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Mental Capacity Bill

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- 'Reconsidering legal capacity: radical critiques, governmentality and dividing practice', 2015 *Griffith Law Review*, Taylor & Francis Australasia, Australia

- *New Law and Ethics in Mental Health Advance Directives: The Convention on the Rights of Person with Disabilities and the Right to Choose* (Routledge, 2013).
- ‘Towards a genealogy of coercive care’ in Ian Freckelton and Bernadette McSherry (eds) *Coercive Care* (New York; Routledge, 2013).
- ‘Lost in translation: human rights and mental health law’ in *Rethinking Rights-Based Mental Health Laws*, Bernadette McSherry and Penelope Weller (eds) (Oxford and Portland Oregon USA: Hart Publishing, 2010).

INTRODUCTION

Associate Professor Penelope Weller was invited by the Ad Hoc Joint Committee for the Mental Capacity Bill for the Northern Ireland Assembly (the Committee) to comment on the draft Mental Capacity Bill. Professor Weller commends the Northern Ireland Assembly for undertaking the important task of leading the world in an effort to combine mental health and capacity legislation. She welcomes the opportunity to comment on the Bill.

APPROACH

The following comments reflects a human rights approach to the analysis of capacity and decision making legislation with particular emphasis on the principles expressed in United Nations Convention on the Rights of Persons with Disabilities. Professor Weller acknowledges the contribution of the Bamford Review for the ongoing development of mental health and capacity law in Northern Ireland and elsewhere.

SCOPE

The comments are limited to Parts 1 to 8 of the Mental Capacity Bill. The criminal justice components of the Bill, the legal framework for people under the age of 18 and the aspects of the Bill that engage with decisions at the end-of-life warrant additional and separate analyses.

SUMMARY COMMENT

The Explanatory and Financial Memorandum to the Mental Capacity Bill explains that the overarching policy objective of the Bill is to provide a single comprehensive legislative framework for the reform of mental health legislation and the introduction of capacity legislation in Northern Ireland, following the recommendations of the Bamford Review and in accordance with agreed principles regarding dignity of the people who may lack capacity.

The United Nations Convention on the Rights of Persons with Disabilities provides authoritative guidance on human rights issues

related to disability. While the author complements the Northern Ireland assembly on the attempt to provide a comprehensive legislative framework for those who lack capacity to make their own decisions, the Mental Capacity Bill in the current form falls short of the vision articulated in the United Nations Convention on the Rights of Persons with Disabilities.

The author welcomes the opportunity to discuss the following assessment in more detail.

COMMENTARY ON CLAUSES

PART 1: PRINCIPLES

Principles

Clause 1- Capacity

Clause 1 establishes the principle of capacity, requiring that a person may not be treated as lacking capacity unless it is positively established that the person lacks capacity. Lack of capacity must not be assumed on the basis of a person's condition characteristics or whether they make unwise decision (subclasses 3 and 5). The Explanatory Financial Memorandum notes that the overarching objective is to provide equally for all circumstances in which person's capacity might be compromised.

The inclusion of statutory obligation to provide all practical and help and support to a person making a decision is a welcome innovation. However, the effect of Clause 1 is to replicate in legislation the binary division between those who have capacity and those who do not that

currently shapes the common law. This is a discriminatory division with the effect of denying legal capacity to those with mental disabilities. By replicating the common law position, the Mental Capacity Bill misses the opportunity to articulate the fundamental principle of equality that animate the human rights framework.

Article 12 of the CRPD protects the right of people with disabilities to equal recognition and protection of the law. Article 12 asserts the right to legal capacity, which includes recognition of a person's legal standing (the right to be seen as a person before the law) and legal agency (the right to make legally binding decisions).¹ These rights persist whether or not the determination of mental incapacity is made. A determination of mental incapacity therefore contravenes human rights principles whenever the determination results in a removal or modification of a person's legal capacity.

