HOUSE OF COMMONS LIBRARY

BRIEFING PAPER

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Mental Capacity (Amendment) Bill

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Summary

The *Mental Capacity (Amendment) Bill* was introduced to the House of Lords on 3 July 2018 and completed its Lords stages on 11 December 2018. It is due to have its Remaining stages in the Commons on Tuesday 12 February 2019. The intention of the Bill is to reform the process for authorising arrangements which enable people who lack capacity to consent to be deprived of their liberty (for the purpose of providing them with care or treatment).

The new regime created by the Bill would replace the existing authorisation process, known as Deprivation of Liberty Safeguards (DoLS), which were introduced in 2009. Those arrangements have attracted significant criticism for being too complex and bureaucratic. Key court judgments have also widened the interpretation of those who should be recognised as having been deprived of their liberty, with significant implications for local authorities and others involved in administering the DoLS scheme.

In March 2017, the Law Commission published a report, *Mental Capacity and Deprivation of Liberty*, recommending an overhaul of the DoLS process. It recommended that DoLS are repealed and replaced by a new scheme called the Liberty Protection Safeguards, which would streamline the process for approving a deprivation of liberty.

The Government's final response, published in March 2018, broadly accepted the Law Commission's recommendations. The *Mental Capacity (Amendment) Bill* was introduced to the House of Lords on 3 July 2018. The Bill broadly follows the Law Commission's recommendations, with some changes.

While noting the shortcomings of the existing DoLS arrangements, a wide range of concerns have been raised about the Bill during its passage through the Lords. These have focussed on the following key areas:

- The role of care home managers in carrying out assessments, with particular concerns raised about potential conflicts of interests in care homes and independent hospitals.
- The appointment and role of Independent Mental Capacity Advocates (IMCAs).
- Provisions relating to reviews by Approved Mental Capacity Professionals (AMCPs) and referral to the Court of Protection.

A number of Peers and Members also asked how the provisions of the Bill would overlap with the recommendations of the Independent Review of the Mental Health Act, which published its report on 6 December.

There have been important changes to the Bill, in the Lords, and during the Commons Committee stage. The Government have introduced a number of amendments, including a new statutory definition of deprivation of liberty. Two amendments were made following Government defeats on division in the Lords. The Government has also tabled a number of amendments ahead of the Commons Report stage. A revised version of the Bill (Bill 323) was published following completion of the Commons Committee stages, and the Department produced updated Explanatory Notes after completion of the Lords stages in December.

The House of Lords Library briefing on the Bill (July 2018), and the Commons Library briefing on Deprivation of Liberty Safeguards, provide an overview of the current DoLS system, and policy background to the introduction of the Liberty Protection Safeguards system. The Bill would apply to England and Wales only.

1. Overview of the Bill

The Bill amends the *Mental Capacity Act 2005*, which provides a statutory framework for people who lack capacity to make decisions for themselves (it would do this by inserting a new Schedule AA1 and repealing Schedules A1 and 1A).

The Bill is based on the recommendations of the Law Commission report *Mental Capacity and Deprivation of Liberty,* which was published together with the Law Commission's draft Bill in March 2017.[1] It recommended that DoLS are repealed and replaced by a new scheme called Liberty Protection Safeguards, which would streamline the process for approving a deprivation of liberty. The Law Commission model seeks to make use of existing mechanisms where possible, but to remove the features of DoLS they identified as being both inherently inefficient and actively detrimental to the interests of people deprived their liberty.[2]

The Government's *Mental Capacity (Amendment) Bill* would reform the process for authorising arrangements which enable people, who lack capacity to consent, to be deprived of their liberty for the purpose of delivering their care or treatment. This Government Explanatory Notes states this will include people with severe dementia, learning disabilities, head injuries and autistic spectrum disorder. Following the Law Commission's usage, the new scheme that the Bill would introduce is called Liberty Protection Safeguards (although this term does not appear in the Bill itself).

The Department of Health and Social Care provide the following useful summary of the Bill in a memoranda to the Joint Committee on Human Rights (JCHR) published on 29 October 2018:

> Clauses 1 to 5 make amendments to the MCA which are necessary for the operation of the new Liberty Protection Safeguard scheme. They make provision about restriction of liability when health and care professionals carry out arrangements under the new scheme; interim deprivation of liberty for the purpose of life-sustaining treatment in an emergency; and the powers of the Court of Protection in relation to the new authorisation scheme.
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> Clause 1(4) and Schedule 1 insert Schedule AA1, which replaces Schedule A1 to the MCA (Schedule A1 is referred to as the "Deprivation of Liberty Safeguards", or "DoLS"). Schedule AA1 provides for a new administrative scheme for authorisation of deprivation of liberty.
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> Under Schedule AA1, a responsible body (which in most cases will be either a hospital trust, clinical commissioning group, local health board, or local authority) will be able to authorise arrangements for care or treatment giving rise to a deprivation of

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1 Law Commission, *Mental Capacity and Deprivation of Liberty*, March 2017

2 The Lords Library briefing on the Bill (July 2018) examines the Law Commission's recommendations and the provisions in the Mental Capacity (Amendment) Bill, and highlights any areas where they differ from the Law Commission's recommendations. This paper also includes the findings of the Joint Committee on Human Rights' examination of the DoLS scheme published in June 2018.

> a person's liberty. Unlike the DoLS, it does not matter where the arrangements will be carried out. Before a deprivation of liberty can be authorised, specified assessments must be carried out: a capacity assessment, a medical assessment of unsound mind and an assessment of whether the arrangements are necessary and proportionate. Full consultation must also be carried out with anyone with an interest in the person's welfare.
>
> Before an authorisation can be given, a pre-authorisation review must be carried out by a person who is independent from the people providing the care and treatment. In cases where the individual objects to the proposed arrangements, that review must be undertaken by an Approved Mental Capacity Professional who must meet with the person and determine whether the authorisation conditions are met.
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> Once an authorisation has been given, the person will receive a number of safeguards, including regular reviews (undertaken by the responsible body) of the need for their care and treatment arrangements, and the right to challenge the authorisation before the Court of Protection. Schedule AA1 also imposes a duty on the responsible body to appoint an independent mental capacity advocate or an appropriate person to represent and support the person from the outset of the assessment process.
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> The Bill also provides for an interface with the Mental Health Act 1983. Broadly speaking, patients in psychiatric hospitals cannot be detained under both the Mental Health Act and the Liberty Protection Safeguards. Patients who object to their mental health care and treatment in hospital are ineligible for the Liberty Protection Safeguards. In the community, however, a person could be the subject of dual authorisations.[3]

The Bill extends to England and Wales. Although health is a devolved policy area the Explanatory Notes to the Bill state that the subject matter of the Bill is "not within the legislative competence of the National Assembly for Wales". Accordingly, legislative consent is not being sought from the Welsh Assembly in relation to any provision of the Bill:

> The matters to which the provisions of the Bill relate are not within the legislative competence of the National Assembly for Wales, and do not alter the competence of the Welsh Government except in a way that is consequential, supplementary or incidental to the subject matter of the Bill. Accordingly no legislative consent motion is being sought in relation to any provision of the Bill. This position is subject to change. If there are amendments relating to matters within the legislative competence of the Scottish Parliament, the National Assembly for Wales or the Northern Ireland Assembly, the consent of the relevant devolved legislature(s) will be sought for the amendments.[4]

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3 Mental Capacity (Amendment) Bill DHSC Memorandum for the Joint Committee on Human Rights, 29 October 2018

4 Explanatory Notes (Bill 303-EN)

1.1 Liberty Protection Safeguards

The Government have stated that one of the key aims of the Bill is to strengthen protections and rights for vulnerable adults who lack mental capacity and have their liberty deprived, and would:

- introduce a simpler process that involves families more and gives swifter access to assessments;
- be less burdensome on people, carers, families and local authorities;
- allow the NHS, rather than local authorities, to make decisions about their patients, allowing a more efficient and clearly accountable process;
- consider restrictions of people's liberties as part of their overall care package; and
- get rid of repeat assessments and authorisations when someone moves between a care home, hospital and ambulance as part of their treatment.[5]

In particular, the Bill aims to strengthen the safeguards for approving a deprivation of liberty – a brief overview of these provisions of the Bill, as first introduced in July 2018, is provided below:

- The Bill would introduce three assessments to authorise a deprivation of liberty – these are (1) the person who is the subject of the arrangements lacks the capacity to consent to the arrangements; (2) the person is of unsound mind; and (3) the arrangements are necessary and proportionate;
- It would introduce a new duty for pre-authorisation independent review – from someone who is not involved in the person's day to day care – to determine whether the authorisation conditions are met;
- It would introduce a new requirement for an Approved Mental Capacity Professional (AMCP) to review cases where the person objects to the proposed arrangements;
- Once an authorisation has been given, there are also a number of safeguards put in place for the person receiving care. These include regular reviews of the authorisation by the responsible body or care home, and the right to challenge the authorisation before the Court of Protection;
- Additionally, there would be a duty to appoint an Independent Mental Capacity Advocate (IMCA) or an appropriate person to represent and support the person when an authorisation is being proposed and while an authorisation is in place.

