



The Government's Response to The Joint Committee on Human Rights 7th and 12th Reports

Presented to Parliament
by the Secretary of State for Health and Social Care
by Command of Her Majesty

April 2019



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Introduction

- 1.1 This is the government's response to both the Joint Committee on Human Rights' (JCHR) seventh and twelfth reports in the 2017-19 Session, *The Right to Freedom and Safety: Reform of the Deprivation of Liberty Safeguards and Legislative Scrutiny: Mental Capacity (Amendment) Bill*. In those reports JCHR made recommendations; on:
- The Bill
 - The recommendations from the Law Commission's 2017 report on *Mental Capacity and Deprivation of Liberty Safeguards*
 - Defining deprivation of liberty
- 1.2 The government is grateful to the JCHR for their consideration regarding this very important issue, and for considering the Law Commission's recommendations and the Bill to reform the Deprivation of Liberty Safeguards (DoLS). The government introduced the *Mental Capacity (Amendment) Bill* in the House of Lords on 3 July 2018. This Bill based on the Law Commission's recommendations would introduce a new streamlined system, the *Liberty Protection Safeguards*, to replace the current DoLS.
- 1.3 The government's response to the recommendations of both the seventh and twelfth reports is set out below.

Responses to the Committee's Recommendations

Statutory Definition

JCHR 7th Report recommendation: 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

JCHR 12th Report recommendation: A definition on the face of the Bill is important to give cared-for persons, their families, and professionals greater certainty about the parameters of the scheme. It would also ensure that scrutiny and resources are deployed where necessary. It is undeniable that any definition in statute may be revised or refined by future case law but, in our view, it is not possible to design and implement an effective system of safeguards without having a clear sense of to whom it should apply.

- 1.4 Government acknowledges the merits of the arguments made by the JCHR and the House of Lords in relation to the potential benefits of a statutory definition. The government is committed to its obligations as a signatory of the European Convention on Human Rights. We agree that any definition of deprivation of liberty, statutory or otherwise, must comply with Article 5 of the European Convention on Human Rights. The Bill has been amended to include a statutory clarification of the meaning of a deprivation of liberty.

Domestic Settings

JCHR 7th Report recommendation: 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.

JCHR 12th Report recommendation: The Bill does not set out a specific 'route' for authorisations for persons living in their own home, however it is understood that it is envisaged that the local authority or clinical commissioning group would carry out the required assessments. We seek further clarity from the Government about how and by whom assessments will be made in domestic settings. It is not clear to what extent the requirements for authorisations would be extended to self-funders who, or whose families, make their own domestic care arrangements.

- 1.5 Government accepts the JCHR's recommendation. The Mental Capacity (Amendment) Bill has the effect of extending the Liberty Protection Safeguards into domestic settings. Taking the approach to exclude people living in domestic settings, regardless of the facts of the case, from the Liberty Protection Safeguards scheme would mean that where individuals living in domestic settings who meet the 'acid test' so are deprived of their liberty would have to have their arrangements authorised in the Court of Protection. This is something we would want to avoid as we know the process can be cumbersome for individuals and costly for local authorities. We will clarify what constitutes deprivation of liberty on the face of the Bill; meaning that it is clear where the Liberty Protection Safeguards do not apply, including in domestic settings.
- 1.6 The new scheme will be simpler and more streamlined than the current system, where in domestic settings an application to authorise arrangements must be made to the Court of Protection. Assessments in domestic settings will be arranged by the Responsible Body, which will be the Local Authority or CCG for

these settings. The model will apply to self-funders and domestic care arrangements where a person is being deprived of their liberty.

- 1.7 The Law Commission's impact assessment found that each supervisory body incurred a £11,500 cost per Court of Protection review, whereas the Liberty Protection Safeguards model would significantly reduce this burden. This will make the experience easier for people, their carers and families.

Advance Consent

JCHR 7th Report recommendation: 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.

JCHR 12th Report recommendation: It continues to be our belief that advance consent, with appropriate safeguards, could offer people greater choice and control over their future care and treatment arrangements.

