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Good Act, Poor Implementation: The Report of the House of Lords Post-Legislative Scrutiny Committee on the Mental Capacity Act 2005

By Peter Bartlett¹

Nottinghamshire Healthcare NHS Trust Professor of Mental Health Law
School of Law and Institute of Mental Health
University of Nottingham

Abstract:

The House of Lords Post-Legislative Scrutiny Committee on the Mental Capacity Act 2005 reported on 13 March 2014. This paper considers the findings and recommendations of the Committee, and in particular its two key recommendations – the establishment of an independent oversight body to co-ordinate implementation of the Act, and the need to develop a replacement for the present deprivation of liberty safeguards (DOLS).

Introduction

The House of Lords Post-Legislative Scrutiny Committee on the Mental Capacity Act 2005 reported on 13 March 2014. This paper considers the findings and recommendations of the Committee. The government is to respond to the report later this spring; no doubt there will be more to be said at that time.

The overall finding of the Committee is that the Mental Capacity Act 2005 (hereinafter the ‘MCA’) is a good and progressive piece of legislation. That view reflects the overwhelming bulk of the evidence submitted to the Committee, which supported the principles, ethos and key provisions of the MCA. The exception to this is the deprivation of liberty safeguards (‘DOLS’) introduced in 2007, which the Report finds to be overly complex, and not understood or reliably used by the relevant professionals. The Committee recommends that the DOLS should be replaced with a new system, following widespread consultation and effective Parliamentary scrutiny.

While the Committee’s overall view of the legislation is otherwise positive, its view of the implementation of the MCA is much more critical. While the Committee finds instances of good practice, the Report also catalogues poor compliance in a wide variety of areas, and provides a range of recommendations for improvement. A number of these will be noted below. In addition to these specific concerns, however, the Committee found an absence of leadership in government: no one body was charged with implementation of the MCA. To address this, the Report proposes the formation of an independent oversight body representing the range of stakeholders and reporting directly to Parliament. The body would not be a regulator, but rather work with the various stakeholders to promote, improve, co-ordinate and monitor implementation of the MCA.

The Report proposes that these two main recommendations would be followed up by the Liaison Committee in one year, to ensure progress towards their realisation.

¹ While Professor Bartlett was the Specialist Advisor to the Committee, this paper is written in a personal capacity, and any views expressed that extend beyond the content of the report itself are those of Professor Bartlett and do not necessarily reflect the views of the Committee.

The Scope and Methods of the Committee

Two points are necessary to place the Committee's report in context. The first is that the report is post-legislative scrutiny. The objective of the exercise is therefore not to re-fight old battles, but rather to determine whether the Act is operating as Parliament had intended (House of Lords Select Committee on the Mental Capacity Act 2005 (2014), (hereinafter cited as 'Report') para 6). As such, it is largely a fact-finding mission. Consistent with that, while the report provides an evidence base for its recommendations, the recommendations themselves are often open-ended. The DOLS recommendation and the proposal for an independent oversight body are good examples of this. While the Report is clear why those recommendations are made, they are not overly prescriptive. The DOLS recommendation is that proper law and policy need to be developed, and the role of the independent oversight body is articulated in relatively broad terms. These are the beginnings of discussion, not foreclosings of discussion.

The focus on the consistency of functioning with Parliamentary intent does mean that some issues are left largely outside the scope of the Report. For example, the big new factor in international law is the United Nations Convention on the Rights of Persons with Disabilities (UN General Assembly, A/61/611), which came into effect in 2008. While some evidence to the Committee and some academic commentary suggests that the MCA may well not be compliant with the Convention, (see, eg., MDAC (2013), Bartlett (2012), 761-7; Fennell and Khaliq (2011), 667-71) and while some of the Committee's recommendations will move implementation closer to the ethos of the Convention, compliance per se was not examined by the Committee in detail. It is currently being examined separately by the Ministry of Justice.

The second contextual point flows from the first: the Committee's deliberations and its Report are evidence led. A total of 216 submissions, running to 1800 pages of evidence were submitted to the Committee, and more than 40 witnesses gave oral evidence. The evidence is available online at <http://www.parliament.uk/business/committees/committees-a-z/lords-select/mental-capacity-act-2005/publications/>. Notwithstanding this extensive portfolio, the evidence to the Committee tended to focus on matters of personal care and medical treatment. Much less was received, for example, regarding property affairs, although that constitutes the bulk of the work of the Court of Protection. Very little was received about some sectors, such as policing and banking. Because of the lack of evidence the Report says little about those sectors. They remain, to a considerable degree, *terra incognita*. The Report does warn that 'in light of what we have heard and received, we would caution against assuming that a lack of evidence suggests that the Act is working well in those sectors' (Report, para 4) and almost certainly that warning is well-placed. Whatever the merits of the Report, much remains to be investigated.

