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Leicestershire
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11th January 2019

To Whom It May Concern
Houses of Parliament
House of Commons
London
SW1A 0PW

Dear Sir/Madam,

Mental Capacity (Amendment) Bill – Consultation period response

I am writing in response to the above proposed changes to the Mental Capacity Act 2005. I have to comment on how inappropriate this consultation period is for. Given the complexities coupled with the Mental Capacity (Amendment) Bill which most notably introduces a replacement scheme to the Deprivation of Liberty Safeguards (DoLS) called the Liberty of Protection Safeguards (LPS) scheme, I am concerned that I and many other people with a passionate interest in this area, will not provide a full response for areas of change to promote and support Government with producing a 'near perfect' replacement. Therefore, my first point would be to seek to 'slow this down' and offer a real opportunity for consultation.

It is difficult to write this purely from a personal perspective when in my professional capacity I manage a DoLS Team for a local authority. Therefore, my starting point is to share with you my experience in working within a local authority as a manager of the DoLS service. This requires me to have both an understanding and practical application of the current legislation and most notably the Deprivation of Liberty Safeguards (DoLS), for which the proposed Amendment Bill is seeking to radically change. I understand the reasons requiring the changes and I am positive about the need for change, as I have been actively engaged in responding to the Law Commission's proposals during the consultation periods that have taken place since 2015.

I saw the engagement process with the Law Commission as a positive opportunity to both help support and influence the need for change in the best interests of the vulnerable adults who come within the scope and need of protection that the current Safeguards provide. It is of my opinion, that the final draft proposals presented by the Law Commission in 2017 appeared to be a welcomed opportunity in balancing a sensible approach to securing a vulnerable adult's Article 5 and 8 Human Rights in ensuring that arbitrary decisions were not made based upon other people's perceptions of adults with any form of mental impairment which could lead to carers/professionals assuming that they lack capacity and thus make all decision on their behalf.

The current system referred to as DoLS, is universally recognised as not being perfect and in many ways is inefficient and overly bureaucratic, leading to unsurmountable costs and creating

waiting lists meaning that many vulnerable adults do not benefit from the protection that the process has to offer. However, in its defence, it is a 'fantastic' tool in promoting an individual's right to choose how they live and to challenge the views of others who (for all the right reasons) have made assumptions of what would be in a person's best interests. It provides the opportunity of ensuring the individual has access to an advocacy which is a vital safeguard for the individual who may otherwise have their views and wishes unheard. And, therefore from a personal perspective knowing that any one of us in society could become mentally impaired and become dependent upon others to help promote our own wishes and views on how we want to live, I am of the strong opinion that further work is required within the current proposals to give the best possible safeguards to vulnerable individuals and that should avoid rushing to get the Amendment Bill into law knowing it carries flaws.

The requirement of having highly skilled professionals referred to as Best Interests Assessors (BIA) have always been crucial in ensuring the legislation was applied and that the individual at the centre of this process has their best interests promoted. Often, this might come into conflict with the local authority, hospitals, care homes and loved ones but it serves to also enlighten, all individuals whether in a paid or unpaid capacity that individuals subject to such restrictive care regimes, should be consulted and their views and wishes taken into account of what is important to them.

When an individual is assessed as possessing capacity, the BIA is often crucial in supporting how care homes and hospitals look at addressing the potential restrictive measures in place, with a view to considering how they can be implemented in a way that meets the need and manages identified risk. More importantly, this promotes the individual's involvement and dignity and provides the individual with a voice to express objection to the care regime in place.

Therefore, whilst the debate continues its journey within the House of Commons concerning what should be included in the Capacity (Amendment) Bill, I wanted to take this opportunity to express my views (albeit rushed due to the short timescale in which to respond), on the current status of that Amendment Bill, with a view to these being considered to support and influence further change for the better.

Areas of concern for consideration for change

The Impact Assessment (dated 29.06.2018) appeared to be worryingly out of touch with the reality of scoping exercise in being able to ascertain the number of individuals that would come under the replacement scheme for DoLS being the Liberty of Protection Safeguards (LPS). My concerns are further reinforced by the recent Equality Analysis produced by the DHSC (December 2018 which comments, *"There is a limited amount of analysis we can do for amendments made to the Bill. This is in part because the data is not available, and we have not been able to communicate and consult on amendments with stakeholders beforehand to gather their input."*

If the above statement is true, then my concern over what I believe to be an under representation of the true number of individuals that should be supported by the new scheme, the cost of implementation and maintenance of such a replacement scheme must also be inadequate. Failing to address this now, means that the main purpose of replacing the existing scheme is futile. Local authorities and Health bodies who will be responsible for ensuring that the LPS scheme is in place, will be overwhelmed with both demand and lack of ability to respond, bringing us back to where we are now meaning that we will not be able to apply the scheme and even where we attempt to apply it we may be under resourced to provide both training to relevant professionals, support

individual who wish to appeal through the Court of Protection and even not being able to provide sufficient IMCAs where required.

I am concerned that nothing has been forthcoming with regard to a revised/new Code of Practice and so professionals, lay-person and Parliament cannot readily see how the proposed new scheme will actually be implemented and maintained. Where is the scope to consult on this if once the Amendment Bill becomes enshrined in law? I fear there will be no opportunity.

