# Written Evidence from Doughty Street Chambers Court of Protection Team to the Public Bill Committee on the Mental Capacity (Amendment) Bill and the Liberty Protection Safeguards

We are a group of barristers who specialise in litigation arising under the Mental Capacity Act 2005 (MCA). More details on who we are and our expertise can be found by clicking here.

We are frequently instructed in applications under section 21A MCA and under section 16 MCA where deprivation of liberty is one of the issues before the court. We may appear for the detained person – "P"- or for members of P's family or for the supervisory body and consider this helps us see the Deprivation of Liberty Safeguards and its proposed replacement from all sides. We also have experience of litigating mental health and learning disability cases before the European Court of Human Rights. Drawing on these experinces, we are very pleased to have the opportunity to comment on the proposed replacement scheme.

We make the following brief observations on the Liberty Protection Safeguards (LPS) and the proposed amendments as of 15 January 2019. In doing so we acknowledge that the LPS scheme currently before the Public Bill Committee has improved significantly since it was introduced in the House of Lords.

## Deprivation of Liberty

1. It is impermissible for the UK to "tie down" in statute the definition of deprivation of liberty for the purpose of Article 5 ECHR in such a way that does not meet ECHR standards. We recognise that a statutory definition was a key recommendation of the Joint Committee on Human Rights. We also recognise that the decision of the Supreme Court in *P v Cheshire West*

*and others* [2014] UKSC 22 ("Cheshire West") has given rise to significant logistical difficulties in providing the necessary safeguards to the most vulnerable individuals affected by the judgment. A definition has some appeal at the operational level, and it is understandable that the legislature would seek to provide guidance for the mental health and social care workforce.

2. Any definition of detention in domestic law must comply with the ECHR, which sets out a floor, not a ceiling, of rights. In other words, domestic law may offer more protections than ECHR standards, whereas a failure to meet those standards is not permitted.

3. The European Court of Human Rights ("ECtHR") has interpreted Article 5(1)(e) on several occasions and there is now a body of case-law. In these cases, the ECtHR has assessed whether there is a deprivation of liberty by reference to whether P is confined for a non-negligible period of time, under constant supervision and free to leave without permission (the objective component). The various cases include one where P was found to be deprived of liberty in an open hospital ward with unescorted open ground leave (*Ashingdane v UK*), in a closed psychiatric hospital the placement of which had been agreed by the patient's guardian (*Shtukaturov v Russia*), and in relation to a patient who had initially consented to remain (*Storck v Germany*). A subjective element must also be present, namely there must be a lack of valid consent.

4. In determining whether someone has been deprived of liberty, the ECtHR has held that, "the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question" (para. 115 of *Stanev v Bulgaria* – see a review of its case-law on Art 5(1)(e) deprivation of liberty at paras 115-120, which was analysed by the UK Supreme Court in *Cheshire West*).

5. While States have a margin of appreciation as to how they deal with individuals ("in deciding whether an individual should be detained as a 'person of unsound mind', the national authorities are to be recognised as having a certain discretion since it is in the first place for them to evaluate

the evidence adduced before them in a particular case" – para 155 of *Stanev*), they do not have a discretion to undercut the ECtHR's definition of detention.

6. With this in mind we have serious concern about clause 4ZA(3) ,which removes Article 5 safeguards altogether from a P who is not under continuous supervision and who is not free to leave a placement. We consider it likely to breach the UK's obligations under the ECHR. If enacted, this provision may well be challenged under the Human Rights Act 1998.

7. By way of example the applicant in the Stanev case himself probably falls into the clause 4ZA(3). In that case, the court found that Mr Stanev was under constant supervision and also:

> 124. With regard to the objective aspect, the Court observes that the applicant was housed in a block which he was able to leave, but emphasises that the question whether the building was locked is not decisive (see *Ashingdane*, cited above, para 42). While it is true that the applicant was able to go to the nearest village, he needed express permission to do so (see para 25 above). Moreover, the time he spent away from the home and the places where he could go were always subject to controls and restrictions.

