



# Joint Committee on Human Rights

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From Rt Hon Harriet Harman MP, Chair

Caroline Dinenage MP  
Minister of State at the Department of Health and Social Care  
Department of Health and Social Care  
39 Victoria Street  
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12 February 2019

Dear Caroline,

## **Mental Capacity (Amendment) Bill**

During the course of its scrutiny on the Mental Capacity (Amendment) Bill, the Joint Committee on Human Rights expressed concern that the Bill, as introduced, did not include a statutory definition of 'deprivation of liberty'. We noted that the wide definition of 'deprivation of liberty' set out by the Supreme Court in the *Cheshire West* case had led to a huge backlog of cases, resulting in many people being unlawfully deprived of their liberty without any safeguards in place. We were particularly concerned that the current situation would be exacerbated by the expansion of the new regime into domestic settings.

We concluded that it was important to include a definition of 'deprivation of liberty' on the face of the Bill in order to give cared-for persons, their families, and professionals greater certainty about the parameters of the scheme. We felt that a clear definition would ensure that scrutiny and resources are deployed where necessary. We acknowledged that any definition in statute may be revised or refined by future case law, but we took the view that it was not possible to design and implement an effective system of safeguards without having a clear sense of to whom it should apply. In particular, we suggested that the Government ought to consider (a) the causes of confinement when assessing whether a person is deprived of their liberty; and (b) whether it is possible to take a more nuanced approach to the expression of 'valid consent' for those who lack mental capacity.

During debate in the Lords, we were pleased that the Government listened to our concerns and agreed to introduce a statutory definition in the Bill. We note that the Government subsequently tabled a new clause introducing an exclusionary definition of 'deprivation of liberty' which was agreed by the Commons Bill Committee after division.

We welcome the Government's efforts to introduce a definition into the Bill. We also welcome the explicit recognition in clause 1(1) that the definition must be interpreted in accordance with Article 5 ECHR. However, we are concerned that clauses 1(2) and 1(3) are intended to reflect existing case law and put the 'acid test' on a statutory footing. This would perpetuate the existing backlog of cases and would catch content individuals living with their families and receiving care in their own homes.

We also note that clause 1(4) excludes from the definition of 'deprivation of liberty' those who are under continuous supervision and control and not free to leave because of the need to administer medical treatment for a physical illness. Whilst we recognise this seeks to reflect existing case law, we are concerned that this would result in differential treatment between physical and mental conditions. Our suggested amendment, as included in our report, was drafted to exempt individuals who were confined where the *dominant reason* for their confinement is their *underlying condition*. We included the phrase "dominant reason" because we recognised that there may be various reasons and multiple conditions resulting in a person's confinement. However, the new definition is drafted to exempt individuals receiving treatment for physical illness only. It is not clear, therefore, how the amendment would apply to persons with multiple conditions who are confined for various reasons (including medical treatment for physical illness). Whilst the Code of Practice may give some further clarity, it may be difficult for practitioners dealing with complex cases to make such nuanced distinctions as envisaged by clause 1(4) and may, therefore, lead to litigation.

It is regrettable that there was no time for adequate consultation on the proposed definition. The issues involved are complex and require considerable expertise to ensure that any statutory definition is pragmatic, medically appropriate, non-discriminatory, and compliant with Article 5. We are concerned that the lack of consultation and lack of time for proper scrutiny of this definition may exacerbate the existing problems under the DoLS scheme.

Yours sincerely



**Rt Hon Harriet Harman MP, Chair**