



Department of

**Health, Social Services  
and Public Safety**

[www.dhsspsni.gov.uk](http://www.dhsspsni.gov.uk)

**By email:**

**[mentalcapacitybill@niassembly.gov.uk](mailto:mentalcapacitybill@niassembly.gov.uk)**

Dr Kathryn Aiken  
Clerk  
Ad hoc joint committee on the  
Mental Capacity Bill  
Room 412  
Parliament Buildings  
Stormont  
Belfast  
BT4 3XX

Room D4.26  
Castle Buildings  
Stormont Estate  
BELFAST  
BT4 3SQ  
Tel: 028 9052 2666

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Dear Kathryn

## **MENTAL CAPACITY BILL**

Thank you for your letter of 22 September setting out the Committee's initial position on Part 5 of the Bill.

### Clause 95

Colleagues in the Department of Finance and Personnel are currently considering whether additional instruction is needed in respect of 16 and 17 year olds and the Committee will receive an update as soon as possible.

### Clause 98

It is the Department's view that this amendment is not necessary. If a property and affairs lasting power of attorney includes maintenance of certain persons within the scope of a lasting power of attorney (under clause 95(5)(b)), then the duly appointed attorney can lawfully maintain such persons provided it is in accordance with the lasting power of attorney. It is envisaged that matters such as this will be clarified in accompanying guidance.

### Clause 99

It is the Department's view that if a person has capacity to make their own decision (including a decision about who should be their attorney) then that decision should be respected. That is the key message of this Bill. Therefore, to amend the Bill as suggested would not align with the Autonomy principle.

The Committee may wish to note that the donor always has the protection of clause 108 which gives the court power to remove an attorney if he/she is not acting in their best interests.

For completeness, it is worth clarifying that individuals who are bankrupt are barred from acting as an Attorney. This is because there are other legal mechanisms in place that prevent such individuals from having powers over their own finances. They could not, therefore, manage another person's affairs.

Finally, it is the Department's understanding that there are no mechanisms currently in place for a donor to be made aware of any convictions that their attorney may have, before appointing that person as their Attorney.

#### Clause 110

The Department remains of the view that the retention of the EPA system alongside the new LPA system is not a viable option. It is at odds entirely with the shift in culture that this Bill is trying to bring about.

Under the EPA scheme, the presumption that there is some point at which a person loses capacity to make *all* future decisions in relation to their property and affairs runs contrary to the Bill's principles. The Bill does not allow blanket labels of incapacity; capacity is issue and time specific. An Attorney acting under a lasting power of attorney will therefore not have a blanket power to act. He/she will only have authority to make those specific decisions that the donor is unable to make despite being given all practicable help and support.

In practical terms retaining the EPA scheme alongside the LPA scheme would mean that practitioners would be working from two very different frameworks which will undoubtedly be more bureaucratic and lead to additional costs and indeed confusion for people on the ground. This Bill presents Northern Ireland with an opportunity to create a new unified scheme for decision-making in respect of people lacking capacity. The Department is of the view that replacing the EPA scheme with the wider, more empowering LPA scheme, will deliver better outcomes for those individuals who wish to plan for their future. This was a key recommendation of the Bamford Review and supported by the majority of stakeholders during the Department's extensive consultation process.

The Department notes that the concerns prevailing are predominately implementation matters and indeed the Department of Justice has already responded on this matter. Departments will of course continue to engage with key stakeholders to address those concerns.

#### Schedule 4

##### *Certification process*

Schedule 4 does not set out any requirements around the need for a witness generally. It would not be appropriate to include such detail (which is likely to require the signature, address, contact details etc. of the witness) on the face of the Bill. Instead, the Department intends to use the regulation making power under paragraph 1(1)(c) of schedule 4 to achieve this aim.

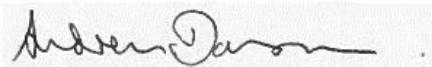
In light of this approach, paragraph 2(4) cannot, therefore, explicitly require the certificate provider to be the witness (because the requirements around the witness are not yet drafted). However, this is something that we could provide for in the aforementioned regulations and it would be our intention to consult with key stakeholders on this matter in advance of drafting.

*Notification process*

The Bill enables the donor to choose a person or persons to be notified before their lasting power of attorney is registered. It is the Department's view that if a person has capacity to make their own decision then that decision should be respected. That is the key message of this Bill. To remove that freedom of choice from the donor and automatically impose a list of people to be notified would not align with the Autonomy principle. The Department would not, therefore, support the proposed amendment.

The Department is also of the view that notification should take place before registration to ensure the Office of Public Guardian has oversight at the earliest opportunity. The Committee may wish to consider this matter in light of concerns raised in relation to clause 99.

Yours sincerely,

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

**Andrew Dawson**  
**Mental Health Policy Unit / Mental Capacity Bill Project**  
**Email: [andrew.dawson@dhsspsni.gov.uk](mailto:andrew.dawson@dhsspsni.gov.uk)**