HOUSES OF PARLIAMENT

Joint Committee on Human Rights

Oral evidence: The right to freedom and safety: Reform of the deprivation of liberty safeguards

HC 890

Wednesday 21 March 2018

Written evidence from witnesses:

- Dr Lucy Series, Research Fellow and Lecturer in Law, Cardiff University

Watch the meeting

Members present: Ms Harriet Harman (Chair); Fiona Bruce; Ms Karen Buck; Alex Burghart; Joanna Cherry; Jeremy Lefroy; Baroness Hamwee; Baroness Lawrence; Baroness O'Cathain; Baroness Prosser; Lord Trimble.

Questions 1–8

Witness[es]: **Graham Enderby**; **Mark Neary**; **Dr Lucy Series**, Research Fellow and Lecturer in Law, Cardiff University; **Alexander Ruck Keene**, Barrister, 39 Essex Chambers gave evidence.

Q1 **Chair:** Thank you so much for coming and giving evidence to us. We are the Joint Committee on Human Rights. We are half the House of Lords and half the House of Commons. There can be scarcely a more important issue than the question of deprivation of liberty, and scarcely a more complex and important one than the circumstances we are looking at here. We are very grateful to you for bringing your very practical experience, your academic experience and your advocacy experience to help us in the situation that we are in now.

Q2 **Baroness O'Cathain:** Good afternoon. The right to live in freedom and safety is central to all our lives. Every one of us wants to be able to do that. The Government are proposing to reform the legal framework that protects this for those who lack mental capacity or the capacity to consent to care arrangements that restrict their liberty. It needs to be reformed. It has been in existence only since 2017, apparently. Do you have views on what the main objectives of the reforms should be?

Alexander Ruck Keene: I am a lawyer who has been working in this field since the Mental Capacity Act came in over 10 years ago, and since the deprivation of liberty safeguards came in in 2009.

The most important thing we need to be thinking about is what we actually want to achieve. From my perspective, the most important thing we want to achieve is to ensure we deliver the right care that properly meets the interests of the individuals concerned. It should properly meet what they want, and we can identify so often what people want. Even if they do not have mental capacity, we can tell. You will hear much more eloquent evidence about that from other people on this panel.

How do we deliver the right care? There may be some circumstances in which that amounts to a restriction of their liberty, and we need to find a framework in which we can authorise it. If we start by thinking, "Oh, hello, how do we deal with deprivation of liberty?", we are already far too far down the line.

> **Baroness O'Cathain:** If you are that far down the line, has there been a lot of research done so that you can relate to the research instead of starting from base? It is going to be different for different people. You say that you can see the cases, but there must a huge number of case reports on this. Is there?
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> **Chair:** Before we come back to that point, Detta, can we hear from the others on the overarching question that you put, which is what the objective should be? You have laid out the starting point: the starting point needs to be the care.

Graham Enderby: It has to be simple. It has to focus on the individuals, where they want to be, where they are content and well looked after. It needs to be easy to run, and easy for the individual to understand and comprehend. The first question is this: is the person in the right place, and if you take them somewhere else will they still be in the right place to best meet their needs? They have to be content and happy. It has to start right at the beginning. Any assessment process is about what is best for the individual. Worrying about whether that amounts to a deprivation of liberty is a lot further down the line.

Mark Neary: There are three aspects that we should bear in mind. I agree with Graham; it is about the fundamental care, to start off with. For me, there are three things. First, what is in place to prevent the person being removed from their normal home into a place where they are seen as deprived of their liberty? Secondly, if the person is unfortunate enough to be in that situation, away from their own home, what puts them at the heart of their care in that place? Thirdly, if somebody is deprived of their liberty away from their home, how can the safeguards be best used to get them out of there as quickly as possible?

Dr Lucy Series: One of the difficulties with the deprivation of liberty safeguards is that we can end up having quite an abstract conversation about a very technical legal term. At the root of all this is a very human question about the power that, often indirectly, the Mental Capacity Act hands to the health and social care professionals to make life-changing

decisions about disabled people. The results of decisions on mental capacity and best interests can affect where a person lives, how they live, who cares for them, whom they have contact with and medical treatment. The Mental Capacity Act is structured in a way that places very, very few checks and balances indeed on that decision-making process, even though these are fundamental human rights concerns.

