

Mental Capacity Bill

Ad Hoc Joint Committee

**Written Response submitted by the Commissioner for Older
People for Northern Ireland**

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Claire Keatinge

Commissioner for Older People NI

7-9 Shaftesbury Square

Belfast BT2 7DP

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Introduction

The Commissioner for Older People for Northern Ireland (the “Commissioner”) welcomes the opportunity to comment and respond to the Mental Capacity Bill.

The Bamford Review into the delivery of mental health and learning disability services in Northern Ireland outlined a number of key recommendations including the creation of new mental capacity legislation for Northern Ireland. The need for the introduction of specific capacity legislation in Northern Ireland that recognises the right of personal autonomy in a similar manner as legislation in other UK jurisdictions is evident¹.

The Commissioner recognises that a comprehensive legislative framework with human rights at its core will aim to enhance the standards of care, protection and treatment of many older people. There is a requirement for this legislation to be clear, well defined with clear guidance as to best practice in safeguarding the rights of all our older people.

The published legislation should ensure that older people have access to appropriate mental health care to help them to maintain the optimum level of physical and mental wellbeing and to prevent or delay the onset of illness. Where an older person is suspected to have diminished or fluctuating capacity they should become active participants in determining what treatment, care and support would be to their benefit.

The Mental Capacity Bill can have a significant positive impact on the lives of many older people by ensuring that their interests are placed at the heart of deciding what mental health care and assistance should be provided. The development of a robust and efficient independent advocacy service is a positive and appropriate measure to help protect the interests of older people which the Commissioner welcomes.

More people in Northern Ireland are living longer and healthier lives than ever before. However, when circumstances arise whereby older people require treatment or assessment under the Mental Capacity Bill they should play an active role in the decision making process. Respect for personal autonomy and human rights should be central tenets in ensuring the needs of older people are identified and met.

The Commissioner makes this addendum response on the published Mental Capacity Bill and refers the Committee to the substantive response previously submitted in response to the Draft Mental Capacity Bill. .

¹ Mental Capacity Act 2005 enacted in England provides for principle of autonomy

COPNI Background

1. The office of the Commissioner for Older People for Northern Ireland is an independent public body established under the Commissioner for Older People Act (Northern Ireland) 2011.
2. The Commissioner has an extensive range of general powers and duties which will provide the statutory remit for the exercise of her functions. In addition the Commissioner may provide advice or information on any matter concerning the interests of older people. Her wide ranging legal powers and duties include amongst others:
 - To promote and safeguard the interests of older people (defined as being those aged over 60 years and in exceptional cases, those aged over 50 years);
 - To keep under review the adequacy and effectiveness of law and practice relating to the interests of older people;
 - To keep under review the adequacy and effectiveness of services provided for older persons by relevant authorities (defined as being local authorities and organisations including health and social care trusts, education boards and private and public residential care homes);
 - To promote the provision of opportunities for and the elimination of discrimination against older persons;
 - To review and where appropriate, investigate advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities;
 - To assist with complaints to and against relevant authorities;
 - The power to bring, intervene in or assist in legal proceedings in respect of relevant authorities;
 - To issue guidance and make representations about any matter concerning the interests of older people.
3. The Commissioner's powers and duties are underpinned by the United Nations Principles for Older Persons (1991) which include Independence, Participation, Care, Self-fulfilment and Dignity.
4. The Commissioner welcomes the opportunity to comment on the published Mental Capacity Bill (the "Bill").

Principles

5. The Commissioner welcomes the primary principle outlined in Clause 1 of the Mental Capacity Bill that a person is assumed to have capacity in relation to a matter unless it is established that the person lacks capacity in relation to the matter. This statutory presumption provides a clear guideline for practitioners making a determination on capacity as well as older people and their families.
6. The Commissioner contends that whilst Clause 1(3)(b) indicates that a person is not to be deemed to have capacity determined merely on the basis of any characteristic of the person it is important to emphasise 'age' as a prescribed characteristic. The Commissioner is of a view that rights and protections should be clearly defined and placed on the face of the bill and as such seeks to include 'age' within Clause 1(3)(b).
7. The Commissioner welcomes the legislative guarantee under Clause 1(3)(b) of the Bill that an older person's capacity will not be determined by reference to a particular condition they may be living with. This clause is particularly relevant to many older people living with dementia. It is imperative that this particular group of older people are protected from arbitrary detention.
8. As previously indicated by the Commissioner in her response of September 2014 to the Draft Mental Capacity Bill the legislation along with any accompanying Code of Practice needs to ensure that unfair assumptions are not made against older people because of a condition they are living with. We are unable to respond effectively on the full merits of this part of the legislative framework until the Code of Practice has been compiled and distributed accordingly.
9. The Commissioner is supportive of the steps outlined at Clause 5(2) of the Bill to ensure that all practicable help and support has been provided to enable an older person to make a decision. The steps outlined at Clause 5(2) will assist in ensuring that appropriate and meaningful support is provided to older people when decisions affecting them are being made.

