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Jane Campbell

Mental Capacity Bill:

Deprivation of Liberty Safeguards

Introduction

Having mental capacity means being able to understand and retain information and to make a decision based on that information. The Deprivation of Liberty Safeguards are intended to:

- protect people who lack mental capacity from being detained when this is not in their best interests;
- to prevent arbitrary detention; and
- to give people the right to challenge a decision.

Many people in hospitals, care homes or other settings, who are deprived of their liberty due to the care or treatment they are receiving, cannot consent to it because they lack the mental capacity to do so. Traditionally, these patients could be detained for their own health and safety under the common law doctrine of necessity. A judgement on whether it was in their best interests was made by the health and care

professionals responsible for their care. If there was doubt or dispute, the High Court could decide whether or not a proposed treatment would be lawful.

However, in recent years the European Court of Human Rights (ECHR) found that acting under the necessity principle did not give adequate protection to people who lacked mental capacity to consent to care or treatment, and who needed limits put on their liberty to keep them safe. Consequently, the UK government introduced a statutory scheme for deprivations of liberty in England and Wales in 2007.

The Explanatory Memorandum to the Mental Capacity Bill[1] refers to the absence of legislative provision in Northern Ireland (NI) in respect of extra-statutory informal interventions involving a deprivation of the liberty of people who lack capacity. The Bill aims to address this gap in a way that avoids many of the difficulties encountered in other jurisdictions and also taking account of developments in international and domestic case law.

- Section 1 of this paper examines the definition of 'deprivation of liberty' and how it is being shaped by case law.
- Section 2 looks at the operation of deprivation of liberty safeguards within the Mental Capacity Act 2005 in England and Wales and some difficulties that have been encountered.
- The final section summarises the proposals in the draft Mental Capacity Bill dealing with deprivation of liberty safeguards and how they might operate in practice.

1 What is deprivation of liberty?

The Mental Capacity Bill's consultation paper notes that there is no simple definition of "deprivation of liberty" [2]and that it depends on the circumstances of each case. The Bill does not contain a detailed statutory definition of what constitutes a deprivation of liberty. Clause 293 of the Bill simply defines the term with reference to Article 5(1) of the European Convention on Human Rights (ECHR):

> *…deprivation of liberty" means a deprivation of liberty within the meaning of Article 5(1) of the Human Rights Convention*[3]

This states that:

> *1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:*

[1] Page 16 http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity-bill---efm---as-introduced.pdf
[2] Page 26 http://www.dhsspsni.gov.uk/mental_capacity_bill_consultation_paper.pdf
[3] Clause 293 http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity---as-introduced.pdf

> *(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;*
>
> *4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful*[4]

The term 'deprivation of liberty' is not otherwise defined in the draft Bill, although the consultation document states that the Code of Practice will provide guidance on the sorts of circumstances that have to date been found by the courts to constitute a deprivation of liberty[5].

The *Bournewood* and *Cheshire West* judgements

A number of UK court cases have helped to clarify the type of situations where deprivations of liberty have occurred. In 2004 the *Bournewood*[6] case tested the necessity principle and led to a statutory scheme being put in place for deprivations of liberty in England and Wales in 2007. The case involved the detention of an autistic man with a profound learning disability, lacking the capacity to consent or object to treatment, who was admitted informally and treated under the common law principle of necessity. Legal action ended with the European Court of Human Rights ultimately finding the man's right to liberty and security had been violated. It determined that he had no recourse to the protections offered by England's Mental Health Act 1983 (such as the ability to challenge detention and the restrictions on treatment). The court judged that the absence of procedural safeguards and access to the court amounted to a breach of Article 5(1) and (4) of the European Convention on Human Rights (ECHR).

Following this, two UK Supreme Court judgements in 2014 in legal action known as *Cheshire West* [7] related to situations that had not been wholly accepted as a deprivation of liberty. The Supreme Court, discarding previous judgments found that both of these cases did amount to a deprivation of liberty. The judgments made it clear that the following factors are irrelevant in considering whether a person has been deprived of their liberty:

- The person's compliance or lack of objection to their care arrangements
- The purpose of the deprivation of liberty
- The extent to which it enables them to live a relatively normal life

[4] http://www.echr.coe.int/Documents/Convention_ENG.pdf
[5] Page 26 http://www.dhsspsni.gov.uk/mental_capacity_bill_consultation_paper.pdf
[6] HL v UK 45508/99 (2004) ECHR 471
http://www.mentalhealthlaw.co.uk/HL_v_UK_45508/99_(2004)_ECHR_471
[7] P v Cheshire West and Chester Council and P and Q v Surrey County Council
http://www.mentalhealthlaw.co.uk/Cheshire_West_and_Chester_Council_v_P_(2014)_UKSC_19,_(2014)_MHLO_16

In conclusion, the Supreme Court held that there are two key questions to ask – the **'acid test'** is:

(1) Is the person subject to continuous supervision and control?

and

(2) Is the person free to leave?

