Mental Capacity (Amendment) Bill: Analysis of 2019 Impact Assessment

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Summary

Care England's analysis of the assumptions behind the original Impact Assessment to this Bill, dated 29 June 2018,[1] found a worrying number of misleading assertions and dubious assumptions. During the Bill's progress through Parliament - which is still ongoing – an extraordinary number of amendments have been tabled in both Houses of Parliament. These have led to some welcome changes, but the level of disquiet among stakeholders remains high.

Many of the issues identified concerned the Bill itself, particularly the sudden imposition of new roles and responsibilities on the managers of care homes. There were also, however, widespread calls for revision to the original flawed Impact Assessment. These finally led to the publication of a revised version on 13 February 2019.

This is disappointing in how much of it is simply copied over from the earlier version, keeping the errors and unjustifiable assumptions. An occasional nod towards the objections raised (e.g. in the appendix to the CPA briefing of September 2018) fails to address them and, indeed, we see repeated many of the funding assumptions for which it is impossible to see a logical rationale – for example, the assertion that GPs will not charge care homes for specific LPS-related capacity assessments.[1]

1 Comparison of the two Impact Assessments

1.1 The policy objectives are among the large areas of text that are identical in both versions, although they appear even more unrelated to the realities of the MC(A)B than they did before amendments. So, they still claim 'a new simplified legal framework which is accessible and clear to all affected parties… a simplified authorisation process… [and compliance] with Articles 5 and 8 of the European Convention on Human Rights.' In addition, the 2019 Impact Assessment still claims that NHS and local authorities will experience 'greater compliance with the law [and] freed up resources from efficiency gains.'[1] This is in itself doubtful but does appear to suggest that many costly responsibilities are to be passed to the care sector, without comparable diversion of funding.

In reality, the framework is now extraordinarily complex, as is the process. Instead of the two routes (local authority or Court of Protection) available under the deprivation of liberty safeguards (DoLS) for assessing and authorising deprivation of liberty in a way that protects the person's rights, there are now multiple routes.

1.2 The liberty protection safeguards (LPS) will be operated by a bewildering range of responsible bodies. If the person is eligible for NHS continuing healthcare funding (CHC), the responsible body will be the clinical commissioning group. In supported living, shared lives schemes, extra-care housing or domiciliary care, it will be the local authority. In an independent hospital, following essential amendment by the House of Lords to take account of serious Safeguarding concerns, it will be the local authority. In an NHS hospital, that hospital Trust runs the process, instructs the assessors, and makes all the decisions (we can only hope they do it ethically and in a person-centred way).

1.3 Worryingly, protection for the rights of people in care homes is achieved by a process even more opaque and illogical than in the first version of the Bill. An extra confusion arises because LPS, inexplicably, in a care home, only apply to people who have reached 18, whereas, following amendment, the LPS scheme in its entirety applies everywhere else to anyone 16 and over, like the rest of the Mental Capacity Act 2005 (MCA). For people aged 16 and above, in supported living, shared lives schemes, extra-care housing or their own homes, the local authority is the responsible body. If the person is in a care home but aged 16 or 17 the jury is still out on how their rights will be protected, perhaps by the local authority, but with Ofsted, rather than CQC, taking the regulatory role.

2 Initial authorisation

2.1 There is a confused context for new work for care home managers. If the person is in a care home and over 18, the local authority must decide, essentially, whether an individual care home manager is 'up to the job' described in the proposed legislation (sections 16 – 23):[2]

[1] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0323/MCAB%20Impact%20Assessment%20FINAL.rtf%20SIGNED.pdf p.4

