

# **LIBERTY**

## **LIBERTY'S BRIEFING ON THE MENTAL CAPACITY AMENDMENT BILL FOR SECOND READING IN THE HOUSE OF COMMONS**

**DECEMBER 2018**

## **ABOUT LIBERTY**

Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty provides policy responses to Government consultations on all issues which have implications for human rights and civil liberties. We also submit evidence to Select Committees, inquiries and other policy fora, and undertake independent, funded research.

Liberty's policy papers are available at [libertyhumanrights.org.uk/policy](https://libertyhumanrights.org.uk/policy)

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## INTRODUCTION

1. The Mental Capacity Amendment Bill would amend the Mental Capacity Act 2005 (MCA) to introduce a new scheme -the Liberty Protection Safeguards (LPS) - to replace the heavily criticised deprivation of liberty safeguards (DoLS). The Government's impact assessment predicts that 300,000 people will be affected by these changes, including those with dementia, learning disabilities, autism, and brain injuries.
2. The Government's motivation for changing the system is primarily to tackle the backlog of DoLS applications, which have increased considerably following the 'Cheshire west' legal case which saw the definition broaden as to what constitutes a deprivation of liberty. In 2014 the Joint Committee on Human Rights said that the DoLS were unfit for purpose.<sup>1</sup>
3. Any legislation that deals with depriving people of their liberty should be examined closely, even more so when dealing with people who potentially cannot object to that decision. It is vital that robust safeguards are put in place to ensure the least restrictive care possible and that any restriction of liberty is genuinely in the person's 'best interests'.
4. Given the importance of the Bill, it was disappointing that it arrived in the House of Lords needing so much work to ensure human rights compliance. Liberty has been briefing alongside Mind, Rethink, Age UK, Mencap, Alzheimer's Society, Rethink Mental Illness, Disability Rights UK, Sense, Learning Disability England, POhWER, BIHR, National Autistic Society and Voiceability throughout the Bill's passage through the House of Lords. While the Bill is now improved, there are several areas that still raise considerable concern.
5. The Mental Capacity Amendment Bill began before the Independent Review of the Mental Health Act was released and its recommendations have not yet had time to be absorbed into the debates on this Bill. That Review asserts that *'just as truth is often described as the first casualty of war, the same is true of dignity when compulsive powers are being invoked.'*<sup>2</sup> This Bill is an opportunity to put dignity at the heart of the process and it is vital we get this right.

## SUMMARY OF RECOMMENDATIONS

- LPS Renewal periods should be reduced from three years to one year
- Any changes to the Bill as a result of the Independent Review of the Mental Health Act (MHA) should be widely consulted upon and discussed within the context of wider interaction between the MCA and the MHA
- The role of the Independent Mental Capacity Advocate (IMCA) needs to be better defined, especially in relation to the appointment of an IMCA through a best interests test
- The Bill should move the burden of consultation away from the care home manager to a body with less conflict of interest

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<sup>1</sup> House of Lords, Report of the Select Committee on the Mental Capacity Act 2005: Post-Legislative Scrutiny, Session 2013–14, HL Paper 139, p 7

<sup>2</sup> The Independent Review of Mental Health Act 2018, Sir Simon Wessely, p17

- An equality impact assessment must be released as soon as possible to allow scrutiny
- The Bill should avoid over-reliance on the Code of Practice

## **LENGTH OF RENEWAL PERIODS**

6. Liberty strongly believes that a three year authorisation period (tripling what currently exists) before renewal will likely lead to protracted litigation and potential violations of (*P*'s) rights.<sup>3</sup> While general safeguards have been improved upon the Bill's passage through the House of Lords, they still do not allay our deep concern around the length of the authorisation period.
7. In response to Baroness Thornton's amendment at Committee Stage pushing for the three year period to be reduced to one year, the Government responded:

*'I know how strongly noble Lords and stakeholders feel about this issue. The noble Baroness, Lady Thornton, made a valid point about aligning the review process with the terms set out under the Care Act. I would like to give further thought to this, particularly in the context of the discussions which will be taking place about the proper role of the care home manager.'*<sup>4</sup>

8. The issue was brought up again at third reading with the Government asserting that they would consider it but pointed out that other safeguards that would help trigger reviews were in place and these would prevent protracted and unnecessary detention periods. Regardless of the level of safeguards introduced, Liberty believes a three year period remains inappropriate and open to abuse.
9. Tripling the length of an authorisation period to three years creates a stark difference between the Mental Capacity and Mental Health Acts. Indeed, the Independent Review of the MHA earlier this month recommended the shortening of detention periods under the MHA down to three and six month periods. Sir Simon Wessely's report also provided evidence which linked the importance of Tribunal hearings to people being released from detention.<sup>5</sup> While the case remains that certain people could be detained under either piece of legislation, it seems extraordinary that one piece of legislation could allow for a three year detention while the other six months. The different directions the two pieces of legislation are heading in are stark and could lead to individuals being placed in whichever piece of legislation has the weaker safeguards in place.

