Mental Capacity (Amendment) Bill HL
Regulatory Impact Assessment
Critique by Care England

Mental Capacity (Amendment) Bill HL: Comments on the DHSC Impact Assessment as this relates to care providers

The Impact Assessment (IA) seriously misrepresents the costs that would be borne by care homes arising from their new responsibilities. It denies that any extra burdens on care home managers would arise from carrying out tasks (of commissioning and/or carrying out assessments and drafting authorizations) that are currently experienced as burdensome by local authorities. Most importantly, perhaps, it fails to consider worrying conflicts of interest that risk vitiating the entire process and making it unfit to protect the rights of extremely vulnerable people.

1 Training costs and burden significantly underestimated

1.1 The IA suggests that care home managers require only half a day's 'familiarisation' with the new process, following which there will be no ongoing training need. Indeed, there is a suggestion that the new process will somehow prove less of a burden, leading to a possible but unquantified reduction in work.

1.2 This fails to acknowledge that

(a) all professionals currently involved in DoLS decision-making have to attend mandatory annual refresher training. They discuss—with others carrying out the same responsibilities—the inevitable practice dilemmas that arise, as well as refining their views of what constitutes best interests, deprivation of liberty, necessity and proportionality, in light of case law. Surely it cannot be suggested that care home managers, starting from a far lower base of knowledge of such matters, can continue without this annual training thought essential for experienced professionals?

(b) as widely noted in discussion of these proposals, the vacancy rates among registered managers is very high and turnover is significant. It is inevitable that 'familiarization' competence, together with the further initial and refresher training that is essential, will leave with staff who depart, requiring more and more to be given. Also, for every training day for a manager, several more are needed for the senior staff who would deputise during sickness or holiday leave.

1.3 The suggestion of half a day's familiarization refers explicitly to the current application form that managers have to complete to trigger assessments for DoLS, claiming that this (current ADASS form 1) is equivalent to completion of the draft authorisation based on assessments, which is completed by the best interests assessor (BIA). This is factually incorrect, as any comparison of the ADASS forms will demonstrate[1].

[1] https://www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance

The whole of the new scheme, as it applies to care homes, rests with the registered manager. Staff will need extensive training in a completely new scheme and equipping to carry out their role, formerly carried out by BIAs and the supervisory body administrators.

1.4 The IA accepts that there is still a significant gap in competency among care providers regarding the Mental Capacity Act (MCA). In this context, DHSC officials cite placing these extra responsibilities on them as a spur to practice improvement. It is therefore incomprehensible to assert that there is no ongoing training need—or indeed any additional administrative burden associated with the suggested scheme.

1.5 The IA hugely underestimates the burden of raising the level of competency among care staff to equal that of the BIAs, in assessing capacity, identifying the acid test, and determining necessity and proportionality. This would be an entirely new training need, quite apart from the ongoing demands from CQC that they

- improve their ability to know and work within the basics of the MCA
- make decisions and take actions in the holistic best interests of those to whom they provide services when they lack capacity, and
- work within the empowering ethos of the statutory Principles.

1.6 It is hard to quantify the costs of initial and on-going training, including essential updates on case law and their implications for the authorisation process. The Association of Directors of Adult Social Services (ADASS) figures for current training of deprivation of liberty safeguards (DoLS) assessors are somewhat lower than those in the IA, since ADASS have streamlined the forms and process, and DoLS teams have achieved economies of scale[2], whereas the figures quoted by the IA[3] are now several years out of date. Assuming this lower figure for the initial training of Best Interests Assessors (BIAs) of c. £850, taken up to around £900 with the refresher training, it is necessary to add some uplift since care home managers will take longer to train than BIAs: the managers lack the legal and theoretical knowledge which has been part of the education of registered professionals.

It is unclear whether the IA is based on the simple training costs or whether it includes replacement costs for a manager attending training, at an indicative professional rate. Hence the following uses the simple IA figure, based on a care home manager's average daily rate of pay being about £126.

Instead of the IA figure of half a day, the annual provision would need to be at least 6 days: and not simply for one manager from each of the c.16,000 care homes, but for somewhere between 3 and 6 people to cover leave and training days.

Additional costs would have to be included to provide cover for them during training, and to train others to carry out the responsibilities during absence on leave or sickness: it is assumed here that these costs are included in the IA figures, though this is uncertain.

Even on this generous basis, it does appear that the IA estimate of £1.01m is out by a factor of 10, and a better estimate would be c. £10m.

It is not acceptable to suggest that half a day is adequate, nor that, for the majority of cases where people lacking capacity are deprived of their liberty, such knowledge is not required: the condition of everyone who is not free to leave their care setting requires careful scrutiny

[2] Private communication, Lorraine Currie, MCA and DoLS Lead for Shropshire
[3] See Impact Assessment: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/mental-capacity-IA.pdf Annex 2ff.

to identify less restrictive options.

It is likely that conscientious, kind care home managers, and 'sole proprietors', might well leave the sector rather than wrestle with such issues.

2 Failure properly to consider the burdens and risk to the proposals from foreseeable changes in management and staffing

The proposed new system places a huge amount of responsibility upon the shoulders of the registered managers of residential care and nursing homes. The sector is already fragile and subject to a range of pressures.

2.1 The CQC report on the state of care in adult social care services starkly highlights the pressures that can quickly lead to bad care.[4] It emphasises the importance of a good manager, in a context where the annual turnover rate of staff is 27.3% and that of registered managers is an astonishing 23%.[5] Failures of governance led to more enforcement action in adult social care, over a three-year period, than any other single factor.