Clause 2- Best Interests

Clause 2 provides that decisions made on behalf of those who lack capacity must be made on 'best interests' basis. Additional

¹ B McSherry, 'Legal Capacity under the Convention the Right of Persons with Disabilities' (2012) 20(1) *Journal of Law and Medicine* 22.

requirements for best interest to determinations are included in clause 7.

The common law principle that decisions should be made on behalf of a person who lacks the mental capacity on the basis of an objective 'best interest' determination is inconsistent with the human rights framework contained in the CRPD, and is inconsistent with the recognition of legal capacity. The logical requirement of article 12 is that in circumstances where a decision must be made on behalf of the person who lacks mental capacity, the persons' prior decisions or known wishes/ decisions should guide the decision-making. In circumstances where this is not possible, a decision that is consistent with what the person would have wished is appropriate, but should only apply in the most difficult circumstances.

Clause 3-Meaning of 'lacks capacity'

Clause 3 establishes functional test for incapacity in relation to 'a decision'. The memorandum asserts that the clause applies to a particular decision, not to decisions generally.

The term 'decision' is not defined in the legislation. The explanatory memorandum refers to interventions (not decisions) noting that the term is meant to apply to a broad range of situations including where there are routine interventions.² The protection from liability clauses (clause 9-12) refers 'to acts done in connection with the care treatment or personal welfare of P'. It would be helpful to improve the consistency of language and core concepts throughout the Bill.

Greater clarity could be achieved by emphasizing the discrete nature of each decision, as is currently implied. It may be useful to reiterate the common law principle that individual's who lack mental capacity with respect to some decisions, may retain mental capacity with respect to others. The practical implications of accepting the common-law appreciation of capacity, however, are complex. A distinction mental capacity grounds that leads to a limitation of rights contravenes the CRPD. A simpler approach is to recognize legal capacity.

Clause 4-Meaning of 'unable to make a decision'

² Explanatory and Financial Memorandum, 10.

Clause 4 sets out the elements of a functional determination of incapacity. These are that the person should be regarded as being unable to make a decision if they are unable to understand, retain and appreciate the relevant information and/or are unable to communicate the decision.

As is noted above, the functional test of capacity is inconsistent with human rights principles. While it appears to provide a fair standard, it reinforces the stigma experienced by individuals with disabilities.

Clause 5- Supporting person to make a decision

Clause 5 requires people to be provided with all practical help and support to enable them to make a decision, including the provision of information at appropriate times and in an appropriate environment.

Clause 5 appears to combine the discourse of supported decision making and that of informed consent. It goes some way to acknowledge both. However, a human rights informed document should contain richer and more detailed account of both mechanisms. Specifically the legislation could mention a range of

informal and formal mechanisms that should or could support legal capacity.

Clause 6 - Compliance with section 1 (2)

Clause 6 clarifies that determination of incapacity is established if the person has a 'reasonable belief' and has followed the steps set out in section 1(2).

A reasonable belief test is a low hurdle. Coupled with lack of clarity about the scope and character of the decisions to which the Bill refers, it seems unlikely that the legislative framework will prompt the cultural change that appears to be envisaged.

Clause 7- Best Interests

Clause 7 lists the information that must be considered by a person who is making a best interest decision on P's behalf. The person must consider all relevant circumstance including whether P is likely to regain capacity. P must be encouraged to participate in the determination of best interests. The decision maker must have

special regard to P's past and present wishes and feelings (in particular in any written statement made by P when they had capacity), the beliefs and values that would be likely to influence P's decision if P had capacity. The person must also consult with 'relevant people' about what would be in P's best interests.

As noted above, the notion of objective best interests is out of step with human rights principles. Clause 7 could be reframed to describe the ways in which P's unknown decisions could be discovered.

Central to the notion of following P's wishes would be formal recognition of documents written by P, or the views of individual's that P had nominated as having a role in communicating P's wishes. Implicit in the foregoing analysis is recognition that 'best interests', in a human rights framework, would be framed as a subjective determination of the person wishes.

