# Mental Capacity (Amendment) Bill

## Summary Briefing

The Mental Capacity (Amendment) Bill is a Government bill that sets out measures to replace the **Deprivation of Liberty Safeguards (DoLS)** scheme in the **Mental Capacity Act 2005.**

When a person who lacks capacity needs to be confined for their care and treatment, this is a deprivation of liberty. The measures in the Bill set out a new legal process in England and Wales for authorising arrangements. This process is referred to as the Liberty Protection Safeguards.

The Liberty Protection Safeguards aim to be in line with the Human Rights Act and the European Convention on Human Rights, and ensure that a deprivation of a person's liberty will not be authorised without an assessment of:

- the person's capacity
- whether the person has a mental disorder (which could be a temporary disturbance of the mind)
- whether the arrangements are necessary to prevent harm and proportionate to the likelihood and seriousness of harm.

The safeguards also require that the person and those that know them are consulted about the arrangements and about the person's wishes and feelings.

### Background

- In 2014, a House of Lords Select Committee, in their post-legislative review into the Mental Capacity Act, concluded that Deprivation of Liberty Safeguards were 'not fit for purpose' and recommended reform.
- Tasked by the Government, the Law Commission conducted over three years of engagement with a wide range of stakeholders and reported in 2017 (See Report). The Law Commission's report proposed the new model of the 'Liberty Protection Safeguards'.
- The 2017/18 annual statistical report published by NHS Digital in October 2018, reported that at the end of March 2018 there were over 125,000 people in England who were waiting for an application to be authorised. This means that they were being deprived of their liberty without the necessary safeguards in place because of a backlog.
- The Government want to ensure that under the new scheme there is no backlog so that people's rights are protected in line with Article 5 of the European Convention on Human Rights.

*The proposals in this Bill are based on the Law Commission recommendations, and would:*

a. Secure protections for people through a simpler process that **minimises duplication of assessments** and which is intended to reduce delays in authorisations so that people can access the safeguards they need more quickly.
b. Be person-centred and include a strong role for carers and families including an **explicit duty to consult with them as well as the person being deprived of their liberty** on the proposed arrangements.

c. Be easier for people, care providers and local authorities as **assessments can take place as part of the wider care-planning process**.

## More Detail

The Mental Capacity (Amendment) Bill was introduced into the House of Lords on 3 July 2018 and sent to the Commons on 11 December 2018. The Bill completed its passage through the Commons on 12th February and most Commons amendments have been agreed in the Lords. A small number of matters remain to be resolved between the Lords and the Commons.

### *What does deprivation of liberty mean?*

Any person who is under constant supervision and control, and is not free to leave their accommodation, who lacks capacity to consent to their care and treatment arrangements, is considered to be deprived of their liberty.

Article 5 of the European Convention on Human Rights (ECHR) guarantees the right to liberty and provides that no one should be deprived of their liberty unless proper safeguards are in place.

The **Deprivation of Liberty Safeguards (Deprivation of Liberty Safeguards)** currently provides a legal process in England and Wales for authorising deprivations of liberty in hospitals and care homes (Note: in other settings an application currently has to be made to the Court of Protection for authorisation of a deprivation of liberty).

### *Who does it affect?*

Arrangements giving rise to a deprivation of liberty can be necessary to keep those with certain health conditions safe and looked after. This commonly includes people with dementia, severe learning disabilities, or acquired brain injury, but can include others, such as people under the influence of alcohol or drugs or people who have had a stroke or have delirium following an illness or an operation, who may temporarily lack capacity to make decisions.

### *What is wrong with the current legislation?*

The process is burdensome, duplicative, and resource intensive. In 2014 the House of Lords, in their post-legislative review into the Mental Capacity Act, concluded that Deprivation of Liberty Safeguards were 'not fit for purpose' and recommended their replacement.
The problematic process is compounded by unsustainable numbers of requests for authorisations. The Supreme Court judgment in **2014,** *P v Cheshire West and Chester Council* and *P v Surrey County Council* (known as "Cheshire West"), gave a **significantly wider** definition of deprivation of liberty than had previously been understood.

Since that judgment, the Deprivation of Liberty Safeguards regime has struggled to cope with the increased number of cases:

- In 2013/14 (prior to Cheshire West) the total number of Deprivation of Liberty Safeguards applications in England was **13,715.**

- In 2017/18 (post Cheshire West) the total number of Deprivation of Liberty Safeguards applications in England increased to **227,400[1].**
- On average, the DoLS assessment process take 138 days to complete (whereas the statutory time limit is 21 days).