The deprivation of liberty safeguards have ended being a tool to answer all these very, very different problems. Before we start thinking about these technical legal human rights questions, we need to ask ourselves as people and as a democracy what are the limits to the powers that health and social care professionals should have to make decisions about where people live, whom they have contact with and what medical treatments they have, either if they are not able to consent or if they are actively refusing. That is really what the heart of this debate is about: it is about what checks and balances we need on the Mental Capacity Act itself.

Chair: Bringing this back to Detta's question about the objective, what is the most important objective of any reform?

Dr Lucy Series: It needs to be broader than Article 5 compliance; thinking about deprivation of liberty. It needs to be about a whole range of human rights that are affected by the Mental Capacity Act, ranging from rights to have contact with your family, to choose where you live, to choose how you live your everyday life and to refuse medical treatment. These issues are often at the core of the debate about deprivation of liberty, rather than this quite abstract concept of detention.

Q3 **Fiona Bruce:** That brings us neatly on to our next question, which is about whether the Law Commission's proposals for liberty protection safeguards strike the correct balance between protection of human rights and the need for a scheme that is perhaps less bureaucratic than the current deprivation of liberty safeguards. I do not know whether either of the lawyers wants to kick off with that question. Do you want to continue with your thoughts, Lucy?

Dr Lucy Series: The scheme has simplified a lot of the duplication and odd dead ends that were present in the DoLS. There are definitely measures that will help reduce some of the costs. Following Cheshire West, the sheer scale of what we are talking about here is still going to be very challenging. I do not work for a local authority, so I cannot tell you how manageable that is likely to be.

Chair: Why is the scale challenging?

Dr Lucy Series: Because it involves more than 200,000 people a year. That is a larger number of people who are detained than we have ever seen in this country. It is about three times greater than the number of people detained under the Mental Health Act. This scheme covers only care homes and hospitals. If we expand the scheme to cover supported living, which I fully support and think needs to happen, we are talking about potentially another 30,000 people. This is no criticism of the Law

Commission; it is very, very difficult to think of any scheme of procedural safeguards that can operate without any bureaucracy on that kind of scale.

The real question we need to think about is where those safeguards should be targeted. One benefit of the Law Commission scheme is that it tries to be flexible and to put more safeguards into areas where there is a dispute. The real issue is going to be how "dispute" is defined, who gets to define it and what safeguards are sufficient in those circumstances.

Alexander Ruck Keene: I should declare an interest in that I was a consultant to the Law Commission, but I am not speaking on behalf of the Law Commission. I know the Committee will hear from the Law Commission later.

This may lead into a question to be considered later: the Law Commission proposals start from a point of not seeking to define what a deprivation of liberty is. They pick up every single person in England and Wales who is said to be deprived of their liberty in this context and then seek to provide a framework to authorise the deprivation of their liberty. If you start from that framework, you are into the sorts of numbers that Lucy is talking about.

If someone is deprived of their liberty, to put it crudely there is only so low one can go in the safeguards that can be given. The European Court of Human Rights has developed protections over many, many years to say, "If you are deprived of your liberty, there has to be a whole series of checks". That has developed in a framework of cases about people being detained in psychiatric hospitals or in very extreme circumstances in which you can understand that it is hugely important that you have lots of independence and you get medical expertise to show the person really is of unsound mind. There is a whole series of procedural safeguards that flow inexorably from that.

It may be a question for later, but I would urge the Committee to think about whether that framework applies and should apply to the situation of someone like MIG. The three people who were before the Supreme Court in Cheshire West are people whom the European Court of Human Rights has never thought about at all. They are not detained in any conventional sense. MIG is living in an adult foster placement with a person she considers to be her mummy and who she is devoted to, and she appears to be absolutely content, as far as anyone can tell.

In law—and I am a lawyer, so I like the law to be involved where it has to be—she is logically in exactly the same situation as someone detained in a high-end psychiatric institution. The Law Commission proposals seek to get the best balance they can, given that all these people are deprived of their liberty.

Q4 **Fiona Bruce:** I do not know whether Mr Neary or Mr Enderby wants to comment on the proposals of the Law Commission and striking a balance between protecting human rights and having a workable procedure, not only for the individuals involved but for local authorities. We have to remember we are talking about huge

numbers of elderly people. I live in Cheshire, and I know a disproportionately high number of older people live in Cheshire. There is great pressure on local authorities already, is there not, to manage their care?

