HOUSE OF LORDS Library Briefing

Mental Capacity (Amendment) Bill [HL] HL Bill 117 of 2017–19

Summary

The Mental Capacity (Amendment) Bill [HL] is a government bill, introduced in the House of Lords on 3 July 2018 and due to have its second reading on 16 July 2018. Its intention 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. 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.

Consequently, the Government tasked the Law Commission with reviewing current deprivation of liberty arrangements. In its final 2017 report, the Law Commission found that there was a compelling case for replacing the DoLS scheme, which it concluded was overly technical, often failed to achieve any positive outcomes for the person concerned or their family, and was not capable of dealing with an increased number of cases following the recent legal judgments referred to above. Most significantly, however, the Law Commission concluded that the DoLS scheme failed to offer sufficient protections, describing a system where the rights of those deprived of liberty had too often been theoretical and illusory.

As a result, the Law Commission recommended that the DoLS scheme be replaced with a new regime which it termed the Liberty Protection Safeguards. The Law Commission model seeks to make use of existing mechanisms where possible, but to remove the features of DoLS it identified as being both inherently inefficient and actively detrimental to the interests of people deprived their liberty. The Government accepted the majority of the Law Commission's recommendations and the Mental Capacity (Amendment) Bill is intended to implement those reforms (with some exceptions).

This briefing briefly outlines the provisions in the Mental Capacity Act 2005 and the DoLS scheme, before examining the Law Commission's recommendations and setting out the provisions in the Mental Capacity (Amendment) Bill and 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.

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1. Mental Capacity Act 2005 and the Deprivation of Liberty Safeguards

Article 5 of the European Convention on Human Rights guarantees the right to personal liberty and provides that no-one should be deprived of liberty in an arbitrary or unjustified manner. Further, if a person is deprived of liberty then certain safeguards must be provided, including the entitlement to legally challenge any such deprivation. As noted by the Law Commission, in 2005 the European Court of Human Rights gave a landmark judgment in *HL* v *United Kingdom* which identified a deficiency in the law known as the 'Bournewood gap'.[1] The Court found that people who lacked capacity to consent were being deprived of their liberty for the purpose of mental health treatment under the common law principle of necessity rather than under the powers provided by the Mental Health Act, and as such found that the claimant was being denied the procedural safeguards demanded by Article 5.[2]

As a result of this judgment, the Mental Health Act 2007 added new sections and two new schedules to the Mental Capacity Act 2005 which became known as the Deprivation of Liberty Safeguards (DoLS). The DoLS scheme provides for the authorisation of deprivations of liberty by an administrative process and also a means to challenge any such deprivation in court.[3] They apply to hospitals and care homes in which people who lack capacity to consent to their living arrangements are deprived of liberty. They do not apply to deprivations of liberty elsewhere, such as in supported living, shared lives, or private or domestic settings, where authorisation needs to be obtained from the Court of Protection.[4]

As recognised in the Government's explanatory notes to the Bill, the DoLS scheme has been subject to significant criticism since its inception.[5] For example, established in May 2013 to conduct post-legislative scrutiny of the Mental Capacity Act 2005, the House of Lords Mental Capacity Act 2005 Committee found that the provisions were inadequate and left those deprived of liberty without adequate protection:

> The provisions are poorly drafted, overly complex and bear no relationship to the language and ethos of the Mental Capacity Act. The safeguards are not well understood and are poorly implemented. Evidence suggested that thousands, if not tens of thousands, of individuals are being deprived of their liberty without the protection of the law, and therefore without the safeguards which Parliament

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[1] *HL* v *United Kingdom* [2005] 40 EHRR 32 (App No 45508/99). The claimant was being treated at Bournewood Hospital in Surrey.

[2] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 1.

[3] ibid, p 2.

[4] However, the Law Commission notes that in practice such authorisation is rarely obtained.

[5] Explanatory Notes, p 2.

> intended. Worse still, far from being used to protect individuals and their rights, they are sometimes used to oppress individuals, and to force upon them decisions made by others without reference to the wishes and feelings of the person concerned.[6]

The Committee added that, as a result, care providers were being left vulnerable to legal challenge, and consequently in the face of such criticisms there was little option but to "start again".[7] The Committee therefore recommended "a comprehensive review of the Deprivation of Liberty Safeguards" with a view to replacing them with provisions that are "compatible in style and ethos" with the rest of the Mental Capacity Act.[8]

Further, a 2014 decision of the Supreme Court in the case of *Cheshire West* gave a significantly wider interpretation of deprivation of liberty than had been previously applied in the health and social care context.[9] This considerably increased the number of people treated as being deprived of liberty, and correspondingly increased the obligations on public authorities (primarily local authorities) in connection with authorising, and providing safeguards for, these extra deprivations of liberty. As noted by the Law Commission, the implications for these public sector bodies have been significant, resulting in 2015–16, for example, in applications for DoLS being thirty percent higher than in the previous year (2014–15), and more than fourteen times higher than in the year prior to the Supreme Court judgment (2013–14).[10]

2. Law Commission Review

Following *Cheshire West*, the Government asked the Law Commission to review the Mental Capacity Act 2005 and the DoLS scheme. The Commission published a consultation paper in July 2015 which contained provisional proposals for the reform of the law and was consulted on over four months, forming in its words "one of the most extensive public consultation exercises undertaken by the Law Commission".[11] This was followed by an interim statement in May 2016, and the publication of its final report on 13 March 2017 with final recommendations together with a draft Bill.[12]

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[6] House of Lords Mental Capacity Act 2005 Committee, *Mental Capacity Act 2005: Post-Legislative Scrutiny*, 13 March 2014, HL 139 of session 2013–14, p 7.

