

BASW

**The professional association for
social work and social workers**

Mental Capacity (Amendment) Bill

**Briefing for House of Lords – Committee
Stage**

1. The British Association of Social Workers (BASW) is the professional body for social work in the UK with 21, 000 members. BASW members are employed in local authorities and in the NHS as Best Interest Assessors who assess deprivation of liberty referrals, as senior managers in Supervisory Bodies, which currently grant authorisations under the Deprivation of Liberty Safeguards (DoLS) provisions, and as researchers in the implementation of the Mental Capacity Act 2005.
2. BASW members are experts in the operationalisation of the MCA – for instance 87% of Best Interest Assessors are social workers¹. This makes BASW uniquely qualified to comment on how this Bill will work in practice. Furthermore, given their professional position regarding the MCA, BASW members will be required to implement any new legislation arising from this current Parliamentary process. Consequently, members want to propose changes, where necessary, that will make the eventual law human rights compliant and fit for practice.
3. This briefing is a summary of amendments requested by BASW members to the Mental Capacity (Amendment) Bill to ensure that the eventual legislation:
 - a. Takes account of the day-to-day realities of practice and can be implemented successfully
 - b. Protects and enhances the human rights of *P*, the cared for person
 - c. Resolves the conflicts of interest that will arise in the role of care homes if the Bill in its current form becomes law
 - d. Provides legal clarity to professionals, thus reducing variations in practice across England and Wales

Suggested amendments

Part 1, Section 1

4. A definition of ‘deprivation of liberty’ should be added to this part of the Bill. This is because while the Supreme Court’s judgement *P v Cheshire West and Chester Council* set the ‘acid test’ of when a deprivation of liberty is occurring, it also lowered the threshold, so that deprivations of liberty can also occur in domestic settings. Some informal carers consider this to be too expansive and an intrusion in family life.
5. Therefore, a new statutory definition could potentially exclude home situations/domestic arrangements from a deprivation of

¹ Hubbard, R. 2018. *Best Interests Assessor Role: An Opportunity or a Dead End for Adult Social Workers?* Practice: social work in action, 2018, Vol 30 Number 2 pp 83-98

liberty, thus removing the current expensive practice whereby the Court of Protection (COP) has to authorise these to make them lawful. In this scenario, the safeguarding provisions of the Care Act 2014 will be drawn upon to protect peoples' liberty within domestic settings.²

6. A statutory definition would also provide legal certainty, thus minimising differences in interpretations in practice and thereby ensuring consistently high standards of implementation.
7. The new law needs to either confirm and codify the *P v Cheshire West and Chester Council* judgement or propose something specific and different - or more practically, have a proportionate and workable approach for those cases that meet the 'acid test' but where a COP case is disproportionate.

Schedule 1 – Section 2(2)(a)

8. Change the starting age for the application of the Liberty Protection Safeguards (LPS) from 18 stated in the Bill to 16 years old, as per the Law Commission's recommendation³. Without this the current legal uncertainty about the minimum age of the application of DoLS will prevail and it will be unclear whether parents, or those with Parental Responsibility can assent to deprivations, or whether COP authorisation is required. This is expensive, time consuming, and can create avoidable adversity between parents and professionals.

Schedule 1 – Section 6

9. Insert an amendment that the authoriser of an LPS must not be involved with the care and/or treatment of *P* or be in a line management structure of anyone who provides care for *P*.
10. This amendment will prevent any potential conflict of interest between the person caring for *P* who may have a financial interest in *P* remaining in a particular residence also being the one who authorises the deprivation of *P*'s liberty. However, the amendment would also allow for employees of the same organisation (e.g. CCG, trusts, local authorities) undertaking the authorisation, provided they are sufficiently professionally distanced. Thus, while minimising conflicts of interest, the amendment will also maintain the intended aim of LPS to speed up the process of granting LPS' and prevent duplications.

