

Written evidence submitted by Independent Age (MCAB59)

About Independent Age

We offer regular contact, a strong campaigning voice and free, impartial advice on the issues that matter to older people: care and support, money and benefits, health and mobility. A charity founded over 150 years ago, we are independent so older people can be too.

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Registered charity number 21072

General comments

Independent Age welcomes the opportunity to submit our views on the on the Mental Capacity (Amendment) Bill. Supporting older people's independence and rights is at the heart of our work and we are concerned that elements of the Bill may have a negative impact on their freedoms and wellbeing.

Our summarised recommendations are as follows:

- 1. We believe that the issue of defining a deprivation of liberty needs much closer analysis than this Bill's remaining parliamentary journey could offer, and recommend that a substantial change to the Cheshire West definition is not made at this point in time.**
- 2. We recommend that amendments to the Bill are made that explicitly:**
 - **Address how section 4 MCA is applied within the authorisation assessments;**
 - **Consider a duty for AMCP review in cases where long term arrangements for a deprivation of liberty have been made;**
 - **Consider explicitly what changes in restrictions constitute a need for new assessments;**
 - **Consider a duty for LPS referrals to be made and considered in advance of their application, wherever possible.**
- 3. We recommend that the Bill stipulates which professionals will be responsible for completing and reviewing LPS assessments, and what training they will need in order to competently undertake the necessary assessments.**
- 4. We also recommend that an AMCP is involved in all cases of psychiatric detention and where there is a dispute around the cared-for person's capacity.**
- 5. We recommend that consideration is given to extending the AMCP role to allow them discretionary recommendations around creating a less restrictive care environment, in line with any identified wishes it is possible to put in place. This could be facilitated in a number of ways.**

- 6. We would support an amendment being made to bring advocacy rights in line with current practice, where an IMCA or an RPR is appointed in all cases where the person is un-befriended, or where the appropriate person needs support to carry out the requirements of their role, particularly to safeguard the person's right to challenge. The amended act should mirror the current IMCA 39A, C, D and RPR roles regarding both eligibility and rights to information, in order to not dilute the safeguards to people's liberty.**
- 7. Consideration should also be given in the Bill around whether only IMCA trained advocates should complete this role, or whether appropriately trained professional RPRs can also complete this function.**
- 8. We recommend the undertaking of a new impact assessment, one that effectively illustrates the resourcing of the implementation strategy.**
- 9. We recommend a pause in the progression of the Bill for further analysis and for a longer period of consultation with the public.**

1. Deprivation of liberty definition

- 1.1 An amendment listed on 09/01/19 proposes a change to the definition of a deprivation of liberty. Whilst there has been much legal conversation around this complex area, we note that the Supreme Court's Cheshire West ruling that informed the definition of a deprivation of liberty involved extensive complicated legal analysis, with regard to the relevant human rights legislation that the UK is obliged to observe as part of the European Convention on Human Rights.
- 1.2 We are concerned particularly by the suggested amendment stipulating that a deprivation of liberty is not occurring when *'the person is free to leave the place temporarily (even if subject to supervision while outside that place)'* and when *'a person is... unable to leave that place provided that if the person expressed a wish to leave the person would be enabled to do so'*, which appears to directly contradict the Cheshire West's and other key judgement's conclusions.
- 1.3 We are concerned this definition may have the likely effect of drastically reducing the number of people who will be eligible to benefit from the safeguards proposed in the amended Bill and may cause greater confusion amongst sector professionals. We are also concerned that this definition hasn't engaged with the proposals given around this matter by the Joint Committee on Human Rights, which highlighted the ECHR influence on the Cheshire West ruling. Their report proposed different approaches to be considered regarding the definition of deprivation of liberty, which this amendment does not appear to reflect.

1.4 We believe that the issue of defining a deprivation of liberty needs much closer analysis than this Bill's remaining parliamentary journey could offer, and recommend that a substantial change to the Cheshire West definition is not made at this point in time.

2. Weakening of the MCA's principles in practice:

2.1 We note that there is evidence of a fundamental root issue with the implementation of the MCA's principles 4 and 5 within DoLS practice, as identified by the Law Commission's consultees. They noted that it was difficult for assessors to realistically apply these principles because *'placements were often dressed up as being in the person's best interests when really they were being taken on the basis of the cheapest available option'*. As the BIA has little ability to influence local authority funding decisions the decision became *'based on a notional 'choice' between the person staying at home in an unsafe environment and the care home placement'*.

2.2 We are concerned that this issue has been further impacted by salient underlying issues within the current social care crisis such as provision of services and underfunded care packages, which are negatively impacting the wellbeing of older people.

2.3 Under current LPS proposals, the additional best interest requirement and associated safeguards of the DoLS are removed. This is in line with the Law Commission's recommendations on compliance with the ECHR, which requires that a deprivation of liberty is 'appropriate and proportionate'. However, the Commission's proposals envisaged that the deprivation proposed was (wherever possible) assessed by the professional carrying out the relevant accompanying best interest decision. This would have meant that application of section 4 MCA to any DoL, would have been integrated into the decision creating these restrictions in the first place.