[7] ibid.

[8] ibid.

[9] *P v Cheshire West and Chester Council* and *P and Q v Surrey County Council* [2014] UKSC 19; Explanatory Notes, p 2.

[10] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 2.

[11] Law Commission, 'Mental Capacity and Deprivation of Liberty', accessed 7 July 2018.

[12] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017. The consultation document and interim report are all available on the Law Commission's website.

In its final report, the Law Commission said the responses it had received to its consultation exercise confirmed "the current regime is in crisis and needs to be overhauled".[13] Among the criticisms levelled at the DoLS scheme was that it was an "administrative and bureaucratic nightmare" which placed additional pressure on an already over-stretched system, and hospital clinicians also reportedly told the Commission it offered no tangible benefits to a person's treatment plan, and in fact often deflected resources away from the provision of care and treatment.[14] Further, a number of respondents highlighted a growing backlog of cases which had resulted from *Cheshire West*, legal timescales for authorisations being missed and a shortage of those qualified to perform roles in the DoLS scheme.

Among the issues also highlighted by the Law Commission's report was the setting or place where people are deprived of liberty, and the subsequent impact on their rights. For example, where deprivation of liberty occurs outside hospital and care homes (so are not covered by DoLS), authorisation needs to be sought from the Court of Protection. However, the Law Commission noted that this is time-consuming and expensive, and in practice is usually not done, leaving the person unlawfully deprived of their liberty. Yet even under DoLS, authorisation is also rigidly tied to one setting, meaning that if a care home resident is admitted to hospital a fresh DoLS authorisation must be obtained (and again when they are returned to a care home, provided the deprivation of their liberty is still considered necessary).

Further, DoLS require that the care home or hospital in which a person is deprived of liberty must apply to a supervisory body (in most cases a local authority) for authorisation. The Law Commission notes that in many cases the person involved has been placed in the care home by the same local authority which has responsibility for granting a DoLS authorisation. The result is that not only does this place an unnecessary form-filling obligation on care home managers and staff, it means the formal process of considering whether deprivation of liberty is justified only begins after the decision to deprive someone's liberty has already been taken, often by the same local authority.[15]

In addition, such applications are often not made until the person has arrived in the care home. While DoLS enables care home staff to grant themselves an "urgent authorisation" at the same time as applying to the supervisory body, the Law Commission further notes that such a procedure was not intended to enable authorisation to be sought at a late stage of the process, and that even the urgent authorisation process has a significant administrative burden. In addition, such urgent authorisations last for seven days, extendable to fourteen days by a local authority, after which only a standard authorisation can legitimise the continued deprivation of liberty. The Law Commission found that in most cases local authorities were not

[13] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 2.
[14] ibid.
[15] ibid, p 4.

issuing standard authorities in "anything like that timeframe", the result being "people unlawfully deprived of their liberty and care homes exposed to civil liability".[16] The report noted the same is true of hospitals in which people are deprived of liberty.

The Law Commission drew further attention to the administrative burden of the current regime, and the fact it has arguably become little more than a "rubber-stamping" exercise in some cases rather than genuine evaluation of whether the deprivation of liberty was justified:

> Once an application is made, the DoLS procedure requires a number of assessments to be carried out on behalf of the supervisory body in order to determine whether the deprivation of liberty is justified. This a paperwork-heavy process, involving six separate assessments of varying degrees of complexity. Much of the assessment process goes over the same ground as has already been gone over by health and social care professionals in deciding to make the placement in the first place. In many (though not all) cases there will be no realistic alternative to granting the authorisation because the person's condition makes a deprivation of liberty necessary. The 'best interests assessors' are, however, directed to consider whether the deprivation of liberty is in the person's best interests. It is not surprising that many best interests assessors told us that they feel they are engaged in a "rubber-stamping" exercise, particularly where the deprivation of liberty is already in place.[17]

Indeed, both the Law Commission and House of Lords Committee found that best interest decisions fail to give sufficient weight to the person's wishes and feelings before arrangements are made to deprive them of their liberty.[18]

Overall, the Law Commission found there was a "compelling case" for replacing the DoLS. It found widespread agreement that DoLS are overly technical, often fail to achieve any positive outcomes for the person concerned or their family, and are not capable of dealing with increased number of cases following *Cheshire West*. Further, noting that Article 5 rights must be practical and effective, the Law Commission contended it was "not acceptable to continue with the current system under which many people's rights have become theoretical and illusory".[19]

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[16] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 4.
[17] ibid.
[18] The Law Commission pointed to a number of judgments where such failures had been recognised, such as *Hillingdon LB* v *Neary* [2011] EWHC 1377 (COP), [2011] 4 All ER 584 and *Essex CC* v *RF* [2015] EWCOP 1.
[19] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 2.