Mark Neary: My first encounter with deprivation of liberty was eight years ago, when my son went away for three days' respite and it took nearly a year for him to come back home again. In the year he was away, he was under four consecutive deprivation of liberty authorisations. When I look at the proposals, I cannot help but put them through this filter: if, God forbid, that was to happen again now, would these proposals serve him any better than they did eight years ago? I am not sure they would make an awful lot of difference, to be honest.

Chair: Mark, can you describe the circumstances in relation to your son—his situation, his age and everything?

Mark Neary: Do you mean back then or now?

Chair: I mean then.

Mark Neary: He went away for three days' respite as I had the flu. At the time, Steven was 19. He has autism and severe learning disabilities. When he left home that first day, he was going to a respite unit that he was familiar with. He had been going there once a fortnight for a couple of years at that point. He has autism, so you have to prepare him for change. He did not respond very well to the move, which was a bit abrupt, to be honest. The following day, the care professionals involved in the respite unit thought they could not manage him for the three days, so they moved him on the second day to a local assessment and treatment unit.

From that point on, from that second day, we got locked into this stalemate for the rest of the year. The professional view was this: "Steven's behaviour is difficult, so if it is difficult here it must be difficult everywhere", whereas my position was, "Let him come home and the behaviour will stop". We got stuck in that position for the whole year. As I say, they authorised four consecutive DoLs for Steven while he was away.

Chair: DoLS are deprivation of liberty safeguards.

Mark Neary: Yes. Ultimately, the deprivation of liberty safeguards enabled Steven's freedom, because we were able to access the courts through the very fact the DoL was in place. Even though the judge in Steven's case decided that all four DoLs had been unlawful, the very fact they had been in place enabled him to access the court and then gain his liberty and his freedom.

To go back to the question, when looking at the proposals for the new scheme, are those safeguards and the access to justice still in place? I am a little wary of the idea of going through a tribunal. I do not know, but I do not think that will carry the same weight as the court currently does.

Fiona Bruce: Thank you. That is very helpful.

Graham Enderby: I worry that there is a lack of independence about the procedures. Under the deprivation of liberty safeguards, the people

commissioning the care, or even running the care home that someone is put in, authorise the deprivation of liberty, provide the people who authorise the deprivation of liberty and then conduct the reviews. It is the same authority. They are also relied on to appoint people to represent the individual, whether they be advocates or family members. Everything is within their control.

On paper, if they are going to make these changes to someone's life and conduct the proposed moves to living elsewhere, it is fine if they look at that right at the very beginning, not if they put someone somewhere and then worry about it afterwards. If you do that, you still have to have a lot of independence and trust.

Over the years, I have seen so much misunderstanding of the Mental Capacity Act and the deprivation of liberty safeguards among professionals that I sometimes worry that these will not be as good as they could be without the independence really being thrust in there.

Baroness Hamwee: I wonder if I can take half a step back to the previous round of questions.

Of course, I understand what you mean about the starting point being what is in the best interests of the individual; it might be hard to find anybody who disagrees with that. But views of what is in someone's best interests often vary. How in practice is that different from the current arrangements and the proposals that we are looking at from the Law Commission? I wonder if the two lawyers have any comments on that.

Dr Lucy Series: That is exactly the concern. If everyone agreed on best interests, we probably would not be in this room. The problem is that the person themselves very often has different ideas from the professionals. They have a right to challenge decisions that will potentially have a serious impact on their lives. Then the families might disagree. Sometimes you get disagreements between public bodies, as we have seen in cases in the Court of Protection.

This is the question: what happens when we have these disagreements? Under the DoLS, you have independent assessment, but that does not necessarily provide any dispute resolution or finality, although it might in some cases. I am sure people that working on the front line of the deprivation of liberty safeguards can tell you stories about where they have used the best interest assessment process or put conditions on detention authorisations to try to improve someone's circumstances, which has helped to resolve any disputes.

When they are not resolved, what is the mechanism there? It is access to the Court of Protection. Our research at Cardiff University suggests there is a really, really serious problem there. There are no official figures on this, but our best guess from the figures available is that fewer than 1% of applications and authorisations under the deprivation of liberty safeguards end up in the Court of Protection. By comparison, the proportion of applications to the tribunal under the Mental Health Act is 47% of the number of overall detentions. There is obviously a huge problem with people accessing justice.