The principle that the decision should be guided by the wishes of the person could also shape the scope of the powers and contribution of the 'relevant persons' listed in the legislation. The relevant people listed in sub clause 11 are: the nominated person, an independent advocate, any other person named by P, someone engaged in caring

for P or interested in P's welfare, an attorney under a lasting power granted by P or deputy appointed by the court. The list is both precise and indeterminate. It permits individuals who may have no relationship with P to voice an opinion and it provides no guidance on the weight that should be given to the different opinions. (The status of decisions made under a Lasting Power of Attorney are acknowledged elsewhere in the legislation. This creates potential confusion.) There is no reference in the Bill or associated materials to the circumstances or methods by which such individuals would be identified, or how they would be contacted what would constitute an appropriate consultation.

Clause 7 also includes reference to the principle that: "if the (best interests) determination relates to life-sustaining treatment for P, the person making the determination must not, in considering whether the treatment is in the best interests of P, be motivated by a desire to bring about P's death" (sub clause 10). Express in this way, the principle is unlikely to provide sufficient guidance for the complexity of legal issues surrounding questions at the end of life.

Clause 8 -Compliance with section 2.

When a person does an act makes the decision in the best interests of another person they are deemed to have complied with section 2 (2) if they have complied with section 7.

It is not clear how 'compliance' with section 7 could be established. There is no guidance on how the different elements of information should be considered how they should be documented or in what timeframe they apply.

PART 2: LACK OF CAPACITY PROTECTION FROM LIABILITY AND SAFEGUARDS

Chapter 1 Protection from liability and general safeguards

Clause 9- Protections from liability for acts in best interests of persons lacking capacity

The explanatory memorandum explains that the purpose of clauses 9 to 12 is to put in the common law defence of necessity on a statutory footing.

The first point to make about this approach is that the common law doctrine of the defence of necessity developed over time in response to silence in the law. It is an incomplete doctrine, often created retrospectively, and in response to a select set of cases. The wisdom of putting the common law on a legislative footing in this way warrants close examination. Modern legislation should be capable of expressing clear obligations and positive duties, based on the agreed principles that inform the Bill.

The second point to make is that while the intended objective may have been achieved in theory, the result is a sequence of very complex provisions. They provide an obscure framework for what (it is hoped) are new care and treatment practices. It seems unlikely that the provisions will achieve this goal in their current form.

The additional safeguard measures mentioned in clause 9 are discussed below.

Clause 10-general limitation on section 9

Clause 10 ensures that the protection from liability set out in clause 9 does not extend to civil or criminal liability for loss or damage resulting from persons negligence, acts done in the course of psychosurgery, or acts which conflict with decisions made under a Lasting Power of Attorney or by a court appointed Deputy. Sub clause 10(4) reiterates the principle that nothing in subsection 3 prevents a person from providing life-sustaining treatment or doing in which he reasonably believes is necessary to prevent a serious deterioration of Ps condition while a decision with respect to a relevant issue is sought from a court.

Clause 10 provides appropriate limitations to what would otherwise be a general protection from liability. As noted above the model adoption provides a weak framework for practice change, especially in circumstance where the practical reality is that legal action or scrutiny are unlikely to occur.

Clause 11-Advance decisions: effect on section 9

Clause 11, referring to advance decisions, is framed as an additional limitation on the protection of liability. It provides some recognition of a person's advance refusal of treatment made at a time when the person has capacity to refuse treatment. Sub clause 11(4) permits the provision of life-sustaining treatment or treatment necessary to prevent a serious deterioration in the person's condition while a decision respecting the relevant issue is sought from the court.

Please note the general comment with respect to protection of liability clauses.

Clause 12-Acts of restraint condition that must be met

Clause 12 is framed as a limitation on the protection of liability its aim is to impose conditions of proportionality on the use of restriction not including restrictions the amount of deprivation of liberty.

Please note the comment elsewhere with respect to protection of liability clauses.

Chapter 2: Additional safeguards the serious interventions

Clause 13- Formal assessment of capacity

Clause 13 provides that a formal assessment of capacity is required with respect to a decision to undertake serious intervention.