2 England and Wales' Deprivation of Liberty Safeguards

The Deprivation of Liberty Safeguards (DoLS) were introduced into England and Wales' Mental Capacity Act 2005 in 2007 and fully implemented in 2009. The Safeguards are a set of legal requirements which ensure that individuals are only deprived of their liberty in a necessary and proportionate way and provide protection for individuals once a DoL has been authorised. The Safeguards relate to adults aged 18 and over who are deprived of their liberty in a hospital or care home. They apply only to individuals who have a mental health condition and lack the capacity to make decisions about their care.

Statistical reports on the DoLS in the Mental Capacity Act 2005 are published annually; these provide detailed information on the operation of the system in England[8]. The most recent report reveals that the majority of people requiring the protection of the DoLS in England are older people with dementia, people with more severe learning disabilities, or people with neurological conditions such as brain injuries. As Figure 1 below shows, almost half of individuals with DoLS applications in 2013/14 in England were suffering from dementia. According to Figure 2 more than three quarters were aged 65 and over.

[8] Health and Social Care Information Centre http://www.hscic.gov.uk/catalogue/PUB14825/dols-eng-1314-rep2.pdf

Figure 1: Percentage of individuals with DoLS applications by disability, England 2013-14[9]

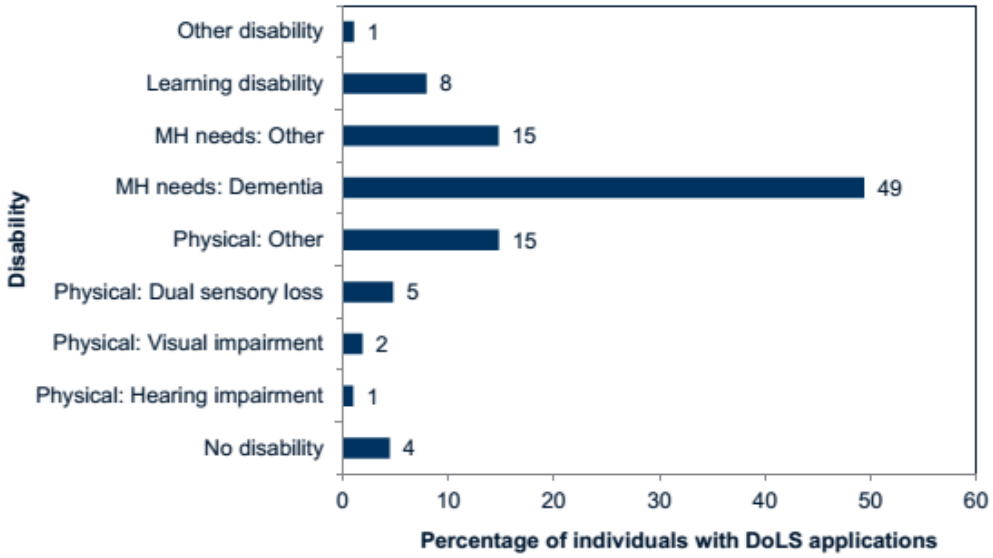
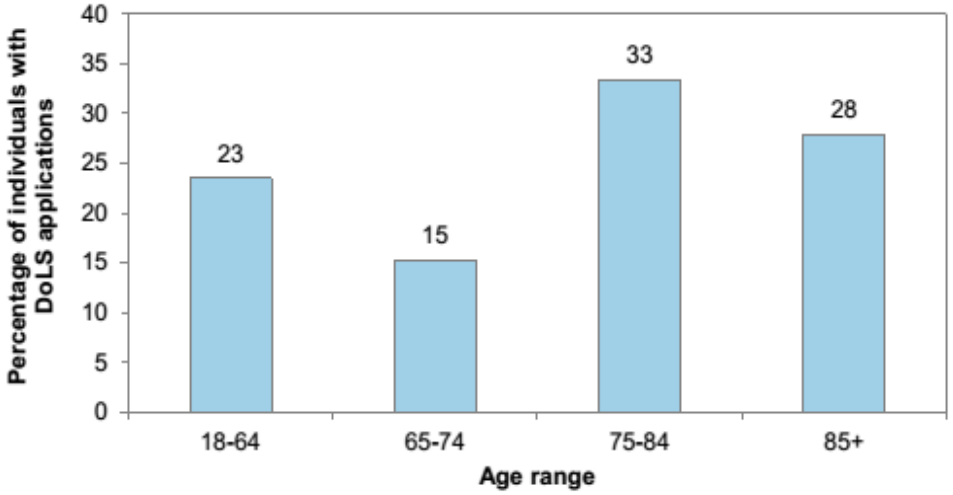