2.2 In the context of these proposals, it is essential to note the disproportionate effect that this additional—if unacknowledged—burden will place on the smaller providers in a struggling sector. CQC found that:

- better care—as noted by the proportion of providers rated 'outstanding'—was more prevalent in community provision than in either residential or nursing homes
- smaller homes provided better care than larger ones
- nursing homes (where so many people are living with dementia) were of the greatest concern to the regulator, with 3% requiring improvement

As Baroness Murphy noted in the Committee Stage debate on 5 September,

However, the notion that the majority who flit through the system on short-term contracts and training—many of whom come from outside the European Union—can, in half a day, master the Mental Capacity Act, be trained through this process to make a proper assessment and identify people within the meaning of the Act is completely ludicrous. It will not be possible. The costs of that sort of training programme and of rejigging the sort of people who are being appointed to roles to take account of this is quite outwith the scope that the Bill is likely to achieve.[6]

Lack of stability in staffing is likely to be exacerbated by Brexit pressures. There is a high risk of smaller providers—the very ones who are known to provide the best care—being forced out of business by the unacknowledged costs of ongoing training and significant extra work, not just for the registered manager, but for their deputies and replacements. This raises serious concerns about the ability of the proposals to meet the necessary aim of protecting the rights of vulnerable people who lack mental capacity.
As Lord Hunt of Kings Heath puts it:

The impact assessment assumes a zero cost to homes and that half a day's training will suffice. Surely the Government cannot be serious about that. Are they really saying that these new responsibilities can simply be subsumed into the everyday business of care homes at the moment?

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[4] https://www.cqc.org.uk/publications/major-report/state-adult-social-care-services-2014-2017

[5] https://www.skillsforcare.org.uk/Documents/NMDS-SC-and-intelligence/NMDS-SC/Analysis-pages/State-of-17/State-of-the-adult-social-care-sector-and-workforce-2017.pdf

[6] See *Hansard* https://hansard.parliament.uk/Lords/2018-09-05/debates/63587B2C-716F-470D-BAE1-12A952E3AF30/MentalCapacity(Amendment)Bill(HL) col. 1822

That surely gives the lie—the concern is that the deprivation of liberty in relation to people covered by this amendment Bill is not being taken seriously enough.[7]

3 Failure to acknowledge the weakness of the safeguards provided by proposed mechanisms for review

- The pre-authorisation reviews are arranged by the care home manager, and apparently cost-free as perceived by the IA.[8] It is hard to see how these can give reassurance to people in such a vulnerable position and indeed, by labelling them as costing nothing, it is impossible to have faith in their rigour or independence.
- Review of draft authorisation by the responsible body, prior to signing, is explicitly referred to as a 'desktop review' and as 'admin', suggesting a merely administrative exercise of checking that the required documents are present (see IA, *op. cit.*).

To present as adequate the perfunctory and perhaps even illusory 'protection' provided by these stages of review is seriously misleading and of great concern.

4 Conflict of interest in a fragile sector

In the context where the significant training needs of a frequently-changing group of registered managers and their senior staff are being so unjustifiably minimised—indeed, denied—the risks are far too high, of careless, routine or thoughtless restraint being placed on extremely vulnerable people by overstretched managers, concerned to fulfil their other responsibilities.

4.1 Lord Hunt of Kings Heath, among other Peers, raised this issue, in the context of the undoubted fragility of the sector. Questioning whether care home managers have the time, the background or the training to carry out these responsibilities, he highlighted with regard to the new proposals:

First, they clearly require the care home manager all too often to be judge and jury about decisions in which they were involved, and in which the viability of whose business may depend on income received from detained patients. Secondly, the state of the sector surely gives rise to concern. I know that there are some fantastic care homes, but one in five has no registered manager in post, despite this being a mandatory requirement … and they need only half a day's training. That is simply not believable.[9]

4.2 The IA suggests that there are no other financial or non-financial implications. However, some care homes already charge a premium to care for people who are subject to a DoLS authorisation, on the grounds of the extra work required to submit the initial form—which, despite the IA claiming the opposite, is in fact far less burdensome than what would be expected of the care home manager in the new proposals. There is a strong likelihood that higher fees will generally be charged for people subject to the new proposals, due to the extra work for the provider. It must be innately unfair to expect people deprived of their liberty in a care setting to pay for the privilege of having some attention given to the very rights described, by Lady Hale in *Cheshire West,* as universal and deserving some level of independent scrutiny[10].

Conclusion

[7] *Hansard* as previously cited, col. 1818
[8] See Impact Assessment: https://publications.parliament.uk/pa/bills/lbill/2017-2019/0117/mental-capacity-IA.pdf Summary and 8.3
[9] *Hansard* as previously cited, col.1819
[10] https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

In the context of

- the financial weakness of the residential care home sector
- the existing gaps in care staff confidence and competence to provide care within the framework of the MCA, combined with the apparent denial of the additional training needs imposed by these proposals
- the lack of stability in staffing even without Brexit pressures, and
- the undeniable conflicts of interest that will arise and, most importantly,
- the great vulnerability of those to whom the proposed new system would apply

it is far too risky to impose on the sector responsibilities it is ill equipped to meet. Financial costs are being significantly underplayed, increased burdens on staffing of training, commissioning and managing the scheme are ignored, and the human rights of vulnerable people are put at risk: all this for proposals that have not been put out to open and transparent consultation.

To refer to these far-reaching and dangerous proposed changes to the Law Commission's proposals as comprising merely a 'small shift'[11] is inexplicable.

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Previous representations have been made by the Care Provider Alliance
https://www.vodg.org.uk/wp-content/uploads/20181008-LPS-cross-sector-briefing-with-logos-FINAL.pdf

and

http://www.careengland.org.uk/news/leading-social-care-interest-groups-warn-government-its-mental-capacity-reforms-are-not-fit

[11] Mental Capacity (Amendment) Bill, Impact Assessment, as previously cited, 8.2