



Department
of Health &
Social Care

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Re: Mental Capacity (Amendment) Bill

Protecting the rights of vulnerable people in our society is a matter of the gravest importance.

Recent debates in the Public Bill Committee on this Bill and the wealth of written evidence submitted to that Committee have demonstrated again the deep concerns that you raised in your petition about this. These concerns are clearly widely shared amongst those that represent, advocate and care for vulnerable people.

It is absolutely right that any proposed change to such protections is given careful scrutiny and tested vigorously. I welcome the careful examination of our Bill which is currently before Parliament.

Article 5 of the European Convention of Human Rights protects our right to liberty and security. Such a right to personal freedom is fundamental. Any restriction placed upon it is a very serious matter.

Where a person is to be deprived of their liberty for the provision of care or treatment considered essential, and where they lack capacity to consent to their arrangements, clear legal checks and processes must be put in place. All deprivation of liberty decisions are carefully scrutinised and can, if necessary, be overturned.

The challenge we face today is that the current system – the “Deprivation of Liberty Safeguards” – no longer provides protection to all of the vulnerable people who are entitled to it. The system has proved to be overly bureaucratic and inefficient to apply, and since then a court case has resulted in Article 5

being understood in a different way and widening the definition of deprivation of liberty. This has resulted in a long backlog of applications which has built up over time, meaning around 125,000 people may be subject to a deprivation of liberty without formal authorisation. This cannot go on.

In 2018, the Law Commission published a report based on over three years' worth of consultation and consideration about how best to reform the Deprivation of Liberty Safeguards. They proposed a draft Bill and a new system: the "Liberty Protection Safeguards". This system is designed to provide robust protections and to be simpler so that those protections can be afforded to everyone who needs them quickly and effectively. It respects a person's inherent dignity by putting their own wishes and feelings at its heart.

This Liberty Protection Safeguards is the system which we are taking forward through our Bill.

I believe that this system addresses the concerns you are raising:

We have built in protections against conflicts of interest for those making decisions about a person's deprivation of liberty. Before an authorisation is given, it must be reviewed by someone who is not involved in the day-to-day care or in providing any treatment to the person: in care home cases, it cannot be completed by care home staff or the manager. In independent hospitals, every pre-authorisation review will be completed by an Approved Mental Capacity Professional. This is someone who is independent from the hospital and will be expected to meet and consult with the person as well as their family, carers, and other advocates. Authorisations will be granted only where arrangements are necessary and proportionate to prevent harm to the person and they are not more restrictive than they need to be. Authorisations will not be based on convenience or cost.

There will remain an entitlement to independent advocacy. A cared-for person will be able to request an Independent Mental Capacity Advocate (an "IMCA") to support them. If they don't have an 'appropriate person' such as a family member or friend, they will automatically have an IMCA appointed to represent them except for in very rare circumstances where this is not in their best interests. This could be a situation where the individual is objecting to IMCA representation, and to ignore this would be to ignore their wishes and feelings. Something I am not willing to do.

We will ensure that anyone who is subject to a deprivation of liberty has the information they need to understand the process, take part in it and raise objections. Our statutory Code of Practice which will sit alongside the legislation will be clear that information should be provided before, during and after a deprivation of liberty is authorised.

The design of the system is built upon the careful consideration and consultation. But we are not complacent and do not envisage that the Bill addresses every circumstance or risk. That is why we are developing a comprehensive Code of Practice for the Bill which will bring the new system to life with explanatory information, examples and description of best practice. This Code will be updated over time to reflect prevailing case law as it develops.

I extend an open offer and invitation to Disabled People's Organisations and self-advocacy groups to work with us on our Code of Practice to ensure that the Bill does promote and protect Disabled people's liberty. I would welcome a discussion with Inclusion London about how to achieve that.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Caroline Dinénage', written in a cursive style.

CAROLINE DINENAGE MP, MINISTER OF STATE FOR CARE