Figure 2: Percentage of individuals with DoLS applications by age range, England 2013-14[10]



The Deprivation of Liberty Safeguards in England and Wales have generated considerable debate since their introduction. There has been concern surrounding their complexity and how they should be implemented[11]. Some commentators have stated that the DoLs are not user friendly and are open to wide interpretation. In particular, it is thought that the absence of a clear definition of deprivation of liberty in the Act may be

[9] http://www.hscic.gov.uk/catalogue/PUB14825/dols-eng-1314-rep2.pdf
[10] http://www.hscic.gov.uk/catalogue/PUB14825/dols-eng-1314-rep2.pdf
[11] House of Lords Select Committee on the Mental Capacity Act *Mental Capacity Act 2005:post-legislative scrutiny* March 2014 http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf

leading to variable interpretation. In a comparison study it was found there was a wide level of disagreement by professionals in making reliable DoL judgements[12].

The Supreme Court ruling in 2014 in *Cheshire West* led to a tenfold rise in DoL cases in England and Wales. Although the 'acid test' deriving from *Cheshire West* appears to be a straightforward test, i.e.:

> *(1) Is the person subject to continuous supervision and control?*
>
> *and*
>
> *(2) Is the person free to leave?*

it has been highlighted that each element is open to significant interpretation (particularly continuous supervision and control). Practitioners have reported that is sometimes difficult to be clear when the use of restriction and restraint in someone's support crosses the line depriving a person of their liberty. [13]

Referring to the Deprivation of Liberty Safeguards, the House of Lords post-legislative scrutiny of the Mental Capacity Act 2005 report stated in March 2014:

> *The provisions are poorly drafted, overly complex and bear no relationship to the language and ethos of the Mental Capacity Act. The safeguards are not well understood and are poorly implemented. Evidence suggested that thousands, if not tens of thousands, of individuals are being deprived of their liberty without the protection of the law, and therefore without the safeguards which Parliament intended. Worse still, far from being used to protect individuals and their rights, they are sometimes used to oppress individuals, and to force upon them decisions made by others without reference to the wishes and feelings of the person concerned.*[14]

The UK government asked the Law Commission to design a new scheme in response to concerns that the current system was not fit for purpose and was failing to cope with a rise in deprivation of liberty cases triggered by the Supreme Court ruling. In July 2015 the Law Commission announced proposals for a framework to replace the Deprivation of Liberty Safeguards (Dols) after concluding that the current system was "deeply flawed".[15]

3 Deprivation of liberty safeguards proposals for Northern Ireland

Deprivation of liberty is specifically covered by Clauses 24 to 27 and Schedules 1 and 2 of the draft Bill. The safeguards aim to ensure that individuals are only deprived of their liberty in a necessary and proportionate way and that there is also protection from

[12] http://pb.rcpsych.org/content/pbrcpsych/35/9/344.full.pdf

[13] Social Care Institute for Excellence *At a glance 43: The Deprivation of Liberty Safeguards* May 2015 http://www.scie.org.uk/publications/ataglance/ataglance43.asp

[14] Page 7 House of Lords Select Committee on the Mental Capacity Act *Mental Capacity Act 2005:post-legislative scrutiny* March 2014 http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf

[15] http://www.communitycare.co.uk/2015/07/07/law-commission-unveils-proposals-deprivation-liberty-safeguards-replacement/

criminal liability for those who are required to provide care or treatment which involves limiting the freedom of an individual.

The Bill makes reference to “P” and “D” in relation to interventions and safeguards. “D” is a person who does an act in connection with the care, treatment or personal welfare of another person “P” who is aged 16 or over and lacks capacity in relation to it.

In the Bill, safeguards are required to be put in place in proportion to the seriousness of the act (intervention). Particular defined interventions also require specific safeguards. All interventions must be carried out on the basis that P lacks capacity in relation to the matter and that it will be in Ps best interests for the intervention to be carried out.