2.4 In contrast LPS proposals will place the majority of the assessment process on care home managers or another un-specified professional who will likely complete these assessments after the relevant best interest decisions that create the deprivation of liberty have been taken.

2.5 We are very concerned that this change from the Commission's proposal, especially when combined with other concerns listed subsequently in our responses (e.g. no conditions, lengthier authorisations and less professional oversight), could result in overly restrictive care arrangements for some individuals and erosions in the experience of their everyday liberty.

2.6 The risk of these liberty erosions increases when combined with the LPS proposals that give the ability for someone to move between locations and responsible bodies, and for the assessor to rely on past assessments where the restrictions have not greatly

changed. We are concerned that this could mean that where interim or urgent best interest decisions are taken without a full consultation process around the long term decision, or where assessments might not provide an accurate picture of the restrictions experienced, that the current proposals provide few safeguards to the cared-for person and instead appears to create a licence for deprivation.

2.7 These risks could result in many outcomes that give cause for concern, including longer delays to a review where someone might become 'lost in the system', which could (especially in the case of urgent interim placement decisions and rehabilitation placements) impede any future ability for the person to return to living at home or more independently. We believe that, where possible, older people should be supported to return to at home and to live as independently as possible. When this is not possible, we believe it is important that any restrictions that are necessary to keep people safe, should be kept to a minimum and be subject to regular review and scrutiny, in line with older people's human rights.

2.8 **We therefore recommend that amendments to the Bill are made that explicitly:**

- **Address how section 4 MCA is applied within the authorisation assessments;**
- **Consider a duty for AMCP review in cases where long term arrangements for a deprivation of liberty have been made;**
- **Consider explicitly what changes in restrictions constitute a need for new assessments;**
- **Consider a duty for LPS referrals to be made and considered in advance of their application, wherever possible.**

3. Reduced professional scrutiny of the deprivation of liberty

3.1 We are concerned that LPS will have insufficient assessment input from a suitably trained professional. Deprivation of liberty is a complicated legal area that untrained assessors could encounter difficulties with. It is also currently unclear which professionals the responsible body can choose between to complete the assessments, what training these assessors will have and how financial conflicts of interest will be avoided. Furthermore it is not clear who will carry out the pre-authorisation review if this does not meet the criteria for an AMCP assessment.

3.2 Currently the AMCP will be referred to complete the pre-authorisation review in cases where the cared-for person is objecting to their placement. We are concerned that AMCP will be unable to impact on the arrangements in a meaningful manner, as they will no longer be able to alter the restrictions via conditions and will only be responsible for assessing the necessity and appropriateness of the decision in relation to risk to self.

3.3 We are also concerned that the criteria for AMCP referral isn't an obligation where there are concerns about an individual's capacity to make decisions, especially considering that disputes around capacity within DoLS decisions are disproportionately

represented in court statistics¹. Finally, we note that in cases of psychiatric detention, where restrictions on people's liberty can be more severe, these cases will not be subject to AMCP review.

3.4 We recommend that the Bill stipulates which professionals will be responsible for completing and reviewing LPS assessments, and what training they will need in order to competently undertake the necessary assessments.

3.5 We also recommend that an AMCP is involved in all cases of psychiatric detention and where there is a dispute around the cared-for person's capacity.

4. Reduced focus on wishes of the cared for person

4.1 Currently a DoLS assessments include a best interest analysis, which is not based solely on a risk assessment. Many key court judgments have repeatedly corrected risk-based decision making in the past². We are concerned that LPS potentially undermines proportionate risk appraisals and provides fewer safeguards to alter and monitor the deprivation that is occurring, whilst also increasing the ease of implementing restrictions.

4.2 We note that there is now a welcome amendment made in the House of Lords for the person's wishes to be considered in the LPS assessment. However, we are uncertain whether there is a meaningful way for someone's wishes and feelings about the restrictions they are experiencing to be addressed within the remit of the authorisation. We are concerned that a person's objection to restrictions may not be understood in a universal manner by all professionals and that AMCP referrals for people who are objecting may not occur. Court judgements in the past³ have given extensive advice around identifying objections because of discrepancies here.

4.3 We are concerned these proposals remain tokenistic, as there is no formal channel whereby the person's views can influence the authorised restrictions. Specifically, we are concerned at the removal of conditions, which currently accompany an authorisation and are a key safeguard that can be used to implement less restrictive care practices. Conditions can indicate changes needed in the daily restrictions within a person's care, which in some cases can avoid more a substantial challenge. Their removal could potentially lead to lengthy, costly and avoidable legal processes, which ultimately might not even address the issues that the person is concerned with.