Part of the problem is the way the case is meant to get to court. There is general recognition that the detained person will probably not be able to initiate the process, so it is left up to their representative. Very often, their representative is a family member, who may support the care plan, even if the person objects, because they may have helped to set it up, or they may not support it but they may not understand how to exercise that right.

Getting to the court is a very complex process. It is designed by lawyers for lawyers. It is very different from the tribunal process. It is very daunting. It is also extremely costly. Our research found that these cases cost on average around £25,000. They could cost hundreds of thousands in certain cases. We found that the average duration of a case was seven months. Half of the cases lasted longer than that. In the sample that we looked at, 8% of people died before they got final determination from the court, because this is a population that is much older and very often ill.

At the heart of the problems with the DoLS is a very, very serious problem with access to justice. While some elements of the Law Commission's proposals, including greater access to advocacy, will help that, the buck still stops with the representative. That does not seem to have worked under the DoLS, and I am not sure why it would work better this time. The Law Commission and the Government have left open the question of where the appeals should go to, whether to a court or to a tribunal, which is a huge question.

Baroness Hamwee: That is very helpful, if depressing. Thank you.

Q5 **Lord Woolf:** Building on the answers you have given, Dr Series, what would you like to see? If you had the Law Commission's job, what would you say to us is the ideal solution?

Dr Lucy Series: I think I should immediately resign. It is very difficult.

Lord Woolf: Perhaps we should resign.

Dr Lucy Series: One of the Law Commission's problems is that the question of what a court does when it reviews deprivation of liberty is not as straightforward for the Court of Protection as it is for the tribunal. It is not a case of saying, "Shall we just let this person go home?" When we looked at Court of Protection files, we found that often these cases, which on the face of it are about detention, are actually about things such as medical treatment, contact with a loved one that is restricted by professionals, where somebody lives and whether they have capacity to consent to sex. If they do not, they will be restricted, to prevent that happening.

This is the difficulty. If we create a separate tribunal process for detention, what do we do about all the issues that are really at stake? It is often very difficult to separate detention from these broader questions about where a person lives and their other fundamental human rights. One solution would be effectively to try to tribunalise the Court of Protection—to keep many members of the judiciary, who are very expert

in this area, but to look at the processes of the tribunal, many of which are more accessible, more efficient, more informal and give the person themselves greater opportunities to participate. That is what I am trying to do.

Lord Woolf: That is the main difference you would like to see. Could I ask your colleague whether he agrees with that?

Alexander Ruck Keene: As Dr Series was saying, the real issues at stake are residence, care and contact. They are crucial things that do not necessarily have very much to do with deprivation of liberty per se.

In terms of access to justice and making sure that people can challenge things that go wrong, deprivation of liberty is, on the one hand, a massive distraction and a red herring. On the other hand, one can understand why Lady Hale, who gave the lead judgment of the majority in Cheshire West, felt that if we flag up as being deprived of their liberty this very vulnerable cohort of people about whom decisions are made, not necessarily properly, we will ensure that we get a set of eyes put on them. It was saying, "Please make sure we get people to look at them".

There is a very interesting—lawyers should not use the word "interesting"; it is not helpful for anybody else—there is an important passage in Lady Hale's judgment where she talks about the policy reasons for having a very wide definition of deprivation of liberty, which are about the vulnerability of this cohort of people and the need to make sure decisions are made about them in their best interests.

At one level, I completely agree with Dr Series that we need to delink arguments about whether these people are deprived of their liberty from what decisions are being made by people in positions of power—health and social care professionals—who are not necessarily trying to exercise it malignly. We need to make sure that, where there are genuine disputes or issues, people are enabled to get to court quickly. That is a hugely important issue. It is a question of how you make sure the court is working efficiently and people are able to get there.

Lord Woolf: Say you had a tribunal set up that was very conscious of the need you have identified, and you got to the position of having a generous and liberal approach to what deprivation of liberty is. The tribunal, in so far as you can make this process cheap, should be specially constructed so as to meet this need.

I want your help on this, because I have no practical experience or knowledge of it. In view of the size of the problem, it seems very important to have a skilled tribunal, which does not have to start at the beginning each time to learn what is needed, with appropriate expert help available from the state, which can be challenged if necessary.