Table1 below aims to provide a concise summary of the deprivation of liberty assessment process in the Bill. Subsequent tables provide further detail on aspects of the process.

	Table 1 Mental capacity and deprivation of liberty		Mental Capacity Bill
1	Does the act amount to a deprivation of liberty? **(FURTHER INFO -SEE TABLE 2)**	Deprivation of liberty is defined in clause 293 of the Bill: *…deprivation of liberty" means a deprivation of liberty within the meaning of Article 5(1) of the Human Rights Convention.* Protection from liability under clause 9 is only available in the following circumstances: the detention of P[16], in circumstances amounting to a deprivation of liberty, in a place in which care or treatment is available for P; or the detention of P in circumstances amounting to a deprivation of liberty while P is being taken to a place in which care or treatment is available for P; or the detention of P in circumstances amounting to a deprivation of liberty in pursuance of a condition imposed in accordance with section 27 (permission for absence from a place in which care or treatment is available)	Clause 293 Clause24(2) Clause25(2)(a) Clause25(2)(b)
2	If yes, seek authorisation	The 5 criteria for authorisation of a deprivation of liberty are in Schedule 1(10) of the Bill	
	(a)	Is it in a place where appropriate care or treatment is available for P?	Schedule 1(10)(a)
	(b)	Would failure to detain P in circumstances amounting to a deprivation of liberty in a place in which appropriate care or treatment is available for P create a risk of serious harm to P or of serious physical harm to other persons?	Schedule 1(10)(b)

[16] D is a person who does an act in connection with the care, treatment or personal welfare of another person "P" who is aged 16 or over and lacks capacity in relation to it.

	(c)	Would detaining P in the place in question in circumstances amounting to a deprivation of liberty be a proportionate response to- - the likelihood of such harm and - the seriousness of the harm concerned?	Schedule 1(10)(c)
	(d)	Does P lack capacity? **(SEE TABLE 3)**	Schedule 1(10)(d)
	(e)	Is it in Ps best interests? **(SEE TABLE 4)**	Schedule 1(10)(e)
For any intervention, if the situation can reasonably be defined as an "emergency" D will be protected from liability if he or she takes action without necessarily complying with safeguards ordinarily required. **(TABLE 6)**			Clause 62

Table 2 Deprivation of liberty

A number of court cases have helped clarify the type of situations where deprivations of liberty have occurred:

The common law 'principle of necessity' was traditionally used to justify care and treatment which put limits on the liberty of people who lacked the mental capacity to consent to the treatment or care.

The legal judgement given by the European Court of Human Rights in the *Bournewood*[17] case in England challenged the 'principle of necessity'. It found that the plaintiff's right to liberty and security had been violated, and that they had no recourse to the protections offered by England's Mental Health Act 1983 (such as the ability to challenge detention and the restrictions on treatment). The absence of procedural safeguards and access to the court amounted to a breach of Article5(1) and (4) of the EHCR. The judgement led to a statutory scheme being put in place for deprivations of liberty in England and Wales in 2007.

In the *Cheshire West* [18]case (2014) the Supreme Court held that there are two key questions to ask when deprivation of liberty is to be determined:

1. Is the person subject to continuous supervision and control?
   and
2. is the person free to leave?

[17] http://www.equalityhumanrights.com/about-us/our-work/human-rights/our-human-rights-inquiry/case-studies/bournewood-case
[18] http://www.mentalhealthlaw.co.uk/Cheshire_West_and_Chester_Council_v_P_(2014)_UKSC_19,_(2014)_MHLO_16

Table 3 Test of capacity to make a decision

It must have been carried out recently and by a "suitably qualified candidate" (to be defined in Regulations) A two stage process is to be applied:		MC Bill
1	The individual must have an impairment of, or disturbance in the functioning of, the mind or brain. (For example, a mental disorder, a learning disability, being under the influence of a mind-altering substance or being unconscious).	Clause 3(1)
2	The person lacks capacity if, as a result of the impairment or disturbance in the functioning of his/her mind or brain the person: - is not able to understand the information relevant to the decision; or - is not able to retain that information for the time required to make the decision; or - is not able to appreciate the relevance of that information and to use and weigh that information as part of the process of making that decision; or - is not able to communicate his or her decision in any way (whether by talking, using sign language or any other means).	Clause 4(1)
When a serious intervention is being considered, a formal assessment of capacity must be carried out by a suitably qualified person (to de defined in Regulations). If that person deems P to lack capacity, then a written ***"statement of incapacity"*** *must be produced which includes:*	(a) Recording the fact that the assessment was carried out, by whom it was carried out and when; (b) Certifying that, in the opinion of the assessor, P lacks capacity within the meaning of this Act in relation to the matter in question; (c) Specifying which of the things mentioned in section 4(1)(a) to (d) P is, in the assessor's opinion, not able to do in relation to that matter because of an impairment of, or a disturbance in the functioning of P's mind or brain; and (d) Specifying any help or support that has been given to P, without success, to enable P to make a decision in relation to the matter.	Clause 14(3)