¹ Keene et al. (2019). Taking capacity seriously? Ten years of mental capacity disputes before England's Court of Protection. *International Journal of Law and Psychiatry*, 62, 56-76.

² See: *Jackson J's statement in Re M (2013)*; *Westminster City Council v Sykes (2014)*; and *Munby J in Local Authority X v MM & Anor (No. 1) (2007)*

³ See *Baker J [2016] EWCOP 49*

4.4 We note that the government has indicated that conditions **may** be added to the final authorisation record. However, we believe that omitting conditions from the Bill explicitly is unwise, **and we recommend that they are re-instated back into the Bill.**

4.5 Related to this, **we recommend that consideration is given to extending the AMCP role to allow them discretionary recommendations around creating a less restrictive care environment, in line with any identified wishes it is possible to put in place.** This could be achieved through re-inserting the ability to set conditions that have to be observed in order for the care to be appropriate and proportionate, and/or by giving the AMCP the ability to formally recommend what care review processes might also be needed to facilitate this to ensure that local authority responsible for the deprivation of liberty has sufficiently observed the MCA's requirements. We suggest that, where necessary, minor changes to conditions could be agreed between the Responsible Body and Appropriate Person/IMCA; and major changes or consideration of new conditions could be agreed through an AMCP review.

4.6 Finally, **we recommend for statutory advice to be given on what constitutes an objection from the cared-for person, drawing on the relevant case law in this area.**

5. Reduced ability for the person to challenge

5.1 We are concerned at the number of confusing developments in the IMCA role. We strongly support the amendment made to ensure that the person is given the rights to information about their deprivation of liberty, as well as how to challenge this.

5.2 However, we are concerned with the language of best interests being used in the Bill surrounding IMCA referrals. Advocacy provision is not usually a familiar concept to older people on which they could give views to inform a best interest decision. Advocacy provides an essential safeguard for people who may not have anyone else to facilitate their wishes and feelings. The few people who might want to refuse an advocate may be most in need of one in order to escalate concerns they might have around their care. Creating unnecessary barriers may erode safeguards of liberty further.

5.3 **We would support an amendment being made to bring advocacy rights in line with current practice, where an IMCA or an RPR is appointed in all cases where the person is un-befriended, or where the appropriate person needs support to carry out the requirements of their role, particularly to safeguard the person's right to challenge. The amended act should mirror the current IMCA 39A, C, D and RPR roles regarding both eligibility and rights to information, in order to not dilute the safeguards to people's liberty.**

5.4 Consideration should also be given in the Bill around whether only IMCA trained advocates should complete this role, or whether appropriately trained professional RPRs can also complete this function. Demand for IMCAs is high and many RPRs currently are not IMCA trained, and in some areas the RPR role is carried out by volunteers. As the Bill currently stands, these RPRs would be ineligible to continue in their role and it is unlikely that there would be enough IMCAs nationwide to complete the regular visits the role requires, in addition to their best interest decisions.

6. Omissions within the current impact assessment

6.1 We have concerns with the current costing figures used in the development of the LPS, as referred to in the impact assessment. As previously mentioned, the care system is consistently under-resourced, and we are concerned that current projections do not sufficiently illustrate where funds for the new workforce requirements and appropriate training will be drawn from, which will be further affected by new amendments.

6.2 We note that it is also likely that the figures around IMCAs in DoLS cases are incorrect, as anecdotal evidence suggests that the IMCA recording database has not been in use since 2015 due to consistent malfunction, and that RPRs have never used it. Furthermore, there is not practice consensus in relation to the number of objections and challenges, suggesting these estimates are likely to be incorrect.

6.3 We believe this requires urgent reconsideration, particularly as this Bill has been argued based on the urgent need to address the backlog of DoLS authorisations. Estimates are also likely to be further affected by the inclusions of community settings in the LPS. If the impact assessment's projections are incorrect, the accuracy of cost estimates will also be affected. This risks a repeat of the issues faced by DoLS in terms of backlog, costs and quality.

6.4 We therefore recommend the undertaking of a new impact assessment, one that effectively illustrates the resourcing of the implementation strategy.

7. Consultation and timelines

7.1 The issues identified above suggest that the Bill urgently requires further analysis and consultation. We believe that the recent review of the Mental Health Act, and its potential interplay with the MCA, along with the forthcoming Green Paper on social care, will benefit from being considered with the Bill.

7.2 Furthermore, the lack of accurate cost projections of a new system is a point of concern. **We recommend a pause in the progression of the Bill for further analysis to take into account the implications of forthcoming social care reforms, to have a**

thorough assessment of the practical implications of further amendments, and for a longer period of consultation with the public.

7.3 Alternatively targeted streamlined processes based on Boroughs who have far fewer authorisations backlogged, and alternative ways to authorise community deprivations of liberty, could be debated and implemented at this stage, whilst an overhaul of the entire system implemented after the above concerns have been addressed.

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