[2] https://services.parliament.uk/Bills/2017-19/mentalcapacityamendment.html

- **Identifying** whether, in the terms of the statutory definition of deprivation to be part of this legislation (which is still disputed at the time of writing) the cared-for person is or is not deprived of their liberty
- **deciding** whether the cared-for person's deprivation of liberty should be authorised under the Mental Health Act 1983 (MHA) rather than the LPS
- **arranging assessments** of the person's capacity and whether or not they have a mental disorder, effectively as described in the MHA: this may comprise costly commissioning, or locating relevant assessments, somehow, among the records of other agencies, such as local authorities, hospitals or GPs)
- **selecting an appropriate assessor** to carry out the assessment of whether the care arrangements are necessary to prevent harm to the person and a proportionate response to the likelihood of harm to the cared-for person and the seriousness of that harm
- **choosing**, once they have all the assessments, the right person to 'make the determinations' – or, 'decide' - whether those assessments sufficiently, and lawfully, and accurately support a care plan which deprives the person of their liberty within this care home and this care plan
- **consulting** as appropriate the cared-for person's relatives or friends, including LPA attorneys, deputies and advocates, to ascertain the person's wishes and feelings about their restrictive care plan
- **identifying** possible objections to the proposed care plan on the part of the person or their relatives/friends
- **highlighting** the need, where there is any objection as above, for the responsible body to instruct an Approved Mental Capacity Professional (AMCP) to be part of the process
- **deciding** who should be the person's representative, whether a family member, friend or independent person
- **recognising** whether there is a need to instruct an Independent Mental Capacity Advocate (IMCA), and presumably notifying the local authority of that, and the details of the cared-for person and their appropriate person (representative)
- **ensuring** that the relevant responsible body (usually the local authority) has commissioned and acquired a pre-authorisation review, which could possibly be by a care home manager provided they don't provide care or treatment to the cared-for person and have no proscribed financial relationship) and
- **drafting** a legally robust authorisation for signature by the local authority.

2.2 There are other roles, such as notifying the cared-for person as early as possible of the plan to seek an authorisation and keeping them informed of their rights, especially the right to challenge the authorisation, at every stage. But care home managers already carry out the responsibilities of keeping the person and their relatives or friends fully informed. The bullet-pointed list consists of roles carried out now, under DoLS, by the local authority: many of them indeed are the responsibility of highly trained Best Interests Assessors and Mental Health Assessors.

3 Renewal and Review

3.1 In addition, the provision for renewal of authorisations, as well as reviewing them, also creates new burdens and responsibilities for care home managers, outlined in sections 32, 32 and 35 and 35 (See Mental Capacity (Amendment) Bill as cited). They must report to the local authority, supported by evidence, a statement that, for renewals:

- the authorisation conditions continue to be met
- it is unlikely that there will be any significant change during the renewal period that would affect this
- whether or not the cared-for person is eligible for deprivation of liberty through the MHA (a complex assessment requiring in-depth knowledge of both legal frameworks)
- the care home manager has carried out consultation again, as described in section 20.

The draft Bill is silent about the burdens of commissioning and acquisition of this evidence. It is hard to avoid the presumption that it will often fall on the care home which arranges to provide it.

3.2 For reviews, which must be carried out, and which will often be the responsibility of the care home manager according to the Bill, there must again be a report, borne out by evidence and delivered on a regular basis, as laid out in the authorisation, and also whenever a reasonable request is made, addressing the matters as above, but also

- specifically exploring and reporting to the local authority any evidence of objection on the part of the cared-for person or their relatives/friends.

4 Misleading cost assumptions

4.1 The new Impact Assessment claims, with even less credibility than its predecessor, that it will reduce bureaucracy and simplify processes. Significantly, it claims, despite the increased complexity of the system, that it will lead to 'significant savings for local authorities to reinvest into care.'[3] It is hard to escape the inference that these savings are because the unavoidable costs are being transferred to care homes, with none of the funding stream similarly transferred.

4.2 We commented in our analysis of the earlier Impact Assessment that this can only lead both to the failure of vulnerable providers, and to unacceptable burdens being placed on users of services. 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.[4]

[3] 2019 Impact Assessment op.cit., 9.5

[4] https://www.supremecourt.uk/decided-cases/docs/UKSC_2012_0068_Judgment.pdf

4.3 All these responsibilities, for arranging a plethora of different assessments (perhaps also paying for their commissioning) and checking them for validity and accuracy, are carried out under DoLS by highly trained professionals, familiar with the MCA and the Mental Health Act, and with extensive legal training, not to mention a bespoke legal department. It is hardly to be wondered at that many small care home providers will give up, and there is a real risk that new, small, innovative services, so needed in learning disability settings, will be daunted and never start.

4.4 We hear, informally, reassurances that many LPS teams (formerly DoLS teams) will simply do all these tasks themselves. Like all assurances not founded in evidence, this is to be treated with caution. It is likely that pressure will be brought on local authority DoLS leads to avail themselves of their legal right to ask care home managers to take over these responsibilities, so that their own funding will stretch further.

4.5 In this context it is most disheartening to see unchanged the estimates of costs of training and familiarisation. Despite evidence being presented in autumn 2018 to the Bill team, the assumption remains in the Impact Assessment that

> We assume no net change in costs of authorisations and administration for care homes. The role for care home managers largely builds on the role they currently play. Care home managers will, in many cases, be responsible for providing a statement to the responsible body. A new application form will be introduced for this purpose but this will replace the existing form used for DoLS applications. The reduced backlog will also mean that care home managers will spend less time chasing authorisations that are waiting to be approved, which they are required to do currently.[5]

4.6 The suggestion of half a day's familiarisation being sufficient 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 with the level of complexity for care home managers in preparing a draft authorisation for LPS will demonstrate.[6]

4.7 It is noticeable, and a matter that has been raised by many commentators since the publication of the Bill, that this Impact Assessment, like its predecessor, contains no arrangements for managing the backlog that will exist on 'day 1' of the LPS. Indeed, many local authority DoLS experts have explicitly suggested that these will simply be transferred from their desks to those of care home managers.

