Royal College of Nursing (RCN) briefing: Mental Capacity (Amendment) Bill 2017-2019.

Our position and interest in this Bill

It is encouraging to see the UK Government setting out their plans to resolve the challenges with the current Deprivation of Liberty Safeguards (DoLS) system (Mental Capacity Act 2005) across England and Wales. DoLS are used to protect vulnerable adults who have impaired capacity, to keep them safe and to make sure they get the medical treatment they need.

Registered nurses lead, coordinate and deliver person-centred care and provide continuity of relationship within a vast range of health and care settings, and in people's own homes. They are key to safe, high quality care and to supporting improved health and wellbeing outcomes for all. Nurses have skills and expertise across all specialities with particular relevance to people affected by mental capacity such as mental health, learning disabilities, and end of life care.

Our briefing is about the principles behind the Liberty Protection Safeguards (LPS) and ensuring the best interests of the person are at the fore, of each and every decision made, and our position is informed by the frontline experience of our diverse membership.

Urgent need for an Equality Impact Assessment

Before the Bill is considered further, we urge the UK Government to undertake a full Equality Impact Assessment on how this Bill will affect vulnerable people, and their protected characteristics. We believe an Equality Impact Assessment is absolutely imperative; it must be conducted and published so that MPs are fully informed.

Baroness Thornton spoke in support of Amendment 143A during Report Stage, second day on 27 November 2018 and in response, Minister Lord O'Shaughnessy said, *'I can commit to publishing the equality impact assessment before the Bill makes it to the Commons so that there will be ample time for consideration before it is debated there'.*[1] The Government must honour the commitment and publish the equality impact assessment.

Amendments to the Bill we want to keep

We supported the substantial changes that the members of the House of Lords achieved during their scrutiny of the Bill, and the Government supported amendments which also passed. The amendments made to the Bill will redress some of the fundamental imbalances in the proposals, which were felt by organisations and professionals alike, to be too far removed from the best interests of the person.

In particular, we agree with the amendment to mandate that mental capacity assessments should be completed by those with the expertise and knowledge, and that the professionals carrying out and overseeing the mental capacity assessments should seek explicit consultation with the person in care, and for their wishes and feelings to be at the fore. Putting the person at the heart of their care will be fundamental to ensuring this Bill is fit for purpose. At every stage in a persons' care, their wishes must be taken into account and carefully considered. If a person in care lacks capacity, it should not mean that their views should be discounted.

Assurances in relation to conflict of interest

Concerns related to staffing levels as a means of conflict of interest

Being deprived of liberty means that you are unable to make autonomous decisions, and need constant supervision. In this Bill, care home managers would carry the responsibility to make mental capacity assessments. We remain concerned that care home managers may feel under

[1] Hansard, House of Lords, *Mental Capacity (Amendment) Bill,* 2018. Accessed December 2018, available here: https://hansard.parliament.uk/Lords/2018-11-27/debates/5B6A3D0F-3743-4FC7-BA48-2A8D003F9CA8/MentalCapacity(Amendment)Bill(HL)?highlight=mental%20capacity#contribution-27C31AD6-6B94-4DE6-BAA6-56DCB5D125CD

pressure in their workplace due to staffing and high bed occupancy, which may prevent them from making decisions which allow the person in care as much freedom as possible. For example, if a care home does not have enough staff to ensure that the cared for person cannot be accompanied leaving the residence, their visits outside the setting may be restricted due to staffing levels and not because of the capacity of the person.

Patient care is being left undone, or is consistently compromised, because of a shortfall in registered nurse numbers. The UK nursing workforce is in crisis, with not enough staff being educated, recruited or retained in our health and care services. We are calling for Governmental, national and local system accountability for staffing to be specified in law in England, including the requirement for health and social care systems to have credible and robust workforce strategy, and data-driven workforce planning.[2] We need accountability for appropriate staffing levels so that financial conflicts of interest are not the reason why people's liberty is being restricted. Wales have recently implemented legislation in 2016, and similarly in Scotland, a safe staffing Bill has been published by the Scottish Government for consideration this autumn.

This Bill presents an unmissable opportunity to be more forward-thinking in terms of the potential impact of the context in which assessments are being made and should take appropriate mitigating actions. We would suggest that the consultation and involvement of the multidisciplinary team when mental capacity assessments and any subsequent reviews are undertaken happens as appropriate. It would introduce checks and balances within the decision making process and prevent one individual, for example a care home manager, from overseeing the decision, thereby increasing transparency and accountability.