8. Clause 4ZA(3) therefore departs from the leading ECHR case on social care detention.

9. Finally, Parliament has a positive duty under Art 5 of the ECHR "to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge" (para 120 of *Stanev*). The obligation to prevent a deprivation of liberty is not met by reclassifying people as undetained. The effect would be to authorise unlawful detention, limit access to the Art 5(4) review and expose the authorities to damages claims.

10. As to who might be excluded from the ambit of the Article 5 protections, the definition in clause 4ZA(3) would probably mean that MIG, one of the appellants in *Cheshire West*, was not deprived of her liberty. MIG had

severe learning difficulties; lived in a foster placement where she received intensive support from her foster mother; had her own room and spent much of her time listening to music; never showed any wish to leave and had to be escorted to school or trips and was unaware of road danger. In the view of many this result would accord with common sense, and a similarly welcome outcome would probably follow in the circumstsances in which Steven Neary is cared for at home by his father. However it would also mean that a compliant person in a care home, who is permitted long periods without active supervision, would probably not be deprived of their liberty and so denied necessary safeguards. This cannot be the intention behind this amendment. This amendment does not appear to resolve the tension between care at home and that provided by the State in a care home.

11. Furthermore, on one reading of pargraph 3, DE in the case *JE v DE and others* [2006] EWHC 3459 might be regarded as not having been deprived of his liberty. DE had been removed to a residential care home, where he had a relative amount of freedom, and was taken out for walks. He was desperate to leave the care home and return home to his wife, who also wanted him to return home, but was told that the police would be called if he did. Munby J held that DE was deprived of his liberty because "The simple reality is that DE will be permitted to leave the institution in which SCC has placed him and be released to the care of JE only as and when – if ever; probably never – SCC considers it appropriate."

12. In addition, there are many people in care homes who have, for example, a mild form of dementia, or mild learning disabilities who do not require much care and support. They include people in the following sorts of situations:
    a. A person who does not need constant or frequent supervision to stop them harming themselves (either deliberately or by accident);
    b. A person who could be left on their own quite safely for several hours in the care home;
    c. A person who is not so disabled that carers decide all or many aspects of their daily routine (e.g. when to get up and go to bed, what to eat, when to go out, which TV programmes to watch);

d. A person who does not need support with all or many everyday tasks (e.g. cooking, shopping, dressing, bathing);
e. A person who is not subject to restrictions on their contact with their family and friends.

13. It is submitted that these people would meet the ECHR definition of being deprived of liberty, but might be considered not to be under "continuous supervision".

14. For these reasons we consider the approach in the proposed definition would violate ECHR standards, be unduly rigid and lead to undesirable conclusions. We acknowledge the complexity of the task. The Committee may wish to revert to the two approaches suggested by the Joint Committee on Human Rights of which the fact sensitive causative approach seems to offer the most flexibility so far as the objective element is concerned. In a recent article[1], Professor Anselm Eldergill, also a judge of the Court of Protection, suggested a "but for" approach to distinguishing a deprivation of liberty from restrictions by asking the following question: "What are the things this applicant can do and wishes to do ('wills') but has not done because we have interfered or are interfering with their freedom?"

15. For the sake of clarity and completeness and because any statutory definition is likely to be used in the context, for example of community patients under the Mental Health Act, some consideration should be given to including reference to the subjective element in any statutory definition in addition.

**The "necessary and proportionate" test**

16. We are seriously concerned that the "necessary and proportionate" test in paragraph 12 requires expansion so as to be practicable on the ground for those taking these decisions and may represent a dilution of the cared-for person's fundamental rights. As such we support the amendment that additionally requires that the arrangements are in the cared-for person's

[1] https://link.springer.com/article/10.1007/s12027-018-0541-4

best interests, that less restrictive options have been considered and that appropriate weight has been given to the cared-for person's feelings and wishes. We consider this change to be absolutely essential for the new scheme to come close to being "compatible in style and ethos to the rest of the Mental Capacity Act"[2] .

**Paragraph 16 arrangements**

17. We remain concerned that the proposals for care home arrangements under paragraph 16 contain an insufficient degree of independence. As the Bill stands, the right to information before the authorisation process in paragraph 13 will apply and there will be a duty on the responsible body to take all practicable steps to ensure that the cared for person (or an an Independent Mental Capacity Advocate (IMCA) or appropriate person representing them) understands the right to advocacy, to request an AMCP assessment and to challenge the authorisation in court.