This is of particular concern because since the draft Amendment Bill was issued back in July 2018, I have not seen any clarification in writing, of the need for the assessment of identifying all restrictions in a care plan and concluding whether or not they amount to a deprivation of liberty needing to be completed by a professional (both qualified and experienced in this area of work). As stated previously, the importance of the current BIA role is both the independence and expert knowledge they bring to the process, as well as the compassion in wanting to promote what is in the best interests of the individual at the heart of the process.

Clarification of who completes what assessments (e.g. social worker, AMCP nurse etc.) needs to be defined now and not left ambiguous and therefore open to mis-interpretation by both local authorities and health bodies. The task of completing the assessments surrounding identifying the restrictions within a care plan, which amount to a deprivation of liberty and whether the restrictions are necessary and proportionate are complex and require professional judgement to be applied. I ask that you please clarify this in the Codes of Practice.

In keeping with the concern raised regarding who completes the assessments, unless it is because I feel rushed in needing to understand the implications of the draft Amendment Bill that I am missing vital information to inform me of how and what they 3 assessments will look like instead of the current six assessment requirement under DoLS. As the Mental Capacity Act already applies to anyone aged 16 years onwards, it is my understanding that with the LPS scheme also applying from 16 years plus, there will still be a requirement to assess that a young person is of the minimum age as a part of the qualifying criteria. Also, I would have thought that it is lawful to have to identify and consult with a potential Lasting Power of Attorney as dependent upon their level of LPA rights, they can make health and welfare decisions and I would have considered this unlawful to not consult.

Final concern regarding the practical requirement for the assessment process is seeking clarification as to what is actually required in the 'necessary and proportionate' assessment? Currently, within the best interests section under DoLS, consideration is giving to the risks of harm and the level of risk of harm if certain support was not provided with a view to evidencing what less restrictive practices have either been tried or considered, leading to as to why it is in the best interests of the person to receive care that amounts to a deprivation of their liberty. I ask that you clarify this in the Amendment Bill so that there is consistency in application of this assessment and removing any potential misinterpretation leading to litigation against both local authorities and Health bodies.

Please reconsider the decision regarding the omission of Conditions that exist within the existing DoLS scheme and ensure they are included in the final Mental Capacity (Amendment) Bill. These are invaluable in encouraging and in some instances enforcing change to improve the circumstances for vulnerable adults who are subject to and in many cases due to poor mental health, passive with regards to the best interests decisions made by the care providers who may implement restrictive care practices that work best for them and not the individual. Conditions are vital to the existing role of the Best Interest Assessor (soon to be replaced by the role of the

Approved Mental Capacity Professional (AMCP)) otherwise there is a potential that the AMCP role will not be able to challenge and improve what is identified as being in the best interests of the individual.

The role of the Appropriate Person requires further consideration in making sure the role is robust in supporting and protecting the individuals human right to appeal against a deprivation where objecting or identified as not being in their best interests. Currently, there is insufficient detail as to the purpose and implementation of that role or indeed if in all cases an individual has an Appointed person or an IMCA. There should be no grey area with regard to this. If an individual is deemed to lack capacity and is being deprived of their liberty, they should automatically have a representative appointed as there is concern that the persons wishes, or objection will go 'unheard'. I ask that you please address this as a requirement and not an option.

An opportunity to remove the over lapping conflict with the Mental Health Act 1983 was removed from the Law Commissions proposals. This is unfortunate, as it means local authorities and the NHS (as a responsible Body) will continue to be subject to lengthy involvements on determining if the Mental Health Act or Capacity Amendment Bill should be applied and also as is currently, applying both Acts at the same time. Again, this could and should be avoided so that where a lawful deprivation occurs it is subject to one due process. The use of two Acts is unfair and confusing, not only to the individual and their families but to professionals also, and I fear this confusion, which generates costly discussions will continue.

Please consider and confirm what profession group will be eligible for training to become Approved Mental Capacity Professionals along with what the training requirement is likely to look like. This is key to the success of any proposed Amendment Bill in ensuring that professionals are qualified and in place to ensure the requirements of the Amendment Bill are implemented. This will take both a considerable amount of planning, time and cost and will already be at high risk of not being successfully implemented if this is not addressed.

To conclude

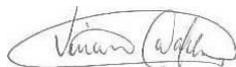
As much as I am in support of positive change to the current Mental Capacity Act, based upon what I have read so far concerning the proposed changes, I am not in support of the draft Mental Capacity (Amendment) Bill as it currently stands, unless the concerns raised above (amongst many more issues/concerns raised by other parties are truly considered for change). Ultimately, for any revised legislation to act in the best interests of individuals that it is designed to protect, it needs to be transparent and easy for all to understand, so as to be successfully implemented and abided by. Failure to provide this (as with the existing Mental Capacity Act), will no doubt lead to vulnerable adults being let down, increased costs and potential litigation against government funded bodies for being set up to fail in the first place.

I have commented during previous consultation periods that I am very much in support of the current DoLS scheme but with modifications to make it more effective in both implementation and effect. I recognise that it is too bureaucratic and costly but could be improved. The proposed LPS scheme is in fear of not building upon 'lessons learned' from the current scheme but rather creating new problems that do not benefit anyone.

I appreciate your time in taking my thoughts, concerns and opinions into consideration especially when I am sure you may have received an overwhelming response to the proposed changes. I continue to live in hope that the House of Commons will prevail in ensuring that some of the vital

elements of the Law Commission's original proposals are reinstated in the final version of the Capacity (Amendment) Bill.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Vincent Duffy", enclosed within a hand-drawn oval.

Vincent Duffy