Department of
Health, Social Services and Public Safety
www.dhsspsni.gov.uk

By email:
mentalcapacitybill@niassembly.gov.uk

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

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

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Dear Kathryn

MENTAL CAPACITY BILL – PART 2 (Clauses 9-34)

Thank you for your email of 5 October setting out the Committee's initial position on Part 2 (clauses 9-34) of the Bill.

The Department's comments and responses are set out below.

Clause 11 - Advance decisions

Raising awareness
As part of the planned implementation work, the Department is committed to raising public awareness around the Bill as a whole, including advance decisions. In the preliminary costings analysis, £300,000 has been allocated for raising awareness generally.

16/17 year olds
The Department is advised that an effective advance decision at common law to refuse treatment can only be made by a competent adult. As a person who is 16 or 17 years of age is a minor and not an adult, it follows that such a person cannot make an effective advance decision under the existing common law. This aligns with the effect of section 4(1) of the Age of Majority Act (NI) 1969, which is identical to its English analogue in the Family Law Reform Act 1969 (see section 8(1)). It also mirrors the effect of the provisions relating to advance decisions in the Mental Capacity Act 2005 which require the person to have reached the age of 18.

Clause 16 – Second opinion needed for certain treatments

Second opinion for capacity assessments
The second opinion provisions in the Bill currently relate to certain serious treatments and require an appropriate medical practitioner to certify that the proposed treatment is in P's best interests. It is an additional safeguard that the Department considers to be proportionate and workable on the ground. To extend it in the way suggested by Disability Action (so that it would apply every time a person's capacity is assessed in relation to a particular decision that needs to be made at a particular time for the purposes of the Bill) would, in the Department's view, make the framework in Part 2 of the Bill inoperable on the ground and unaffordable.

It is important to note, however, that there is nothing in the Bill that stops anyone from seeking another opinion about an assessment that has been made about a person's capacity for the purposes of an intervention made under the Bill. Furthermore, it is also important to note that dealing with/resolving disagreements is already inherent in the core provisions of the Bill. In other words, it would be the Department's view that the Bill already addresses Disability Action's concern, just in a different way that reflects the scope and nature of the framework in Part 2 of the Bill.

To briefly explain, the fundamental point is that continuing disputes about a person's capacity to make a particular decision will clearly have a material impact on whether a decision maker's belief for the purposes of the condition in clause 9(1)(d)(i) is a reasonable one. If this condition is not met, the decision maker cannot proceed with the intervention without incurring liability for his/her actions. In other words, the legal protection available under clause 9 will not be available. This is a strong protection for P.

The additional safeguards mentioned in clause 9 are also relevant. For example, the requirement for a *formal* assessment of capacity for all serious interventions is new. These assessments must include a statement of incapacity. This statement cannot be made unless all practicable steps have been taken to help the person make the decision for him/herself. For the most serious interventions, the authorisation safeguard will also apply, triggered by a reasonable objection from the nominated person or in certain cases by P's resistance. This will involve a separate formal determination of the person's capacity (and of best interests) by, in most cases, a Trust panel. P and his/her nominated person will have a right to challenge any authorisation granted in respect of him/her by making an application to the Review Tribunal. Ultimately, recourse to the High Court under Part 6 of the Bill is also option.

The Code of Practice will provide further guidance and examples of how this new framework will operate.

Clause 18 – Second opinions: relevant certificates

Subsection (2)
Clause 18(2) is based on article 63(4) of the Mental Health (NI) Order 1986. It gives the appropriate medical practitioner the power (which may be exercised more than once) to visit and examine P and to require the production of and examine any relevant health records for the purposes of providing a second opinion. If the intention behind the suggestion made by RQIA and COPNI is that the appropriate medical practitioner should be required to make at least one visit and to have made at least one request for relevant records, it is the Department's view that this would be best

achieved by amending subsection (3) to add to the requirements in it, rather than changing "may" to "must" in subsection (2). To do the latter would make subsection (2) unclear. Clarification from RQIA and COPNI of the exact nature of the policy change they are proposing is therefore required before the Department can give a final view on this matter.

Clause 22 – Resistance etc by P to provision of certain treatment

Prevention of serious harm condition
The prevention of serious harm condition is a very high bar that a decision maker must be satisfied is met, even in emergencies, before providing certain serious treatments to P where P's nominated person is objecting. In effect, it means that it must be reasonably believed that withholding the treatment would create an unacceptable risk of serious harm even if an alternative treatment were given instead.

It is the Department's view that this condition is a necessary and proportionate safeguard where P's nominated person is objecting to the proposed treatment. However, if it were to apply where P alone resists as suggested by the Law Centre, the result could be that the proposed treatment would have to be withheld even though for example P's resistance is totally unexpected or unrelated to the treatment itself, there is no objection from the nominated person and the treatment is otherwise considered to be in the person's best interests. Such an outcome would, in the Department's view, be difficult to justify. The Department would not therefore support the amendment put forward by the Law Centre.

We would point out, however, that in any case where P is resisting an intervention, the condition in clause 12 (acts of restraint) will always apply. This condition is a significant protection for P where for example the choice is between providing the treatment and delaying in the hope that P may at a later time be persuaded to take the treatment without use of force, in a case where delay will do no harm. It is also a protection against using a large degree of force in order to give a treatment where the harm to P of not having the treatment at all would only be minor. In addition, clause 7(8) will always apply. It requires the decision maker to have regard to less restrictive options and is a protection against any unnecessary use of force. The Code of Practice will provide further guidance on these protections.

Clause 25 – Section 24: Definitions

"Serious harm"
Clause 293 clarifies what "harm" means for the purposes of the Bill[1]. "Serious harm" however, is not defined on the basis that whether a particular harm constitutes *serious* harm will depend on the individual circumstances of each case and the particular context in which the harm is occurring. Guidance and examples will be provided in the Code of Practice. Case law relating to the provisions in the Mental Health (NI) Order 1986 (upon which the prevention of serious harm condition is based) will also be relevant to how the term is interpreted. Both "serious" and "harm" are concepts that will be familiar to the courts.

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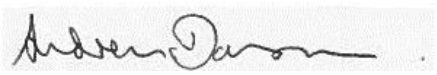
[1] *"harm" -*

(a)except in references to physical harm, means harm of any kind whether physical or non-physical; and

(b)includes harm to a person resulting from that person's harming others;"

While it is entirely legitimate for the courts to consider definitions of a particular term where it is used in other statutes, it is important to note that the definition in the Criminal Justice (NI) Order 2008 (2008 Order) has not been expressly applied for the purposes of the Bill nor, we are advised, would it automatically apply. Based on case law, the particular context of the Bill will be of supreme importance if the matter were to be considered by the courts. The Committee will also wish to note that the definition in the 2008 Order is limited to physical harm, whereas harm as defined in clause 293 means harm of any kind.

Yours sincerely,



Andrew Dawson
Mental Health Policy Unit / Mental Capacity Bill Project
Email: andrew.dawson@dhsspsni.gov.uk