a two-tiered system of review whereby unless a cared-for person objects or, someone raises an objection on their behalf, they will not have access to the additional safeguards and independence provided by the AMCP.
11. The Mental Health Act review has recommended that “the law should be amended so that only the MCA framework (DoLS, in future the LPS) can be used where a person lacks capacity to consent to their admission or treatment for mental disorder and it is clear that they are not objecting.”
12. If the Mental Health Act review recommendations are implemented, people detained under the Mental Health Act, who are not otherwise objecting, could only have their admissions authorised under the Mental Capacity Act.
13. We have grave concerns about a significant group of people who are currently eligible to be detained under the Mental Health Act, but lack capacity and are not objecting, being moved over to LPS under the Mental Capacity Act, where they would only be able to access an independent review of their arrangements if they object to them.
14. We fundamentally disagree with this two-tiered system of review and support all cared-for persons having the conditions of their authorisation reviewed by an AMCP.

### Suggested amendments:

- Schedule 1, page 15, line 39, leave out sub-paragraph 21(1)
- Schedule 1, page 16, line 3 leave out sub-paragraph 21(2) and insert – 21 (1) The review must be by an Approved Mental Capacity Professional
- Schedule 1, page 16, line 13 leave out sub-paragraphs 21(3), 21(4) and 21(5)
- Schedule 1, page 16, line 30 leave out “if the review is by an Approved Mental Capacity Practitioners (whether or not paragraph 21(2) applies)
- Schedule 1, page 16, line 45, leave out paragraph 23

*Explanatory note: These amendments require an AMCP to complete the pre-authorisation review in all cases before the arrangements can be authorised. The AMCP must also consult with the cared-for person.*

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<sup>2</sup> Cheshire West and Chester Council v P [2014] [https://www.supremecourt.uk/decided-cases/docs/UKSC\\_2012\\_0068\\_Judgment.pdf](https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf)

- Schedule 1, page 16, line 38, leave out “if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so”

*Explanatory note: This amendment requires the AMCP to consult with the cared-for person.*

- Schedule 1, page 20, line 5, leave out sub-paragraph (e)
- Schedule 1, page 20, line 9, leave out paragraph 4
- Schedule 1, page 20, line 18, leave out paragraph 5
- Schedule 1, page 20, line 27, leave out “where sub-paragraph 4 applies”

*Explanatory note: These amendments requires the reviewer to refer the authorisation to an Approved Mental Capacity Professional in all cases to determine whether the authorisation conditions are made.*

- Schedule 1, page 20, line 34, leave out “if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so”

*Explanatory note: This amendment requires the AMCP to consult with the cared-for person.*

## **No requirement for conditions within LPS**

15. The DoLS arrangements allow an authorisation to be granted subject to certain conditions. The best interests assessor can recommend conditions and the supervisory body must consider whether to make them part of the authorisation.
16. There is no prescribed list of conditions but the Code of Practice states that they may include contact, or issues relating to a person’s culture. Where an authorisation is subject to conditions the managing body must ensure that they are complied with, and non-compliance may trigger a review.
17. Conditions are an important tool to ensure that restrictions on a person’s liberty are kept to a minimum and that the authorisation is person-centred. For example, maintaining contact with family members or a particular social activity may be so important to a person that without this the authorisation would not be proportionate.
18. On our legal helpline we regularly hear of family contact being suspended or not facilitated, which can have a huge impact on the welfare of the individual. Having a contact condition within the authorisation provides oversight and a route for review or challenge.
19. Government has responded to a previous amendment to allow conditions. The particular ‘arrangements’ that the LPS authorise in any particular case, they suggest, will provide a greater level of detail than DoLS authorisations, and therefore conditions would be superfluous:

*‘For example, the authorised arrangements could include enabling the person to be taken out on trips with one-to-one support, or their care plan could specify that*

*additional staff should be provided to enable the person to be taken out more frequently.*<sup>3</sup>

20. Firstly, a detail in a care plan does not provide the same level of oversight or enforceability as a condition in the authorisation. The Bill does not provide for a review nor a right of challenge where something in the care plan is not being provided. And nor should it, as care plans necessarily contain a high level of detail. Conditions should be top-line essential elements to the authorisation.
21. Secondly, while the authorisation ‘could include’ details such as leave, as in the above example, there is no requirement for it to do so. The authorisation record must ‘specify all arrangements authorised’ (para 24). It need not record all the cared-for person’s leave, contact, activities, cultural requirements etc., which is right, as in many cases these details will not go to the heart of the authorisation. Including conditions allow those matters which are of particular importance to the individual to be recorded and enforced.

#### **Suggested amendments:**

*Schedule 1, page 13, line 41, at end insert –*

- “18 An authorisation may be given subject to conditions.
- (2) Before deciding whether to give the authorisation subject to conditions, the supervisory body must have regard to any recommendations in the pre-authorisation review about such conditions.
- (3) The responsible body must ensure that any conditions are complied with.

*Schedule 1, page 17, line 2, at end insert –*

- “23 The person carrying out the review may recommend conditions to which the authorisation is, or is not, to be subject in accordance with paragraph 18.”

*Schedule 1, page 17, line 11, at end insert –*

- “(e) any conditions to which the authorisation is subject.”

*Schedule 1, page 20, line 8, at end insert –*

- (g) conditions to which the authorisation is subject in accordance with paragraph 18 cease to be complied with.”

### **Special regard to wishes and feelings of cared for person**

22. A decision taken under the Mental Capacity Act on a person’s behalf must be in the best interests. What is in their best interests is determined by considering factors in section 4 of the Act. One such factor is the person’s ‘wishes and feelings’. It is currently not more important than any of the other factors.
23. The Law Commission recommended increasing the regard that must be paid to the person’s views, as:
- Evidence suggests that best interests decisions regularly fail to give any weight to them; and

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<sup>3</sup> [Hansard, Column 574, Volume 794, 27 November 2018](#)

- International developments since the development of the Act, such as the Human Rights Act and the UNCRPD, now require a greater weight to be given to the person's views.

24. This amendment would represent a significant step forward in empowering individuals with mental health conditions to make decisions for themselves and have those decisions respected. There will of course still be cases where decisions must be made contrary to the person's wishes, but these should be exceptional.

25. The Government has responded that this amendment is outside the scope of this Bill, but there is no reason for this to be the case.

**Suggested amendments:**

*Section 2, page 3, line 4, at end insert –*

- **“Best interests**
- (1)Section 4(6) of the Mental Capacity Act 2005 (ascertaining a person's wishes and feelings etc in order to determine best interests) is amended as follows.
- (2)For “consider, so far as is reasonably ascertainable”, substitute “ascertain, so far as is reasonably practicable”.
- (3)In paragraph (a) for “and, in particular,” substitute “in particular, by considering”.
- (4)In paragraph (c)— (a)for “the” substitute “any”, and (b)for “so.” substitute “so; and in making the determination