Alexander Ruck Keene: You will hear from the Law Commission next week, I think.

In relation to what body there should be access to, the Law Commission said that, because the Government are considering a review of tribunals more generally, it will not make a specific recommendation, save to have

a holding thing saying that it should go to the Court of Protection. It said, which I would entirely endorse, that any mechanism must take the best bits of the tribunal—in other words, accessibility, informality and speed—but make sure there is expertise.

An important aspect is the idea that there may be situations in which not only do you need a legal chair and a medical expert, as in a mental health tribunal, but you might have someone with lived experience or a carer, so you have a body of expertise to recognise that this is not just a legal or medical issue but a range of things about a human being. If you can get such a tribunal, it does not matter what you call it when it comes to achieving what you want. It is a combination of expertise across the board.

> **Lord Woolf:** Having heard what you have to say, my worry is that by leaving Government as they are now, looking at tribunals generally, this will not be given the same attention as if they were asked to look at this specifically. In view of what we have heard about the number of cases and the amount involved, it seems to me that it might be better separated out for consideration. What do you say about that?

Dr Lucy Series: I agree. The point I was trying to make earlier about using tribunal processes within the court is that, if you hive off deprivation of liberty from the rest of the Mental Capacity Act, the tribunal will find its powers too limited to review what is really at stake. If the Government were to embark upon a consultation, and I hope they do, I would hope that it would look at the future of dispute resolution under the Mental Capacity Act as a whole, not just the question of deprivation of liberty, because I do not think it can be decoupled.

Alexander Ruck Keene: I would just flag up one hugely important issue, which is legal aid. There is a very perverse incentive to make sure that you find an enormous cohort of people to be deprived of their liberty. The Government will then agree that if you are deprived of your liberty you should get non-means-tested legal aid to challenge it. Then you can smuggle in to challenges to deprivation of liberty—and in reality it is smuggling in—a whole host of side issues, which may be aside from the deprivation of liberty but are really important.

For instance, contact narrowly has nothing to do with deprivation of liberty but on a day-to-day basis is probably much, much more important for the human being involved. That is a perverse incentive, on one view, to make sure that the definition is kept very wide. Dr Series and her colleagues' research from Cardiff was so important. Without access and without legal aid, the ability to access any form of justice is more or less nugatory for most people.

> **Lord Woolf:** Thank you very much. I should have declared two interests. One is from the past, having been involved in a case concerning this problem, and the other is that I have an autistic grandchild.

Chair: Can I follow up on something Mark said about the length of time it took? Was that because you were just in a queue waiting to get to court, or did you have a number of applications that were being knocked back?

Mark Neary: For the first three months that Steven was away, he was not allowed any legal redress at all.

Chair: There was nothing you could do, because there was no order in place to challenge.

Mark Neary: Yes, for the first three months. The first deprivation of liberty authorisation happened after he had been away for four months. I had never heard of them. It was suddenly presented one day that they were doing this authorisation on Steven. Although I was appointed his representative, it took a couple of months to gain the knowledge about what part I had to play in that.

The fundamental reason why we did not get to court for such a long time was because we were blocked from having an independent mental capacity advocate. Although the deprivation of liberty scheme says that both the person detained and their representative are entitled to an independent advocate, it took from April until the fourth DoL being authorised in November for the local authority to refer us for an advocate. To be honest, without that independent voice, the person detained and their family are not really going to get anywhere.

Baroness Lawrence of Clarendon: Lucy talked about the cost and that it can cost upwards of £25,000. Who pays for that and where does it come from? You just mentioned legal aid. Were they able to use legal aid to get themselves represented?

Dr Lucy Series: The cost estimates that we pulled together are drawn from separate sources. Using the Freedom of Information Act, we asked local authorities how much they were spending on these cases, and they told us that it was from around £10,000 to £15,000.

Chair: This is about the process, not about the care.

Dr Lucy Series: This is just about the case. Most of those costs are spent on in-house lawyers and barristers. Quite a small proportion, between £1,000 and £3,000, is on expert reports. Then we got access to the legal aid certificate costs. The median cost for a legal aid certificate was £20,000 for a personal welfare dispute, but markedly less—more like £7,000 or £8,000—for a deprivation of liberty case.