[5] See Department of Health and Social Care, New law introduced to protect vulnerable people in care, July 2018

2. Lords stages

Labour, Liberal Democrat and crossbench Members of the House of Lords broadly supported the aims of the Bill (which are largely based on Law Commission proposals) and there was agreement amongst Peers and stakeholders about the serious deficiencies of the existing DoLS arrangements. However, both Opposition and Cross-Bench peers have raised a wide range of concerns about the Bill. These have focussed on the following key areas:

- The definition of deprivation of liberty.
- The role of care home managers in carrying out assessments, with particular concerns raised about potential conflicts of interests in care homes and independent hospitals.
- The appointment and role of Independent Mental Capacity Advocates (IMCAs).
- Provisions relating to reviews by Approved Mental Capacity Professionals (AMCPs) and referral to the Court of Protection.

During the Lords Committee stage of the Bill a large number of probing amendments were put forward, and the Health Minister Lord O'Shaughnessy indicated at the start of the second day in Committee, on 15 October 2018, that the Government was proposing to address some of the issues raised with its own amendments:

> The first issue that was raised is extending the scope of the Bill to include 16 and 17 year-olds. I said in Committee that we would look at that and I can tell noble Lords that we will bring forward proposals to include that group in the scheme. I will also reflect on the points made by the noble Lord, Lord Hunt, and the noble Baronesses, Lady Thornton, Lady Finlay and Lady Barker, about the role of the cared-for person being front and centre. In fact, that was the one obligation to consult that was not translated from the Law Commission report into the Bill. Clearly, if we want to get the improvements that we want to see, it is essential that that person's wishes and feelings about proposed arrangements be at the heart of the model, so we will ensure that the Bill reflects this.
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> […]
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> As I said, we will make sure that the Bill reflects the need to consult the cared-for person. We have also taken on board the comments about the phrase "of sound mind", which is used in one of the amendments later on. That is one reason why we might want to reconsider it. I know that there is a great concern that the language is inappropriate and that creating a new definition might create a gap, but, having looked at this further, we think we would be able to change this language and carry out various other work to reduce the gap to a minimum. That is something that we intend to bring forward, so I hope that that will be welcomed by many people.[6]

The Joint Committee for Human Right's report, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, was published on 26 October 2018.

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6 House of Lords Committee stage (day 2), 15 October 2018

The report identified several problems with the Bill. The Committee suggested a number of amendments to enhance the rights of cared for persons. For example:

- Many of those caught by the Cheshire West definition are not perceived by their family or professional carers as being 'deprived of their liberty'. The Committee calls to Parliament to consider including in the legislation a definition of deprivation of liberty in the context of mental capacity law, to clarify the application of the Supreme Court's 'acid test' whilst being mindful of the fact that any definition must comply with Article 5.
- Most significantly for those living in care homes, responsibility for undertaking or arranging the assessments required before a deprivation of liberty can be authorised would in future fall to care home managers. The Government has asserted that its proposals provide the assessment process with the degree of independence required by Article 5 case law. The Committee shares concerns expressed by disabled people, professional bodies, service providers and lawyers that in practice, care home managers will face conflicts of interest that will seriously hinder their ability to make objective assessments. The report proposes amendments to the Bill to enhance these safeguards.

While the Government has not made a formal response to the Committee a number of amendments were subsequently brought forward at Report stage in the Lords which aimed to address concerns about the proper role for care home managers (see section below). The Government also said it will consider the issue of defining deprivation of liberty during the Commons stages of the Bill, and a statutory definition was introduced during the Commons Committee stage on 22 January.

During the Lords Third Reading debate on 11 December 2018 a number of Peers also asked how the provisions of the Bill would interact with the recommendations of the Independent Review of the Mental Health Act review, which published its report in the previous week (6 December).[7]

2.1 Overview of changes to the Bill in the Lords

During the passage of the Bill though the Lords a number of changes were agreed. The Government agreed to amend the Bill in a number of areas so that:

- The Bill will now apply to 16 and 17 year-olds as well as those aged over 18.
- Family, friends and staff will be able to trigger a review by an Approved Mental Capacity Professional (AMCP) if they identify the cared for person objects to the arrangements they are subject to.[8]

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7 Modernising the Mental Health Act: increasing choice, reducing compulsion (December 2018) – final report from the independent review of the Mental Health Act 1983

8 This amendment relates to pre-authorisation reviews and the Minister, Lord O'Shaughnessy said the Government would return to this issue in the Commons to

- The person completing assessments must have appropriate skills and knowledge, and their statements to the responsible body must be in writing and accompanied by an assessment that proposed arrangements are 'necessary and proportionate'.
- The Bill now prohibits pre-authorisation reviews being carried out by persons who have a prescribed connection with a care home (such as care home managers).
- The Bill no longer contains outmoded references to persons of "unsound mind".
- The cared-for person has been added to the list of those who must be consulted in assessments, to ensure their voice is heard in every case.
- There are stronger provisions around referring cases to AMCPs, and the appointment of Independent Mental Capacity Advocates (IMCAs).

There were a number of amendments to widen access to IMCAs. These included amendments, giving effect to the JCHR's recommendation, removing the requirement for care home managers to notify a responsible body whether an IMCA should be appointed.[9] Amendments also provided that appointment of IMCAs in care home cases is not contigent on notification from the care home. Finally, amendments introduced a presumption that an IMCA should be appointed where there is no other appropriate person to represent the cared for person (with the exception of cases where an IMCA would not be in the person's best interests).

There were two areas where the Government was defeated on division in the House of Lords:

- On an amendment on rights of information being provided to the cared for person about the authorisation of their care arrangements, and their rights to challenge the authorisation in court.
- On an amendment to specify that for care arrangements involving a deprivation of liberty to be authorised, these arrangements should be necessary and proportionate *in order to prevent harm to self*.

Provision of information

The JCHR's October 2018 report on the Bill considered it essential that cared for persons and their appropriate representative are provided with information about rights of appeal.[10] Various amendments were introduced to give effect to the right to this information. At Report

ensure the same provision to trigger AMCP reviews applied to the ongoing review process.

9 Joint Committee on Human Rights, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, 26 October 2018

10 Joint Committee on Human Rights, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, 26 October 2018

stage in the Lords a vote took place on the insertion of a new clause into the bill entitled 'Right to Information'.[11]

In particular the new clause would ensure that prior to any authorisation of care arrangements, the cared-for individual - or their advocate - are fully informed of their rights, and the responsible body takes necessary steps to explain all possible outcomes and the reasons why the cared-for person may be deprived of their liberty.

The clause would also ensure:

- The Independent Mental Capacity Advocate (IMCA) takes necessary steps to assist the cared-for individual in understanding their care arrangements and rights.
- The responsible body takes responsibility for referring cases to court when the cared-for individuals exercises their right for judicial review.

At Third Reading in the Lords the Minister Lord O'Shaughnessy said the Government will carefully consider the amendment on rights of information being provided to the cared for person. This section of the Bill was further changed, following Government amendments introduced at Committee stage in the Commons (see section below).

Prevention of harm to the cared for person

The Bill as introduced set out three assessments to authorise a deprivation of liberty – these are (1) the person who is the subject of the arrangements lacks the capacity to consent to the arrangements; (2) the person is of unsound mind; and (3) the arrangements are necessary and proportionate.

At the first day of Lords Report stage on 21 November 2018, Members considered a change to the Bill which would ensure that the authorisation arrangements for care and treatments are necessary to prevent harm to the cared-for person.

An amendment, opposed by the Government, added to the last criterion that arrangements must be necessary "to prevent harm to the cared-for person". An accompanying amendment that the authorisation be proportionate "in relation to the likelihood and seriousness of harm to the cared-for person" was agreed without a division.[12] The revised wording restates part of the best interests requirement of an authorisation under the current DoLS system.

At Third Reading the Minister Lord O'Shaughnessy confirmed that the Government will not seek to change the amendment to specify that arrangements should be necessary and proportionate in order to prevent harm to self.

Summing up at Third Reading Lord O'Shaughnessy listed what he said were a number of important changes to the Bill:

> The Bill will now apply to 16 and 17 year-olds as well as those aged over 18. We have carefully designed a role for care homes

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11 Baroness Watkins of Tavistock moved amendment 29, in Schedule 1, page 10, line 8, at end to insert the new clause Rights to information.277 members voted in favour of the new clause and 192 voted against, and so the change was made.

12 202 members were in favour of this amendment, with 188 against (see Lords Division Result for further information).

> while eliminating conflicts of interest and being clearer about their role in the system. We have been explicit that the person completing assessments must have appropriate skills and knowledge, and a statement to the responsible body must be written. The Bill no longer contains the outmoded and unwanted references to "unsound mind" and we have also strengthened the provisions around appointing IMCAs, including a presumption that they now will be appointed. I hope that in practice that deals with the concern just expressed by the noble Baroness, Lady Barker. We have also made sure that the cared-for person must be consulted so that their voice is heard in every case, and today we have amended the Bill to enable families and staff whistleblowers to raise concerns much sooner and for those concerns to be acted on.
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> I should also say that the House has made its own opinion known in defeating the Government on the issue of specifying that arrangements should be necessary and proportionate in order to prevent harm to self, and I can confirm that the Government will not seek to change this position in the Commons. The Government will also carefully consider the amendment passed by noble Lords on rights of information being provided to the person.
>
> ... We have achieved a lot, and even if there is more that we wanted to achieve, the contributions of noble Lords have directly influenced the changes that we intend to make in the Commons. So, although it is for those in the other place to pass the amendments, noble Lords should be congratulated on their role in designing them. I hope that they will get support when we move them in the other place.[13]

Some further information on Lords debates and amendments concerning the role of care home managers is provided in the following section.