Clinical judgement

Appropriate adjustments for different types of settings, bureaucracy and time pressures in end of life care could be a barrier to people receiving the care they need and deserve.
Anecdotally our members working across hospice services have said that the end of life care deprivation of liberty applications are not working in practice due to delays, and the backlog has meant that patients have passed away while waiting for assessments to take place. This may have meant a patient has not been able to die at home because the bureaucracy of a slow, and fragmented system. The current DoLS for end of life care requires a nuanced approach and a better system, which includes prioritising and seeking clinical judgement where appropriate to enable the wishes of the person to be taken into account.

Length of authorisation and renewal

Patients must be at the heart of the decision making process, with regular proactive opportunities for patient input. With regard to the renewal period for authorisation, we welcome the commitment to authorisation for the period of no longer than 12 months. Deprivation of liberty without authorisation is unlawful. Further to this, we would like consideration given to an additional provision for both reactive reviews of authorisation, in circumstances whereby a condition changes, and proactive reviews of authorisation at regular time intervals.

This should be in line with provisions within the Mental Health Act tribunal system, and we ask the Government to consider recent recommendations in the Mental Health Act review with regard to the parity of esteem agenda. The recommendations from the Mental Health Act review provide an opportunity for further alignment, and we await the Governments response detailing how this will be undertaken.

Authorisation reviews should be conducted in a timely manner with access to legal aid available for any person wishing to seek redress if they believe decisions about their liberty, and care are unfair in the Court of Protection. Therefore, the Government must not seek to extend the authorisation length of time for any longer than 12 months, and must ensure that the person in care or their advocate have recourse to the resources they need to challenge any decisions.

[2] RCN, *Nursing on the brink*, 2018. Accessed May 2018, Available here: https://www.rcn.org.uk/professional-development/publications/pdf-007025

Access to Independent Mental Capacity Advocates (IMCA)

An IMCA is an advocate appointed to support the person in care, who acts on their behalf if they are unable to make independent decisions. In England, an IMCA is appointed by the responsible body – often the local authority, and in Wales an IMCA is appointed by the local Health Board. Decisions on whether to appoint an independent advocate should not rest within the funding envelopes available to local authorities, nor with the care home managers, who may make untested decisions to keep care plans restricted due to staffing or financial motives. Access to independent advocates should be a human right, and providers should be held accountable for ensuring this provision is available for those within their care. Therefore, the Government must provide us with assurance that skilled, and independent advocates as well as access to legal aid, are available for individuals and their families.

Implementation of the Mental Capacity Amendment

Extension to 16 and 17 year olds

We welcome the proposal to extend the legislation to include 16 and 17 year olds who are often left to fall through the gaps when transitioning between adolescent and adult health care services. The person in care may be 16 or 17 in age, but with a capacity of a person much younger so this would need to be taken into account to make sure the appropriate decisions were taken. In order to facilitate this extension, meaningful engagement with those working with children and young people transition services, including children's hospices, child and adolescent mental health services and palliative care professionals, should take place to seek their views as they are expertly placed to advise on how to support some of the vulnerable people affected by impaired capacity.

Resources and education

All health and care staff should be educated to understand the deprivation of liberty processes, and the impact that this Bill will have on the patients they care for. It will be important for nursing staff to be skilled and experienced to carry out, and contribute to mental capacity assessments and reviews. Without adequate education, health care professionals cannot make provision for best interests of the person in care.

Following the Bill becoming an Act, the UK Government, and the Nursing and Midwifery Council should consider including mental capacity as part of the curriculum, and take steps to standardise this education for professionals working across all health and social care settings.

Definition of deprivation of Liberty

Introducing a nationally recognised definition for the deprivation of liberty, which focuses on the individual and considers their wishes. A clear definition will remove subjectivity that may occur on interpretation and ensure that all health and social care workers assessing and reviewing the individual's capacity in their care understand the parameters of the legislation. We welcome extensions to the Bill which make the deprivation of liberty as enabling as possible, rather than focusing on restrictions, which was also echoed by the Law Commission in its final report.[3]

For more information, please contact Rachael Truswell, Public Affairs Adviser on Rachael.Truswell@rcn.org.uk or Charli Hadden, Policy Adviser on Charli.Hadden@rcn.org.uk

[3] Law Commission, *Mental Capacity and Deprivation of Liberty*, 2018. Accessed December 2018, available here: https://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/