Where people get legal aid, that is what that would cost, but in cases where people are not considered to be deprived of their liberty and are not eligible for legal aid, they will potentially pay out of their own purse. The cost would be higher still for privately paying people, because the fees that solicitors can charge are not capped. They are prohibitive for most families.

Q6 **Baroness Prosser:** I did not want to forget this point about the make-up of tribunals. We have something like 60 years of experience of the employment tribunal process, both at first stage

and at appeal level, where there is a qualified lawyer, or secondly a more senior judge, with a person on one side of them who has long experience of employment from the employer's point of view and a person on the other side with that experience from the employee's point of view.

I sat on the employment appeal tribunal for 11 years with very learned people who did not have the first idea about what was going on in a day-to-day way and would have owned up to that. The proposal should be for hearings of this nature to be heard by somebody who completely understands the law and other people who absolutely understand what it is like day to day.

The point was made that you are suddenly faced with a legal requirement and you have never in your life seen such a thing before. How do you deal with that? The common sense that comes from that needs not to be forgotten. In the new process, it sounds to me like that it may be able to deal with what has been and will be really subjective decision-making. You can look at what precisely you fit into a legal framework, but those decisions and thought processes will almost certainly be pretty subjective.

Chair: Graham, what do you think about the question of a tribunal versus a court, when you get that far down the line?

Graham Enderby: I have no experience of tribunals apart from attending an employment tribunal once. I favour the court, frankly, because I do not know what the tribunal is going to look like or what it is going to be made up of. There are a number of streets you could go down. You could have a carer or someone experienced in care. It needs to be somebody completely independent. It probably needs somebody legal, but who is going to be the professional? I have no clue.

This is what worries me about assessments. Are you getting the right people to do assessments? Frankly, it does not matter how many professionals they have doing assessments as long as they are the right ones. It does not matter whether you have a psychiatrist, a psychologist or anybody else if they do not know anything about autism or assessing someone who has autistic needs. There need to be the right people.

To extend that, when you are considering a tribunal system, you need the tribunal to be made up of people who understand the type of problem they are dealing with.

Baroness Prosser: You could have an independent expert.

Q7 **Alex Burghart:** I would like to take us back to what Alex said at the start. I thought that was very grounded. If this is about delivering the right care in the right way, and the care that people, and presumably their carers or families, want, do you think we can get to that position without a new statute?

Alexander Ruck Keene: Do you mean a new statute across the board, or one about what deprivation of liberty is?

> **Alex Burghart:** That is for you to tell me. It strikes me, as a lay person listening to this, that the current system is a pig's breakfast. We can try to push it about in order to get a quick fix, and that may be desirable in the short term, but, if there are fundamental problems in the way the legislation lies, do we need to go through Parliament in order to fix the primary legislation?

Alexander Ruck Keene: The short answer is absolutely, yes. This cannot be resolved without primary legislation. The slightly longer answer is that we need to make sure that primary legislation is placed in its context. To take social care, for example, you already have the Care Act. The Care Act should have an annual review. If you do not have the ability to take part in that annual review as the person receiving services, you are supposed to get an advocate to assist you. There are already supposed to be checks on the care that is being given. There are already mechanisms in other parts of the law that are meant to be looking at these sorts of things. You are meant to get advocacy support.

I am very, very deliberately using the word "meant", because there is a gap, as was made very clear by the Law Commission, between what is said to be happening in other areas of the law and what actually happens, but for one second let us just assume everything happens as the law says it should do. You have checks across the board in a whole series of different ways. If you take that framework, you have already gone a long way to answering the questions about what we are doing to make sure that the right care is being delivered. It is really a question of making sure that people actually get Care Act reviews, NHS reviews and advocacy support. Then we can be much more relaxed as a society.

To put it the other way round, we should focus much more as a society and in democratic decisions on saying, "Of that group of people, is there a group of people who are subject to care that is being delivered against their will in circumstances that are against their will?" They may be in institutions, which are classically where we have seen that being delivered, but not necessarily.

We have shut down so many institutions: long-term and learning disability places. We as a society have put people in supported living. They could very well be there against their will. Frankly, you could be cared for in your own home in circumstances where you do not want to be. We need a system that lets us put real scrutiny on those people and say, "These are the people we are most exercised about, because they are the people who are actually deprived of their liberty". They are the people for whom you want to be asking, "Why is this being done against this person's will? Could we do something that means it is not against this person's will?"