Liberty Protection Safeguards

The Law Commission's proposed model to replace DoLS are Liberty Protection Safeguards, which it suggested would use much of the same mechanisms and procedures but would "remove the features of DoLS we have identified as being both inherently inefficient and actively detrimental to the interests of people deprived their liberty".[20]

One aspect where Liberty Protection Safeguards and DoLS would diverge is on the issue of place or setting. Under the Liberty Protection Safeguards, the Law Commission proposed that an authorisation could cover deprivation of liberty in any setting *and* in more than one setting, to resolve the example provided above regarding patients moving between hospital and social care. Under Liberty Protection Safeguards, the means by and manner in which a person can be transported to a particular place or places can also be authorised.

Similarly, on the issue of authorisation, the Law Commission argued that Liberty Protection Safeguards would remove the "carousel-like process" where a local authority decides to place a person in a care home, the care home applies to the local authority for authorisation of the resulting deprivation of liberty and the local authority then decides whether to authorise a deprivation of liberty that they have already arranged. Instead, under the Liberty Protection Safeguards formal consideration of the justification for a deprivation of liberty would be brought forward so it occurs before the arrangements are made, rather than afterwards. It would replace urgent authorisations with a statutory authority to deprive someone of liberty temporarily in what the Law Commission described as "truly urgent situations and sudden emergencies", and only then to enable life-sustaining treatment or prevent a serious deterioration in that person's condition.[21] Apart from such situations, under the Liberty Protection Safeguards it would not be possible to deprive someone of their liberty until authorisation had been provided. The Law Commission contended this would "give prominence to the issues of the person's human rights, and of whether a deprivation of liberty is necessary and proportionate, at the stage at which arrangements are being devised".[22]

The decision-making process involved in Liberty Protection Safeguards is illustrated in figure 1 at the end of this section. As summarised by the Law Commission, the new arrangements would involve a review process, in certain cases undertaken by an Approved Mental Capacity Professional modelled on similar provision in mental health legislation:

> Our recommended decision-making process requires the local authority or NHS decision-makers to have formally assessed the

[20] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 3.
[21] ibid, p 5.
[22] ibid.

> deprivation of liberty as being justified. That assessment then needs to be confirmed in an internal review or, in two categories of sensitive cases, to be confirmed following a separate assessment by an Approved Mental Capacity Professional. This new role is modelled on that of the Approved Mental Health Professional in mental health legislation; we intend it to involve similar levels of professional qualification and independence.
>
> The requirement of a second assessment by an Approved Mental Capacity Professional applies in cases where it appears that the person does not wish to reside in or receive care or treatment at a particular place or proposed accommodation, or where the arrangements are wholly or mainly for the protection of people other than the person being placed.[23]

Arguably one of the most significant differences between the DoLS and Liberty Protection Safeguards is that the latter would make provision for the particular arrangements for a person's care or treatment insofar as those arrangements give rise to a deprivation of liberty (as supposed to authorising a deprivation of liberty alone).[24] The Law Commission contends this move away from only considering whether or not a person should be deprived of liberty, but rather the *ways* in which a person may justifiably be deprived of liberty, would ensure such deprivations are necessary and proportionate; a requirement of the European Convention of Human Rights and existing case law.[25]

Such human rights considerations similarly informed who the Law Commission considered should be the responsible bodies for authorising a deprivation of liberty:

> [T]he responsible bodies for authorising a deprivation of liberty under the Liberty Protection Safeguards would be the local authorities and hospital managers that are commissioning the person's care or treatment arrangements that will give rise to the deprivation of liberty. This is necessary in order to make the authorisation process truly part of the care or treatment planning process. It also removes from local authorities in England the burden that they currently undertake of authorising deprivations of liberty in hospital settings, and would help to make the NHS an active partner in protecting people's Article 5 rights.[26]

In cases where arrangements are put in place or commissioned by a body other than an NHS body or local authority, such as those involving individuals receiving private medical treatment or 'self-funders' in care

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[23] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 5.
[24] ibid.
[25] ibid, p 6.
[26] ibid.

homes, under the Liberty Protection Safeguards regime the private care or treatment provider would need to apply to a local authority for authorisation. The Law Commission's draft bill suggested creating a sanction for failure to do so by creating a new civil claim for damages where arrangements for a deprivation of liberty are put in place which are not authorised.[27]

The Liberty Protection Safeguards also contained a proscribed list of conditions what must be met for such authorisation to be provided, both 'positive' and 'negative' in character as set out below:

> The positive conditions are as follows:
> (1) the person lacks capacity to consent to the arrangements;
> (2) the person is of "unsound mind";
> (3) the arrangements are necessary and proportionate;
> (4) the required consultation has been carried out;
> (5) an independent review has been carried out; and
> (6) in certain cases, the approval of an Approved Mental Capacity Professional has been obtained.
>
> The negative conditions are that the arrangements do not conflict with a valid decision of:
> (1) a donee of a lasting power of attorney; or
> (2) a court appointed deputy.[28]