The role of care home managers

During the first day of Report stage, on 21 November, Lord O'Shaughnessy brought forward a group of amendments in response to concerns raised by Lords and stakeholders throughout the passage of the Bill about the proper role of care home managers. I have set out his introduction to these amendments, which were all agreed, below:

> I agree that we must be absolutely clear at this stage in legislation about what is the right role for those care home managers. I also agree that there should be no scope for any conflict of interest – not when we are talking about the safety and care of very vulnerable people – and that we should ensure that all assessments are completed by those with the appropriate experience and knowledge. Furthermore, people should always have confidence that they will have access to independent support and representation.
>
> (…)
>
> There has been a great deal of discussion about the role of care home managers in authorisation. I have strongly and deeply considered noble Lords' concerns in the context of what we know works now in the current system. There is a desire to make sure that the liberty protection system that we intend to introduce

[13] House of Lords Third Reading, 11 December 2018

> builds on what works and changes what does not. Under the current DoLS system, care home managers have the role of identifying that someone may lack capacity and need restrictions as part of their care. In practice, they must complete form 1, which brings together all of the current assessments for a person. This is then sent to local authorities, which appoint a best-interest assessor to conduct a further assessment ahead of providing the authorisation. This is an appropriate role for care home managers to undertake, and is the role we are proposing and clarifying through our amendments.

The Minister then outlined what each Amendment would do. He set out that Amendments 30 and 90 would require local authorities (as the responsible body) to decide whether it is appropriate to carry out functions, including arranging assessments and reviews:

> Amendment 30 requires the responsible body to make a decision on whether it is content that it is appropriate for the care home manager to carry out the relevant functions prior to authorisation, including arranging assessments and carrying out consultation. Amendment 90 applies this decision to reviews as well. This is an important change because it provides additional protections in cases where there may be concerns about a particular provider and its capability for conducting its role, and it allows responsibility to take on all the relevant functions in these cases. There may also be cases where there are no concerns about quality of care, but there may, for example, be particularly strong social worker involvement and it may make sense for them to take on those functions.

Lord O'Shaughnessy noted that local authorities would have the power to remove care home managers from the process at any point, for example, if they had concerns about the validity of assessments:

> This power to remove the care home manager from the process can be enacted at any point, and we would expect it to be done at the earliest possible point, particularly if there are concerns. We will use the code of practice to set out the detail so that it is applied consistently by different local authorities, with clear criteria for the responsible body to make a decision on whether to retain responsibility for the relevant functions. In the case of care home residents, this significantly strengthens the role of local authorities in terms of oversight, intervention and supporting the quality of the operation of the scheme. If the responsible body has decided that the care home manager should be responsible for providing the statement and carrying out the other functions, the care home manager will bring together the information, evidence and assessments needed for the responsible body to make a decision on whether to authorise the liberty protection safeguard. In many cases, this will bring together recent valid assessments that can be used for this purpose.
>
> As has been said previously, care needs change over time. We recognise that putting hard and fast rules on the validity and timeliness of assessments would not recognise the reality of what happens. That is why we will set out in the code of practice what we would expect to see in terms of valid and up-to-date assessments. The Bill also enables the responsible body to step in, if they are not confident in the validity of the assessments, by refusing to authorise the arrangements. Let me be clear that all the assessments would involve consultation with the person. In addition, the Bill will require the care home manager, or the

> responsible body, to complete the consultation with the person and other interested persons.

Responding directly to concerns about conflicts of interest, Lord O'Shaughnessy explained that Amendment 52 would exclude care home managers or others from undertaking assessments if they had a specified connection with the care home:

> Some noble Lords have stated their concern that there is a potential conflict of interest if care home managers were to conduct assessments. The Government agree that there is a potential financial conflict if care home managers were to complete assessments for people in their own care homes, particularly when it comes to considering whether there are less restrictive alternatives. Amendment 52 explicitly excludes care home managers or people from undertaking the assessments if they have a specified connection to the care home, in particular if there is a financial connection. This will be set out in regulations. We will use the regulations to ensure, in England, that care home staff are not able to conduct assessments where they have a potential financial conflict of interest and the Welsh Government will have the power to do the same. Doing this in regulations allows us to provide the necessary detail, given the complexity of the care home sector, to ensure that there are no loopholes. For example, we would not want someone who works in another care home run by the same company to conduct the assessments.[14]

On the second day of Report the Lords considered another group of Government amendments which aimed to address concerns from stakeholders and Peers. These included amendments to ensure that only responsible bodies can arrange the pre-authorisation review and that care home managers will be explicitly excluded from completing the pre-authorisation review. Lord O'Shaughnessy noted that "This is important because pre-authorisation should not confirm poor care planning or perpetuate a system where someone is receiving care in an inappropriate setting". The Minister said the amendments would:

> …counteract any incentive the care home manager might have to ensure that a resident stays in a care home inappropriately. We are also determined to make sure that the care home manager cannot act as a gatekeeper to the IMCA appointment, and we have laid amendments accordingly.[15]

The Minister also committed to the Government considering a number of other issues in the Commons, and some of these are outlined in the section below.

2.2 Other issues raised during Lords stages

Speaking for the Labour frontbench at Third Reading in the Lords, Baroness Thornton noted a number of outstanding issues that the Commons would need to address to improve the Bill further:

> …it needs to consider length of renewal periods, the interface with Simon Wessely's review [the independent review of the Mental Health Act published on 6 December], the role of IMCAs,

14 House of Lords Report stage (day 1), 21 November 2018
15 *Ibid.*

> remaining conflicts of interest, impact assessments and implementation, and indeed, the issue of the definition of deprivation of liberty, which the Minister has undertaken to tackle. It also needs to discuss money, budgets and so on, as we have not done so during the passage of the Bill.[16]

A number of these issues, raised during the Lords stages, were returned to in the Commons.

Definition of deprivation of liberty

In its 26 October 2018 report, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, the JCHR concluded that it is important to include a definition of 'deprivation of liberty' on the face of the Bill in order to give cared-for persons, their families, and professionals greater certainty about the parameters of the scheme. The Committee acknowledged that any definition in statute may be revised or refined by future case law but, the Committee took the view that it was not possible to design and implement an effective system of safeguards without having a clear sense of to whom it should apply.[17]

Committee Chair Harriet Harman MP said:

> We must give cared-for people, their families and professionals greater certainty by providing a clear definition: the Bill must be changed if it is to do that.[18]

In a briefing published ahead of the Lords Committee stage Age UK highlighted why this is important for people receiving care in their own homes in particular:

> To provide practitioners, families and the cared for person with an agreed definition that is unambiguous where authorisation of deprivation of liberty is enacted. A definition of 'deprivation of liberty' must be included in the Bill. This is particularly important where the authorisation of deprivation of liberty is being considered for someone living in their own home
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> (…)
>
> The Bill seeks to authorise 'arrangements' that are necessary to deliver care and treatment, rather than the care and treatment itself. It is therefore highly likely that the issue of arrangements in domestic settings will arise.
>
> At present, concerns about those deprived of their liberty in domestic settings are settled via the Court of Protection. Whilst this had drawbacks (expense, delays and families facing a potentially upsetting and onerous court process) it did provide the highest level of scrutiny. To change from this system, to one whereby the local authority (or CCG in some cases) approves such arrangements, is a substantial alteration.
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> A definition will provide practitioners, families and the cared for person with the best opportunity to understand whether care

16 House of Lords Third Reading, 11 December 2018
17 Joint Committee on Human Rights, *Legislative Scrutiny: Mental Capacity (Amendment) Bill*, 26 October 2018
18 JCHR press release, 26 October 2018

> arrangements within a domestic home amount to a deprivation of liberty.[19]

This issue was raised during the Lords stages of the Bill, with Baroness Tyler and Lord Woolf bringing forward different probing amendments to address this. The Health Minister Lord O'Shaughnessy acknowledged that there was confusion on the ground amongst practitioners owing to the problem of definition. The Minister stated that the Government had given this a great deal of thought and had decided that 'deprivation of liberty' should be clarified in statute. During the Lords Third Reading on 11 December 2018 Lord O'Shaughnessy confirmed that the issue of definition is something that the Government "intend to deal with in the Commons".[20] As noted previously, a new statutory definition was introduced by the Government at Committee stage in the Commons (see section below).