Serious intervention is defined in chapter 9 clause 60 as an intervention in connection with the care treatment or personal welfare of he which consists of major surgery, a thing that causes P behind series distress or serious side-effects, affects their options in a future life or has serious consequences, including deprivations of liberties, requirements to attend for treatment and the imposition of community residence orders.

Given the breadth of the definition in clause 60 it would appear that formal assessment of capacity would be required in all situations other than the most trivial.

Clause 14-formal capacity assessments and statements of incapacity

Clause 14 sets out formalities with respect to the recording of the assessment. The clause does not refer to the proximity of the assessment with respect to the decision that will be made, nor to the period of time for which a formal capacity assessment might be regarded as valid.

The danger of formal documentation without such requirements is that it will become fixed interpretation of the person's capacity or incapacity.

Nominated persons

Clause 15 nominated person: need to have in place and consult

Clause 15 is a requirement the nominated person is in place for decisions with respect to serious interventions.

Chapter 3: additional safeguard second opinion

Clause 16- second opinion needed to certain treatment

*Clause 17-second opinion needed for continuation on medication
clause*

Clause 18- second opinion relevant certificate

These clauses set out a requirement for a second opinion with respect to the electroconvulsive therapy, any treatment with serious consequences as defined in regulations pursuant to the Bill. The entitlement of a second opinion in difficult circumstances is one often sought by consumers of mental health services.

Chapter 4: Additional safeguard: authorisations etc.

*Clause 19 -treatment with serious, consequences of objection from
nominated person*

Treatment that is done, despite a reasonable rejection from P's nominated person, only attracts protection of liability if it is authorized, and the treatment is in P's best interests. (9(1)(c) and (d)) and the additional requirements in clause 21 satisfied.

Clause 20- meaning of treatment with serious consequences

The definition of treatment with serious consequences in this part is slightly different from the definition in clause 60. Different definitions of the same words the different circumstances are likely to create confusion about the legal obligations that attracted by different circumstances.

Clause 21- the prevention of serious harm condition

Clause 21 replicate this conditions that are often included in mental health legislation which provide the treatment to be given where there is a risk of serious harm to P or of serious physical harm to another person. The difficulties around this formulation are the subject of extended debate in mental health law.

The effect of including this framework in applicable legislation warrants close consideration. It opens the opportunity to impose compulsory treatments and interventions on any person who is deemed to lack capacity. If this is the intention of the literature it warrants an open public debate.

Sub clause 21 (2) and (3) appear to provide a framework that encourages the delivery of treatment that is not objected to by Ps nominated person.

Clause 22- resistance etc. by P to provision of certain treatment

Clause 23- meaning of subject to an additional measure

Clause 22 appears to provide protection from liability where treatment is given and P objects to or resists the treatment.

Deprivation of liberty

Clause 24- deprivation of liberty

Clause 25 definition

Clause 26 taking persons to a place for depth privations of liberty

The common-law requirements with respect to deprivation of liberty following recent judgments of the European Court of Human Rights emphasize the question of proportionality. It is not clear that the legislative framework would forward in the Bill satisfies this requirement.

Clause 27 permission absence

Clause 28 requirement to attend for certain treatment

Clause 29 duty to revoke requirement when criteria no longer met

The effect of clause 29 is to require that a person who regains capacity is no longer subject to the requirements of the legislation. While this obligation is consistent with the capacity-based framework, the experience with mental health laws in Australia is that such provisions are limited in their ability to facilitate transition into voluntary care.

Community residence requirements

Clause 30- community residence requirements: authorisation etc

Clause 31- meaning of community resident requirement

Clause 32- duty to revoke community resident requirement where criteria no longer met

Clause 33- duties in relation to people subject community residence requirements Clause 34 -committee residence requirements further provision

Clause 30 includes a prevention of harm condition that is worded quite differently from other provisions in the bill. In particular it is framed by the concept of proportionality. This begs the question whether other provisions are not so framed.

Chapter 5: Additional safeguard: independent advocate

Clause 35 Independent advocate: need to have in place and consult

Clause 36 Relevant acts

Note that P can only decline to accept the support of the independent advocate when they have capacity to do so.