4.8 In a previous paper, we analysed in depth the assumptions underlying the costs proposed as likely for this infamous 'half day familiarisation' which is still, inexplicably, regarded as sufficient for care home managers. In our earlier analysis, even using the

[5] https://publications.parliament.uk/pa/bills/cbill/2017-2019/0323/MCAB%20Impact%20Assessment%20FINAL.rtf%20SIGNED.pdf (12.28)
[6] https://www.gov.uk/government/publications/deprivation-of-liberty-safeguards-forms-and-guidance

figures provided in the earlier Impact Assessment and repeated in this second version, we estimated that the costings were too low by a factor of ten. This was primarily due to a failure to account for churn among managers and senior staff, and for the need for several staff members to be trained, rather than just one, to allow for leave and other commitments. In this analysis, we turn, rather, to the costs listed as arising elsewhere in the system, whereas, as we will show, they will fall to care home managers.

5 Unacknowledged new burdens on care home managers

5.1 It is hard to compare the two sets of costings, since, for example, the 'necessary and proportionate' assessment costs are now conflated with reviews. It is clear, though, that this particular estimated sum, just under £20m, covers tasks explicitly now falling to the care home manager in a large number of cases (potentially all those where there is no objection expressed to the care plan by the cared-for person or their relatives: see bullet-pointed lists above).

5.2 The money allocated for these elements will be given to responsible bodies, but not to the care home managers who will be carrying them out. Similarly, a further estimate of just under £20m has been allocated to training costs - for social workers, doctors, advocates, everyone except care home managers and their senior staff, for whom the sum remains at just over £1m, representing the discredited sum for half a day's familiarisation, and calculated anyway for a far smaller number of people than will actually need to operate the system.

5.3 Costs lumped together under 'admin' and desktop reviews are estimated to be likely to cost responsible bodies the highest sum of any single item, £47m. This is even more than legal costs at £35m. It seems to us undeniable that large amounts of these 'admin' costs will in fact fall to the care home managers but will not be acknowledged to land on their desks. It is more than worrying that this is completely ignored in the Impact Assessments. And it is impossible to be sure that care home managers will not sometimes be in need of their own legal advice, since they will be asked to carry out tasks central to matters very prone to litigation, such as deprivation of liberty, or the relationship between the MCA and the MHA, for the first time.

6 Misleading non-monetised 'benefits' and account of process

6.1 Among the myths perpetuated in this Impact Assessment, as in the 2018 version, are those claiming intangible benefits, such as that people and their relatives will be involved in the process[7] (they already have to be, as a legal requirement of DoLS); and that 'Providers are currently unclear on their legal position and may be punished in the form of a lower rating from CQC for not having authorisations in place'[8] whereas CQC guidance explicitly

[7] 2019 Impact Assessment op.cit., 9.4
[8] 2019 Impact Assessment op.cit., 11.34

explains that, provided they have sought authorisation appropriately and continue to try to minimise restrictions, CQC recognises that providers have done all they can.[9]

6.2 A further misleading assertion in the 2019 Impact Assessment is that, subsequent to agreeing the Law Commission's proposals for LPS in principle, they have 'worked with a range of stakeholders.' The list in an Annex[10] consists overwhelmingly of arms of government, and it is noticeable that a Freedom of Information request that sought details of who was consulted was recently refused by the Department of Health and Social Care.

7 Conclusion

The opportunity has been missed to simplify the process by treating all providers of health and social care in the same way. We now face a fractured process which is hard to understand or explain, and seems to lack logic. Despite the confusion, it is hard to escape the clear conclusion that costs are being removed from LAs and covertly put onto care providers, particularly those in care homes.

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, the new burdens for care homes of staffing, 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. The ongoing failure to present accurately where the new cost burdens will fall, is reprehensible.

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[9] https://www.cqc.org.uk/guidance-providers/all-services/mental-capacity-act-deprivation-liberty-safeguards
[10] 2019 Impact Assessment op.cit., 8.1 and Annex 1
[11] Mental Capacity (Amendment) Bill, 2018 Impact Assessment, as previously cited, 8.2