The Mental Capacity Act 2005 and the Amendment Bill explained

There has been lots of recent press coverage on the Mental Capacity Act Amendment Bill (MCA Bill). The key principles of the Mental Capacity Act 2005 (MCA) and the proposed reforms are explained below.

When does the MCA 2005 apply?

The MCA is engaged in any situation when the circumstances require a person to make a decision on behalf of another person.

For example, in relation to whether to receive medical treatment or where the person is to live in order to receive care.

In such a situation there are a number of steps which must be taken before a decision can be made on behalf of that person by law.
The ultimate purpose of the MCA is to both empower and protect potentially vulnerable persons.

**Presumption of capacity**

The **fundamental principle** is that any person must be assumed to have the capacity to make a decision, unless it is established otherwise.

Capacity is date, time and decision specific because it can change depending on a person’s medical condition.

**When will a person be deemed to ‘lack capacity’?**

If there is a concern about whether the person has capacity to make the particular decision in question, their capacity must be assessed according to the following test:

A person is deemed to ‘lack capacity’ in relation to the decision in question, if he or she is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

If this **cannot be established** (i.e. the person is able to understand or retain or weigh information relevant to the decision, and is able to communicate their decision), it is for the person who is to receive the treatment to make the decision, not a third party.

If it is established that the person cannot make the decision for themselves, the decision will need to be made for them by someone else on a ‘best interests’ basis.

**Best interests**

To determine what is in a person’s ‘best interests’, there are a number of factors which must be considered.

These include: the person’s past and present wishes and feelings, the beliefs and values that would be likely to influence the decision if the person had capacity, and any other factors that he or she would be likely to consider if the person were able to do so.

The person must be encouraged to participate in the decision and the decision maker must take into account the views of any Attorneys, Deputies, family members or anyone engaged in caring for the person.
Deprivation of Liberty Safeguards (DOLS)

The purpose of DOLS is to ensure that where a Hospital or Care Home proposes to deprive a person of their liberty, the deprivation is authorised by a supervisory body (a Local Authority) to protect the person’s Article 5 ECHR: right to liberty and security.

Upon receipt of an application, a Local Authority must arrange a series of 6 assessments (usually completed by a Best Interests Assessor and a Mental Health professional) to determine whether:

- The person lacks capacity.
- The deprivation of liberty is in their best interests.
- The deprivation is necessary and proportionate to reduce the risk of harm to the individual.

If the answer is “yes” to the above questions, a standard authorisation is usually granted for up to 1 year before the authorisation must be reviewed. If the person wishes to object to the deprivation, they have an absolute right to challenge through their “Relevant Person’s Representative” or “RPR”.

The MCA Reform Agenda

A Supreme Court judgement known as Cheshire West in 2014 widened considerably what was understood to be the cohort of people deprived of liberty, which lead to a huge increase in the number of DOLS authorisations required [1].

In turn, this has caused a huge backlog in the number of DOLS applications which await authorisation. Local Authorities simply do not have the capacity to process authorisations efficiently [2].

It is estimated that 125,000 people are left without protections and over 48,000 wait for more than 1 year for an authorisation to be granted. DOLS does not, therefore, seem to ensure that often the most vulnerable people in our society are protected from potential breaches of their Article 5 ECHR: right to liberty and security. In addition, delays in authorisations may result in a delay to an individual receiving care and support commensurate with need, which respects their wishes, feelings, beliefs and values.

One of the key drivers behind the MCA Amendment Bill is, therefore, to address the DOLS system, in an attempt to improve protection for vulnerable persons.
Proposed reforms

With the above context in mind, the MCA Bill seeks to implement the Law Commission’s proposed replacement of Liberty Protection Safeguards (LPS).

Current proposed changes include:

- Care providers will be responsible for compiling a statement which explains the person’s care needs and the reasons for the deprivation. This will inform the authorisation.

- Local Authorities will complete a pre-authorisation review, to ensure there is independent oversight. Where there are objections, or the case is complex, the authorisation will be referred to an Approved Mental Capacity Professional (AMCP).

- The NHS will authorise its own deprivations.

- The intention is for the AMCP to act as a form of mediation prior to a challenge at the Court of Protection.

- Assessments of capacity, which inform the statement, cannot be completed by care staff. Often this will need to be arranged through a GP.

- An ‘appropriate person’ should be made available to represent the views of the person the authorisation relates to. Where necessary an Independent Mental Capacity Act (IMCA) may need to be appointed.

- LPS will apply to hospitals, care homes, supported living, shared lives and domestic settings.

- A statutory definition of ‘deprivation of liberty’ is to be introduced.

House of Lords Amendments – Tuesday 26 February 2019

The MCA Bill is currently at the so-called “ping-pong” stage. This means the Bill is going back and forth between the House of Commons and the House of Lords to deal with proposed amendments.

At the most recent stage in the House of Lords, the Government’s proposed statutory definition of deprivation of liberty was not accepted. The Lords instead voted to adopt the definition proposed by Baroness Tyler.
“A person is deprived of liberty if they –

- Are subject to confinement in a particular place for more than a negligible period of time; and
- Have not given valid consent to their confinement; and
- The arrangements are due to an action of a person or body responsible for the state.

A person is subject to confinement where they –

- Are prevented from removing themselves permanently from the place in which they are required to reside, in order to live where and with whom they choose; and
- Are subject to continuous supervision and control”.

The majority of the Government’s suggested amendments in the House of Commons were otherwise accepted. Albeit these amendments simply serve to clarify the wording of the proposed changes only.

**Concerns**

Commentators have widely criticised the MCA Bill. Concerns have been raised about the proposed statutory definition of deprivation of liberty and whether it is compliant with Article 5 EHCR: the right to liberty and security.

In addition, a large number of campaigners through a letter presented by the Voluntary Organisations Disability Group (VODG) have expressed sincere concerns that the MCA Bill will, in fact, lead to a weakening of protections for vulnerable persons. Overall the concern is that reform may be rushed through, without adequate and thorough consideration of whether the proposals will really strengthen protections for vulnerable persons.

**What next?**

The amendments proposed by the House of Lords will need to be considered by the House of Commons further. When this will take place is not yet clear.

**An opportunity missed?**

It seems unlikely that significant, further amendments to the MCA Bill will take place at this stage. The concerns
expressed to the Government by VODG ought to be taken seriously given the MCA Bill impacts protections for some of the most vulnerable people in our society. Perhaps, the Bill represents an opportunity missed, to address the criticisms of key organisations and the House of Lords Select Committee.

All we can hope is that “ping-pong” results in an amended Bill, capable of delivering a balance between administrative ease and adequate protection to vulnerable persons deprived of their liberty.

Need advice?

If you would like further information or advice on the Mental Capacity Act, please visit our Community Care page or contact our team on the details above.

[1] Prior to this judgement, the Law Commission reported that the total number of DOLS applications in England was 13,715. NHS data shows that by 2016-17, the number of DOLS applications has increased substantially to 217,235. It is estimated that around 53,000 applications to the Court of Protection every year (known as the Re X procedure) to obtain authorisation of deprivation of liberty in Community settings (such as supported living, shared lives or private homes) because the current legislative regime does not extend to cover these situations.

[2] In 2014/15, there were 315 applications unprocessed from the previous year. By 2016/17, this figure had increased significantly to 108,545 applications.