The dividing line between the Mental Capacity Act and the Mental Health Act

During the Lords Third Reading of the Bill on 11 December 2018, crossbenchers Baroness Hollins, Baroness Murphy and Baroness Meacher raised concerns about cases where it is not clear whether a person should be detained under the *Mental Capacity Act* or the *Mental Health Act* (for example, where a person with a learning disability, autism or dementia also has a mental illness). A number of Peers noted the publication of the *Independent Review of the Mental Health Act* on 6 December, which set set out recommendations for government on how this Act and associated practice needs to change. One part of the report of the independent review addressed the dividing line between the two Acts. In particular, the review recommends that the law should be amended so that only the *Mental Capacity Act* framework (currently DoLS, in future LPS) can be used where a person lacks capacity to consent to their admission or treatment for mental disorder and it is clear that they are not objecting.

The review concluded that "objection" is the right dividing line between the two Acts and agreed with the statutory definition for 'objection' in the *Mental Capacity Act* (which will be maintained in the Bill). The review also noted that amendments to the *Mental Capacity Act* contained in the Bill would make implementation of its recommendations easier in two ways:

> The first is because, unlike DoLS, the key decision-makers for authorising deprivation of liberty under the LPS could be the same as those for detentions under sections 2 or 3 of the MHA. We hope that means the new LPS process will no longer be seen as more of an administrative burden to complete than the MHA.
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> The second is through the way in which the LPS would work to authorise the deprivation of a person's liberty. Amendments to section 4B of the MCA would mean that a person with impaired capacity can be lawfully deprived of their liberty in order to give life sustaining treatment or carry out vital action, either in an

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19 Age UK Briefing: Mental Capacity (Amendment) Bill (HL) Committee Stage – October 2018

20 House of Lords Third Reading, 11 December 2018

> emergency, or where the process to get an authorisation under the LPS has been started and the person needs to be deprived of their liberty where they are until it is completed.[21]

However, the report of the independent review acknowledged the difficulty in including its recommendations in the current the Bill:

> …our recommendations here had been drawn up on the basis that they would be included in future legislation, rather than the current Bill. We anticipate that some time will be needed to 'bed down' the new LPS arrangements before they could be used to authorise a deprivation of liberty for non-objecting patients lacking capacity. The Government will need to consider the practical implications of the new dividing line between the MCA and MHA, including testing guidance for the Code of Practice, perhaps in pilot areas. That would make it problematic, even if it were possible, for the Government to introduce our proposed objection interface in their current Bill.
>
> We should make clear that our proposed MCA and MHA dividing line will only work if the Government's proposals in the Bill, that an MCA deprivation of liberty can be authorised on the basis of risk of harm to others, are enacted136. Otherwise, it would not be possible to use the MCA in the inpatient setting for someone who has impaired capacity, who needs treatment to prevent the risk of harm to others, but who is not objecting to being admitted and/or treated.[22]

At Report, Health Minister Lord O'Shaughnessy referred to the Mental Health Act review:

> Perhaps I may mention the Mental Health Act review before I finish on the amendment and move on. Clearly, it is an important piece of work. There are 152 recommendations and it is right that we take time to consider the right way to respond to them. The Government have already taken on board two of those recommendations, but there are many more to consider. One of the questions in front of us, which we have talked about to some degree during the stages of the Bill—and which will clearly come to the fore in the Commons stages—is: what is the right vehicle to deal with the interface between the suggestions that Simon Wessely has made?
>
> There is a difference of opinion in this House about how that should be done. The noble Baroness, Lady Meacher, and others have a contrary view, but we need to solve the problem in front of us—which is that the deprivation of liberty safeguard system is not working—and then, when we have decided what the right thing to do is, to improve the Mental Health Act and its interface with the Mental Capacity Act at that point. It would be precipitous to try to do that now, before we have had an opportunity to consider it properly. In saying that, I do not mean it is not important—quite the opposite. It is so important to get it right that rushing through it could store up problems of a kind that we do not want.[23]

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21 Modernising the Mental Health Act: increasing choice, reducing compulsion (December 2018) – final report from the independent review of the Mental Health Act 1983

22 *Ibid.*

23 House of Lords Third Reading, 11 December 2018

Advance consent

During the Lords Committee stage Peers considered the issue of cared for persons providing advance consent to care and treatment, which had been raised by the Law Commission's proposals for reform in 2017. Baroness Thornton tabled an amendment that would provide for this in the Bill. Responding for the Government, Lord O'Shaughnessy noted that while he recognised the laudable aims of the Law Commission in proposing this approach, the Government were concerned about safeguards for individuals. However the Minister noted he would be keen to understand more about previous discussions of this topic and:

> …whether there are other ways to provide that sense of agency for the person who will be cared for without producing undue pressure on them or legal force in a way that would go against their interests and, in legal terms, their human rights.[24]

Independent hospitals

The application of LPS to independent hospitals was raised a number of times during the Lords stages. At Third Reading, Labour frontbencher Baroness Thornton and crossbenchers Baroness Meacher and Baroness Watkins of Tavistock, asked that assurances that work will be done in preparation for the Commons stages. Baroness Watkins noted that as responsible bodies, independent hospitals will have a conflict of interest in authorising deprivations of liberty of people in their care.[25]

What should be covered in the code of practice?

There was some debate about what is appropriate to include on the face of the Bill and what should be set out in the Code of Practice at the Bill's Lords Second Reading in September.[26] During the Third Reading debate Liberal Democrat Baroness Barker commented on this:

> Perhaps the Bill's biggest deficiency, and one we have not discussed much, is that practically nothing is in regulation; large swathes of it will be left to a code of practice. If one goes back to the Mental Capacity Act, however, one finds regulations that relate primarily to those who will be enacting this legislation. Regulatory conditions are applied to those who can be an AMCP, and to what their training has to be, and to those who can act as an IMCA, and to their ongoing duties to maintain contact when people move and to step in when the appropriate person, for some reason or another, ceases to fulfil the obligations it was initially assumed they would.[27]

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24 House of Lords Committee stage (day 3), 22 October 2018, c737
25 House of Lords Third Reading, 11 December 2018
26 House of Lords Second Reading debate, 5 September 2018, c1875
27 House of Lords Third Reading, 11 December 2018

3. Commons stages

3.1 Second Reading

The Official Opposition opposed the Second Reading of the Bill in the Commons on 18 December 2018, with Barbara Keeley tabling the following reasoned amendment that:

> "…this House declines to give a Second Reading to the Mental Capacity (Amendment) Bill, notwithstanding the need for reform to the current system of mental capacity assessments and while acknowledging the improvements made to the Bill by the House of Lords, because the Bill underwent no pre-legislative scrutiny, it does not put the interests of the cared-for person at the heart of the Bill, it enshrines a conflict of interest in relation to independent providers of health and care services, it fails to provide measures to reduce the substantial backlog of Deprivation of Liberty Safeguards Assessments and it fails to recognise explicitly the interface with the Mental Health Act when determining which legislation should be used to authorise care or treatment arrangements."[28]

In particular, Barbara Keeley noted that the legislation was being rushed through without proper scrutiny: "The fact that the Bill has less than two hours for Second Reading and was brought forward with just two sitting days' notice speaks volumes of the speed that the Government are adopting in respect of the Bill, and will raise further concerns among those who care about these matters". She acknowledged the need for reform of the current deprivation of liberty safeguards need reform but that the Bill would create new problems "that cannot be solved simply with further amendments".[29]

Barbara Keeley also highlighted the differences between the Bill and the Law Commission's proposed legislation:

> "…the transformative spirit of the Law Commission's draft Bill has been squashed, and the measures that would place the best interests of the cared-for person at the heart of the new system have been reduced.
>
> The Government should have enacted the Law Commission's proposals in full through the 15-clause Bill that was drafted, but instead we have this five-clause Bill. Why did they not simply bring forward the Law Commission's proposals? The inescapable conclusion that we have come to from reading the Bill is that the Government are more interested in cost saving than in the best interests of cared-for people. This is a crucial point, because there can be disastrous consequences when the best interests of cared-for people are not taken into consideration."[30]

The Secretary of State for Health and Social Care, Matt Hancock, addressed the Opposition's reasoned amendment:

> "…I want briefly to deal with the Opposition's reasoned amendment, because I hope we are able to show in this debate that all the points they raise have been considered. (…) First, they

