

The British Association of Social Workers (BASW) response to the Law Commission's Mental Capacity and Deprivation of Liberty Interim Statement of May 25th 2016

Views compiled by the MCA DoLS Sub Group of the BASW England Social Work with Adults Reference Group. June 22nd 2016

The British Association of Social Workers is the independent and member-led professional association of social workers in the United Kingdom. We have over 20,000 members and we are part of the international community of social work organisations, and as such are active members of the International Federation of Social Workers (IFSW) and its European Region. We have offices in each of the four countries of the UK.

BASW was a contributor to the House of Lords post-legislative scrutiny committee on the Mental Capacity Act, and broadly supported the scrutiny committee findings and report, in particular we concluded that the DoLS were not “fit for purpose” and agreed with the proposals that DoLS needed a radical overhaul. BASW made a submission in November 2015 on the Law Commission's consultation paper on deprivation of liberty in which we were broadly supportive of the proposed changes. BASW members strongly support the need for existence of legislation to support and be compatible with human rights legislation for people who may lack capacity over decision making, but recognise that the legislation must be “fit for purpose” and understandable.

Introduction

The Law Commission's Interim report only asks one question, which is in paragraph 1.48 and that is the question of the title for the potential replacement of the DoLS.

DoLS Replacement title

Given the short timescale on the consultation (one month) BASW England has not undertaken a survey of the views of all members, but has consulted with members of two of our expert reference groups. There was consensus in these groups that the existing title of Deprivation of Liberty Safeguards needs to be changed, not because there is anything technically wrong with the current title, but because of the emphasis on “deprivation”. There is also a view that the title is problematic in practice as many care providers have (wrongly) taken the view that “deprivation” is a bad thing with which they do not wish to be associated. We have had a proposal that if the word order was changed to “Safeguards for Deprivation of Liberty” the stress would be on the first word i.e. safeguard being before any necessary deprivation.

We did have some support for the term “Liberty Safeguards”, but there is concern that that term is not accurate. In circumstances where we are acting in someone's overall best interests by depriving them of their liberty it seems to be somewhat Orwellian to describe that process as safeguarding their liberty when most explicitly we are taking away their liberty even if for the best of motivations and with robust

safeguards. There was also concern about the title “Protective Care” for similar reasons to “Liberty Safeguards”.

“Capacity Safeguards” is another option that was considered, but we are concerned that this misses the point as we are not in a position to safeguard anyone’s capacity – it’s about safeguarding the rights of those whose capacity is constrained. Similarly, we don’t like “Sanctions to restrict Liberty” as we don’t think sanctioning is the issue and even more negative than the current DoLS.

We think there is merit in the proposal for “Liberty and Rights Safeguards”. It may not be an entirely accurate description but it puts the emphasis on liberty while including the protection of rights in circumstances where liberty cannot on balance be supported.

So to conclude, we favour “Liberty and Rights Safeguards” or “Safeguards for Deprivation of Liberty”.