	Table 4 Best Interests Test	MC Bill	
	If a reasonable belief is formed that P does not have the capacity to make a particular decision, even with support, then D must determine what is in P's best interests. In doing so, D must not make the determination on the basis of (a) P's age or appearance; or (b) a condition of P's, or an aspect of P's behaviour, which might lead others to make unjustified assumptions about what might be in P's best interests.	Clause 7(2)	
	In deciding on what is in P's best interests, D must "consider all the relevant circumstances" and must take the following steps: D must consider: (a) whether it is likely that P will at some time have capacity in relation to the matter in question; and (b) if it appears likely that P will, when that is likely to be. D must also, so far as is practicable, encourage and help P to participate as fully as possible in the determination of what would be in P's best interests D must have special regard to, (so far as they are reasonably ascertainable): (a) P's past and present wishes and feelings (and, in particular, any relevant written statement made by P when P had capacity); (b) The beliefs and values that would be likely to influence P's decision if P has capacity; and (c) The other factors that P would be likely to consider if able to do so D must : (a) If it is practicable and appropriate to do so, consult the relevant people about what would be in P's best interests and, in particular, about the matters mentioned in subsection (6); and (b) Take into account the views of those people (so far as ascertained from the consultation or otherwise) about what would be in P's best interests and, in	Clause 7(4) to 7(7)	Clause 7(11) clarifies that relevant people means: - someone who P specifically wants to be consulted with - a carer or someone else with

	particular, about those matters.		an interest in P's welfare - a nominated person - an independent advocate - an attorney; and - a court appointed deputy
	Further steps which must be taken in a determination of P's best interests: The person making the determination must, in relation to any act or decision that is being considered, have regard to whether the same purpose can be as effectively achieved in a way that is less restrictive of P's rights and freedom of action. That person must, in relation to any act that is being considered, have regard to whether failure to do the act is likely to result in harm to other persons with resulting harm to P. If the determination related to life-sustaining treatment for P, the person making the determination must not, in considering whether the treatment is in the best interests of P, be motivated by a desire to bring about P's death.	Clause 7(8) to 7(10)	
	If the act is in P's best interests: Any act that amounts to a deprivation of liberty for P must be authorised through one of two ways: 1. By a panel under Schedule 1 for certain serious interventions which includes at Sch. 1 para 2(2)(b) deprivation of liberty. 2. By the making of a report under Schedule 2**.** Schedule 2 is concerned with short-term detention in hospital for examination etc.	Clause 25(3)(a) Schedule 1 Clause 25(3)(b) Schedule 2	

Table 5 Authorisation of an act that amounts to a deprivation of liberty		MC Bill
There are two authorisation processes which must be followed if certain serious interventions need to be made in relation to P's care and /or treatment. Any act that amounts to a deprivation of liberty for P must be authorised. The two authorisation processes are:		
1 Authorisation by a HSC panel for certain serious interventions.	Panels are to have three members with relevant expertise and convened specifically to consider the application. (More details will be provided in Regulations). An application for authorisation should be made by an approved social worker or " a person of a prescribed description who is authorised by the managing authority of a hospital or care home in which P is an in-patient or resident as a person who may make applications under this Schedule" (more detail to be provided in Regulations). Any application must: **(a)** be in the prescribed form **(b)** include a medical report **(c)** include a care plan **(d)** include prescribed information about the views, on prescribed matters, or P's nominated person and such other persons as may be prescribed, and **(e)** include such other information as may be prescribed. A schedule 1 authorisation expires after six months. It can be extended beyond the initial period of authorisation for an additional six months.	Schedule 1, paragraph 5(2)(b) Schedule 1, paragraph 6 Sch 1,para.15 Clause 37 and Sch 3
2 A report to authorise short-term detention for examination in hospital.	The report must be made by an "appropriate healthcare professional" who is either an approved social worker or a "person of a prescribed description" (to be defined in Regulations) The report must:	Schedule 2, paragraph 3(2)