28 House of Commons Second Reading debate, 18 December 2018, c731
29 *Ibid.*, c733
30 *Ibid.*, cc733-734

> make the claim that somehow the Bill has been rushed through and insufficient pre-legislative scrutiny has been carried out. The Bill follows the Law Commission spending three years developing the new model, consulting extensively. The Joint Committee on Human Rights then conducted an inquiry and pre-legislative scrutiny. The Local Government Association, Age UK and Sir Simon Wessely have all backed the new legislation now. The LGA says:
>
> "The Bill provides a vital opportunity for long-awaited reform"
>
> and it needs to be passed. So we need to get this Bill on the statute book, because every extra delay risks depriving someone of their liberty and their right to freedom unnecessarily, and I do not want to see that happen.
>
> Secondly, the amendment claims that the Bill
>
> "enshrines a conflict of interest in relation to independent providers of health and care services".
>
> Again, that is not the case. Every authorisation must be reviewed by somebody who does not deliver day-to-day care and treatment for the person in question. We plan to go further by tabling Government amendments that will require authorisations in independent hospitals to be reviewed by an external approved mental capacity professional. Finally, the reasoned amendment claims that it is concerned about clearing the backlog in the current system. Well, so are we, and that is what this Bill does. Anyone concerned about the backlog and the current system should back the Bill with enthusiasm.
>
> The claims that this Bill does not put the interests of the cared for person first or address the interface with the Mental Health Act have been addressed already. The very reason we need this legislation is so that we can put their interests first, because they cannot afford to wait for the recommendations of the Mental Health Act review to come into effect, in a Bill that will inevitably take time to develop, because of the need to do this on a consultative and broad basis. While welcoming the probing, I very much hope that the Opposition and every Member of this House will support this Bill, because it strikes a careful balance between liberty and protection. It offers vulnerable people a brighter and better future. We have listened to concerns and we continue to be open to ideas. We have sought to amend and improve the Bill as it has progressed through the other place, and we will make further amendments in this House. I therefore hope that this opportunity to change the system for the better is one that the House recognises. I also hope it will recognise that doing nothing is not an option. That is why I am proud to commend the Bill to the House.[31]

Noting the Secretary of State's reference to support for the Bill proceeding from the Local Government Association, Age UK and Sir Simon Wessely (chair of the independent review of the Mental Health Act) Barbara Keeley listed the organisations calling for the Bill to be paused:

> "Relatives & Residents Association, Mencap, the National Autistic Society, Mind, Rethink, the Alzheimer's Society, VoiceAbility, Disability Rights UK, POhWER, the British Institute of Human Rights, Sense, Liberty, Learning Disability England and Inclusion

[31] *Ibid.*, c731

> London have all called for the Bill to be paused so that further consultation can take place."[32]

The Liberal Democrat spokesperson, Rt Hon Norman Lamb, noted that his assessment of the Bill would be made at the end of the legislative process:

> "…is it workable? Does it genuinely respect and safeguard individuals' human rights? Does it result in very vulnerable people being better protected than they are under the existing, highly flawed system? On those tests will we decide whether to support the Bill on Third Reading."[33]

Norman Lamb urged Minister's to undertake further engagement and highlighted some of the key issues that he considered needed addressed:

> First, many viewed the impact assessment that was presented to the House of Lords as based on fantasy, even before all the amendments were made there. I understand that it is being updated, but it is really important that it is a credible and robust document and, critically, that, along with the impact assessment, the new system is properly resourced. If it is not properly resourced, people's human rights will continue to be flouted.
>
> Secondly, there needs to be a published equality impact assessment. There has not been one yet. That is not acceptable. The Government need to get on and publish anything that they have produced. If they have not done the work on it, they need to get on and do that.
>
> Thirdly, there are continuing concerns about really important conflicts of interest of independent hospitals and care home managers, who will still carry out consultations. Independent hospitals, as I understand it, are still able to authorise the deprivation of liberty within the hospital. When financial interests are at stake, there will be those who behave badly and who are prepared to act to keep a bed filled to earn the money from that individual—the "cash cow", as the shadow Minister suggested. That is why robust safeguards are absolutely critical.
>
> Fourthly, we need a clear definition of the "deprivation of liberty", and the Minister has indicated that that will be forthcoming.
>
> Fifthly, there are the renewal periods. I understand—the Minister made this point to me yesterday—that we do not want a tick-box exercise when it is clear and obvious to everyone that the arrangements are in that person's interest, but there is something very concerning about our moving in the opposite direction to what Simon Wessely's review said should happen with regard to the Mental Health Act 1983, where we would see improved safeguards. Here, however, we are talking about a longer period between reviews and renewals, and that seems to me to be a real concern.
>
> Sixthly, there is the interface with the Mental Health Act—please get this right, because if we legislate and repent later, it will be too late and people will lose out as a result. My final comment is:

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32 *Ibid.,* c732
33 *Ibid.,* c744

> listen to us, talk to us and talk to the interest groups to make sure that we get this right.[34]

3.2 Commons Committee Stage

During the Committee stage a number of Government amendments were agreed, including an amendment requiring authorisations in independent hospitals to be reviewed by an external approved mental capacity professional, and a new statutory definition of deprivation of liberty.

Written evidence was received from a wide range of individuals and organisations, including local authorities, NHS organisations and charities, including Rethink, Mind, Mencap, Learning Disability England and Age UK. Individual submissions came from doctors, social workers, local authority DoLS managers, academics and concerned members of the public.

Day 1 (15 January 2019)

Debate during the first day in Committee (on 15 January 2019) focussed on Opposition concerns about potential conflicts of interest, around independent hospital and care home managers responsibility for arranging assessments, and about the role of Approved Mental Capacity Professionals (AMCPs).

Independent hospitals

The Minister, Caroline Dinenage, introduced Government Amendment 9 (which was agreed in Committee on 15 January) to require an Approved Mental Capacity Professional (AMCP) to conduct the pre-authorisation review should arrangements mean that the cared-for person receives care or treatment mainly in an independent hospital.

Opposition Amendment 19 would have meant that the responsible body for arranging an assessment was the NHS (clinical commissioning group) or local authority, not the independent hospital. While Opposition amendments relating to independent hospitals, were negatived on division, the Minister committed to looking at the issue again:

> "At this stage, I am prepared to say that I fully take on board and share the concern felt by the hon. Lady and others about ensuring that independent hospitals are not only seen to be above board, but are above board in every way that we can manage. That is why I have committed to looking again at everything that we have said so far to see if there is anything further we can do."[35]

In response to a question the Minister also noted the relatively small proportion of patients with deprivation of liberty safeguards or liberty protection safeguards in independent hospitals:

> With deprivation of liberty safeguards or liberty protection safeguards, roughly 80% are in care homes, 20% are in hospitals and—I know this will add up to over 100%c, but it is there or thereabouts in each case—about 1% are in independent

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34 *Ibid.,* c744

35 House of Commons Committee stage (day 2), 17 January 2019, c117

> hospitals., roughly 80% are in care homes, 20% are in hospitals and around 1% are in independent hospitals. [36]

The role of Approved Mental Capacity Professionals (AMCPs)

The Minister explained that Amendment 9 would also clarify that an AMCP can conduct pre-authorisation reviews in any case, not just where an individual objects or where the responsible body is an independent hospital:

> The Government's view has always been that certain cases might benefit from scrutiny by an AMCP due purely to their complexity or nature. The amendment will apply to all cases, not just cases where the independent hospital is the responsible body. The statutory code of practice will be used to explain in detail how these powers should be exercised. For example, authorisations that relate to people with an acquired brain injury might benefit from consideration by an AMCP, as the nature of their illness means that it can often be difficult to establish whether they have capacity, and their capacity might fluctuate. AMCPs will also play a key role should particularly restrictive arrangements be proposed.[37]

The Official Opposition introduced amendments to set out in the Bill specific circumstances in which individuals would have access to ACMPs, which were negatived on division. The Minister cautioned against too much detail being put in the Bill, noting that it already required that an AMCP completes the pre-authorisation review if it is reasonable to believe that the cared-for person does not want to reside in, or receive care or treatment at, a certain place. She also noted that the objection can be raised by anyone with an interest in the cared-for person's welfare.

As noted previously, the Government amended the Bill in the Lords to provide that the Liberty Protection Safeguards would apply to 16 and 17 year olds. Opposition Amendment 38, would have provided that an ACMP should be involved in all cases involving 16 or 17 year olds. The Minister responded that the Government had not "taken a blanket approach" to the involvement of AMCPs, as they wanted a targeted system focused on resources where they are needed most:

> The hon. Member for Stockton North [Alex Cunningham] suggested that the problem is something to do with resourcing, but it is not—it is about focusing resources where they are most needed. In a case where a young person agrees to their care, their parents are happy with it and all professionals agree it is in their best interests, what does an AMCP add? The case would still be reviewed by someone not involved in their care, through the pre-authorisation process. Every single application under the liberty protection safeguards will be carefully reviewed by someone not involved in their care or treatment.
>
> (…)
>
> We understand that there are particular concerns about the use of restrictive practices on young people with learning disabilities or autism. That is why we have tabled an amendment to clarify that

[36] House of Commons Committee stage (day 1), 15 January 2019 c8
[37] *Ibid.*, c6

> responsible bodies can refer cases other than those with objections to an AMCP. In many cases, we would expect that to happen.[38]

Care home managers

The Opposition frontbench introduced a number of amendments to remove what Barbara Keeley described as removing "…the remaining conflict of interest in respect of care home managers". Opposition Amendment 20 (and a number of consequential amendments) would have provide that the responsible body (the local authority) take on all functions relating to renewal of deprivation of liberty in cases relating to care homes. Barbara Keeley explained the changes to the Bill relating to the authorisation process in care homes that were made in the Lords:

> When this Bill was first presented to the House of Lords—many people will have read all the *Hansard* reports from that House—there were enormous concerns about the role of care home managers, because they would be judge and jury for deprivation of liberty applications within their own care homes. For organisations with a clear financial interest in keeping their residents in care homes, that represented a very clear conflict of interest, so I am grateful to Members of the House of Lords for their strident opposition—there is no other way of describing it—to such a system and I am glad that the Bill is improved somewhat. No longer will the care home manager automatically be the responsible body in all cases relating to their care home. No longer will they automatically be the person responsible for renewing authorisations in their own care home. No longer will it be the care home manager who decides whether a cared-for person should get an advocate. It is worth saying that those are welcome developments.[39]

