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Clerk  
Ad hoc joint committee on the Mental Capacity Bill  
Room 410  
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15 December 2015

Dear Kathryn

## **MENTAL CAPACITY BILL – DEPARTMENTAL AMENDMENTS**

Further to the Ad-hoc Committee meetings on 23 and 30 November, the Department of Justice (DOJ) has further considered the issues of psychological harm and restraining orders for individuals who are unfit to be tried. New amendments have now been drafted in respect of these two particular issues, the detail of which is set out in the annexes to this letter for the Committee's consideration.

The DOJ would wish to draw the Committee's attention to the following:

### **Psychological harm**

At the Committee session on 23 November, it was agreed that "psychological harm" should be added to clause 166 provided it was of a serious nature, and the amendments to the clause, along with an accompanying explanation of their effect, are set out at **Annex A** to this letter. DOJ has also taken the opportunity to clarify what is meant by "harm" in Parts 9 and 10 of the Bill, that is to say, whether it means physical or psychological or both.

### **Restraining Orders**

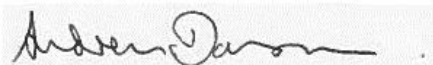
At the Committee session on 30 November, the issue of the availability of restraining orders for individuals found unfit to plead was discussed. The DOJ has considered the matter and has concluded that a restraining order is not currently available under Article 7 of the Protection from Harassment (Northern Ireland) Order 1997 ("the 1997 Order") when an individual has been found unfit to plead. This is a similar position to the one in England and Wales, highlighted by recent decision of the Court of Appeal (E&W) in the case of R. v Chinegwundoh, which held that a finding of unfitness was

neither a conviction nor an acquittal, so no power was available to make a restraining order under the Protection from Harassment Act 1997.

Therefore, new clause 207A – set out at **Annex B** to this letter – amends Articles 7 and 7A of the 1997 Order, in order to allow the courts to sentence an individual to a restraining order where that individual has been found unfit to plead.

I hope that the information provided in this letter and in the accompanying annexes will assist the Committee's consideration of the proposed Departmental amendments.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Andrew Dawson", is written over a light grey rectangular background.

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## ANNEX A – PSYCHOLOGICAL HARM AMENDMENT LIST

**Clause 137**, Page 76, Line 39

After first 'serious' insert 'physical or psychological'

**Clause 137**, Page 77, Line 2

Leave out sub-paragraphs (i) and (ii) and insert 'the likelihood and seriousness of the harm concerned;'

**Clause 141**, Page 78, Line 25

After 'preventing' insert 'physical or psychological'

**Clause 142**, Page 78, Line 38

After first 'serious' insert 'physical or psychological'

**Clause 142**, Page 79, Line 1

Leave out sub-paragraphs (i) and (ii) and insert 'the likelihood and seriousness of the harm concerned;'

**Explanation: Clauses 137, 141, and 142 – which cover the power to remove a person from a public place to place of safety, and their subsequent detention at that place of safety – have been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.**

**Clause 143**, Page 79, Line 27

After 'serious' insert 'physical or psychological'

**Clause 143**, Page 79, Line 31

Leave out sub-paragraphs (i) and (ii) and insert 'the likelihood and seriousness of the harm concerned;'

**Explanation: Clause 143 – which sets out the criteria the criteria for transferring a person from one place of safety to another – has been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.**

**Clause 163**, Page 88, Line 38

After first 'serious' insert 'physical or psychological'

**Explanation: Clause 163 – which deals with remanding an individual to a hospital for treatment – has been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.**

**Clause 166**, Page 91, Line 39  
After 'physical' insert 'or psychological'

**Clause 166**, Page 92, Line 6  
After 'of' insert 'physical or psychological'

**Explanation: Clause 166** – which deals with detaining an individual under a public protection order – has been amended so that the potential of the individual to create a risk of serious “physical or psychological harm” to other persons must be considered.

**Clause 167**, Page 92, Line 28  
After 'physical' insert 'or psychological'

**Clause 167**, Page 92, Line 32  
After 'of' insert 'physical or psychological'

**Explanation: Clause 167** – which deals with imposing a restriction condition upon an individual detained under a public protection order – has been amended so that the potential of the individual to create a risk of serious “physical or psychological harm” to other persons must be considered.

**Clause 170**, Page 93, Line 30  
After 'physical' insert 'or psychological'

**Explanation: Clause 170** – which deals with the ending of restriction conditions imposed upon an individual detained under a public protection order – has been amended so that the potential of the individual to create a risk of serious “physical or psychological harm” to other persons must be considered.

**Clause 173**, Page 95, Line 24  
After 'serious' insert 'physical or psychological'

**Explanation: Clause 173** – which sets out the conditions for giving a hospital direction – has been amended so that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.

**Clause 178**, Page 99, Line 5  
After 'physical' insert 'or psychological'

**Explanation: Clause 178** – which sets out the conditions for discharging an individual subject to a public protection order without restrictions from detention – has been amended so that the potential of the individual to create a risk of serious “physical or psychological harm” to other persons must be considered.

**Clause 183**, Page 100, Line 41  
After 'physical' insert 'or psychological'

**Explanation: Clause 183** – which covers the conditions for the continuation of a public protection order without restrictions – has been amended so that the potential of the individual to create a risk of serious “physical or psychological harm” to other persons must be considered.