Unlike the DoLS regime which only applies to those 18 and over, the Law Commission also argues that Liberty Protection Safeguards should apply to 16 and 17 year olds, contending that the current regime is inadequate and failing to protect the rights of young people:

> The current legal framework for the deprivation of liberty of 16 and 17 year olds (which includes secure accommodation under section 25 of the Children Act 1989, detention under the Mental Health Act 1983 or a court authorisation) provides an inadequate basis for dealing with many young people who lack mental capacity and need to be deprived of their liberty. Section 25 of the Children Act has a punitive quality which makes it inappropriate for the vast majority of cases within this group. Unless detention under the Mental Health Act is appropriate for them, an application must be made for a court to authorise a deprivation of liberty. This is unnecessarily onerous and expensive for the State (especially NHS bodies and local authorities, which are often expected to bring cases to court), and potentially distressing for the young person and family concerned. We were particularly concerned

[27] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 6.
[28] ibid, p 7.

by the reports that public authorities are not currently taking cases to court when they should.[29]

As a result, the Law Commission concluded that the existing legal framework is failing to deliver Article 5 safeguards to many young people who lack capacity to consent to their care and treatment arrangements.

As set out in the Government's response to the review, the Law Commission's recommendations can be summarised as follows:[30]

A new system: DoLS should be replaced with Liberty Protection Safeguards. Authorisations should be in place in advance of any deprivation of liberty and should apply to those aged 16 and above and should be capable of applying in multiple settings.

Authorising Liberty Protection Safeguards: Hospital trusts and CCGs should be responsible bodies as well as local authorities; a capacity assessment, medical assessment and necessary and proportionate assessment should be completed before an [sic] Liberty Protection Safeguards assessment is authorised; authorisations are to apply for some people whose capacity fluctuates; and a responsible body should in some circumstances be able to rely on previous capacity and medical assessments.

Independence: Assessments should be independently reviewed and a new Approved Mental Capacity Practitioner role is to be created and assessments should be referred to them if there is an objection to the arrangements or in "harm to others" cases.

Renewals: An authorisation should last for up to 12 months, after this a responsible body should be able to renew them for up to another 12 months and then for up to three years.

Advocates and Appropriate Persons: An Independent Mental Capacity Advocate should be appointed unless a person does not consent or it is not in their best interests, or if the local authority determines there is an appropriate person to support and represent the individual.

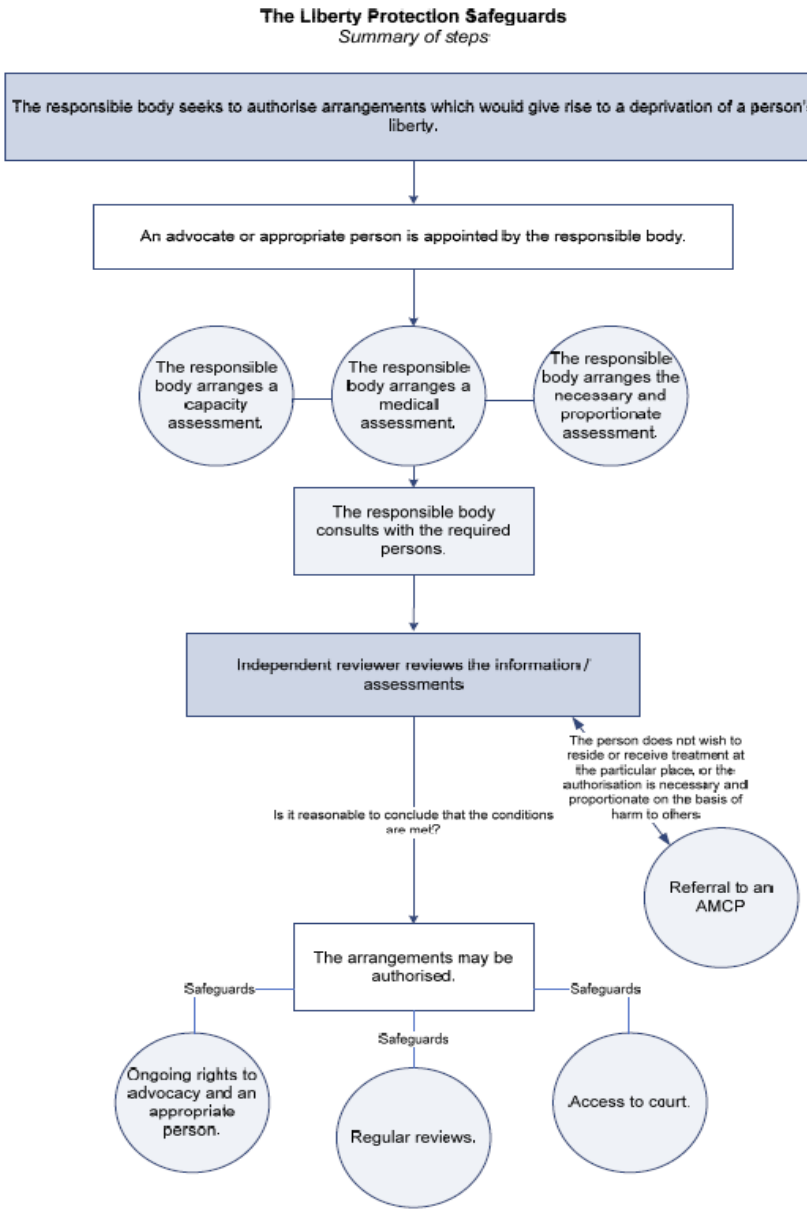
Interaction with the Mental Health Act: Liberty Protection Safeguards should not apply to arrangements in hospital currently authorised by the Mental Health Act and the Government should review mental health law in England and Wales with a view to introducing a single scheme to cover non-consensual care for the