- 1.8 The government agrees with the general principle that people should have choice and control over future decisions being made on their behalf, as far as possible.
- 1.9 Specifically relating to individuals in the last few weeks of life, the Department has published guidance which confirms that if an individual had capacity to consent to the arrangements for their care and/or treatment at the time of their admission or at a time before losing capacity, and did consent, the Department considers this consent to cover the period until death and there will be no deprivation of liberty as a result. However, the guidance is also clear that this consent would no longer be

valid if significant extra restrictions were put in place after this point to which the person had not consented.

- 1.10 Many stakeholders raised concerns about extending the use of advance consent to situations beyond end-of-life care during the Department's engagement on the Law Commission's recommendations, and during debates in the Bill's passage. Section 4(6)(a) of the Mental Capacity Act recognises that people can make written statements when they have capacity to do so, setting out their wishes and feelings. Decision makers must consider such statements when making best interests decisions. We will explore the detail of how advance consent operates in practice as part of care planning within the Liberty Protection Safeguards statutory Code of Practice.

Right to Independent Mental Capacity Advocates

JCHR 7th Report recommendation: 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.

JCHR 12th Report recommendation: We note that the practicality and resource implications of providing advocates to all will be affected by whether the definition of 'deprivation of liberty' is revisited to reduce the numbers of people caught by it. Notwithstanding our concerns about the shortage of advocates and the need for appropriate funding for them, we continue to believe that access to advocacy should be available as of right. This should not be subject to a best interests test.

- 1.11 The government agrees that Independent Mental Capacity Advocates (IMCAs) provide a valuable service. We also recognise that family members can play an important role in representing and supporting cared-for persons and the role of 'appropriate person' in the Mental Capacity (Amendment) Bill provides an opportunity for this.
- 1.12 Where there is no 'appropriate person', the Bill provides that the cared-for person can request an IMCA (if they have capacity to do so) and otherwise an IMCA must be appointed unless being represented by an IMCA is not in the person's best

interests. This, in effect, creates a presumption that where there is no appropriate person, an IMCA will be provided unless having one is not in the cared for person's best interests. We expect that cases where having an IMCA is not in the person's best interests would be extremely rare. We expect that the role of the 'appropriate person' in Liberty Protection Safeguards, as well as providing a clear role for families, loved ones and carers in the new model, could free-up IMCA capacity compared to the current system.

Cared-for Persons Ability to Participate in Court

JCHR 7th Report recommendation: 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.

JCHR 12th Report recommendation: The Bill as it stands is silent on this issue and in its impact assessment the Government predicts that as a result of the introduction of the AMCP role the number of appeals to the Court of Protection will halve to a mere 0.5% of applications. In light of this we strongly reiterate our previous recommendations.

- 1.13 We agree that access to court is an essential and necessary part of the Article 5 rights. This is why on introduction in both Houses, the Bill was declared as compliant with the Convention of Human Rights. The Bill provides that as soon as practicable after authorising arrangements, the responsible body must take such steps as are practicable to ensure that the cared for person and if applicable any IMCA or appropriate person understands the right to make an application to the court.
- 1.14 Case law establishes that under the current DoLS system, supervisory bodies have an overarching duty to ensure compliance with Article 5 and part of this is making sure that people have access to the court where relevant. This remains the case with the Liberty Protection Safeguards scheme introduced by the Mental Capacity (Amendment) Bill.

The following paragraphs refer to recommendations featured only in JCHR's 12th report during the 2017-19 Session.

Access to information

JCHR 12th Report recommendation: We also consider it essential that the cared-for person and their 'appropriate person' are provided with information about the authorisation and their rights to challenge the authorisation in court. This is a safeguard required under Article 5 (4) ECHR. Such a requirement currently exists under DoLS but is not included in the LPS scheme. The Government has suggested that the right to make a Subject Access Request (SAR) under the General Data Protection Regulation (GDPR) offers an alternative means by which the cared-for person or their family can obtain information about an authorisation; we do not accept this is an adequate substitute. This omission ought to be remedied.