	(a) Include a medical report; **(b)** Include a statement by the appropriate healthcare professional that in his or her opinion the criteria for authorisation are met; **(c)** Include prescribed information about the views, on prescribed matters, of P's nominated person and any prescribed person; and **(d)** State that the report authorises the detention, in circumstances amounting to a deprivation of liberty, of P in a specified hospital for the purposes of examination followed by other care or treatment.	Schedule 2 paragraph 4

Table 6 Deprivation of liberty in emergency situations		MC Bill
For any intervention, if the situation can reasonably be defined as an “emergency”, D will be protected from liability is s/he takes action without necessarily complying with the safeguards normally required for that intervention.		
A situation is only defined as an emergency if:	(a) D knows that the safeguard in that section is not met, but reasonably believes that to delay until that safeguard is met would create an unacceptable risk of harm to P, or (b) D does not know whether that safeguard is met, but reasonably believes that to delay even until it is established whether it is met would create an unacceptable risk of harm to P.	Clause 62(2)
The risk of delay in establishing whether a safeguard can or should be met is considered “unacceptable” if:	(a) The seriousness of the harm that could be caused to P by such delay, and (b) The likelihood of the harm are thought as to outweigh the risk of harm to P of not complying with the safeguard.	Clause 63(3)

Table 7 Ensuring that a nominated person is in place and consulted with		MC Bill
If a nominated person is in place for P when D determines whether the serious intervention (which involves deprivation of liberty) would be in P's best interests, D must both consult and take into account the views of the nominated person.	P will have the power to appoint a nominated person of his or her choosing –providing P has the capacity to do so – which will have to be witnessed by a prescribed person. The nominated person must also give his/her consent in writing.	Part 3 Clauses 67 to 83
If P has not previously appointed a nominated person, clause 71 provides a list of who should be considered by D to be the default nominated person in ranking order: (a) P's carer within the meaning given by section 74; (b) P's spouse or civil partner; (c) A person within subsection (5): (d) P's child; (e) P's parent; (f) P's brother or sister; (g) P's grandparent (h) P's grandchild; (i) P's aunt or uncle; (j) P's niece or nephew; (k) A person within subsection 6:	An individual is deemed to be P's carer if he or she: (a) Is aged 16 or over; and (b) Provides (or where P has been admitted to a hospital or a care or home or a place of prescribed description, did provide before P's admission) a substantial amount of care and support to P: (i) On a regular basis; and (ii) On a domestic basis {(5)a person is within this subsection if: (a) the person is living with P as if he or she were P's spouse or civil partner, and has been so living for a period of at least 6 months; or (b) if P is living in a hospital or a care or home or a place of prescribed description, the person had been living with P as if he or she were P's spouse or civil partner for a period of at least 6 months when P was admitted.} {(6)a person is within this subsection if: (a) the person is living with P as if he or she were P's spouse or civil partner, and has been so living for a period of at least 6 months; or (b) if P is living in a hospital or a care or home or a place of prescribed description, the person had been living with P as if he or she sere P's spouse or civil partner for a period of at least 6 months when P was admitted.}	Clause 71(3) Clause 74(1) Clause 71(5) Clause 71(6)
The nominated person has specific powers in the Bill, namely: • He or she can object to a course of treatment for P with serious consequences, which may require it to be authorised by a HSC Trust panel if the health professionals still believe it to be necessary. • He or she can contest any compulsory interventions that require a Schedule 1 or Schedule 2 authorisation by referring it to the Review Tribunal.		Clause 19 Clause 78

Table 8 The independent advocate conditions	MC Bill
For all compulsory serious interventions including all deprivations of liberty an independent advocate must be put in place. The role of an independent advocate is to represent and provide support to P in the determination of whether the proposed act would be in P's best interests.	Clause 36(1)(a) Clause 84
This involves: **(a)** providing support to P so that P may participate as fully as possible in any relevant decision; **(b)** obtaining and evaluating relevant information; **(c)** ascertaining P's past and present wishes and feelings and the beliefs and values that would be likely to influence P's decision if P had capacity; **(d)** ascertaining what alternative courses of action are available in relation to P; **(e)** informing persons responsible for determining what would be in P's best interests of the independent advocate's conclusions informing P's nominated person (if any) of matters relevant to the nominated person.	Clause 85(3)