However, she explained that further changes were needed to make clear it is never appropriate for care home managers to have responsibility for renewing deprivation of liberty:

> The Bill now creates a system whereby local authorities can choose whether to trust care home managers to carry out their own authorisation process. … Some local authorities will conscientiously retain this role themselves. ... However, that will not always be the case, because some authorities are struggling so much with resources.
>
> Other local authorities, because they do not have the staff and resources or because they simply do not want to take on the work, will delegate the whole process to care home managers. They could do that, because there is no guidance in the Bill about when it is appropriate to give care home managers that responsibility. Our amendment proposes a clear answer to that question: it is never appropriate. On a matter as important as somebody's liberty, it cannot be right that decisions are taken by the manager of an organisation that has a financial stake in the granting of the authorisation.[40]

The Minister responded to Opposition Amendment 20 by noting that care homes already have an important role in the DoLS system, which gives them the legal protection that they need when they are keeping

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38 *Ibid.*, c24-25
39 *Ibid.*, c57
40 *Ibid.*, c57

somebody in their care, and that they should continue to "play a central role":

> They are responsible for identifying where a person lacks capacity, and for working out where restrictions might be needed as part of care. They are responsible for making an application to a local authority.
>
> It is important that care home managers continue to play a central role in the liberty protection safeguard system, but we completely recognise that it would be a conflict of interest to have care home managers completing assessments. …there is no plan for care home managers to do the assessments; they are just gathering the information required. We amended the Bill in the other place to reflect that.
>
> If we remove the care home manager from the process entirely, we remove a professional with expert training who is closely involved and responsible for the individual's care plan through their responsibility under the Care Act. We would be taking them out of the process, completely unnecessarily, to duplicate a system that we already know is not working and is broken.[41]

Opposition Amendment 20 was negatived in a division.

Provision of information

In the House of Lords the Government was defeated on an amendment providing a right to information for the cared-for person (and their representatives) ahead of the authorisation of their care arrangements, including information on their rights to challenge the authorisation

In Committee in the Commons the Government introduced Amendment 4 to provide information as soon as practicable after arrangements are authorised. The Minister explained the purpose of the Government amendment, which she added was necessary as the amendment made in the Lords was unworkable:

> The amendment requires the responsible body to provide a copy of the authorisation record to the person under protection, as well as any appropriate person or independent mental capacity advocate, or IMCA, as soon as practicable after the authorisation is granted. It also specifies that the responsible body must, as soon as practicable after authorisation, ensure among other matters that the person understands the effect of the authorisation and their right to challenge it in a Court of Protection.
>
> The amendment replaces the amendment inserted in the other place on this matter, which was unfortunately not workable within the existing Mental Capacity Act.
>
> The Lords amendment set out a range of information that should be shared with the person, but it did not provide clarity on where this information should be shared, which could lead to practical difficulties for practitioners and create exactly the sort of legal loopholes we are trying to avoid.
>
> The Government amendment clarifies exactly what information needs to be provided and to whom, as well as specifying a clear point at which information should be shared. It will impose a legal duty on responsible bodies, so it must be clear where these duties

41 Ibid., 69-70

> arise. Information can, of course, be shared prior to this point, and in most cases we would expect and encourage this. We will set out more details of this in the code of practice and hopefully make that as explicit as possible.[42]

The Opposition objected Amendment 4 (which was agreed on division) and Barbara Keeley noted that the changes made in the Lords had wide stakeholder support. She stated that the provision of information before authorisation of a deprivation of liberty is a fundamental human right:

> The Government's new amendment would restore the fundamental imbalance in proposals that were removed by the House of Lords in the current paragraph 13 in regards to rights of information. Paragraph 13 established that the individual would receive information about their rights in a meaningful way in advance of the authorisation. That was a critical addition. Being giving information before authorisation of a deprivation of liberty is a fundamental human right.[43]

Day 2 (17 January 2019)

At the start of day 2 in Committee Opposition Amendment 30, that would have made provision enabling parents to object to care arrangements that give rise to their child's deprivation of liberty, was negatived on division.[44] Opposition Amendment 34, to introduce a requirement to consult parents about their child's care arrangements was also negatived on division.[45]

The Committee also returned to potential conflicts of interest, and access to Approved Mental Capacity Professionals (ACMPs).

Opposition Amendments 35 and 36 were introduced to prohibit pre-authorisation reviews being carried out by a person employed by an organisation involved in the day-to-day care of a cared-for person (or having a prescribed connection with an independent hospital). The Opposition Amendments were negatived on division.[46]

Opposition Amendments 42 and 43 would have provided that the AMCP must meet with the cared-for-person in all the cases that they review. The Bill currently requires them to do so where it is "appropriate and practical" but the Minister noted that the AMCP would be required to meet with the person in "virtually every case" – and very limited exemption might include where the person was in a coma or did not wish to meet with an AMCP.[47] These Amendments were also negatived on division.

Steve McCabe withdrew an amendment designed to probe that the responsible body could not authorise arrangements for the deprivation of liberty (under Clause 15) if the cared for person does not have access to reasonable support and consideration by an Approved Mental Capacity Professional (ACMP).

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42 Ibid., cc47-48
43 Ibid., c48
44 House of Commons Committee stage (day 2), 17 January 2019 cc79-85
45 Ibid., cc111-112
46 Ibid., cc112-118
47 Ibid., cc126-127

Assessment of individuals with fluctuating capacity

Opposition frontbench spokesperson Paula Sheriff introduced Amendment 32, to require that an assessment of whether a person's capacity is likely to fluctuate is included within the initial capacity and medical assessments, and therefore seeks to ensure that fluctuating capacity is reflected in the care plan of the cared-for person.

Paula Sheriff noted that people with fluctuating mental capacity were mentioned at length in the Law Commission's proposals, but "are conspicuous by their absence from the Government's proposals.":

> The Law Commission identified this point as a significant weakness in the DoLS system, as fluctuating capacity is dealt with entirely within the code of practice rather than in the legislation.
>
> (…)
>
> The Bill does not change the status quo. It requires a binary decision to be made—either the person has capacity or they do not. The Law Commission found it unacceptable for the legislative framework to simply ignore fluctuating capacity, as it exposes health and social care professionals and those authorising a deprivation of liberty to significant legal risk.[48]

The Minister, Caroline Dinenage responded that she would take this point away and look at it, but would have to consider this matter very

carefully. In particular she noted she would have to consider whether there are appropriate protections already in the Bill:

For example, she said the Bill currently sets out how every authorisation has a programme of reviews:

> …if there is a change in the circumstances meaning that authorisation conditions are no longer met, the authorisation is no longer valid, and a review is triggered by reasonable request or significant changes in a person's circumstances—so it is well within the scope of the Bill to address people with fluctuating capacity and to make sure that there is the necessary capacity.[49]

The Minister went on to note the importance of considering on-going case law:

> The other issue that I have to take into consideration is that in a case regarding a patient known as CDM, fluctuating capacity has been considered by the Court of Protection, and that is currently being appealed. We are awaiting that decision, which will give useful guidance on how care workers should assess those with fluctuating capacity. That is something we will want to reflect on.[50]

Responding to the question of why the Government had differed from the Law Commission's recommendations, the Minister explained:

> The Law Commission had anticipated an entirely separate scheme for fluctuating capacity, adding a hugely complex dimension to this whole piece of work. Under its recommendations, people with fluctuating capacity would be dealt with in a separate

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48 *Ibid.*, c90
49 *Ibid.*, cc99-100
50 *Ibid.*, c100

> authorisation process not directly linked to the main scheme. That is why there is a bit of confusion there.[51]

Opposition Amendment 32 was negatived on division.

Assessments by medical practitioners

Opposition frontbench spokesperson Paula Sheriff introduced Amendments 31 and 33 that would require medical assessments to be carried out by a registered medical practitioner, and to require persons carrying out medical or capacity assessments to have the appropriate skills. The Minister said she completely agreed that the person who conducts the medical assessment must be suitably competent, and that the Bill already states that a person carrying out a medical capacity assessment must have "appropriate experience and knowledge", but that this might not require a registered doctor in all cases:

> We expect capacity assessments to be completed by a registered professional such as a nurse, social worker or occupational therapist, and medical assessments must be completed by physicians, such as family GPs and other doctors.
>
> However, we have to take into consideration that objective medical evidence does not require a registered doctor in all cases. Case law confirms that it can also include psychologists, for example, as was confirmed by the Law Commission.[52]

Opposition Amendments 31 and 32 were negatived on division.