## **Renewal Periods in other Countries**

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<sup>3</sup> Throughout this briefing we use the term (*P*) to stand for the person subject to the LPS order. The legislation uses the term cared-for person

<sup>4</sup> - Lord O'Shaughnessy, 3<sup>rd</sup> Day Committee Stage, Column 715

<sup>5</sup> Statistics show that in 17% of section 3 cases discharge occurs within 48 hours of when a tribunal hearing is scheduled. The Independent Review of the Mental Health Act 2018, P116

10. A three year period would put the UK out of step with other countries. Comparing mental health legislation in five different jurisdictions (Ontario (Canada), Victoria (Australia), Scotland, Republic of Ireland, and England and Wales) shows that:

*‘Renewal Orders vary in different jurisdictions with the time periods for subsequent orders being longer in duration up to a maximum of 12 months, except in Ontario (3 months) and Victoria (6 months).’*<sup>6</sup> The three year period is clearly out of step with time periods in other jurisdictions.

### **Renewals under the Current DoLS System**

11. The DoLS system operates a maximum period of 12 months of detention before renewal. Renewal in the current system means going through the original best interest assessments and safeguards again. As such the renewal process acts as a safeguard against lengthy detention. The current DoLS Code of Practice states that a deprivation of liberty should be for the minimum period necessary. For the maximum 12-month period to apply, the assessor will need to be confident that there is unlikely to be a change in the person’s circumstances that would affect the authorisation within that timescale.<sup>7</sup>

### **Law Commission Proposals on Renewals**

12. The Law Commission ran a consultation on the DoLS and what should replace them between July 2015 and March 2017.<sup>8</sup> They received evidence illustrating significant delays in reviews and renewals of DoLS authorisations. The Law Commission’s consultation paper provisionally proposed that under the new scheme, authorisations should be given for a period not in excess of 12 months.<sup>9</sup> However, in the final report the Commission recommended that an authorisation could be renewed for a second period of up to 12 months and then for an indefinite number of periods of up to three years. They also recommended a streamlined renewal process which would mean that the assessment process would not start from scratch with the renewal of every authorisation period.
13. The Law Commission emphasised that despite these recommendations, a person should always remain subject to a robust system of reviews and have access to justice. They stressed the importance of ensuring that a person’s circumstances are kept under constant review and not only at fixed points at the end of an authorisation.

### **The Government’s Proposals on Renewals**

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<sup>6</sup> A comparison of mental health legislation in five developed countries: a narrative review. Irish Journal of Psychological Medicine, Volume 34, Special Issue 4 (Special Issue on Coercion)

<sup>7</sup> DoLS Code of Practice, paragraph 4.71

<sup>8</sup> <https://www.lawcom.gov.uk/project/mental-capacity-and-deprivation-of-liberty/>

<sup>9</sup> Consultation paper, paragraph 7.76

14. The Government accepted the Law Commission's recommendations on the length and new process for renewals. In the current Bill a responsible body can renew an authorisation if it "reasonably believes" that:
- (1) the person continues to lack capacity to consent to the arrangements;
  - (2) the person continues to have a mental disorder; and
  - (3) the arrangements continue to be necessary and proportionate.
15. When outside of a care home arrangements, paragraph 31(a)(ii) requires that the responsible body must be satisfied that it is unlikely that there will be any significant change in the person's condition during the renewal period which would affect whether the authorisation conditions are met (paragraph 12). This is to ensure that longer-term renewals are only used in the case of persons whose condition and circumstances are likely to be long-term and stable.

### **What does a Regular Review Entail?**

16. We have concerns that while the Bill requires regular reviews of a deprivation (Paragraph 35 (2)), it does not stipulate what 'regular' entails – it would be inappropriate to leave this to the Code of Practice or even up to the Responsible Body or care home manager.
17. Strasbourg case law confirms that a lawful deprivation of liberty for the purposes of Article 5(1)(e) of the ECHR must include both "limits in terms of time" and **"continuing clinical assessment of the persistence of a disorder warranting detention"**.<sup>10</sup> Therefore, in order to comply with Article 5, any scheme must contain: (1) a provision for the termination of the authorisation after the maximum time limit has expired; and the ability to terminate an authorisation before the time limit has expired if the deprivation of liberty is no longer necessary.
18. A three year renewal provision is likely to pose problems for responsible bodies especially in cases concerning conditions such as learning disabilities, acquired brain injuries and other non-degenerative mental impairments. The courts are likely to intervene to interpret paragraphs concerning renewals (31(a)(ii), 32(b)(ii) and 33(1)(b)) as narrowly as possible.<sup>11</sup> Capacity assessments are time-specific. A three-year old capacity assessment cannot be relied on as accurate evidence for detention.
19. The Bill has improved what triggers a review but again there is a discrepancy in the direction of travel between the MHA and the MCA. The MHA Review has argued for an automatic referral to the tribunal 4 months after the detention started and 12 months after the detention started, and annually after that.<sup>12</sup> The MHA is offering much greater safeguards than would exist in the LPS.

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<sup>10</sup> HL v UK (2005) 40 EHRR 32 (App No 45508/99) at [120].