A Good Act, Poorly Implemented

The Committee considers that the MCA itself is a progressive piece of legislation, with the potential to transform lives for the better. Its overarching principles remained relevant, empowering people who lack capacity to make decisions for themselves and providing carers of those people with an appropriate structure of decision-making (Report, para 12).

While there is a lack of systematic monitoring of implementation, a matter itself of considerable concern to the Committee, the evidence submitted indicated that implementation of the Act was often poor, with professional and non-professional carers either unaware of the MCA, or failing successfully to implement its provisions. Too often, the empowering ethos of the MCA gave way to

concerns of paternalism, risk and safeguarding, with decisions taken to overrule P's² wishes and feelings rather than to support them. At the same time, the presumption of capacity is found sometime to have become an excuse for the provision of substandard care or indeed the denial of care entirely, on the basis of a highly suspect view that P was agreeing and had capacity to agree to such inappropriate care. This was particularly evident when P's incapable choice worked to the financial advantage of a service provider (Report, para 61-64). Capacity assessments, when they occurred, seemed to be triggered by perceived risk or an unusual event such as P becoming obstreperous or violent (Report, para 78-9, 85-90). When they occurred, capacity assessments are found to be often carried out by professionals that may lack the relevant expertise in the specific condition affecting P, or are not closely associated with the care of P (Report, para 67-73).

There was little evidence of supported decision-making, notwithstanding its express requirement in the MCA (Report, para 80-83; see MCA s 1(3), 3(2), 4(4)).

'Best interests' is found by the Committee generally to be given its lay or clinical meaning, rather than the specific meaning defined in s 4 of the MCA. The result of this was often the exclusion of family members and similar carers from best interests determinations, in particular when they challenged professional decision-making (Report, para 92-3; cf MCA s 4(7), which specifically requires the involvement of such carers in the best interests determination). The question of who was responsible for determining best interests was also poorly understood, with a mistaken belief that the general defence provided in s 5 of the MCA created a positive authority for third parties to act in P's perceived best interests (Report, para 97-101). The question of whether the proposed intervention was the least restrictive alternative is also found to be inadequately considered. As with issues of capacity determination, the perceived wisdom of P's own decision is found to figure large in the implementation of the Act, with safeguarding overwhelming P's empowerment.

The mechanisms for advance planning are also found to be weakly implemented. While the number of Lasting Powers of Attorney (LPA) is rising, the Committee found that there are still issues about public knowledge of their availability, and the ease and expense of registration of such instruments. The Committee noted concerns regarding the extent of financial abuse by holders of LPAs, whether this flowed from lack of knowledge as to their responsibilities or other factors (Report, para 186-187). Insofar as it is possible to know (data is not gathered systematically), advance decisions to refuse treatment are relatively little used. And for both these mechanisms, the Committee noted problems as to how carers would find out about these instruments at the time they needed to be relied upon.

In addressing these issues, the Committee was particularly enthusiastic about the use of Independent Mental Capacity Advocates (IMCAs), favouring a move towards structured professionalization and accreditation of individuals to perform the service, coupled with an expansion of the role. It also noted a conflict of interest whereby the commissioners of IMCA were likely to be the same bodies as were subject to the IMCAs advocacy, with some evidence suggesting that IMCA advocacy was sometimes compromised as a result (Report, para 171). The Committee considered that the costs of an expanded role for IMCAs would be met from complex decisions not escalating into court or other expensive decision fora.

Getting the Word Out: Standards and Compliance

The Committee makes a number of proposals to address these issues. At their core is a view that no single person or entity in government has overall responsibility for the implementation of the MCA.

² Consistent with the usage of the MCA, a person lacking (or, depending on context, thought to be lacking) capacity is referred to herein as P.

This is an Act that affects a diverse range of government departments and people and organisations in the private and third sectors; the Committee views a co-ordinated approach to implementation as essential. To this end, it recommends the establishment of an independent oversight body, reporting directly to Parliament, and charged with co-ordinating, promoting, and monitoring the implementation of the MCA. This would not be a regulator (although it would work closely with regulators), and would not be intended to remove overall ministerial responsibility for the Act. It would rather be a supportive body, working with the range of stakeholders, both governmental and non-governmental and including service users and their families. It would in part have a cheerleading function, to further implementation of the Act and would also ensure that appropriate monitoring is undertaken, to provide a better evidence base for gauging the success of implementation. It would be independent of government, existing either as its own separate entity or as part of a broader body.