Notification where authorisation conditions are not met

The Opposition introduced Amendment 40, to require an AMCP to notify the responsible body within 48 hours if they determine that the authorisation conditions for depriving a person's liberty have not been met (or where an objection has been raised). Similarly, Opposition Amendment 41 would require an AMCP to determine whether an application to the Court of Protection is required, and notify the responsible body, cared-for person and others of this decision. Opposition spokesperson Barbara Keeley described the amendments as an important means of "filling a statutory grey area… that is not currently contained within the Bill". These amendments were negatived on division.[53]

Authorisation review period

The Opposition frontbench spokesperson Barbara Keeley introduced Amendment 44, which sought to limit the length of any authorisation to 12 months before it must be renewed; this was also negatived on division.[54]

Day 3 (22 January 2019)

On the third and final day, the Committee returned to the issue of fluctuating mental capacity, with an Opposition amendment

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51 *Ibid.*, c100
52 *Ibid.*, c100
53 *Ibid.,* c128
54 *Ibid.,* c140

(Amendment 45) introduced for the responsible body to consider this. The Minister again noted she was tempted by some of the Opposition's suggestions but that these complex matters would be better considered in the code of practice. The Amendment was negatived on division.

Barbara Keeley introduced Opposition Amendment 18, to clarify that all relevant issues pertaining to Schedule AA1 can be addressed by the Court of Protection, for example whether an IMCA should be appointed or an AMCP involved. This was negatived on division.

Appointment of Independent Mental Capacity Advocates (IMCAs)

Opposition spokesperson Barbara Keely introduced Amendment 46, to amend the requirements for an IMCA to be appointed, so that advocacy is the default position. It also makes provision for appropriate persons to be appointed subject to certain conditions relating to how they discharge their role. Barbara Keeley highlighted the fundamental importance of advocacy, and described the Bill as proposing "a rather convoluted system for deciding whether an advocate should be appointed."[55] She noted that a number of stakeholders had concerns about the requirement to apply a best interests test at various stages before an IMCA is appointed:

> The best interest test has been particularly opposed by stakeholders. At a recent stakeholder roundtable on the Bill, almost every organisation that attended expressed deep concerns about the provision. A best interest test should play no part in access to those essential safeguards, as that would interfere with a person's right of appeal and compromise that crucial safeguard against the powers given to health and social care professionals under the Mental Capacity Act 2005.[56]

She noted that the Opposition Amendment 46 would simplify the system proposed by the Bill and would mean that the appointment of an IMCA would be the default position:

> Our amendment proposes significant changes to the system and seeks to remove some of the issues with the Bill, while maintaining the parts that work. It is important to discuss some of those important provisions. The version of paragraph 39(2) proposed in the amendment lays out the different circumstances in which an independent mental capacity advocate should be appointed, and only one of those conditions needs to be met for such an appointment. The cumulative impact of those conditions means that advocacy should be the default position. It simplifies the system proposed in the Bill, and ensures that people are not denied advocacy based on a best interest test.[57]

The Minister, Caroline Dinenage agreed on the utmost importance of advocacy but noted that the core aspect of "best interest" test is the cared-for person's wishes and feelings:

> We are, largely, starting on the same page. We all agree that advocacy is of the utmost importance for the cared-for person. The Bill is clear that everyone has a right to an advocate, whether

55 House of Commons Committee stage (day 3), 22 January 2019, c154
56 *Ibid.*, c155
57 *Ibid.*, c155

> an appropriate person, an IMCA or, in some cases, both. The Bill sets out clearly that, if no appropriate person is available or able to represent and support a person, the responsible body must take all reasonable steps to appoint an IMCA, if the person has capacity and requests an IMCA and wherever a person lacks capacity, unless in very rare cases it is not in their best interest, as my hon. Friend the Member for Halesowen and Rowley Regis mentioned.
>
> I thank hon. Members for recognising in the amendment the wishes of the cared-for person as a condition for appointment, as we would not wish to force advocacy on anyone. The Bill already allows an appropriate person to request the support of an IMCA. However, I am concerned about the way in which that best interest has been discussed today. Best interest is the standard that governs decision making under the MCA. I am concerned
>
> that the Opposition are disregarding that in relation to IMCAs. I apologise if I have misinterpreted what hon. Members have said. The core aspect of best interest is the person's wishes and feelings. That has to be the primary consideration when it comes to rights and IMCAs.[58]

Barbara Keeley responded that her concern was that in many cases the "best interest" test is applied incorrectly and the cared-for person's best interests have been ignored.[59] The amendment was negatived on division.

Emergency authorisation

The Opposition introduced Amendments 16 and 17 to strengthen safeguards applied to emergency admissions under Clause 2. Amendment 16 would limit the time during which an emergency authorisation can be in place to 14 days. Amendment 17 would provide that for those subject to emergency authorisation that information is shared with the cared-for person and any person of interest in the cared for person's welfare, setting out when an application to the Court of Protection must be made immediately.

The Minister explained that Clause 2 allows care givers, in limited situations, to deprive someone of their liberty for a short period of time prior to an authorisation being in place or in an emergency. That can be done only to provide the person with life-sustaining treatment or to prevent a serious deterioration in their condition:

> The clause enables a care home to place restrictions on the person for their own protection ahead of an authorisation being approved. That interim legal cover will be decision-specific and it will be targeted to life- sustaining treatment and care or to a vital act. Once those acts are completed, the conditions no longer apply and legal cover for depriving someone of their liberty ends.
>
> (…)
>
> Under the Bill, the legal cover is provided simply for as long as the life-sustaining care is needed and no longer. It is therefore a limited power and a better safeguard.[60]

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58 *Ibid.*, c167
59 *Ibid.*, c168
60 *Ibid.*, cc176-177

Clause 2 replaces the urgent authorisations that exist under the current deprivation of liberty safeguards system. Under the current system urgent authorisations last for up to 14 days in a situation where the need to deprive someone of liberty is urgent. Both Opposition amendments were negatived on division.

Conditions to be fulfilled before implementation of the Bill

The Opposition introduced Amendments 52, 53 and 54 to Clause 5, to provide that the Bill cannot be enacted until the Government has published the following documents:

- The Government response to the findings of the Independent Review of the Mental Health Act, specifically the interface between the Mental Health Act and the Mental Capacity Act.
- An updated impact assessment for the Bill, and an implementation strategy for the new Liberty Protection Safeguards system.
- The Code of Practice, which has been approved in a vote in each House of Parliament.

These amendments were negatived on division.

Summing up for the Opposition frontbench position, Barbara Keeley said that the Bill remains deeply flawed in a host of areas, and expressed her disappointment that the Minister had rejected all the Opposition's proposed amendments:

> We entered Committee in a spirit of co-operation, but I feel that that has not been matched by the Government. Our amendments were not a Christmas list of things that would be nice to have; they were the minimum reforms needed to make the Bill fit for purpose. The fact that so many remedial amendments were needed shows that the Bill has been put together in anything but a methodical way. The reality is that the Government are pushing ahead at breakneck speed, contrary to all the warnings from a wide group of concerned stakeholders. That is not a proper way to treat an issue of such importance.[61]

Barbara Keeley also quoted from a letter in *the Times* on the 22 January, from a group of organisations including Liberty, Mind, Alzheimer's Society, the National Autistic Society, POhWER, the British Institute of Human Rights, Sense, Compassion in Dying, YoungMinds, Learning Disability England, Voluntary Organisations Disability Group and Headway. She quoted the following passages, which she said encapsulated what the Opposition had been trying to say during the Committee's debates:

> "It is with dismay that we note the lack of improvement within the Mental Capacity (Amendment) Bill. The bill would replace existing deprivation of liberty safeguards with an entirely unfit new system of protection. To avoid the risk of exploitation and abuse it is vital that there are robust safeguards in place.
>
> Alarmingly, the bill proposes to triple the time that people can be deprived of their liberty without review…while not doing enough

[61] *Ibid.*, c192

> to guarantee that all patients have access to independent and impartial advocates."
>
> The bill also creates a worrying conflict of interest for care home managers, giving them a greater role in the assessment process. Many vulnerable people will find it hard to express their concerns to a person providing them with care. The result is a rushed, incomplete and unworkable bill that will replace one dysfunctional system with another".[62]

In her closing comments on the final day in Committee Barbara Keeley said she hoped "…the Government will reflect on what we have discussed. Many areas of the Bill are still deficient, and the concerns of stakeholders have not been addressed. We will continue to work in a constructive spirit in order to build a system that protects the liberties of all cared-for people in our country."[63]

Definition of deprivation of liberty

The Government introduced a new clause (New Clause 1) to provide statutory clarification in relation to the meaning of deprivation of liberty for the purposes of the Mental Capacity Act. The Mental Capacity Act defines a deprivation of liberty by reference to article 5 of the European convention on human rights. The Minister explained the proposed new clause "adopts the same fundamental approach, by anchoring the meaning of deprivation of liberty to article 5." The Minister provided some further background to the decision to introduce a new definition:

> As Committee members will be aware, the 2014 Supreme Court Cheshire West case changed what was commonly thought of as a deprivation of liberty, resulting in an eighteenfold increase in people entering the DoLS system, and applications are still growing year on year. That resulted in a significant rise in resource use for local authorities and the care sector, resulting in a backlog of over 125,000 people waiting for their applications to be authorised, as I have mentioned on numerous occasions during our debates.
>
> The Law Commission was against a definition of a deprivation of liberty, but noble peers, stakeholders and the Joint Committee on Human Rights have all called for a definition to be included in the Bill, to bring proportionality to this situation and ensure that liberty protection safeguards are appropriately applied. The new clause does that by bringing clarity to prescribing circumstances, or exceptions, that are not a deprivation of liberty. If a person meets the conditions in one of its subsections, they are not being deprived of their liberty and so do not fall under the liberty protection safeguards. These subsections are drawn from case law.[64]