'Best Interests'

10. Placing the 'best interests' principle on a statutory footing as defined by Clause 7 of the Bill can, in the right circumstances, provide significant safeguards for older people. The Commissioner welcomes the specific reference to 'age' at Clause 7(2). Statutory guidance as to what constitutes 'best interests' should be given clearer definition within the Bill.
11. The Commissioner welcomes Clause 7(5) of the Bill which provides for a statutory obligation on persons making determination on best interests to encourage and help the older person to participate as fully as possible in that determination process.

Placing this statutory obligation on the face of the bill should provide the means for the protection of older people and further provides them with legal recourse if the statutory guidance is not adequately followed.

12. However, the current wording of the Bill at Clause 7(5) could be improved. It indicates that the older person must be helped and encouraged insofar as practicable to participate in the determination process². What is meant by 'help' and 'encouragement' requires further clarification and definition. Both terms are subjective and the Bill would be enhanced by the provision of clear guidance to ensure that there is a uniformity of approach.
13. Additionally, in circumstances where an older person fundamentally disagrees with the decision made in their 'best interests' a form of statutory right of appeal or challenge to enable the older person directly or through their independent advocate would be a welcome addition to the Bill. This will enhance the existing safeguards outlined within Clause 7 of the proposed Bill.
14. It is unclear whether or not appropriate sanctions for non-compliance with the statutory steps to determine 'best interests' apply in relation to Clauses 7 and 8. The use of sanctions may help to ensure that the guidelines are followed and could help to provide additional safeguards to older people involved in the determination process.

Protection from Liability

15. It is important that any protection from liability does not exclude civil liability for loss or damage including personal injury resulting from a person's negligence in doing an act. Clause 10(1)(a) currently does not mention personal injury. To avoid doubt and potential uncertainty 'personal injury' should be included on the bill. There is no reasonable rationale to include loss and damage whilst excluding personal injury.
16. The Commissioner is of the view that the decision to carry out an act of restraint should be open, transparent and proportionate given the particular circumstances of a case. Clause 12 of the Bill which outlines the conditions that must be met when carrying out an act of restraint places a statutory obligation on practitioners and others to act in a proportionate and measured manner. The Commissioner contends that the approach outlined in Clause 12 may be reasonable, if appropriately adhered to, given the particular circumstances of each case.

² Clause 7(5) Mental Capacity Bill

Capacity Assessment

17. The Commissioner considers that the wording used in Clause 13(3) of the Bill namely 'the formal capacity assessment must have been carried out, and the statement of incapacity made, *recently enough* before the act is done for it to be reasonable in all the circumstances to rely on them' requires a stricter definition. The term '*recently enough*' is too loose when considering the reasonableness of a formal capacity assessment and protection from liability. The Commissioner suggests that '*recently enough*' should be amended to a fixed time period for example 28 days or another prescribed period which meets 'best practice' guidelines in this field.
18. The formal capacity assessments and statement of incapacity procedures as outlined at Clause 14 should help to ensure that a uniform record and information management system is introduced. The importance of a detailed and rigorous capacity assessment undertaken by a suitably qualified practitioner can't be emphasised enough.
19. The Commissioner in her June 2014 report 'Protecting our Older People in Northern Ireland: A Call for Adult Safeguarding Legislation', published a number of recommendations to Government with a view to enhancing current Adult Safeguarding measures through a standalone Adult Safeguarding Bill.
20. One of the key recommendations from the report called for a power of access to a private home or residence for the purposes of conducting a private interview assessment to determine if a person was at risk or at harm. Such a power as described by the Commissioner in her report would also benefit practitioners undertaking Capacity Assessments.
21. The Commissioner's published recommendations for an Adult Safeguarding Bill compliment Clause 14 of the Mental Capacity Bill and also provide the most needed potential for a statutory framework in which practitioners can work to protect older people with capacity, fluctuating capacity and without capacity. The Commissioner takes this opportunity to re-iterate her call for a standalone Adult Safeguarding Bill which fundamentally compliments this proposed Bill including the provisions outlined at Clause 14.