In a sense, this body would become the pivot point for a number of the other recommendations of the Committee. For example, the Committee was critical of the information strategy that has been used to further compliance with the MCA. While the two relevant Codes of Practice may be readable, it was found to be less obvious that they were being read, and in any event they were now out of date. The Committee does not recommend that they be re-written in their current form, but instead recommends that the strategy for information provision be re-thought, taking into account the diverse needs and audiences relevant to the MCA. This would be commenced under the existing MCA Steering Group, but would eventually fall within the remit of the independent oversight body (Report, para 156-162).

The expectation is that implementation initiatives would be launched into the range of domains where the MCA is relevant. Sometimes this would be the general public (for example, trumpeting the availability of advance decisions to refuse treatment and LPAs). Sometimes it would be in professional domains where the MCA is thought to be relevant but where there is little awareness or culture of implementation (the lack of evidence makes identifying these problematic, but perhaps banks and the police will serve as examples). Sometimes it will be in areas where there has been at least some awareness of the relevance of the MCA (medical contexts, care homes, and local authorities for example). Sometimes the independent body might undertake the initiative itself, but often it would be expected that it would work with professional organisations as part of the general requirements of professional training. The Committee recommends, for example, that the General Medical Council and Royal Colleges take a more assertive role in ensuring standards of understanding and implementation in the medical professions (Report, para 128-142). The role of the independent oversight body would be to work with such bodies to ensure that appropriate initiatives are taken, and also to ensure consistency between initiatives. Such consistency may be important not merely for theoretical, but for very practical reasons: a nurse working in a care home may be subject to two or more sets of guidance from different sources; they must impose consistent expectations. Similarly, the role of the CQC, both in setting standards and inspection, is perceived by the Committee as of considerable importance, and the Committee welcomes the renewed interest of the CQC in engagement with the MCA (Report, para 120-127). This renewed interest arose only in 2013, however, so it is too early to gauge its actual effects.

The independent oversight body would also be expected to work with ADASS and NHS England to develop commissioning arrangements that will ensure MCA compliance. The commissioning requirements promulgated by NHS England do include references to the MCA, but the Committee notes that these are intrinsically linked to safeguarding functions rather than empowerment, and focus on structures rather than outcomes in practice (Report, para 143-153). Overall, the Committee proposes an express inclusion of the MCA in the NHS Mandate, and a clearer set of expectations regarding the MCA in commissioning documents.

The CQC collects data systematically on the use of the DOLS, but other than that, there is little by way of systematic evidence-gathering regarding the implementation and effects of the MCA. The independent oversight body would be expected to address this. The MCA was expected to introduce a new culture of care not merely among professionals, but in society as a whole. The independent oversight body would be expected to establish benchmarks to measure this on a periodic basis. Within professional circles and specific care contexts, it would further collect data to provide a clearer understanding of how the MCA is actually being used.

The Committee favours IMCAs, but notes that there is evidence of inconsistent provision, and inconsistent calibre. It recommends that IMCAs should be increasingly professionalised, and that standards of training ought to be introduced for them. It is proposed that this, too, would fall under the remit of the independent oversight body.

The independent oversight body would report to Parliament on an annual basis.

Access to Justice: The Court of Protection

While noting problems of delay and perceived remoteness of the Court of Protection, the Committee was broadly sympathetic to the Court's work (Report, chapter 6), considering and specifically not recommending that it be replaced or supplemented with a tribunal. It applauds and encourages recent moves towards greater transparency, proposes improved online resources, and recommends the appointment of additional authorised officers as a mechanism to reduce delays in non-contentious matters. It further recommends the implementation of the proposals of the ad hoc Rules Committee of 2010.

The Committee makes a number of recommendations relevant to access to justice in the Court. It finds that the duty on public authorities to bring cases before the Court is not always well-known, and is not clear in its scope, and it recommends that these issues be tackled by the government in conjunction with the proposed independent oversight body. It proposes that court processes are appropriate in situations where all carers agree with a decision taken, but P himself or herself objects to it. It further proposes improved legal aid, and improved funding for the Official Solicitor.

The Committee further proposes the establishment of mediation procedures within the Court, suggesting that the Office of the Public Guardian is well-placed to house such a service at least as relates to matters of property and affairs. Mediation is proposed in part because of its own merits, but also to limit the financial exposure of P to litigation in matters of property and affairs, where P normally provides the costs for all parties, even if P did not commence the litigation.