[29] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 10.
[30] HM Government, *Response to the Law Commission*, March 2018, pp 1–2.

treatment of both physical and mental disorders when an individual lacks the capacity to consent.

Wider Amendments to the Mental Capacity Act: Past and present wishes and feelings should be given greater weight as part of best interests decisions; the statutory defence under Section 5 of the Mental Capacity Act should not be available for certain important decisions unless written records are kept; the Mental Capacity Act should be amended to allow emergency deprivations of liberty as long as a written record is provided afterwards; and an individual should be able to bring civil proceeding[s] against private care home and hospital providers if there has been an unlawful deprivation of liberty.

Figure 1. Liberty Protection Safeguards: Summary of Steps



(Source: Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 8.)

3. Government Response to the Law Commission and the Mental Capacity (Amendment) Bill

In the Government's final response to the Law Commission report, published in March 2018, it accepted that the DoLS system should be replaced, and "broadly agreed" with the model set out in the Commission's draft bill.[31] As set out in that document, the Government agreed with all of the Law Commission's recommendations with the following exceptions:

- Law Commission recommendation: The Government should consider reviewing mental capacity law relating to all children, with a view to statutory codification.

  This followed representations to the Law Commission as part of its consultation process that the remit of their review should extend to all children and young people aged under 18, and called for a "Children's Capacity Act" which could codify and clarify the issue of capacity in relation to those under 18. The Law Commission said they had "some degree of sympathy with these concerns" (which echo those previously expressed by others including members of the judiciary) and urged the Government to consider a review of this area of law with a view to statutory codification.[32]

  Government response: The response document "noted" the Law Commission's recommendation but said that the Government did not intend to review mental capacity law relating to children at this time.[33]

- Law Commission recommendation: The responsible body may authorise arrangements if (amongst other requirements) those arrangements are necessary and proportionate, having regard to either or both of the following matters: (1) the likelihood of harm to the person if the arrangements were not in place and the seriousness of that harm; and (2) the likelihood of harm to other individuals if the arrangements were not in place and the seriousness of that harm.

  Government response: The Government stated that it agreed that a 'necessary and proportionate' test would be useful in the context of deprivation of liberty. However, it added that many stakeholders in post-publication engagement sessions with the Department of Health and Social Care on the new model "raised concerns" about the inclusion of harm to others in necessary and

[31] Explanatory Notes, p 2.
[32] Law Commission, *Mental Capacity and Deprivation of Liberty*, 13 March 2017, HC 1079 of session 2016–17, p 61.
[33] HM Government, *Response to the Law Commission*, March 2018, p 4.

proportionate assessments.[34] The Government added that stakeholders had suggested the current system provides sufficient flexibility that where there is a wish to consider a risk of harm to others, professionals can exercise their discretion to bring that into their assessment. Stakeholders also reportedly raised concerns that this inclusion, mirroring as it would the explicit requirement in the Mental Health Act, could be "contrary to the person-centred empowering ethos" of the Mental Capacity Act. In conclusion, the Government said that, given it had already commissioned a "wide-ranging and independent review" into the Mental Health Act, it was more appropriate for this issue to be considered as part of that review.[35]

- Law Commission recommendation: The Liberty Protection Safeguards should not apply to arrangements carried out in hospital for the purpose of assessing, or providing medical treatment for, mental disorder within the meaning it is given by the Mental Health Act. But the Liberty Protection Safeguards should be available to authorise arrangements in hospital for the purpose of providing medical treatment where those arrangements arise by reason of learning disability where that disability is not associated with abnormally aggressive or seriously irresponsible conduct.

  Government response: Again, the Government said this issue was being considered as part of the review of the Mental Health Act.

- Law Commission recommendation: The Liberty Protection Safeguards should not apply to arrangements which are inconsistent with: (1) a requirement imposed by a guardian under section 8 of the Mental Health Act; (2) a condition or direction under section 17 of the Mental Health Act; (3) a condition in a community treatment order made under section 17A of the Mental Health Act; (4) a condition or direction in respect of a hospital order under section 37 of the Mental Health Act; (5) a requirement imposed by a guardian under section 37 of the Mental Health Act; (6) a condition in respect of a restriction order under section 42 of the Mental Health Act; (7) a condition imposed when a person is conditionally discharged under section 73 of the Mental Health Act; or a condition or requirement imposed under any other enactment prescribed by regulations.