Second Opinions

22. The requirement to have a 'second opinion' for certain treatments is welcomed by the Commissioner. However, the absence of a specific requirement to apply for a second opinion in an emergency situation in Clause 16(4) of the Bill is of concern to the Commissioner. Given the potential serious repercussions for acting in the

absence of a second opinion the Commissioner is of the view that most emergency scenarios should still present a reasonable opportunity to obtain a second opinion. The obtaining of a second opinion acts as a further safeguard and protection for older people and is a vital mechanism for protecting their interests and rights.

23. Clause 22 which deals with the resistance by a party to provision of certain treatment should be mindful of relevant and up to date Human Rights jurisprudence. There are well defined judicial guidelines on the refusal to consent to certain medical treatments and this clause needs to be Human Rights compliant. It is unclear at present whether Clauses 22(1) and 22(2) satisfy expected Human Rights thresholds. The draughts team may wish to seek advice on this point.

Deprivation of Liberty

24. The Commissioner asserts that the deprivation of an older person's liberty, as described in Clause 24, should only occur in controlled circumstances that are lawful, proportionate and in accordance with human rights principles and case law.³
25. The Draft consultation document indicated that an accompanying Code of Practice will provide guidance based on the sorts of circumstances that have to date been found by the courts to constitute a deprivation of liberty. It is essential that any guidance to practitioners is clear, unambiguous and free from complexity. The House of Lords Select Committee on the Mental Capacity Act 2005 indicated that Deprivation of Liberty Safeguards needed to set out clearly why they are needed; be much easier to understand, fit in with the rest of the Mental Capacity Act and make sure that everyone who needs it has the protection of the rules⁴. The Commissioner believes that this is a rational and sensible approach that should be followed in a similar manner with the drafting of guidance for practitioners in Northern Ireland.
26. The process and criteria for authorising the deprivation of an older person's liberty should be clear, well defined and thorough. In the event that a deviation from the approved criteria occurs there should be no protection from liability for practitioners. Clause 24(2) indicates that protection from liability applies in certain circumstances. The Commissioner is of the view that protection from liability should apply where the actions of the party are deemed to be reasonable and proportionate given the particular circumstances of a case. The current definitions within Clauses 24 and 25 does not appropriately address 'reasonableness' or 'proportionality'.

³ HL v The United Kingdom 2004 ECHR 471 – Bournemouth Case

⁴ www.mentalhealthlaw.co.uk/House_of_Lords_Select_Committee_on_the_Mental_Capacity_Act_2005

27. If liberty is to be deprived to prevent a risk of 'serious harm' to an older person under Clause 24 of the Bill or to prevent 'serious physical harm' to others then 'serious harm' needs to be defined within the legislation. The proposed legislation does not give any indication as to this defined level of harm.
28. The mechanisms in place for depriving someone of their liberty should be clear, well defined with robust safeguards in place. The panel authorising the detention will require all relevant information to be available to them. The older person, along with their advocate and legal representative should have early and meaningful involvement in this decision making process.
29. A review and appellate body which could hear appeals from older people quickly and efficiently would safeguard against Human Rights principles being breached⁵.

Mental Health Review Tribunal

30. The Commissioner notes the proposal to rename the Mental Health Review Tribunal as the Review Tribunal.
31. At present within the proposed legislation, under Clause 48, there is a duty on the HSC Trust to refer a review case to the Tribunal after a prescribed period of time. In line with this duty the Commissioner welcomes Clause 55 which deals with the provision of information. This legislative duty on the HSC Trust to inform an older person of their right to refer their own case to the Review Tribunal along with other relevant rights are an important safeguard that may enhance the overall protection of older people's rights. A record of when this information is communicated should be maintained to ensure compliance with the statutory duty.

Nominated Persons

32. The Commissioner notes the mechanism to appoint Nominated Persons within Clause 71 and 72. At present Clause 72 indicates that where two or more persons are within the same paragraph of the list at Clause 71 the default nominated person is deemed to be the older(or oldest) of those persons. The Commissioner is of the view that the nominated person should be a person who acts in the best interests of the older person, who is mindful of assisting in promoting and safeguarding the rights of the older person and who places the older person and their interests at the heart of any decisions regarding the older person.