It is also proposed that s 44 of the MCA, the offence of ill-treating a person lacking capacity, be re-drafted. This is following criticism of the drafting from the Court of Appeal: see *R v Dunn* [2010] EWCA Crim 2935, *R v Hopkins and R v Priest* [2011] EWCA Crim 1513, *R v Hopkins and R v Priest* [2011] EWCA Crim 1513.

DOLS

The Committee's evidential findings regarding the DOLS will be unsurprising to those working in the field. The DOLS are said to be unduly complicated, and not understood or owned by the people on the ground who would commence the processes by requesting a standard authorisation. The marked inconsistency of their use in the various regions of the country is noted, along with the overall minimal usage in the country as a whole. Unlike the broader MCA, which was viewed with

broad approval in the evidence, the DOLS were roundly subjected to criticism in the submissions to the Committee. The Committee's response is to recommend that the existing regime be scrapped, and new legislation introduced following appropriate consultation and proper parliamentary scrutiny (Report, para 256-278).

While the Committee does not foreclose the discussion of what should replace the DOLS, it does provide some frameworks or starting points. It continues to see the issue as flowing from *HL v the United Kingdom* (2005) 40 EHRR 32 (the '*Bournemouth*' case), which was the impetus for the original DOLS framework. This case places the difficulty squarely within the context of Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the ECHR), therefore applying when a 'deprivation of liberty' is at issue within the meaning of that Article. Consistent with that approach, the Committee does not recommend a statutory definition of 'deprivation of liberty', but instead proposes continued reliance on the relevant ECHR jurisprudence (Report, para 279-283). The Committee further recommends that the replacement provisions reflect the principles of the main MCA (Report, para 274), and proposes that the role of the Relevant Person's Representative be strengthened (Report, para 286-288). It is recommended that the new system further extend to supported accommodation in the community, not merely to hospitals and care homes (Report, para 294-297).

The DOLS provisions will no doubt be among the most discussed proposals of the Committee. The Committee, quite properly given its mandate, was guided by the evidence it received. Any move to a replacement for the DOLS will show up some of the tensions in that evidence, however. The placement of the issue within the context of *HL* and Article 5 for example (an approach uniformly adopted by the evidence) is problematic. As the Committee notes (Report, para 284-285), this context may perpetuate the unhelpful and stigmatising language relating to 'deprivation of liberty', taken by carers suggest often incorrectly the provision of substandard care. At least as problematically, it implicitly characterises the DOLS as a response to a technical legal problem, rather than a mechanism that can provide real benefits in care to service users. Insofar as it is perceived as a technical legal problem, it is difficult to see how it will be owned with any enthusiasm by the carers who are pivotal to its implementation. It may perhaps be more helpful, as the discussions commence, to move away from questions about the scope of Article 5 and begin to ask under what circumstances an outside view of the care we provide may be of real benefit to P, and work from there.

As we do so, at least two themes that are of overarching importance in the implementation of the MCA generally will re-arise. The first, as the Committee notes, is the relationship between safeguarding/paternalism and empowerment. While the Committee quite properly wants to see an ethos of empowerment in the DOLS replacement, many of the most visible cases will occur in the context of safeguarding applications. The concern is that the context of risk analysis will over-power any ethos of empowerment in the individual case. This clearly requires a values-based discussion about how empowerment can exist in a situation of risk. It may also, perhaps, require a discussion of whether proper safeguarding legislation may be appropriate so that these cases are removed from the MCA. The Law Commission had originally proposed that safeguarding be dealt with through an amended guardianship regime under the Mental Health Act 1983 (see Law Commission (1995), part IX); it may be appropriate to re-visit that question.

Second, decisions under the Act are only meaningful in the context of a range of options. Particularly in a time of austerity and restraint, availability of such options may well be inseparable from the MCA issues. The MCA, of course, provides no right to services, but if some way to address the availability of services coincident with the MCA determinations is not found, there is a real risk

that the MCA determinations may become irrelevant: it is not obvious how much discussion there can be of best interests, when there is only one option on the table.