18. The responsible body must take all reasonable steps to appoint an Independent Mental Capacity Advocate (IMCA) (paragraph 39) unless the cared for person has an "appropriate person" who can represent them (paragraph 39(5)), makes a capacitous request for an IMCA (paragraph 39(2)) or lacks capacity to consent to IMCA involvement and the responsible body concludes an IMCA is not in his or her best interests. The requirement to "take all reasonable steps" is a weakening of the current requirement that the supervisory body must appoint an IMCA (section 39A(3) Mental Capacity Act). **It is therefore possible that a "cared for person" may qualify for an IMCA but that due to resource issues the reasonable steps taken do not result in such an appointment, and this safeguard may not be available.**

19. The consultation required by paragraph 20 will in the case of care home arrangements have been carried out by the care home manager. Moreover this is not consultation in the holistic sense of section 4(7) Mental Capacity Act 2005, but is limited to ascertaining the cared-for person's wishes and feelings (paragraphs 20(3)).

[2] Mental Capacity Act: Post Legislative Scrutiny Summary at p.8

20. The assessments as to capacity, mental disorder and whether the arrangements are "necessary and proportionate" will be arranged by the care home manager, who also decides when to get fresh assessments (paragraphs (18(6)-(7), 18(2), 18(3)). Unless the requirement for an Approved Mental Capacity Professional (AMCP) is triggered (see below) there will be no face to face interaction between the cared for person and the responsible body.

**21.** Whilst we appreciate that regulations will be put into place to avoid conflicts of interests (paragraphs 18(3)-(4) and 19(3)-(4**) we remain of the view that the process under paragraph 16 is insufficiently independent of the care home manager and moreover delegates to that person the burden of making or overseeing nuanced determinations of fact and law. Given the pressure the care home sector is under we are most concerned that care home managers with the best will in the world may be ill-equipped to shoulder this. We consider this will require great vigilance from responsible bodies who may not always pick up when it is appropriate for them to make the arrangements.**

**Access to an Approved Mental Capacity Professional**

22. We remain concerned about the dramatic reduction in the number of detained persons who will be made subject to the new scheme and who will not have access to a (pre-authorisation) review by an AMCP (paragraph 21(2) ). Given the pivotal role played by highly trained Best Interests Assessors in interrogating care arrangements and seeking lesser levels of restrictions this change again significantly reduces the available safeguards. We acknowledge that the new scheme must be rooted in economic realities. Were the "necessary and proportionate" test to be augmented or replaced by the best interests requirement in the current scheme, this would provide some reassurance. Additionally, as it stands it highlights the need for an IMCA (above) who can initiate a challenge before the court if necessary.

**Compliance with Article 5(4) European Convention on Human Rights**

23. Article 5(4) gives a person who is deprived of his or her liberty the right to challenge their detention in court. We support the amendment which requires an application to the Court of Protection by the person relying on the amended Section 4B in the event that the cared-for person, their deputy or attorney or a person interested in their welfare objects to the arrangements.

24. We welcome the amendment to paragraph 13(2) by Caroline Dinenage which seeks to strengthen this provision, by ensuring the responsible body must take such steps as are practicable to ensure that the cared for person, the appropriate person and/or any IMCA appointed understand the relevant rights as soon as an authorisation is granted, as well as before the process starts.

25. We welcome paragraph 13(5) which requires the responsible body to ensure that cases are referred to court. This will require very clear guidance as to the extent of this responsibility. Does it require the responsible body to bring cases itself if IMCAs or appropriate persons do not do so (as Baker J concluded in AJ v A Local Authority [2015] EWCOP 5)? If so how will the responsible body monitor cases?

26. We note that new Section 21ZA (clause 3) would appear only to give the court jurisdiction whilst an authorisation is in place. This could lead to properly made applications to the court lapsing through no fault of the cared for person or their representatives, if for example an authorisation expires and is not renewed immediately. In these circumstances the cared-for person is doubly disadvantaged both by being unlawfully detained and losing their opportunity to challenge the detention in court. We consider this is unlikely to comply with Article 5(4).

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