⁵ Art 5(4) ECHR

33. The Commissioner is concerned that the default position is to appoint a nominated person on the basis that they may be older than another potential nominated person. The fact that a person is ultimately chosen for this important role on the basis of their age will not ensure that the most appropriate person undertakes the role. The draughts team may wish to review Clause 72 to amend the default position where the older of the potential nominated persons is appointed.

Independent Advocates

34. The Commissioner welcomes the formal introduction of an Independent Advocacy Service. This service could provide much needed additional support and assistance to many older people. In particular, older people who have no relatives or friends to advocate on their behalf require an additional level of support that is not provided for within the current legislative framework.

35. An older person should have the right to request the assistance of an independent advocate. At present the legislation allows for the involvement of an independent advocate once requested by an appropriate healthcare professional.⁶ It is important that whilst the older person has the authority to decline assistance they have no statutory right to request the assistance of an independent advocate. The Commissioner feels that this is a gap in the proposed Bill.

36. It is unclear from the proposed legislation what role an advocate will play in the event that the older person already has a solicitor or legal representative. The role of the independent advocate should add value to any legal representation already in place.

37. The effectiveness of an independent advocate should be subject to review to ensure that an older person is receiving a sufficient level of advice and assistance. The legislation should provide for a formal review body to monitor the advocacy service provided to older people. Independent advocates should be suitably trained, registered and subject to continuing professional development to ensure that the highest level of support is provided to older people.

38. The independent advocate should have a right of access to all information in the possession, power and control of the relevant Health and Social Care Trust relating to an older person's medical history, treatment plan, medication and personal welfare. The proposed legislation indicates that all records that the person holding

⁶ Clause 86(1) Mental Capacity Bill

the documents deemed relevant should be disclosed⁷. The independent advocate should, with the consent of the older person, have access to whatever information is necessary to adequately advocate for the older person. It should not be at the discretion of the custodian of the records to decide the relevancy of the information in their possession.

39. In addition, the older person should be advised that they ultimately have the authority to revoke the involvement of the advocate if necessary under Clause 91 of the Bill. An effective information and communication campaign should follow the introduction of an independent advocate service.

Future Decision Making Arrangements

40. The Commissioner notes the proposal under Clause 95 of the Bill to introduce Lasting Powers of Attorney (LPA). The legislative framework extends existing powers to allow the 'attorney' the authority to make decisions, not just in relation to financial matters but also welfare and health matters.
41. In principle, the provision for an LPA provides an opportunity for many older people to ensure that their future wishes and instructions are respected and adhered to. The procedure, if effectively managed, will allow older people to lay the foundations for future decision making arrangements that will aim to satisfy their 'best interests' and help them to feel they have control over decisions made.
42. On a practical level the process for obtaining an LPA should aim to be straight forward and free from complexity. The cost for obtaining the authority should also be affordable to older people. If the process for obtaining an LPA is kept straight forward it will lessen the time needed to engage professional legal advice thus keeping costs incurred as low as possible.
43. The process for obtaining an LPA as described in Clauses 121 and 122 of the Bill appear to provide the opportunity for appropriate review, investigation and interrogation of proposed applications.
44. In circumstances, outlined in Clause 95(1)(a) where an older person has an LPA registered which relates to health and welfare matters a formal requirement to involve a registered medical officer should be needed before the 'attorney' can act. This proactive safeguard would help to ensure that authority only passes once a formal medical consultation has taken place.

⁷ Clause 90(4)(b) Mental Capacity Bill

45. In the proposed legislation an LPA, in so far as it relates to property and affairs, is revoked in circumstances where an 'attorney' is declared bankrupt.⁸ Consideration should also be given to the potential to revoke the LPA where an 'attorney' has been convicted of a criminal offence of dishonesty or sentenced to a prison term of a prescribed period. Given the growth in the prevalence of reported financial abuse and the extended powers introduced by the proposed LPA it is imperative that older people are adequately protected from persons who may not have their 'best interests' at heart.
46. Advance decisions, as defined in Clause 97 of the Bill, will provide older people with the authority to advise medical practitioners of particular types of treatment which they do not wish to be the subject of in the future. The proposed legislation does not codify the Common Law rules in relation to Advance Decisions. The Mental Capacity Act 2005 outlines in clear statutory terms the meaning, effect and validity of Advance Decisions⁹. In an attempt to avoid confusion and to clearly set out the mechanisms and parameters for an Advance Decision there should be appropriate clauses placed on the face of the draft Bill. At present, the draft legislation does not include sufficient detail on the face of the Bill. The Commissioner would suggest that this is an area which should be reviewed by the legislative drafting team.
47. Any legislative outline of Advance Decisions should be accompanied by an accessible and easy to understand practical guide to assist older people to make reasoned and informed choices regarding advance decisions. Health practitioners should, on a case by case basis, explain to older people their right to make an advance decision. An effective communications campaign should be undertaken to ensure that older people are informed of this right and where they can find out more about it.
48. Alongside the right to make an advance decision stringent safeguards to ensure that the 'advanced decision' making process is free from third party interference should be implemented. The procedure should be clear and well defined and should involve the option of having a private and confidential interview in order to confirm the wishes of the older person. Any concern of undue influence being placed on an older person should be raised with an appropriate review body. A legislative duty placed on appropriate health practitioners could help to alleviate any concerns about older people being pressurised into making certain 'advance decisions'.