The decision of the Supreme Court in *P v Cheshire West and Chester Council* [2014] UKSC 19, which was issued less than a week after the House of Lords report, is both a blessing and a problem for the development of a replacement DOLS framework. That decision, consistent with the ECHR jurisprudence, takes a reasonably broad view of the meaning of 'deprivation of liberty', suggesting a relatively large number of people in care homes and hospitals will be affected. On the one hand, this re-enforces the urgency of the House of Lords recommendation: it is vital that an appropriate and workable system be developed for these people. At the same time, the urgency may create problems. It was, after all, the urgency that resulted from the *HL* decision ten years ago that gave us the existing unsatisfactory system; it would be unfortunate if urgency flowing from *Cheshire West* had the same effect. The urgency is however real: there are a considerable number of people now deprived of liberty (and who in some cases may have been deprived of liberty for some years) who are subject to no legal authorisation for that. That is, to put it mildly, a problem. The other possibility is that supervisory bodies will make a real attempt to implement the existing DOLS. While that is perhaps the best outcome in the short term, it raises problems in the longer term, as such bodies are told after having invested energy in making the DOLS work that those processes are to be replaced with something else, the DOLS replacement. That transition would have considerable morale costs.

Roads Not Travelled

While the Committee report is broad in its application, there are matters that it does not address.

Some of these flow from a lack of evidence. Some of those, as noted above, are about sectors where the MCA may or may not be being implemented. Interestingly, there was very little systematic evidence provided as to the case law of the Court of Protection, and that case law is therefore largely unanalysed by the Report. This is perhaps unfortunate, as that case law arguably reflects many of the deficiencies identified by the Committee. The Court's case law, for example, is clear that there is no ranking of the statutory criteria in the determination of best interests (see *Re M* [2009] EWHC 2525 (Fam)), and a number of Court of Protection decisions are reported where no reference is made to the preferences of the individual either at the time of the decision or when competent. While the recent Supreme Court decision in *Aintree University Hospital Foundation Trust v James* [2013] EWCA Civ 65 may perhaps redress this balance somewhat, even that case refers more to placing P at the centre of the decision rather than focussing on the specific factors of s 4 of the MCA. It is thus at best arguable whether the jurisprudence furthers empowerment rather than safeguarding or paternalism.

A surprise for me when I read the evidence and went back to re-read the Law Commission report and similar documents that commenced the process leading to the enactment of the MCA was the way in which social care professionals had become integrated into the process. The Law Commission report seems at times to think professionals will be largely absent: their vision was of a statute that would give families and similar carers a coherent and legally sound framework for decisions to be made about their loved ones lacking capacity. In that context, there is an irony that the Committee report notes on numerous occasions how the MCA has had the reverse effect, freezing families out of care decisions. The significant involvement of professionals is not necessarily a criticism of the way things have developed (although any marginalisation of P and his or her domestic carers is of course a matter of concern). There may be much to be said for using professionals, who may be expected to have a more developed understanding of the legislation, to ensure consistency of application. For present purposes, the more interesting question concerns the

present economic context. At a time of austerity, it seems likely that there will be increasing pressure on the professionals and NGOs who have up to now piloted implementation of the Act. How this will play out is not yet clear. The Committee's recommendations would create a new organisation at the centre of implementation, but otherwise spread implementation out broadly, to many professionals and organisations. This might well be an effective strategy in times of restraint. It might also be the case, however, that we see a de-professionalization of implementation, with responsibility reverting back onto families with relatively little professional advice provided. In a sense, this may be closer to what the Law Commission envisaged, but it is not clear what it would mean for implementation overall.

Further, increasingly the use of capacity itself is being called into question, and issues are arising as to whether there are new directions in which legislation should be moving. This in part flows from the UN CRPD, as discussed above, but it is not restricted to that context. Ideas develop over time. Denzil Lush, the Senior Judge of the Court of Protection, made the point with particular clarity in his evidence to the Committee:

[I]n a way the Mental Capacity Act represents thinking from the early 1990s. We have tended in this country to change our legislation on mental capacity, probably once every generation, or every 25 years. I could bore you with details of statutes going back to 1860. Every 25 or 30 years there has been a change. In particular, this Act predates the UN Convention on the Rights of Persons with Disabilities. I am not entirely convinced that the Act is compliant with Article 12 of that 8 convention, so one might explore statutory amendments that gave a wider range of powers to the court, rather similar to the Bill just published in the Irish Republic enabling assisted decision-making and possibly co-decision-making agreements. (Lush, 2013, q 294)

The Committee report was post-legislative scrutiny: its role was not to generate new ideas about where legislation should go, but rather to assess the implementation and effects of the statute as it was passed. That does not of course mean that this forward thinking should stop; indeed, if Judge Lush's chronology is accurate, we should expect significant debates regarding the legislation to arise soon (as, indeed, they are already in the context of the CRPD). While the Committee report is a significant achievement, it is unlikely to be the last word on the subject.

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