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Dr Kathryn Aiken
Clerk
Ad hoc joint committee on the Mental Capacity Bill
Room 410
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4 January 2016

Dear Kathryn

MENTAL CAPACITY BILL – CLAUSE 5

Thank you for your letter of 30 November following the Department's evidence session on clause 5.

The Department discussed the Committee's suggestion with Counsel and the background to it. An alternative amendment is attached at **Appendix A** for the Committee's consideration. Importantly, it does not alter the generality of subsection (2) but, together with the proposed amendment to clause 4, aims to clarify and amplify the policy intent in a way that seeks to address the Committee's concerns (and those of the RCSLT). The amendment to clause 158 is in consequence of the changes to clauses 4 and 5.

The Department would also wish to advise the Committee of further minor amendments made to paragraph 20 of Schedule 1 and to clause 50. These are also attached at **Appendix A** for the Committee's consideration. They change the wording (but not the underlying policy or effect) of the relevant provisions relating to interim authorisations made under Schedule 1.

As ever, Bill teams would be happy to brief the Committee on these further Departmental amendments if required.

Yours sincerely,

Andrew Dawson
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Departmental Amendments

Mental Capacity Bill – Amendments - Support and Interim Authorisations

Clause 4, Page 2, Line 41

At end insert-

‘and references to enabling or helping a person to make a decision about a matter are to be read accordingly.’

Explanation: This amendment ensures that references to enabling a person to make a decision (or helping a person to make a decision) are read as enabling or helping the person to do the things in clause 4(1)(a) to (d). This means that it is now clear on the face of the Bill that help and support must be given to enable the person to communicate his or her decision, as originally intended.

Clause 5, Page 3, Line 29

At end insert-

‘(3A) For the purposes of providing the information or explanation mentioned in subsection (2)(a) in a way appropriate to the person’s circumstances it may, in particular, be appropriate—

- (a) to use simple language or visual aids; or
- (b) to provide support for the purposes of communicating the information or explanation.

(3B) The reference in subsection (2)(c) to persons whose involvement is likely to help the person to make a decision may, in particular, include a person who provides support to help the person communicate his or her decision.’

Explanation: This amendment amplifies what is said in subsection (2) in a way that brings out the point that help and support must be given to enable the person to communicate his or her decision but does not affect the generality of subsection (2).

Clause 158, Page 86, Line 19

Leave out ‘has the meaning given by’ and insert ‘, and references to enabling a person to make a decision, are to be read in accordance with’

Explanation: This is a consequential amendment linked to the above amendment to clause 5.

Clause 50, Page 27, Line 27

Leave out 'it is more likely than not' and insert 'there is a good prospect of it being established'

Explanation: This amendment is to clarify that where the Tribunal decides if the criteria for authorisation are met, it must do so on the balance of probabilities – the civil standard of proof. Using the words “more likely than not” (which is the civil standard) expressly in subsection (3) could have inferred that a more heightened standard applied for the purposes of subsection (2). The amendment avoids this potential for confusion.

Clause 50, Page 27, Line 30

Leave out 'it is more likely than not' and insert 'there is a good prospect of it being established'

Explanation: This amendment is to clarify that where the Tribunal decides if the criteria for authorisation are met, it must do so on the balance of probabilities. Using the words “more likely than not” (which is the civil standard) expressly in subsection (3) could have inferred that a more heightened standard applied for the purposes of subsection (2). The amendment avoids this potential for confusion.

Schedule 1, Page 167, Line 32

Leave out from 'in' to end of line 36 and insert '—

- (a) that it will not be possible within that period to decide whether the criteria for authorisation are met in respect of a measure proposed in the application, but
- (b) that there is a good prospect of it being established that the criteria for authorisation are met in respect of the measure,'

Explanation: This amendment aims to achieve the same as the original wording but now avoids using the same wording as the civil standard of proof (which, for the avoidance of doubt, applies where the panel (or the tribunal) is deciding if the criteria for authorisation are met). “Good” is a relatively high test – higher than “reasonable” and, in the Department’s view, is justified in the circumstances where an interim authorisation is being granted.