**Clause 190**, Page 104, Line 23  
After 'physical' insert 'or psychological'

**Explanation: Clause 190** – which sets out the power to recall a person who has been conditionally discharged from a public protection order with restrictions – has been amended so that the potential of the individual to create a risk of serious “physical or psychological harm” to other persons must be considered.

**Clause 196**, Page 107, Line 16  
After first 'serious' insert 'physical or psychological'

**Explanation: Clause 196** – which deals with the transfer to prison of a person detained in hospital under a hospital direction – has been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.

**Clause 209**, Page 113, Line 26  
After first 'serious' insert 'physical or psychological'

**Explanation: Clause 209** – which sets out the conditions that must be met in order to exercise the power at clause 208 to transfer a person serving a custodial sentence to hospital – has been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.

**Clause 213**, Page 115, Line 14  
After first 'serious' insert 'physical or psychological'

**Explanation: Clause 213** – which deals with the duration of a direction made under clause 211 to transfer a civil prisoner or immigration detainee to hospital – has been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.

**Clause 216**, Page 116, Line 29

After first 'serious' insert 'physical or psychological'

**Explanation: Clause 216** – which deals with the duration of a direction made under clause 214 to transfer a person remanded by a magistrates' court to hospital – has been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.

**Clause 219**, Page 118, Line 20

After first 'serious' insert 'physical or psychological'

**Clause 219**, Page 118, Line 36

After first 'serious' insert 'physical or psychological'

**Explanation: Clause 219** – which deals with the duration of a direction made under clause 217 to transfer certain other detainees to hospital – has been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.

**Clause 220**, Page 119, Line 32

After first 'serious' insert 'physical or psychological'

**Explanation: Clause 220** – which sets out the conditions for transfer to a hospital under clauses 211, 214 and 217 – has been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.

**Clause 230**, Page 125, Line 12

At end insert 'or psychological'

**Explanation: Clause 230** – which provides an explanation of the “prevention of serious harm condition” for the purposes of clauses 228 and 229 – has been amended so that the potential of the individual to create a risk of serious “psychological harm” to other persons must be also considered in addition to serious physical harm.

**Clause 234**, Page 127, Line 17

After first 'serious' insert 'physical or psychological'

**Explanation: Clause 234** – which sets out the powers of the Tribunal in respect of hospital directions and hospital transfer directions – has been amended to clarify that the potential of the individual to create a risk of serious “physical or psychological harm” to himself must be considered.

**Clause 282**, Page 152, Line 31

Leave out 'from serious physical harm'

**Explanation: Clause 282 – which deals with the provision of special accommodation for persons that require care of treatment in conditions of special security for the protection of other persons – has been amended so that the words “from serious physical harm” have been removed, to allow for the detention of individuals who might pose a risk of “serious psychological harm” to other persons.**

**Clause 293**, Page 157, Line 9

After 'physical' insert 'or psychological'

**Clause 293**, Page 157, Line 11

After '(b)' insert 'except in references to physical harm,'

**Explanation: Clause 293 – which provides a definition of “harm” for the purposes of the Bill – has been amended so that the potential of the individual to create a risk of serious “psychological harm” is included within the scope of the definition.**

## ANNEX B – RESTRAINING ORDERS AMENDMENT LIST

### New clause

After clause 207 insert-

#### *‘Restraining orders*

#### **Power to make restraining order following finding of unfitness to plead etc**

**207A.**—(1) In Article 7 of the Protection from Harassment (Northern Ireland) Order 1997 (restraining orders on conviction) (“the 1997 Order”)—

- (a) in the heading at the end insert “etc”;
- (b) for paragraph (7) substitute—

“(7) A court—

- (a) which deals with a person convicted of an offence under this Article, or
- (b) before which a person is acquitted of an offence under this Article,

may vary or discharge the order in question by a further order.

(8) In paragraphs (1) and (7) references to a person convicted of an offence include—

- (a) a person in respect of whom findings that the person is unfit to be tried, and that the person did the act or made the omission charged against him or her in respect of the offence, have been made; and
- (b) a person in respect of whom a public protection order (as defined by section 165 of the Mental Capacity Act (Northern Ireland) 2016) has been made in respect of the offence by virtue of section 207 of that Act.

(9) Where an order under this Article is made in respect of a person by virtue of paragraph (7)(b) or (8), the person has the same right of appeal against the order as if—

- (a) the person had been convicted of the offence in question before the court that made the order; and
- (b) that court had made the order when dealing with the person in respect of that offence.”.

(2) In Article 7A(2) of the 1997 Order (restraining orders on acquittal) after “7” insert “(and paragraph (8) so far as applying for the purposes of paragraph (7))”.

(3) The amendments made by subsections (1) and (2) apply in relation to offences committed (or alleged to have been committed) before (as well as after) the coming into operation of this section.

(4) In Article 7(8)(b) of the 1997 Order (inserted by subsection (1))—

- (a) the reference to a public protection order is to be read, until the coming into operation of section 165, as a reference to a hospital order within the meaning of the Mental Health Order; and
- (b) the reference to section 207 is to be read, until the coming into operation of that section, as a reference to Article 44(4) of the Mental Health Order.’

**Explanation: New clause 207A amends Articles 7 and 7A of the Harassment (Northern Ireland) Order 1997 to address the lacuna identified by the Committee.**