



By email: mentalcapacitybill@niassembly.gov.uk

Dr Kathryn Aiken
Clerk
Ad hoc joint committee on the Mental Capacity Bill
Room 410
Parliament Buildings
Stormont
Belfast
BT4 3XX

26 November 2015

Dear Kathryn

MENTAL CAPACITY BILL

Thank you for your letters of 16 November following the Committee's further deliberations on clause 11 (advance decisions), the extension of the disregard provision and Parts 6, 7, 8, 11, 13, 14 and 15.

Further to my holding reply of 24 November, the Department's comments and responses are set out below.

Clause 11 (Advance Decisions)

The Department has considered and accepts the Committee's request to bring forward an amendment to provide for a "review and report" clause on the law on advance decisions. A draft amendment for this can be found in Annex A of my separate letter of today's date on Departmental amendments.

Extension of disregard provision

The Department has noted the Committee's letter on the extension of the disregard provision.

Clause 116

As requested, a draft amendment for the Committee's consideration can be found in Annex A of my separate letter of today's date on Departmental amendments.

Clause 256

Inclusion of Enduring Power of Attorney (EPA)

As requested, a draft amendment for the Committee's consideration can be found in Annex A of my separate letter of today's date on Departmental amendments.

Clauses 256 and 257

Length of sentence on summary conviction

On the issue of offences and maximum custodial sentences, the Department has been liaising further with DoJ and can provide the following update.

We are advised that, while section 154(1) of the Criminal Justice Act 2003 raises the maximum penalty on summary conviction in England and Wales from 6 to 12 months, this provision remains uncommenced. The direct equivalent in Northern Ireland remains imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both.

As mentioned in our previous letter, in exceptional cases in Northern Ireland, a maximum sentence greater than 6 months on summary conviction can be specified for a new offence. There should be specific and strong policy grounds for doing this and Article 29 of the Magistrates' Courts (Northern Ireland) Order 1981 will apply. This gives the defendant the option to ask for a jury trial, with concomitant escalations in cost and court time that may not be warranted by the seriousness of the alleged offence and may not attract the higher penalty. This right, however, can be removed for individual offences if deemed appropriate, although this would require an amendment to Article 29(1) of the Magistrates' Courts (Northern Ireland) Order 1981.

It is also worth noting that the clauses 256 and 257 in the Bill are hybrid offences (where trial is explicitly allowed for in either Magistrates' Court or Crown Court, depending on the seriousness of the individual case) meaning that the higher penalties of the Crown Court would be available for any deserving case.

Based on the above analysis, the Department is not prepared to bring forward the requested amendment at this time. Raising the maximum custodial sentence could result in lower level cases, where the penalty may be a fine or a very short custodial sentence, being unnecessarily elevated from the Magistrates' to the Crown Court, incurring significant additional public expenditure.

Clause 278

Lay magistrate

As requested, a draft amendment for the Committee's consideration can be found in Annex A of my separate letter of today's date on Departmental amendments.

Approved Social Worker

As requested, a draft amendment for the Committee's consideration can be found in Annex A of my separate letter of today's date on Departmental amendments.

Ill-treatment and neglect / assessment of premises

A draft amendment clarifying the scope of clause 278 for the Committee's consideration can be found in Annex A of my separate letter of today's date on Departmental amendments. As amended, clause 278 would allow a warrant to be issued to enter any premises and remove a relevant person. "Relevant person" is defined as someone who is liable to be detained in a place by virtue of the Act and is

to be taken to that place. So, provided it can be established that, among other things, there is reasonable cause to believe that such a person is to be found on the premises, a warrant can be issued to enter the premises and remove the person. Clearly, this could apply where there are concerns that someone is being ill-treated or not attending to their health needs. But, only where the applicable safeguards in Part 2 relating to the person's detention once removed are met. It is the Department's view that, in the context of this Bill, it would be difficult to justify the exercise of a warrant power of this nature in any other circumstances.

Clause 283

Panel quorum

As requested, a draft amendment for the Committee's consideration can be found in Annex A of my separate letter of today's date on Departmental amendments.

Majority vote

We discussed the Committee's proposal with professional colleagues who have identified a number of issues. For example, it is possible that the panel member in the minority may be the one with the most relevant expertise and experience. In the Department's view, this casts doubt on whether a 'one size fits all' approach would work particularly given that the cases coming before the panel will be wide ranging.

In light of this, the Department is not minded to bring forward the requested amendment and remains of the view that dealing with this matter in regulations is the most prudent approach (as already provided for in subsection (4)(d)).

Clause 288

In light of recent correspondence, the Department anticipates that the Committee will indicate, in its final report, that it regards clause 288 (as introduced) as too wide, that it is only prepared to allow powers that we can establish are needed and that it has accordingly asked the Departments to bring forward amendments to address its concerns.

As requested, therefore, draft amendments to clause 288 for the Committee's consideration can be found in Annex A of my separate letter of today's date on Departmental amendments.

The effect of making these amendments will be to reduce the powers conferred by the Bill, which the Departments thought prudent to include in order to deal with the 'unknown unknowns' given the size and complexity of this Bill. This change of approach will of course increase the risk of needing a further Bill to supplement the Mental Capacity Act (if enacted).

The Committee will also wish to note that there may be further powers required to amend Part 11 as there are still proposed amendments outstanding on this matter. As Part 11 regards transfers to other jurisdictions, a subordinate legislation power to amend Part 11 would allow the Departments to respond to legislative changes in other jurisdictions within the United Kingdom without the requirement of another Bill. Finally,

the Departments may also need to revisit the amendments to clause 288 in light of any non-departmental amendments passed at consideration stage.

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