

**By email:**

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13 October 2015

Dear Kathryn

**MENTAL CAPACITY BILL – REQUEST FOR FURTHER INFORMATION  
RELATING TO PART 12**

Thank you for your email of 5 October, seeking further information following the evidence session on Part 12 of the Bill.

The Department's response is as follows.

**“Special regard”**

The origins of the term “special regard”, examples of other pieces of legislation in which the term is used and how it has been interpreted by the courts are explained below.

As the Committee is aware, following the public consultation on the draft Bill in 2014, the Department decided to amend clause 7(6) to replace the phrase “take into account” with “special regard”. The amendment was made in response to stakeholder concerns that P’s wishes and feelings were not being given enough weight in clause 7<sup>1</sup>. The emerging debate around the precise meaning of Article 12 of the UN

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<sup>1</sup> The equivalent requirement in the Mental Capacity Act 2005 is to “consider” P’s wishes and feelings, which arguably requires even less weight to be put on them than “take into account”.

Convention on the Rights of Persons with Disabilities (UNCRPD) was also a relevant factor.

At the time of drafting, the Department was advised that “special regard” is a phrase that is sometimes used in legislation. Examples that we have since come across include:

- s.4 of the Video Recording Act 1984;
- s.7 of the Broadcasting Act 1990;
- s.2 of the Children Act 2004;
- s.66 of the Planning (Listed Buildings and Conservation Areas) Act 1990; and
- s.10 of the Planning Act 2008.

The wide-ranging nature of the legislation referred to above would seem to suggest that the term has a range of uses.

Its intended use in the Bill, however, is as follows.

As explained during the evidence sessions, the use of special regard in clause 7 is intended to give P’s own wishes and feelings, and the other matters mentioned in subsection (6), more prominence in the list of factors/steps that are relevant when a person is making a determination of what is in P’s best interests. In other words, it aims to give P’s wishes and feelings, etc, a special statutory status as a particularly important consideration. As previously explained, this does not, however, mean that P’s wishes and feelings necessarily outweigh other considerations. This will depend entirely on the circumstances of each individual case as will be explained in the Code of Practice.

The only relevant case of which the Department is currently aware that touches on this issue concerns the use of “special regard” in s.66 of the Planning (Listed Buildings and Conservation Areas) Act 1990 and a planning application for a set of four wind turbines in the vicinity of “heritage assets” in Northamptonshire.<sup>2</sup> In summary, the Court of Appeal in that case upheld the interpretation given to the term by the lower court as follows:

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<sup>2</sup> *Wye Valley NHS Trust v Mr B [2015] EWCOP 60*

*“In order to give effect to the statutory duty under section 66(1), a decision-maker should accord considerable importance and weight to the “desirability of preserving... the setting” of listed buildings when weighing this factor in the balance with other ‘material considerations’ which have not been given this special statutory status.”*

#### Education Other Than At School (EOTAS)

The Department is advised that Article 86 of the Education Order (Northern Ireland) 1998 (the 1998 Order) governs the provision of education to children who, by reason of illness, may not receive suitable education unless arrangements are made for them otherwise than at school.

The Department understands that Article 86(1) places a statutory duty on the now Education Authority (EA) to make such arrangements in respect of children of compulsory school age (i.e. aged between 4 and 16). In paragraph (2) of the same Article, a similar power is conferred on the EA in respect of children over 16 years of age but under 19. The Department is advised that it is for the Department of Education (DE) to determine whether this power is to be exercised.

The Department is also advised that while children over compulsory school age are entitled to access secondary education, there is, however, no statutory requirement on children of that age to do so. There is, conversely, a requirement on parents of children of compulsory school age to cause them to receive efficient full-time education.<sup>3</sup> This, it is suggested, could be one reason why Article 86(2) is couched in terms of a permissive and enabling power rather than a statutory duty.

Ultimately, however, it is clear that EOTAS is a matter falling within the purview of the DE, and therefore a matter for DE, in conjunction with EA, to determine.

#### Detention of 16/17 year olds in adult psychiatric wards

The Department is advised that the statistics requested by the Committee are only available for 2013-14 and 2014-15.

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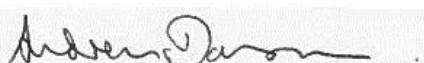
<sup>3</sup> Article 45 of the Education and Libraries (NI) Order 1986

During 2013-14, there were no children under 18 detained under the Mental Health (NI) Order 1986 ("the 1986 Order") in an adult psychiatric ward. During 2014-2015, records show that there were six detentions involving children aged 16 to 17 and one of a child under 16 under the 1986 Order in adult psychiatric wards. It is important to note that this may not mean that 7 children were detained in adult wards as some of the children involved may have been detained more than once. No information is currently available on length of stay.

The Department cannot provide reasons as to why an adult ward was selected rather than a children's ward in individual cases. However, the Health and Social Care Board has advised that the vast majority of admissions (voluntary and detained) involving children and young people are in respect of young people over 16 years of age, with a number pertaining to young people close to their 18th birthday. The main reasons provided for these admissions are (1) short term crisis management; (2) no immediate bed availability in Beechcroft; and (3) in some instances, requests from the young person or their family that care be provided in a hospital setting close to home.

I hope that this reply is helpful. The Bill Team is happy to consider any further queries the Committee may have.

Yours sincerely,



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