<sup>11</sup> September 2018, 39 Essex Chambers, Mental Capacity Report: Special Report: Mental Capacity (Amendment) Bill, p18

<sup>12</sup> The Independent Review of Mental Health Act 2018, Sir Simon Wessely, p122

20. While the new LPS ‘renewal system’ is designed to lessen the burden on the responsible body, it is also a tangible reduction in the level of safeguards intended to prevent long-term detention. The possibility of a three year period of detention, with limited safeguards that are dependent on the opinion of care home managers, gets the balance wrong between safeguarding vulnerable people and the desire to reduce the bureaucracy of the system.

## **INTERFACE BETWEEN THE MENTAL CAPACITY ACT AND MENTAL HEALTH ACT**

21. The Independent Review of the MHA has reported back with substantial recommendations on the interaction between the MHA and the MCA. The Review recommends a new dividing line of ‘objection’ to distinguish who should be treated under which piece of legislation.<sup>13</sup> Liberty strongly believes that any response in the Mental Capacity Amendment Bill to this suggestion would be pre-emptive. Any changes in the interaction between the legislation should be widely consulted on and made in tandem with other changes that the MHA Review has put forward. It is our broader view that the Mental Capacity Amendment Bill should be paused until a full response and legislative plan is introduced in response to the Independent Review of the MHA.

## **ROLE OF IMCAs**

22. The importance of advocacy within the mental capacity setting cannot be overstated. Part 5 of the Bill deals with the appointment of an IMCA. Paragraph 39 (3) (b) states that an IMCA should be appointed if:

*‘the responsible body is satisfied that being represented and supported by an IMCA would not be in the cared-for person’s best interests.’*

This is the opposite of the situation at paragraph 40 (3)(b) which sets out IMCA support for the appropriate person and reads that an IMCA should be appointed if:

*‘the responsible body is satisfied the appropriate person’s being supported by an IMCA would be in the cared-for person’s best interests.’*

23. The wording at paragraph 39(3)(b) runs counter to the assumed intention gleaned from Government comment on this issue through the House of Lords. This urgently needs to be clarified. If paragraph 39 is amended to assert that an IMCA can be appointed if the responsible body believes it is in the best interest of (P), then Liberty has concerns.
24. A best interests test leads to discretion as to whether an IMCA should be appointed. While hypothetically there could be a case in which it is in (P’s) best interests not to have an advocate, it is hard to picture this in reality and the Government have produced no evidence of individuals rejecting the opportunity to have an IMCA, despite promising to do so.

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<sup>13</sup> Ibid

25. The role of advocacy is essential in supporting (*P*) to access appeal and review rights, yet these advocacy arrangements remain significantly weaker than those proposed by the Law Commission, which would have given an automatic right to an independent advocate on an opt-out basis to those detained under the LPS system.

## **CONFLICTS OF INTEREST**

26. The Bill has been greatly improved in terms of conflicts of interest especially regarding the role of the care home manager. Yet several concerns still remain in relation to independent hospitals and care home managers. Paragraph 20 of the Bill allows for the care home manager to carry out the consultation to ascertain the wishes and feelings of (*P*), which will impact on authorisations being accepted or denied. A stronger safeguard would be to ensure independence within the consultation process.
27. There is also an outstanding issue of independent hospitals being able to authorise the deprivation of liberty of people within the hospital – as they act as the responsible body. While we are sure this was not the intention of the Bill, it should be rectified to avoid conflicts of interest between those authorising a detention and those carrying out that detention.

## **EQUALITY IMPACT ASSESSMENT, GENERAL IMPACT ASSESSMENT AND CODE OF PRACTICE**

28. Liberty is concerned that no equality impact assessment has been released and would urge the Government to release this as soon as possible to support MPs in properly scrutinising the Bill. We also await a new general impact assessment considering the number of amendments this Bill has received in the House of Lords since the initial impact assessment was carried out.
29. Liberty is also concerned by the over-reliance on delegating issues into the Code of Practice. This is certainly the case in reference to what ‘regular’ review amounts to. A Code of Practice should not set out rights – it should merely explain the rights that exist on the face of the Bill. Case law has confirmed that a Code of Practice carries less weight than statutory law.<sup>14</sup> As such it is important the face of the Bill contains and elucidates on the rights that (*P*) and those caring for (*P*) are entitled to.

## **CONCLUSION**

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<sup>14</sup> “Whatever the weight given to the Code by section 42 of the MCA 2005, it does not create an obligation as a matter of law to apply to court in every case”. – NHS Trust and others (Respondents) v Y, 2018



30. The above issues require resolving as the Bill moves through the Commons. We remain concerned at the speed with which the Bill is progressing and urge time for further consultation. The release of the Independent Review into the MHA, the lack of an equality impact assessment, a Code of Practice and an up to date impact assessment should all provide pause for thought. The proposed LPS system is set out as an exercise in bureaucracy reduction, but it is firmly Liberty's belief that the balance has swung too far away from safeguards put in place to protect people who often cannot object to detention themselves. A functioning system requires resources and it is these resources that should be provided and not vital safeguards that should be gutted. As the Bill stands, it is likely that the same road blocks will be hit, litigation brought, and subsequent legislation will have to be debated all over again.