- 1.15 The government agrees that it is important that cared-for persons, their families, appropriate persons and IMCA's are given full information about their authorisation and their relevant rights, including rights to review and appeal. The government has amended the Bill to clarify that duty to provide information and will amend the Bill further at Report stage to ensure the information is accessible and is shared as soon as practicable.

Care Home Managers

JCHR 12th Report: It is a significant concern that the statement that care home managers would be required to provide to the responsible body (Schedule 1 (14)) does not appear to include a record of the assessment of necessity and proportionality, only the capacity and medical assessments. We recommend that the Bill is amended to require that care home managers must provide a record of the necessity and proportionality assessment.

- 1.16 The Bill has been amended and now requires a record of the necessary and proportionate assessment to be provided to the responsible body for consideration alongside a record of the medical and capacity assessments needed for authorisations.

The following paragraphs refer to recommendations featured only in JCHR's seventh report during the 2017-19 Session.

Tribunals: the way forward?

JCHR 7th Report recommendation: 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.

- 1.17 Government is committed to reviewing whether challenges to deprivation of liberty should be dealt with by the Court of Protection or a tribunal. The review will consider the impact of developments in the Court of Protection, and the recommendations from the Mental Health Act review published in December 2018.

Legal Aid

JCHR 7th Report recommendation: 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.

1.18 The government recognises that cases involving capacity are some of the most difficult cases that the courts deal with. That is why we will make sure that non-means tested legal aid will continue to be available for the relevant proceedings challenging a deprivation of liberty under the Mental Capacity Act that raise these fundamental and difficult issues.

1.19 Currently, non-means tested legal aid is available for proceedings challenging a deprivation of liberty under section 21A of the Mental Capacity Act 2005 so that the most vulnerable claimants can access legal representation to challenge their detention. The provisions within the Bill will not change this. Non-means tested legal aid will continue to be available for proceedings challenging a Liberty Protection Safeguards authorisation.

“Unsound Mind”

JCHR 7th Report: 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.

1.20 The government recognises that the expression “unsound mind” is outdated and stigmatising. The government amended the Bill in the House of Lords which removed reference of the antiquated terminology ‘unsound mind’. This amendment inserted the phrase from the Mental Health Act instead: mental disorder. Anyone who lacks capacity to consent to their arrangements, but does not fall within this definition are likely to be small in number, and will still be able to access safeguards through the Court of Protection.

Interface between the Mental Health Act and the Mental Capacity Act

JCHR 7th Report: 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.

- 1.21 The government stated in its response to the Law Commission that it is more appropriate for recommendations relating to the interface between the Mental Health Act and Mental Capacity Act to be considered as part of the Mental Health Act Review. The Mental Capacity (Amendment) Bill has therefore been drafted to maintain, to a large degree, the current interface.
- 1.22 The Independent Mental Health Act Review report was published on the 6th December where it considered this issue more fully. Government is considering its findings and will respond in due course.

Deprivations of Liberty are Reviewed Independently

JCHR 7th Report: 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.

- 1.23 We recognise and agree that compliance and ensuring rights is essential. Government has been able to provide a declaration that the provisions of the Mental Capacity (Amendment) Bill are compatible with the Convention rights.
- 1.24 The Mental Capacity (Amendment) Bill requires all proposals to deprive someone of liberty must be reviewed by a person who is independent and not involved in the day-to-day care or treatment for the cared-for person before any authorisation is made. Government has also recognised that in some cases, it is appropriate to limit the care home managers' role in relation to some of the functions in the new Liberty Protection Safeguards system. This enables the government to be confident that the Bill guarantees independence and aligns with The European Court of Human Rights.
- 1.25 The Bill has been amended to address any potential for a conflict of interest in a care home setting by preventing care home managers from conducting assessments, acting as 'gatekeepers' to IMCAs and ensuring that pre-authorisation reviews are only conducted by responsible bodies. We will also consider carefully how we can use the Code of Practice to support practice in this area.
- 1.26 The Bill also makes provision for the cared-for person to be represented by an "appropriate person" or an Independent Mental Capacity Advocate and ultimately there is a right of challenge to the Court of Protection.

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