[34] HM Government, *Response to the Law Commission*, March 2018, p 4.
[35] ibid, p 6.

Government response: This was being considered as part of the review of the Mental Health Act.

- Law Commission recommendation: The UK Government and the Welsh Government should review mental health law in England and in Wales with a view to the introduction of a single legislative scheme governing non-consensual care or treatment of both physical and mental disorders, whereby such care or treatment may only be given if the person lacks the capacity to consent.

  Government response: This was being considered as part of the review of the Mental Health Act.

- Law Commission Recommendation: The Secretary of State and Welsh Ministers should be given the power, by regulations, to establish a supported decision-making scheme to support persons making decisions about their personal welfare or property and affairs (or both).

  The Law Commission noted in its report that the Mental Capacity Act does not create a formal process for supported decision-making, although the second principle of the Act requires that all practicable steps must be taken to help a person to make a decision before they are treated as lacking capacity to make that decision. The report further observed that a number of common law jurisdictions have introduced, or are moving towards, formal supported decision-making schemes set out in legislation. During its consultation process, the Law Commission argued that a majority supported the proposal to establish a similar scheme, with a number of respondees arguing this would secure greater compliance with the UN Convention on the Rights of Persons with Disabilities.[36]

  Government response: The Government stated that it accepted this recommendation "in principle" and said it would consider approaches to supported decision-making as part of its response to the UN Convention on the Rights of Persons with Disabilities. However, the Government response added that it was "not clear at this stage whether a new regulatory scheme is an appropriate response for this and we will need to look into this issue in more detail".[37]

[36] Law Commission, *Mental Capacity and Deprivation of Liberty: Summary*, 13 March 2017, p 24.
[37] HM Government, *Response to the Law Commission*, March 2018, p 22.

- Law Commission recommendation: A person aged 16 or over who has capacity to do so, should be able to consent to specified care or treatment arrangements being put in place at a later time, which would otherwise give rise to a deprivation of that person's liberty.

  Government response: Again, the Government said it accepted this recommendation in principle, but said it would "need to consider in more detail this recommendation's practical application and implementation".[38]

- Law Commission recommendation: A person should be able to bring civil proceedings against the managers of a private care home or an independent hospital when arrangements giving rise to a deprivation of their liberty have been put in place and have not been authorised under the Mental Capacity Act, the Mental Health Act or by an order of a court.

  Government response: The Government stated that it agreed that that private care providers should be held to account, and said it would "consider carefully" whether current arrangements for that were sufficient and whether allowing civil proceedings against private care providers would be an effective way to improve accountability.[39]

- Law Commission recommendation: If the Department of Health and Social Care decides not to introduce its proposed reform to require a medical examiner or medical practitioner to refer a case to a coroner if the death was attributable to a failure of care, measures should be put in place to ensure that deaths of people subject to the Liberty Protection Safeguards or deprived of their liberty pursuant to an order of the Court of Protection are notified to the coroner.

  Government response: The Government said it was still committed to the planned reforms to introduce medical examiners, as set out it its guidance document of 26 May 2016 and the written statement made by the Parliamentary Under Secretary of State for Health, Lord O'Shaughnessy to Parliament on 11 June 2018.[40]

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[38] HM Government, *Response to the Law Commission*, March 2018, p 22.

[39] ibid, p 23.

[40] Department of Health, *An Overview of the Death Certification Reforms*, 26 May 2016; and House of Lords, Written Statement: Introduction of Medical Examiners and Reforms to Death certification in England and Wales, 11 June 2018, HLWS725.

The Bill Clause by Clause

The Mental Capacity (Amendment) Bill contains five clauses and two schedules designed to implement the Law Commission's proposals, as summarised below.

Clause 1: Deprivation of Liberty: Authorisation of Arrangements Enabling Care and Treatment

Clause 1 would insert new schedule AA1 (schedule 1 of the Bill) into the Mental Capacity Act 2005, containing the new administrative scheme for authorising arrangements enabling the care and treatment of persons who lack capacity to consent to those arrangements, which give rise to a deprivation of liberty. Clause 1 would also make further consequential arrangements to allow for the new Liberty Protection Safeguards.[41]

Clause 2: Deprivation of Liberty: Authorisation of Steps Necessary for Life-Sustaining Treatment or Vital Act

Clause 2 would amend 4B of the Mental Capacity Act 2005 to provide the authority for a person's liberty to be deprived if certain conditions are met. As stated in the explanatory notes, broadly speaking the new section 4B would provide the authority to take steps to deprive a person of their liberty in three circumstances: (1) where a decision relevant to whether there is authority to deprive the person of liberty is being sought from a court; (2) where steps are being taken (either by a responsible body or a care home manager) to obtain authorisation under schedule AA1; or (3) in an emergency.

In each situation the person must reasonably believe that the person to be deprived of liberty lacks the capacity to consent to the steps being taken. The deprivation of liberty must also be necessary either to provide the person with life-sustaining treatment or to prevent a serious deterioration in their condition. The new power to deprive a person of liberty while an authorisation is being sought (under subsection (7)(b) and (c)) would take the place, in part, of the current provision within the current DoLS system for urgent authorisations.[42]

Clause 3: Powers of the Court to Determine Questions

Clause 3 would insert new provisions into the Mental Capacity Act 2005 principally to set out the powers of the Court of Protection in relation to authorisations given under Schedule AA1.[43]

Clause 4: Consequential provision etc.