Given where we have got to as a society in this country, I fear that we have ended up in a position where anybody who is getting complex care is very likely to be considered to be deprived of their liberty, because

complex care means that they are likely not to be free to leave the place they are in and are likely to be under continuous supervision and control, which is the objective element of confinement. It is likely that they would not be said to have the capacity to agree to that. It is very likely that the state will have some involvement.
Once you have those three pieces in place, you have deprivation of liberty according to the law. In that definition, you have no calibration for whether this is going on against this person's will. I would ask you to ask Mark about his son's situation, where his son is said to be deprived of this liberty. After the amazing battle fought to get him home, he is said to be deprived of his liberty. He should be getting exactly the same level of protections, procedural protections and all the things that he should have been getting in a situation where he was being intensely coerced and taken away from his father. We have slightly lost something there, which why it is very, very important democratically that we take a step back and ask where we want to go. To my mind, it is about where something is going on against the person's will.

Q8 **Chair:** Can I pick up on the point about extending the safeguards beyond care homes and hospitals into domestic settings, and ask you specifically to deal with that point?

Mark Neary: I agree with Alex that care is a foundation stone of this.
On the things that Lucy listed a few minutes ago, we currently have legislation—the Mental Capacity Act, the Human Rights Act and the Care Act—that covers them. I struggle to get my head round how we have gone from eight years ago when Steven was in an assessment and treatment unit and was deprived of his liberty to our current encounter with the deprivation of liberty scheme, which is going on as we are talking.
Steven is currently being assessed for whether he is being deprived of his liberty in his own home. Since October 2016, he has had his own place. He is very much king of his castle in his own place. He requires 24/7 support, which is either me or a member of the support team. It was decided last week that Steven is being deprived of his liberty in his own home on two bases: first, that he is not free to leave, because he needs support workers to go with him when he goes to the shop or goes swimming; and, secondly, that he is under constant supervision.
I find it very difficult to square that one. When I see him going around his everyday life, interacting with his support workers and getting them to make a toasted cheese sandwich for him, that does not feel to me like supervision. That does not feel to me like a deprivation of liberty. When I compare it to eight years ago, that was an obvious deprivation of liberty. He was kept away from his own home. Seclusion was part of the deprivation at times. Physical restraint and medication were part of the deprivation at the time. None of that exists now in his own home, but we have come down such a crazy road in the last eight years that we cannot

tell the difference between deprivation of liberty in an institutionalised unit and in someone's own home.

Chair: Do you think the deprivation of liberty safeguards regime or whatever replaces it should not apply when somebody is living in their own home or living with their family?

Mark Neary: I acknowledge that some people living in their own home, with support or with their family, are experiencing some sort of deprivation.

Baroness Prosser: Has Steven expressed a desire or a frustration at not being able to go out on his own?

Mark Neary: No, not at all. When he was in the unit, he absconded several times, but he was trying to escape. He was found in places where he was trying to find his way back home. It was clear what his motivation was; he was trying to escape. I do not think that the thought of escaping from his own home even enters into his head. We live across the road from my sister. Once he went over, and when I asked him, "Where have you been, Steven?", he said, "I have been for a chat with Uncle Wayne". That was not escaping. I find it very difficult to identify the regime that he was under then with the current regime.

Graham Enderby: We have gone so far overboard after this judgment, it is ridiculous, frankly. People living in their own homes have often consented to be in their own homes: "Never put me in a care home. I'm going to stay here as long as I want". They already have a care package that suits them. Just because their memory or their capacity goes, they are automatically deprived of their liberty now. That overrides the Mental Capacity Act in terms of past and present wishes. It is an interference in life, and the responsibility of the state may be for two hours a day, because you get four half-hour visits if you are lucky, never more. Who is responsible for the other 22 hours of a day? It is disproportionate. People should be living in their own homes and accepting the help that they need.

The problem is also who is consenting to what or who has the capacity to decide what. Everyone is getting a blanket response: "You have no capacity because you cannot answer a particular question at a particular time in a particular way". They do not look at the individual, how they communicate or how they express any form of consent or contentment. Before H was taken to the hospital, he had learned lots of stuff while at home. He had come out of his shell, he was on a known medication.