Chapter 6: Extension of the period of certain authorisations

Clauses 37 to 44

Period extensions in this chapter seem to be set at intervals of six months and then one year. The weight of current practice in mental

health law is to limit periods of authorisation and require automatic review of extensions.

Chapter 7 Rights of review of authorization

Clauses 45- 51

Provide a framework for ensuring there is tribunal view of authorisations. However the framework falls short comprehensive review. For example the duty of the HSC trust to refer to the tribunal only arises if a person's case has not been considered within two years (clause 48). These provisions require detailed review.

Chapter 8: Supplementary

Clause 52- medical reports: involvement of the nominated person

Clause 53- medical reports: involvement of independent advocate

Clause 54- section 52 and 53 meaning of emergency

The statutory obligation to involve nominated persons and independent advocates is welcome however the provision that enables the obligation to be overlooked is too broad.

Clause 55 and 56 provision of information

Clause 57 failure to take certain steps

Clause 58-part two not applicable

Clause 59 disregard of certain detention

Comment on these clauses is not included in this review

Chapter 9: Definitions

Clauses 62-66

Comment on definition of serious intervention is made elsewhere in this document.

PART THREE: NOMINATED PERSON

Clauses 67 to 81 set out the conditions for the selection and appointment of the nominated person. The obligation on decision-makers is to consult the nominated person. The objection of a nominated person constitutes one of the conditions that would escalate the safeguard requirements. Other than these references and clause 82 (see below) there is nothing in the section that describes or indicates the expected role of the Nominated Person, nor the powers or obligations that might fall to that person. It seems that their role is merely to advise when consulted about what would be in the best interests of P. As the obligation on decision-makers is merely to consult, the formality of these provisions is disproportionate to the Nominated Person role as it is described in the legislation.

Cause 82- duties in relation to a nominated person

Clause 82 imposes an obligation on the decision maker to inform and consult the nominated person to take into account their views in determining P's best interests.

Sub clauses 82 (3)-(5) significantly limit the duty.

PART FOUR: INDEPENDENT ADVOCATES

Clauses 84-independent advocates

Clause 85 function of independent advocates provision of support etc

Clauses 86 -94.

The inclusion of independent advocate is a positive aspect of the Bill.

Encourage the department to make regulations that facilitate the functions and actions of the independent advocate in line with human rights principles.

PART FIVE: LASTING POWERS OF ATTORNEY

Clauses 95-110.

The general principle that a decision maker appointed under a lasting power of attorney has the authority to make decisions on behalf of P is welcome, as is the recognition of an advanced decision to refuse treatment mentioned in clause 97 (2).

PART SIX: HIGH COURT POWERS DECISIONS AND DEPUTIES

Decisions and deputies

Clauses 111-117

Clauses 11-117 set out the powers of the court to appoint deputies in circumstances where a person who lacks capacity and requires another person to make decisions on their behalf. The court may revoke the appointment of deputy if the deputy is not acting in P's best interests. The deputy has broad powers.

The deputy system provides an important in addition to the lasting power of attorney scheme. The circumstances and manner in which deputies will operate warrants close scrutiny. A preliminary comment is that the Bill does not make it clear what circumstances would trigger the appointment of a deputy with respect to the decisions of the person that lacked capacity.

PART SEVEN: PUBLIC GUARDIAN AND COURT VISITORS

Clauses 123-129

The provision for an independent public guardian and /or court visitor is an important element of accountability in the Bill.

PART EIGHT: RESEARCH

Clauses 130 - 136

The inclusion of requirements for research is a welcome addition to mental capacity framework. It seems that the intention of the provisions is that the decision to participate in research should be governed by an assessment of the person's wishes and feelings, nevertheless they are complex and likely to be confusing for all concerned.

PART NINE: POWER OF POLICE TO REMOVE PERSON TO PLACE OF SAFETY

An analysis of police powers is beyond the scope of this review.

PART 10: CRIMINAL JUSTICE

An analysis of the interface between civil commitment, forensic matters and the criminal justice system is beyond the scope of this review.