Clause 4 would grant the Secretary of State a regulation-making power to make provision that is consequential on any provision of the Bill. This would

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[41] Explanatory Notes, pp 3–4.
[42] ibid, p 4.
[43] ibid.

include the power to amend, repeal or revoke primary or secondary legislation. Such regulation-making power must be exercised by statutory instrument, and those regulations would be subject to the negative procedure, save where the Secretary of State proposes to make changes to primary legislation in which case the affirmative procedure would apply.[44] A memorandum from the Department of Health and Social Care to the Delegated Powers and Regulatory Reform Committee sets out the justification for these provisions.[45]

Clause 5: Extent, Commencement and Short Title

Clause 5 stipulates that the Bill would extend to England and Wales only. It also provides that clauses 4 and 5 would come into force on the day the Bill is passed but that all other provisions will come into force on a date determined by the Secretary of State by regulations.[46]

Schedule 1: Schedule to be Inserted as Schedule AA1 to the Mental Capacity Act 2005

Schedule 1 would insert schedule AA1 into the Mental Capacity Act 2005 to provide for the new administrative scheme for the authorisation of arrangements enabling care or treatment of a person who lacks capacity to consent to the arrangements, which give rise to a deprivation of that person's liberty (the 'Liberty Protection Safeguards'). Under schedule AA1, a responsible body would be able to authorise arrangements giving rise to a deprivation of a person's liberty in any setting.

Before a responsible body can authorise such arrangements, it must be satisfied that three authorisation conditions are met: (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. A person who is not involved in the day-to-day care of, or in providing any treatment to, the person must also carry out a pre-authorisation review to determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met. In cases where the person is objecting to the proposed arrangements, an Approved Mental Capacity Professional must carry out the pre-authorisation review. In that case, the Approved Mental Capacity Professional must determine whether the authorisation conditions are met.

Once an authorisation has been given, the schedule would provide for a number of safeguards to be put in place. 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 (under Clause 3). Schedule AA1 would further place a duty on each responsible body to appoint an Independent Mental Capacity Advocate (IMCA) or an appropriate

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[44] Explanatory Notes, pp 4–5.

[45] Department of Health and Social Care, *Mental Capacity (Amendment) Bill: Memorandum to the Delegated Powers and Regulatory Reform Committee*, July 2018.

[46] Explanatory Notes, p 5.

person to represent and support the person when an authorisation is being proposed and while an authorisation is in place.

With regard to the relationship between the Liberty Protection Safeguards scheme and the Mental Health Act 1983, in broad terms patients who are detained under the Mental Health Act 1983 or who are objecting to their treatment, would not be made subject to an authorisation under schedule AA1. However, the explanatory notes state that in the community a person could be subject to an authorisation under schedule AA1 and subject to Mental Health Act requirements, so long as the authorisation does not conflict with those requirements.[47]

Schedule 2: Minor and Consequential Amendments

Schedule 2 would provide for minor and consequential amendments to be made to the Mental Capacity Act 2005 and other legislation such as the Mental Health Act 2007.[48]

4. Joint Committee on Human Rights Report

On 27 June 2018, the Joint Committee on Human Rights published its report, *The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards*.[49] Speaking to the Law Commission's findings and the Government's proposals, the Committee said:

> We support the principle that Article 5 safeguards should be applied to all those deprived of their liberty regardless of their care arrangements, but the potential expansion of the scheme into domestic settings runs the risk of creating an invasive scheme that is difficult to operate effectively. This highlights the importance of establishing more clearly the definition of "deprivation of liberty" so that such safeguards are applied to those who truly need them.[50]

Consequently, among the Committee recommendations was that Parliament should "provide a statutory definition" of what constitutes a deprivation of liberty in the case of those who lack mental capacity to bring clarity for families and frontline professionals. Without such clarity, the Committee contended there was a risk that the Law Commission's proposals "will become unworkable in the domestic sphere".[51]

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[47] Explanatory Notes, p 5.
[48] ibid, p 10.
[49] House of Commons and House of Lords Joint Committee on Human Rights, *The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards*, 27 June 2018, HL Paper 161 of session 2017–19.
[50] ibid, p 3.
[51] ibid, pp 3–4.

