BASW
The professional association for social work and social workers

STATUTORY DEFINITION OF DEPRIVATION OF LIBERTY

A briefing by the British Association of Social Workers

Introduction

1. This briefing by the British Association of Social Workers (BASW), explains our members' response to the proposed statutory definition of 'deprivation of liberty' (henceforth referred to as 'definition'). The definition is included in the Mental Capacity (Amendment) Act, currently at Committee Stage, House of Commons. In this briefing, we explore the likely impact of the definition on social work practice and propose changes to improve it, where necessary.

2. The Mental Capacity (Amendment) Bill seeks to reform the Deprivation of Liberty Safeguards (DoLS), which is part of the Mental Capacity Act 2005. The Bill was introduced at the House of Lords last summer.[1] By the end of the Lords stages, the government committed to expand the remit of deprivation of liberty to 16-17-year olds; it retreated from its original proposal to place care home managers at the centre of assessments of deprivation of liberty; and it increased the role of Approved Mental Capacity Professionals, which will build on the role of Best Interest Assessor – professionals who have the statutory duty to assess for deprivation of liberty. [2] Finally, in the Lords, the government committed to publishing proposals for a statutory definition of deprivation of liberty.

3. Social workers are 'gateway' professionals to the operationalisation of the current Mental Capacity Act 2005. They assess, plan, and safeguard the needs of adults and children with complex needs who need to be detained for their care and treatment. Social workers will have an enhanced role if the Bill is passed because of the expansion of the remit of Liberty Protection Safeguards. Furthermore, the AMCP role will be required in a wider range of cases, and as it builds on the BIA function, and 87% of them are social workers[3], the demand for the skills and values of social workers will increase.

[1] Law Commission. 2017. Mental capacity and deprivation of liberty

[2] For a discussion of the Bill's journey through the Lords, please see: Powell, Thomas. 2018. Mental Capacity (Amendment) Bill. House of Commons Library Briefing Paper. Number CBP8466

[3] Hubbard R. 2018. Best Interests Assessor Role: An Opportunity or a 'Dead End' for Adult Social Workers? *Practice: Social Work in Action*, 2018, Vol 30, No 2 (April 2018), 83-98.

For further information contact:
Name
Position
Email: xxxxx

4. The next section explores the principles that we believe should underpin a statutory definition of deprivation of liberty to ensure that it is operationalisable and human rights compliant.

Overarching principles

5. The statutory definition needs to be operationalisable. To achieve this, it needs to be clear, free of legal jargon, and it needs to be consistent with case law to prevent confusion. Furthermore, the definition should not reduce the scope of cases in which deprivation of liberty applies without providing human rights safeguards.

6. BASW members broadly welcome the proposed definition because it codifies the Supreme Court judgement in *P v Cheshire West and Chester Council and P&Q v Surrey County Council*. This is because the judgement provided definitional clarity about the meaning of deprivation of liberty and it was consistent with pronouncements by the Strasbourg Court. Through clarification, the Supreme Court judgement also enhanced implementation by social workers and enabled them to protect the human rights of incapacitated adults.

7. However we believe that clause 1(3) of the proposed definition excludes (or reduces) domestic settings from the remit of deprivation of liberty deliberations without providing alternative human rights safeguards. This omission has to be addressed by MPs.

8. BASW members request that the definition and the Bill should address the backlog of DoLS assessments. However the government hasn't articulated a consistent strategy for doing so throughout this legislative process. We believe that this present proposed definition will increase the administrative barriers to addressing the pending assessments.

9. We welcome the fact that the proposed definition reflects aspects of the *R (Ferreira) v HM Senior Coroner for Inner South London and others* judgement. This is because it is a landmark clarification of the application of deprivation of liberty in health settings, where people need life-saving treatment. It was also approved by the Supreme Court as consistent with *Cheshire West,* when it refused permission to appeal against the Court of Appeal judgment. However this also requires safeguards and we expand on this in the next section.

Healthcare settings

10. *R (Ferreira) v HM Senior Coroner for Inner South London and others* clarified the remit of deprivation of liberty in cases where people require medical treatment. In the judgement, medical interventions would not constitute a deprivation if done for 'life saving treatment'.

Thus a statutory definition of deprivation of liberty should adhere to the qualification, 'life saving treatment', to prevent an expansive interpretation of *R (Ferreira) v HM Senior Coroner for Inner South London and others* in medical settings. In the proposed definition, this qualification is omitted with the addition of the clause 'medical treatment for physical illness or injury' in 4(a). That section gives the impression that *all* physical illness that require treatment are excluded from the cope of deprivation of liberty considerations. If all physical illness appeared to be excluded from cases of deprivation of liberty, then there is risk of human rights abuses, if there are no safeguards.

11. To prevent the above from occurring, there should be clear safeguards for *P* if he or she is objecting to the treatment.

12. We recognise that 'life-saving procedure' may include at least two kinds. In the first, clinical professionals may have to act immediately to sustain *P's* life, or to prevent rapid deterioration in *P's* condition, unless there's a legally binding direction to the contrary – for example, where *P* has an advance directive. But there is a second kind where 'life-saving procedure' could also be a condition, which will eventually lead to P's death without treatment – for example, a gangrenous limb. We will argue that the second case should be decided by a court if *P* is objecting, and the outcome should depend on the facts. There are already 'real life cases' of the second kind in which *P's* wishes have been supported by the court and *P* has died as a consequence.

13. Understandably, doctors' primary role is to treat and save lives, viewing this as necessarily in peoples' best interest. This sometimes leads them to prioritise treatment over determination of when a care plan may constitute a deprivation of liberty.[4]

14. Thus, to prevent an overtly expansionist interpretation of *R (Ferreira) v HM Senior Coroner for Inner South London and others* in medical settings, safeguards are required. This might, for instance, include the involvement of an Approved Mental Capacity Professional if *P*, their carers, or other professionals raise objections to treatment.