These figures do not capture people who are deprived of liberty in settings not covered by the Deprivation of Liberty Safeguards, (e.g. supported living, shared lives and private and domestic settings) where the only available mechanism to provide Article 5 safeguards is via authorisation by the Court of Protection (this number was estimated by the Law Commission[2] at around 53,000).

The current system is unable to cope with the number of people requiring a deprivation of liberty to be authorised. As well as being a drain on resource, the backlog (reported as 125,630 as at the end of March 2018) of applications that have not been authorised means many number of individuals are being left without safeguards for an extended period.

### Summary of Bill policy

The objective of the Bill is to replace the current Deprivation of Liberty Safeguards (DoLS), with the new system recommended by the Law Commission – the Liberty Protection Safeguards. The policy being introduced will ensure that those requiring these safeguards will follow a streamlined, person-centred and less bureaucratic process.

*The measures set out in the Bill intend to put people first and the system second, and will:*

- Reduce and eliminate the backlog of authorisation requests to be dealt with by local authorities. This will be done with a streamlined process which will:
  - ✓ Reduce bureaucracy by allowing authorisations to apply in more than one setting, providing they are planned for and included at the time of the authorisation.
  - ✓ Eliminate Duplication - by embedding Liberty Protection Safeguards assessments into existing care planning and allowing existing capacity assessments and medical assessments (that is, of a mental disorder) to be re-used, when appropriate.
  - ✓ Require three assessments rather than six, within the legal framework of the Act.
  - ✓ Require all information to be considered in a "pre-authorisation review prior to authorisation
  - ✓ Remove the requirement to re-start the authorisations process from scratch every single year.
- Ensure that people are supported and afforded their rights throughout the process by an '**appropriate person'** similar to that in the Care Act. If no appropriate person is available, an **Independent Mental Capacity Advocate** is automatically appointed unless not having one is in the persons best interests (note: this will be very rare and the Coe of Practice will describe where this might be the case, such as in some end of life situations, or when the person has previously expressed, when capacitous, that they do not want an advocate to be used)
- Give carers and families a stronger role in the new model: there is an explicit duty to consult with them, as well as with the person at the centre.

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[1] NHS Digital, *Mental Capacity Act 2005 Deprivation of Liberty Safeguards 2017-2018 report:* https://files.digital.nhs.uk/04/B15A3A/Deprivation of Liberty Safeguards%201718%20Final%20Report.pdf (02 October 2018)

[2] Law Commission Impact Assessment: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/03/lc372_mental_capacity_impact.pdf

- If there is reason to believe a person is objecting, either before or after authorisation, or the person subsequently objects at a later point, an **Approved Mental Capacity Professional** (an "AMCP") is appointed to review the arrangements. This objection can be raised by anyone with an interest in the cared-for person. An AMCP can also conduct the pre-authorisation review in complex circumstances. Further guidance will be included in the Code of Practice.
- Extend the authorisation process beyond hospitals and care homes to a **wider range of settings** including supported living, shared live schemes and domestic settings. The Bill also extends to 16 and 17-year olds. Currently these situations must be taken to the Court of Protection for access to safeguards.
- Ensure that NHS hospital providers are responsible for authorising applications in their own settings (with appropriate separation of interests from those providing day-to-day care and treatment). In England, clinical commissioning groups are responsible for authorising applications where arrangements are Continuing Healthcare arrangements, in Wales, the local health board takes responsibility for arrangements that are equivalent to continuing healthcare. In these cases they are referred to as the **'responsible body'**. In all other cases the responsible body would be the local authority (except that in Wales the local Health board is the responsible body for independent hospitals).

### The assessments

1. *The mental capacity assessment*
   - An assessment to determine whether the person has capacity to consent to the arrangements.
2. *The medical assessment*
   - This identifies if the person has a mental disorder and is an example of an assessment that might commonly be re-used, for example someone with a stable, long-term condition. Under existing DoLS legislation, this would have to be commissioned each time, which can very costly.
3. *Necessary and Proportionate assessment.*
   - This considers if less restrictive options are available and the benefits that will arise for the person; it includes finding out the wishes and feeling of the person.

In **care home** cases, the assessments cannot be done by anyone with a connection to the care home and they must be done by someone with appropriate experience and knowledge.

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