² Feldon, P. 2017. *The Social Workers' Guide to the Care Act 2014*. St Albans. Critical Publishing

³ Parkins, E. 2018. [Briefing Paper: Deprivation of Liberty Safeguards](#). House of Commons Library

Part 2 – Section 11b

11. BASW endorses Baroness Tyler’s proposed amendment to this section. Our members believe that ‘unsound mind’ is an outdated and stigmatising terminology. It should be replaced with ‘*any disorder or disability of the mind or brain.*’

Part 2 – Section 11c

12. In this part of the Bill, insert an amendment which explains ‘necessary and proportionate’ because it is a legal concept, which will be operationalised by practitioners, who are not lawyers. Greater definitional clarity will reduce the risk of ambiguities and inconsistencies in practice.
13. One option for amendment is to include ‘is the person a harm to others?’ to the existing ‘best interest’ checklist. This will address the concern with ‘best interest’ that ‘necessary and proportionate’ was proposed to resolve; namely that the former does not allow for intervention in cases where *P* might be a risk to others⁴.
14. Another option is for the government to provide a steer during this Parliamentary process, about whether a new Code of Practice will provide clarity and hypothetical scenarios about the meaning of ‘necessary and proportionate’.

Part 2 – Section 11

15. Insert a new section (d) to specify the conditions when new care arrangements warrant an LPS. Any request for an LPS should include a declaration that the care plan is:
 - a. Necessary, because the risks to *P* are sufficiently serious to justify *P* being deprived of his / her liberty; and
 - b. Proportionate, because no less intrusive option is available which would achieve a better balance of benefits and harms for *P*

Section 13

16. BASW recommends that this Section should be deleted, and the Bill should ensure that all LPS authorisations are overseen by the Responsible Body (RB). The risk is that the Bill will lead to intractable conflicts of interest - care homes will be ‘pre-authorising’ deprivations of liberty simultaneously as they have substantial interests in them being granted.

⁴ Law Commission. 2017. [Mental capacity and deprivation of liberty.](#)

17. A possible objection to the BASW amendment proposed here is that it will lead to increased workload for social workers. However, making the RB responsible for the LPS process shouldn't add significantly to social workers' workload. Social workers will be collating evidence on capacity during care planning and this could also include whether the plan would lead to a deprivation of liberty, thus avoiding duplication and another tranche of assessments for authorisations.

Section 14

18. A new sub-clause - '*P* (the cared for person) and the person(s) involved in their care (both paid and informal carers) must be involved and at minimum informed' – should be inserted. Without this, questions can be raised as to whether this Bill is compliant with Article 5 of the European Convention on Human Rights. This is because in the present formulation, *P* would be subject to an LPS without prior notice and a right to appeal – the very situation, which led to the challenge to the European Court of Human Rights and the subsequent Bournemouth judgment.

Section 15 (1)(b)

19. Insert a new subclause -- 'If there is any doubt as to whether or not *P* is of unsound mind then there needs to be medical evidence provided as part of the determination of lack of capacity.'
20. This amendment will ensure that any declaration of 'unsound mind' is based on strong medical evidence, reducing the likelihood of human rights violations.

Section 17

21. In 17(1) an amendment should be inserted stating that consultations can only be done by people independent of the care home. This is because without this amendment, the current formulation will lead to profound conflicts of interests for care homes, whereby they request and consult on LPS for *P* while still having an interest in the outcome of the consultation.
22. In 17 (2) Insert subclause (f) that *P* must be informed of the consultation and his wishes and views should be taken into account.

Section 18

23. Insert a new section 18(2)(c) to require an Approved Mental Capacity Professional (AMCP) review if the

necessity/proportionality argument is based on the risk that *P* poses to others. This will provide a check on the misuse of the provision.

Section 31

24. Insert an amendment that where a request for review is rejected as 'unreasonable' it must be referred to an AMCP to consider whether a full (or new) review is required. While there is the need to prevent vexatious claims for reviews, it is also important to safeguard and preserve the rights of *P* to have their LPS re-examined. This will help prevent human rights abuses and ensure compliance with Article 5 of the European Convention on Human Rights.

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