The Committee also supported the Law Commission's proposals on a right to advocacy but called on the Government to ensure there was funding for sufficient numbers of advocates:

> However, we recognize the shortage of advocates available and urge the Government to consider appropriate funding arrangements for adequate levels of advocates. We also suggest that an individual's right to participate in court ought to be codified and that responsibility for securing the individual's access to court should be prescribed clearly on the face of the Bill. Whilst the individual's appropriate person and advocate should have a duty to appeal on behalf of the individual, the responsible body should be under a clear statutory duty to refer cases where others fail to do so, for example, when the individual objects or the arrangements are particularly intrusive.[52]

In conclusion, the Committee also said the reforms as a whole would need adequate funding:

> The Law Commission's proposals could form the basis of a better scheme for authorising deprivations of liberty, directing scrutiny to those who need it most. However, while it should be cheaper than the application of the current DoLS to all those falling within the *Cheshire West* definition, it is not cost free. We urge the Government to consider how this new scheme might be appropriately funded.[53]

The Committee's full recommendations are set out below:

> **Defining deprivation of liberty**
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> 1. In our view, Parliament should set out a statutory definition of deprivation of liberty which clarifies the application of the Supreme Court's acid test and brings clarity for frontline professionals. In doing so, Parliament will be mindful of the fact that any definition must comply with Article 5. The courts will be under a duty to interpret the statutory provision compatibly with Convention rights. We note the decision in Ferreira and consider that it is possible to legislate for a Convention-compliant definition that would produce greater clarity and would extend safeguards only to those who truly need them, whilst respecting the right to personal autonomy of those who are clearly content with their situation, even if they are not capable of verbalising such consent. (Paragraph 45)

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[52] House of Commons and House of Lords Joint Committee on Human Rights, *The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards*, 27 June 2018, HL Paper 161 of session 2017–19, p 2.
[53] ibid, p 3.

Recommendations relating to the Law Commission's proposals

2. We support the Law Commission's proposal to extend safeguards into domestic settings in order to ensure Article 5 safeguards are applied to all persons deprived of their liberty irrespective of where they reside, but Parliament needs to consider the delicate balance between safeguarding and disproportionate intrusion. We note that while the impact of extending safeguards into domestic settings would be limited if the definition of deprivation of liberty were to be narrowed, it would still be an expansion of the scheme. In making this recommendation, we are mindful of the resource implications for Local Authorities as domestic cases previously dealt with by the Court of Protection would now fall to them. We urge the Government to consider how appropriate funding arrangements can be made to implement this new scheme.

3. Human rights law requires that authorisations of deprivations of liberty are reviewed independently. The European Court of Human Rights has held that where the same clinicians are responsible for depriving a person of their liberty and for their treatment, there must be guarantees of independence. In our view, the Law Commission proposals are compliant with this requirement. However, the review process is not entirely free from conflict of interest. Whilst it would be disproportionate to establish a separate review body, we recommend that the Code of Practice must set out clear guidelines to eradicate conflicts of interest.

4. We consider that advance consent for care arrangements should be valid as long as safeguards are in place to verify the validity of this consent. The current proposals do not require any formalities as to the giving of advance consent—it can be given orally or in writing. We would recommend formalising the arrangements for the giving of advance consent and establishing a monitoring mechanism to ensure that the arrangements put in place respect any stipulations the person concerned has made about his or her future care, and that proper records are kept. The records should be in writing explaining the circumstances in which consent is given and, if the person to whom consent relates has not given the consent personally, the authority for giving that consent.

5. We support the enhancement of rights to an independent advocate in the Law Commission's proposals. However, there is a shortage of such advocates. The Government should ensure consideration is given to appropriate funding arrangements so that advocates can be appointed as early as possible.

6. We suggest that the individual's right to participate in court ought to be codified and that responsibility for securing the individual's access to court should be prescribed clearly on the face of the Bill. Whilst the individual's appropriate person and advocate should have a duty to appeal on their behalf, the responsible body should be under a clear statutory duty to refer cases where others fail to do so, for example, when the individual objects or the arrangements are particularly intrusive.

7. It is clear that there is a need for expertise alongside accessibility, informality and speed. We recommend that any future consideration by the Lord Chancellor, the Lord Chief Justice and the Senior President of Tribunals should give serious consideration to the merits of a tribunal. Any future tribunal will need sufficient powers to consider not just the issue of detention but the wider issues at stake.

8. The current system has produced arbitrary limitations on individuals' right of access to a court. Legal aid must be available for all eligible persons challenging their deprivation of liberty, regardless of whether an authorisation is in place, particularly given the significant number of people unlawfully deprived due to systemic delays and failures.

9. We recommend that further thought be given to replacing "unsound mind" with a medically and legally appropriate term and that a clear definition is set out in the Code of Practice.

10. We agree that the Law Commission's proposals for dealing with the interface between the Mental Health Act and the Mental Capacity Act are likely to alleviate some of the confusion with the current system, as objection to treatment would no longer be a relevant factor. However, we are concerned by two issues. Firstly, this proposal requires assessors to determine the primary purpose of the assessment or treatment of a mental or physical disorder—this is difficult where persons have multiple physical and mental disorders. Secondly, we are concerned that there are essentially different laws and different rights for people lacking capacity depending upon whether their disorder is mental or physical. We consider that the rights of persons lacking capacity should be the same irrespective of whether they have mental or physical disorders. We encourage those undertaking the Mental Health Act review to bear this in mind and to seek to ensure that rights are applied equally to persons irrespective of the condition causing their incapacity.[54]

[54] House of Commons and House of Lords Joint Committee on Human Rights, *The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards*, 27 June 2018, HL Paper 161 of session 2017–19, pp 27–8.