The Minister noted that the Department has decided not to include a full definition of a deprivation of liberty "because primary legislation needs to be extremely clear and precise, and case law is constantly evolving." She also highlighted that the new clause would be accompanied by detailed statutory guidance and case studies within the

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62 *Ibid.*, c205; the full text of the letter is available on the website of the British Institute of Human Rights
63 *Ibid.*, c220
64 *Ibid.*, c209

code of practice. The Minister went on to explain why the concept of consent had not been included in the new definition:

> The inclusion of a clause in relation to consent has been carefully considered, but one has not been included. That is for several reasons. First, to give valid consent, an individual would need capacity, as set out by the Mental Capacity Act. If they have capacity and are consenting to the arrangements, then that automatically cannot be a deprivation of liberty. Secondly, there is not enough in case law to support the validity of de facto consent—that is, consent given by someone without capacity—and I am concerned that it would not be compatible with the Human Rights Act 1998. Above all, we must protect the rights of cared-for people.[65]

Summing up the Minister said:

> The new clause will clarify issues post Cheshire West, it will determine when the LPS should and should not apply, and it will support those planning care in considering the least restrictive options to enable greater freedom for those in their care.[66]

Responding for the Opposition, Barbara Keeley called for the Government to withdraw the new clause and consult more widely on the definition:

> The Government should withdraw their new clause, put their proposed definition out to a wide public consultation and listen to what experts have to say. Once they have done that and produced a definition that carries broad support, they should introduce it on Report. If they remain determined to rush the Bill through, they should introduce it at a later date. If they do not do so, they risk creating a legal mess.[67]

3.3 Government amendments tabled ahead of Report stage

Ahead of the Report stage the Government has tabled a number of amendments. In particular, Amendment 13 would ensure that where arrangements are carried out mainly in an independent hospital the responsible body for those arrangements will not be the hospital manager. Amendment 14 makes clear that where arrangements are carried out in an independent hospital in England the responsible body would be the relevant local authority. Amendment 22 sets out more detail about who the responsible local authority will be in such cases.

Government Amendment 24 relates to the provision of information at the outset of the authorisation process. This amendment would insert new paragraphs 12A and 12B of the new Schedule AA1 to require responsible bodies to publish information about authorisation of arrangements under the Schedule and to take steps at the outset of the authorisation process to ensure that cared-for persons and appropriate persons understand the process.

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65 *Ibid.*, c209
66 *Ibid.*, c210
67 *Ibid.*, c214

4. The current DoLS regime

Deprivation of Liberty Safeguards (DoLS) were introduced in 2009, and form part of the *Mental Capacity Act 2005.* The provisions are set out in sections 4A and 4B of, and Schedules A1 and 1A to the *Mental Capacity Act 2005* (added by the *Mental Health Act 2007*, and coming into force in 2009). The 2005 Act provides a statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves.

DoLS provide a framework for approving the deprivation of liberty for someone who lacks the mental capacity to consent to necessary treatment in a hospital or care home.[68] The safeguards are intended to ensure that someone is only deprived of their liberty in a safe and correct way, and that this is only done when it is in the best interests of the person and there is no other way to look after them.

DoLS legislation sets out when and how deprivation of liberty may be authorised, and it provides a statutory assessment process with designated professionals and responsible bodies. It also details arrangements for renewing and challenging a deprivation of liberty.

To authorise a deprivation of liberty the hospital or care home must identify those at risk of deprivation of liberty, and request authorisation from the supervisory body (the NHS Trust, local authority or local health board). The supervisory body must arrange a series of six assessments. These assessments must be completed within 21 days. An Independent Mental Capacity Advocate (IMCA) must also be instructed for anyone without other representation.

The person and/or their representative can request a review of the deprivation of liberty at any time. The managing authority also has a duty to monitor the case to see if the person's circumstances change and if they no longer need to be deprived of their liberty.

The person and their representative also have a right to apply to the Court of Protection, which has powers to terminate authorisation or vary the conditions of the deprivation of liberty.

These DoLS provisions are supported by a Code of Practice on the Mental Capacity Act 2005 (the 'main Code', which provides guidance on the statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves) and a separate Code of Practice on DoLS. The DoLS Code of Practice was published in 2008, to add to the main Code, which was issued in 2007 (both Codes are intended to be used in conjunction). Although DoLS were mentioned in the main Code, they were not covered in any detail because, at the time the main Code was published, the DoLS provisions were still going through the Parliamentary process as part of what became *the Mental Health Act 2007*.

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[68] If a person's liberty needs to be deprived in other settings, an authorisation must be obtained from the Court of Protection.

4.1 Background to reform

In March 2017, the Law Commission published a report and Draft Bill recommending an overhaul of the DoLS process. It recommended that DoLS are repealed and replaced by a new scheme called Liberty Protection Safeguards, which would streamline the process for approving a deprivation of liberty.[69]

The Government's final response, published in March 2018, broadly accepted the model recommended by the Law Commission. Care Minister Caroline Dinenage confirmed that the Government would "bring forward legislation to implement the model when parliamentary time allows."[70]

The *Mental Capacity (Amendment) Bill* was introduced to the House of Lords on 3 July 2018. As noted previously, the Bill broadly follows the Law Commission's recommendations, with some changes. The House of Lords Library briefing on the Bill provides the following overview of the policy background to the Bill and the proposals to replace DoLS:

> The intention of the Mental Capacity (Amendment) Bill is to reform the process for authorising arrangements which enable those who lack the capacity to consent to be deprived of their liberty for the purposes of providing them with care or treatment. The new regime created by the Bill would replace the existing authorisation process, known as the Deprivation of Liberty Safeguards (DoLS), which is provided for by the Mental Capacity Act 2005. Those arrangements have attracted significant criticism, including from the House of Lords Mental Capacity Act 2005 Committee in 2014, and at the same time key court judgments have widened the interpretation of those who should be recognised as having been deprived of their liberty, with significant implications for the public sector bodies charged with administering the DoLS scheme.

In particular, the 2014 Supreme Court judgment, known as "Cheshire West" significantly widened the definition of deprivation of liberty, meaning more people were subsequently considered to have their liberty deprived and to require safeguards. The Court held that the key feature is whether the person concerned is under continuous supervision and control and is not free to leave. This means that, when a person is unable to consent because they lack capacity, their admission to hospital for assessment or treatment is much more likely to be considered a deprivation of their liberty. Official data has shown a tenfold increase in DoLS applications between 2013-14 and 2014-15, the period following the Supreme Court Judgement.[71]

The Law Commission found that the increase in DoLS applications has led to substantial processing delays and financial costs:

> The implications for the public sector have been significant.

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69 Law Commission, *Mental Capacity and Deprivation of Liberty*, March 2017

70 Final Government Response to the Law Commission's review of Deprivation of Liberty Safeguards and Mental Capacity: Written statement - HCWS542, 14 March 2018

71 NHS Digital, Mental Capacity Act (2005) Deprivation of Liberty Safeguards (England) England 2015-16 National Statistics, 28 September 2015

> […]
>
> Many responses [to the Consultation] (particularly from NHS bodies and local authorities) pointed to the practical and financial impact of Cheshire West, such as the increasing backlog of cases, referrals for authorisation being left unassessed, the legal timescales for authorisations being frequently breached and shortages of people qualified to perform roles under the DoLS provisions.[72]

In addition, the House of Lords Select Committee on the Mental Capacity Act found in its 2014 post-legislative scrutiny report that the DoLS were "frequently not used when they should be, leaving individuals without the safeguards Parliament intended" and care providers "vulnerable to legal challenge". The Committee concluded that "the legislation is not fit for purpose" and recommended its replacement.[73]

Criticism of DoLS for being too complex and bureaucratic, together with the consequences of the *Cheshire West* judgement, led to the Government commissioning the review by the Law Commission. The Law Commission reported in 2017 and found the DoLS scheme, was overly technical and often failed to achieve any positive outcomes for the person concerned or their family. The Law Commission recommended that the DoLS scheme be replaced with a new regime which it termed the Liberty Protection Safeguards. As noted in the Lords Library briefing the Law Commission model seeks to make use of existing mechanisms where possible, but to remove the features of DoLS they identified as being both inherently inefficient and actively detrimental to the interests of people deprived their liberty.[74]

The Commons Library also has a briefing on Deprivation of Liberty Safeguards which provides an overview of the current DoLS system.

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72 Law Commission, *Mental Capacity and Deprivation of Liberty*, March 2017
73 Select Committee on the Mental Capacity Act 2005 - Report: *Mental Capacity Act 2005: post-legislative scrutiny* (February 2014)
74 https://researchbriefings.parliament.uk/ResearchBriefing/Summary/LLN-2018-0077

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