⁸ Clause 99(2) Mental Capacity Bill

⁹ Ss 24, 25 26 Mental Capacity Act 2005

Offences

49. The Commissioner welcomes the introduction of a specific criminal offence of ill-treatment or neglect of a person who lacks capacity¹⁰. The draft legislation indicates that the relevant section may apply to a person who has been appointed as an attorney under an LPA. For the avoidance of doubt the legislation should also apply to a person who has been appointed under an active enduring power of attorney. As proposed the offence can be committed by a person with an LPA but not a person with enduring power of attorney. This anomaly should be addressed. The Mental Capacity Act 2005 covers circumstances where an enduring power of attorney is in existence¹¹.
50. The Commissioner recognises the importance of proportionate sanctions where criminal conduct is in evidence. When allegations of ill-treatment or neglect are proven the judiciary should have sufficient scope to deal adequately with these serious cases. At present the draft legislation places a maximum sentence, on summary conviction, of 6 months.¹² This compares to 12 months under the Mental Capacity Act 2005 for a similar fact conviction.¹³ Evidently there is a need for a uniform approach and it is imperative that older people are equally protected and that perpetrators should receive similar sanction wherever the offence happens to be committed within the UK. As such, an extension of the current maximum sentence, on summary conviction, contained within the Bill would be required.
51. In the proposed legislation, where a person makes a false statement and knows or is reckless as to whether it is a false statement that person, is liable, on summary conviction, to a sentence of 6 months imprisonment¹⁴. In the Mental Capacity Act 2005 a person, who makes a false statement in the registration of an LPA, is liable, on summary conviction, to receive a maximum sentence of 12 months¹⁵. The Commissioner believes that this disparity should be corrected in the proposed legislation. There is a need for strong deterrents to be in place which ensure that a prospective 'attorney' acts in an honest manner that corresponds with the 'best interests' of the older person.

¹⁰ Clause 256 Mental Capacity Bill

¹¹ S.44(1)(b) Mental Capacity Act 2005

¹² Clause 256(3)(a) Mental Capacity Bill

¹³ S.44(3) Mental Capacity Act 2005

¹⁴ Clause 257(4) Mental Capacity Bill

¹⁵ Schedule 2 s.4(4) Mental Capacity Act 2005

52. The Bill outlines an offence of 'Obstruction' which should assist practitioners in carrying out their duties effectively and in a timely manner. The sanction for obstructing an examination or investigation is currently proposed to be for a period of 3 months on conviction¹⁶. An act of Obstruction which has the aim of preventing or unnecessarily delaying an investigation into an older person's capacity should entail serious and significant consequences. At present an offence of obstructing police in the execution of their duty carries a sentence of up to 6 months on summary conviction or up to 2 years on indictment¹⁷.
53. The Bill does not allow for a prosecution on indictment. Whilst hopefully a rarely needed sanction the legislation should permit a prosecution, in the most serious of circumstances dealing with a vulnerable older person as an injured party, to proceed by way of indictment. The impact of obstructing a live inquiry and investigation could have serious safeguarding implications and this should be reflected within the draft legislation.
54. The introduction of formal corporate neglect offences, under Clause 262 of the Bill, is an important step in ensuring that protection is central to those organisations providing care and support to older people. The sanctions for breaching relevant legislation should be proportionate and act as a real and meaningful deterrent.

**The Commissioner for Older People
Equality House
7-9 Shaftesbury Square
Belfast
BT2 7DP
Tel: 028 90 890 892
Email: info@copni.org**

¹⁶ Clause 261(3) Mental Capacity Bill

¹⁷ S.66 Police Act NI 1998