Social care settings

15. BASW members welcome the restatement of *Cheshire West* principle, subclause (2), that people who are 'free to leave permanently' are not deprived of their liberty. However we are concerned that the explanation in subclause (5) about operationalisation may be ineffective in practice.

16. In (5) it is explained that the rights in (2) will be attained if the person 'expressed a wish to leave'. However we detect a potential circularity here because the Liberty Protection Safeguards apply if *P* is/might be incapacitated yet *P* would require some

[4] British Medical Association. 2018.Deprivation of Liberty Safeguards

mental capacity to express a wish to leave the care setting for their rights to be realised.

17. Thus to ensure that subclause (2) can be exercised, this qualification has to be included in (5) – '*there are no doubts about P's desire to remain and if P expressed a wish to leave, P would be enabled to do so.'* This places the onus on professionals to ascertain that *P* indeed wants to stay. Secondly, it enshrines a duty on others to implement *P's* expressed wish to leave.

18. Moving on to subclause (3), another implication of *Cheshire West* is that, people 'not subject to continuous supervision'*,* or 'those free to leave a place temporarily', are outside the remit of deprivation of liberty. However in practice these clauses are hard to operationalise. Some care plans may objectively state that a person is free to leave their residence. However the intensity and intrusive nature of supervision can cause people to have the *belief* that they are under continuous supervision, making then unwilling or unlikely to attempt to leave.

19. The above point particularly applies to people who are likely to fall under the remit of the Liberty Protection Safeguards, for instance people with learning disability, autism, dementia, mental disorder. They are likely to have been subjected to high levels of care, consequently accepting supervision as a feature of their lives.

20. Moreover, under European Convention of Human Rights jurisprudence, 'subject to continuous supervision and control' includes what, at first slight, appears innocuous. For instance in *Stanev V Bulgaria*, the court held that the Appellant was subject to a deprivation of liberty even though he was objectively free to leave:

> 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…. *While it is true that the applicant was able to go to the nearest village, he needed express permission to do so*. Moreover, the time he spent away from the home and the places where he could go were always subject to controls and restrictions.[5](emphasis added).

21. There is a growing consensus on the efficacy of supported models of decision-making in mental capacity[6] because they show how service users can be empowered to express their wishes and actualise their desires, irrespective of their mental disorder(s). To ensure that the statutory definition reflects this, 3(b) should include a corresponding duty to inform *P* that they are free to leave. This might include, for instance, provision of information and use of advocacy. Mechanisms are also

[5] [2012] ECHR 46 (Application no. 36760/06) European Court of Human Rights, Grand Chamber. 2012

[6] Richardson, Genevra. 2012. Mental Disabilities and the Law: From Substitute to Supported Decision-Making? *Current Legal Problems.* 65(1). p. 333-354

needed to verify that *P* is indeed free to leave temporarily when they wish, and to monitor the steps that are being taken to support *P's* decision-making in this regard.

Domestic settings

22. Deprivation of liberty applies in domestic care arrangements, which can be 'imputable' to the state. This may occur in two forms: either state professionals are aware of the care arrangements and/or provide services; or secondly, that the state *ought to know* about the arrangements.

> Imputability may thus arise as a result either of the State's "direct involvement" in the person's detention or of the State's positive obligations to protect the person against interferences with their liberty carried out by private persons.[7] (Law Commission 2017, p. 25)

23. Nevertheless state involvement in family and friends care arrangements is sometimes opposed as being an unwarranted extension of the state's reach into private lives. It is also argued that the inclusion of domestic settings in deprivation of liberty cases has increased the workload of the Court of Protection. For these two reasons (and others), there have been calls to limit the scope of deprivation of liberty in domestic care arrangements.

24. The proposed definition in the Bill attempts this through the phrase 'free to leave the place temporarily' in 3(a), however we believe this is problematic. This is because it does not provide corresponding safeguards and oversight for cases in which people may experience human rights abuses at home.

25. Additionally, the quote from the Law Commission in point 22 above implies that the state has a corresponding duty to ensure that people can exercise their human right to leave a place temporarily. Thus, if people being cared for at home cannot leave the premises at any time of their choosing, or with someone that they identify, even if they have to be supported, then this may not be a freedom at all. This would mean that even though they are being cared for in a domestic setting, deprivation of liberty applies.

26. To ensure that people leave their home – for instance for leisure, care, and treatment – which will make them fall outside the scope of deprivation of liberty considerations, there should be a stipulation in the statutory definition that *P should* be supported to leave.

27. BASW members also argue that limiting the scope in domestic settings should not be the end goal for its own sake. The government should ensure a simplified process for people in domestic settings to have their human rights actualised. We have argued

[7] Law Commission (2017) 'Mental Capacity and Deprivation of Liberty'. https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2017/03/lc372_mental_capacity.pdf

in the past that this can be achieved by ensuring a clearer overlap between the legislation on mental capacity and care.

Conclusion

28. In this briefing we have argued for human rights and operationalisation principles that should underpin any statutory definition of deprivation of liberty. We have shown that in order for the definition to be widely implemented by social workers, it has to be: clear, consistent with case law, and it should not reduce the scope of the application of deprivation of liberty without alternative safeguards. On the whole we welcome the proposed definition because it is consistent with *Cheshire West, however* we have serious concerns about misinterpretation in medical settings and lack of duties to ensure that *P* 's rights to leave, to be informed of his/her rights to object to certain care and treatment, and lack of safeguards in domestic settings.

Please contact:

Dr Godfred Boahen
British Association of Social Workers
Godfred.boahen@basw.co.uk