He gets taken back into hospital. He does not want to be there. He tries to get out. They medicate him, with 11 changes in medication in three months just to control him. He gets out after the Appeal Court judgment. He comes home. He changes back, in two days flat, to showing contentment.

That is the history of it. He can show that he is content and whether he has given consent to where he wants to be. Since Cheshire West, questions have been raised as to whether he is deprived of his liberty living at home. There is so much evidence of his contentment and the

way he consents to things, but in the way it is written down, a capacity assessment might say that he is deprived of his liberty.

Chair: Where have you got to in the process?

Graham Enderby: He was found not to be deprived of his liberty living in his own home. He does not meet the criteria for being under constant supervision, or so the best-interest assessors decided. That is lucky, because no one at the Department of Health had envisioned, when they wrote the code of practice after HL's case, that he would ever be deprived of his liberty living in his own home. When they drew up all the guidelines and altered the Mental Capacity Act, not one member of that committee apparently, or so I am told by the person who chaired it, thought for a moment that he was deprived of his liberty living with us. Now it has just expanded into such a preposterous mammoth.

You have to bring back a sense of proportion and look at how people live their lives and how they want to live them. The language makes the family think, "God, the person is imprisoned. How do I deal with that?" The language of the deprivation of liberty safeguards, when they first came out, should have said at the very least: "safeguards for people being deprived of their liberty". Give it a sense of ordinary language, in such a way that families and carers can address it in English and understand what it is about. The best thing about the Law Commission's proposal is to provide advocates for the families right at the beginning of the process, so they understand what is going on and stand the best chance.

Mark Neary: Something has gone terribly wrong when something that should be viewed as a sensible care plan is now viewed through this lens of depriving somebody of their liberty. In Steven's case, his care enables his liberty completely, not the opposite. He would be more likely to be deprived of his liberty if he did not have those aspects of his care plan in place.

Chair: It is not about the locked door for him or anything.

Mark Neary: No.

Graham Enderby: You can take a residential home full of people with learning disabilities, who may or may not be able to consent to aspects of their care or where they live, but they all like social activities. They love to go to the pub, they love to go bowling, they love to go to discos and they love to go out for a meal. They are enabled to do that on a regular basis because they have support that stops them getting ripped off or run over, to put it frankly. Surely, in normal common sense, enabling people to do things that they want to do at a time they want to do them cannot contribute to a deprivation of their liberty just because they need a little support. Deprivation is not being allowed to do that.

Baroness Lawrence of Clarendon: Were you just talking about your son at home?

Graham Enderby: Yes. He is the person who lives with us and we look after.

Baroness Lawrence of Clarendon: I wanted to ask how it is for him. It sounds as though you were saying, "Now he does not need us and is making decisions for himself". Is that what you were saying?

Graham Enderby: He can decide for himself on a day-to-day basis what he wants to do, what he wants to eat and when he wants to do things. Yes, he would not be living in a care environment if he did not need quite a lot of support. That is completely different from living under a regime. We do not have staff looking after anybody. He just lives as a member of the family.

Baroness Lawrence of Clarendon: Is he more independent now?

Graham Enderby: He is much more independent in how he expresses himself, because he is not on loads of medication in a hospital. He has learned a new life. He has learnt how to communicate. He is non-verbal, but he has learned lots of other ways of communicating: indicating whom he likes to see, whom he does not like to see, and how he likes to run his day.

To the question of whether he could function on his own, probably not after the fridge was empty, but he can make himself quite clear about what he wants and when he wants it.

When strangers come to assess someone for capacity, it is a very short exercise based on one meeting. For people who are on the autistic spectrum, that is going to be an absolute nightmare and no one is going to deal with it. An IMCA has a certain length of time to work on a decision like that, with guidelines, before the case is supposed to be completed. I have refused to do that as an IMCA, because to get to know the individual and find out what he wants and what he is really thinking is going to take a long time, since he is so profoundly autistic.

You have to adapt to what is going on with the individual you have in front of you. I suspect that if I was to go round and knock on Steven's door, it would take a long time for him to accept who I was and for me to understand how he was communicating. I do not think you can send a stranger to do these tick-box capacity assessments on an individual personal basis.

Chair: Thank you very much indeed, all of you, for bringing your very diverse but very relevant experience to us, and for your written evidence as well. Thank you very much indeed for helping us with the inquiry.