

# Mental Capacity (Amendment) Bill [HL] 2017-19

Committee stage, 5 September 2018

NHS Providers is the membership organisation and trade association for the NHS hospital, mental health, community and ambulance services that treat patients and service users in the NHS. We help those NHS foundation trusts and trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate. NHS Providers has all trusts in membership, collectively accounting for £84bn of annual expenditure and employing more than one million staff.

## NHS Providers' view

The Mental Capacity (Amendment) Bill was introduced following the publication of the Law Commission recommendations, and will see Deprivation of Liberty Safeguards (DoLS) – as provided for in the Mental Capacity Act 2005 – replaced by Liberty Protection Safeguards (LPS).

We welcome these reforms as, under the new safeguards, deprivations of liberty need to be authorised in advance by the 'responsible body' which for hospitals (whether NHS or private) will usually be a manager in the NHS Trust which runs the hospital. This provision will allow the NHS, rather than local authorities, to make decisions about patients, resulting in a more efficient and clearly accountable process because patients are most likely to be onsite or in touch with NHS services at the time they require these provisions. Nevertheless, there are areas which require further clarification:

- We would have liked to see the reforms combined with the Mental Health Act Review. Contrary to the Law Commission's recommendations, the draft bill reproduces the notoriously complex<sup>1</sup> and poorly understood<sup>2</sup> interface between DoLS and the Mental Health Act. Whereas disputes over that interface currently take place within a local authority, under LPS, the same dispute would arise between a hospital manager and a local authority. Clarity is needed around who would resolve such disputes, and how, if they occur under the new system.
- The authorisation procedure involves three assessments and a pre-authorisation review, usually all conducted by staff from the same organisation. Clarity is needed as to whom organisations should delegate these duties, and how to ensure that the pre-authorisation review constitutes a meaningful safeguard for patients.
- It may be that the new provisions result in additional costs for trusts and if this is the case, how national bodies will ensure providers are appropriately resourced to deliver them needs to be confirmed.

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<sup>1</sup> Law Commission, "Mental Capacity and Deprivation of Liberty Summary", para. 90

<sup>2</sup> Care Quality Commission, "The State of Health Care and Adult Social Care In England 2016/17", p121

NHS Providers supports policy and legislative measures to better enable trusts to apply the Mental Health Act and the Mental Capacity Act in a consistent and transparent way that protects patients' and services users' rights and supports high quality care. It is paramount that changes made by this Bill are in step with the wider transformation work underway within the NHS.

## Background

DoLS is the current legal framework designed to protect against arbitrary detention (deprivation of liberty) people in hospital or care homes who do not have the mental capacity to make their own decisions about their care. This could be, for example, people with dementia, learning disabilities or mental illness. DoLS provides that local authorities must, on the application of a hospital or care home, determine whether it is necessary, proportionate and in a person's best interests to be subject to restrictions that amount to a deprivation of liberty. There are six assessments which have to take place before local authorities may decide whether or not to formally authorise any proposed arrangements.

The DoLS scheme was described in the House of Lords post legislative scrutiny of the Mental Capacity Act 2005 as being "poorly drafted, overly complex and bear[ing] no relationship to the language and ethos of the Mental Capacity Act".<sup>3</sup> The Law Commission carried out a review of DoLS and found that "the current regime is in crisis and needs to be overhauled".<sup>4</sup> The system has also been criticised for adding an administrative burden on an already over-stretched system, according to hospital clinicians, DoLS offers no tangible benefits to a person's treatment plan and in fact often deflected resources away from the provision of care and treatment.<sup>5</sup>

The CQC has repeatedly expressed concern about widespread variations in the effectiveness with which DoLS is implemented, noting that providers across the health and adult social care sector often lack "effective practical understanding of how to apply aspects of DoLS legislation" and that very few local authorities are confident that they are adequately resourced to discharge all of their statutory duties under the scheme.<sup>6</sup>

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<sup>3</sup> House of Lords Mental Capacity Act 2005 Committee, Mental Capacity Act 2005: Post Legislative Scrutiny, 13 March 2014, HL 139 of session 2013–14, p 7.

<sup>4</sup> Law Commission, Mental Capacity and Deprivation of Liberty: Summary, 13 March 2017, p 2

<sup>5</sup> Law Commission, Mental Capacity and Deprivation of Liberty: Summary, 13 March 2017, p 2

<sup>6</sup> Care Quality Commission, The State of Health Care and Adult Social Care In England 2016/17, p117-123