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cc. Ian Cheeseman

Wednesday 16th October 2019

Response to consultation on draft Detention Services Order XX/2019 Mental Incapacity / Disability in Immigration Detention

Dear Shadia,

Many thanks for the opportunity to provide a response to the consultation on Detention Services Order (DSO) XX/2019. We made initial submissions to this consultation on 25th September, but are re-submitting in light of the meeting Ian Cheeseman kindly held with ourselves and other NGOs on 8th October. I would be grateful if you could disregard the submission of 25th September and treat this letter as our response to the consultation.

Detention Action welcomes the drafting of this DSO in terms of consideration being given to this major issue within detention. The detention of people who lack mental capacity, and inadequate support and protection for people where this identified after they have been detained, are of very serious concern. When we contributed to the consultation on the proposed changes to the Detention Centre Rules earlier this year, we highlighted the absence of detailed mechanisms for identifying and supporting those who lack capacity as a major shortcoming of the revised Rules.

However, we have serious concerns about the content and emphasis of this draft DSO as it stands. We believe that the DSO should be substantively reconsidered along with wider consideration of the mechanisms to identify and safeguard those who lack capacity; these should include provision of access to appropriate independent advocates.

Firstly, we have fundamental concerns about the framing of the DSO as a tool for 'management' of those who may lack mental capacity, and the focus on 'making reasonable adjustments' for clients in this situation, presupposing that their detention will continue. We believe that anyone who lacks mental capacity is clearly vulnerable, and that no vulnerable person should be detained. It is difficult to imagine what 'reasonable adjustments' could be made that would make continued detention appropriate.

Secondly, the DSO does not introduce a system for provision of suitable independent advocates for those who lack mental capacity. The cover letter to the consultation states that consideration around representation is ongoing. However, finalizing this DSO without further work on advocates having been progressed would appear to be a seriously flawed approach. While arrangements for independent representation for those who lack mental capacity remain non-existent, clients in this situation are being discriminated against because they are not being provided with the support needed to challenge their detention.

Thirdly, the wording of the DSO does not establish a sufficiently low threshold for concerns about mental capacity to be raised to an appropriate professional for an assessment. The statement in paragraph 4 outlining the principle 'that individuals should be assumed to have capacity unless it is established otherwise' and that 'simply because someone makes a decision (or decisions) that appear unwise, this does not necessarily mean that they lack the capacity to make that decision' is technically a reasonable position. Respect for an individual's autonomy and self-determination is of course vital. However, we are concerned that the steps described in the DSO, specifically in paragraphs 7-10, could lead to strong indicators of mental incapacity being overlooked or 'explained away' in the light of other circumstances. Paragraph 6 states that only specific trained professionals can conduct capacity assessments, but we would argue that this principle is ambiguous across the DSO and that this ambiguity could be dangerous. The last line of paragraph 10 states that 'if there is any doubt about the individual's capacity after following this guidance, a referral to Healthcare for a professional assessment should be made.' We believe that any serious doubts about an individual's mental capacity should result in a referral to a professional for assessment. The guidance as currently phrased invites the possibility that staff not qualified to make the appropriate assessment reach the incorrect conclusion that there are no capacity issues, and therefore fail to refer on a vulnerable person.

We were concerned by the suggestion, at the recent meeting, that there are limits to the resources that the Government can devote to this issue when there is an absence of evidence of significant numbers of people detained who may lack capacity. Clearly, current mechanisms for identifying and assessing people in this situation are inadequate and therefore inevitably evidence of the issue is limited. However, we at Detention Action encounter these concerns regularly and we are sure that a number of other NGOs who support people detained would comment similarly. More importantly, however, we do not believe that limited resources are a sufficient reason for a failure to provide adequate support and protection for people detained. One person without mental capacity being held in detention is clearly one person too many.

In addition, we would like to make the following comments in relation to particular parts of the DSO:

13: To reiterate the point, it is hard to envisage what adequate 'reasonable adjustments' could be made to make detention an appropriate place for someone who lacks capacity. At the very least, a person in this situation requires an independent advocate and as stated above currently there is no system for providing this. The DSO does not explore how people identified as lacking capacity can obtain appropriate legal advice and representation.

14: We would reiterate that no vulnerable person should be detained. Any consideration of an individual's potential vulnerability should be a transparent process with a decision letter stating the reasons if detention is maintained. If an individual is assessed as lacking mental capacity, this should

be considered as level 3 evidence under the Adults at Risk policy and should lead without delay to the person being released.

15: The wording here should perhaps reflect the fact that an individual is unlikely to self-declare concerns about their own mental capacity.

16: The Adults at Risk policy currently relies on individuals providing evidence of their vulnerability; people who lack capacity cannot be expected to do this. This should be reflected in the DSO.

19: We are aware of significant and ongoing delays with a number of aspects of healthcare provision within the IRCS, and particularly with the Rule 35 process. The DSO should clarify further the expected timescales in terms of a healthcare response, and set an expectation that capacity assessments should be prioritized.

21: A person lacking mental capacity may not always be in a position to agree to or understand a care plan. This is one of a number of areas where having an advocate is important.

Please do not hesitate to contact me if you would like me to clarify any of the points raised, or if we can in any way further assist this consultation.

Yours sincerely,

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