



Essex Autonomy Project

Alastair Ross, Chairperson
ad hoc Joint Committee to Consider the Mental Capacity Bill
Northern Ireland Assembly
mentalcapacitybill@niassembly.gov.uk

7 July, 2015

Dear Chairperson Ross,

I write in response to the call for public comment on the Mental Capacity Bill currently being considered by the ad hoc Committee. These comments are intended to supplement the oral evidence that I presented to the Committee on 29 June, and are organised around the specific amendments that Alex Ruck Keene and I presented for the Committee's consideration.

Before turning to the specifics of my comments, it might be useful to offer a few words of introduction. My name is Wayne Martin; I am Professor of Philosophy at the University of Essex, where I also serve as Director and Principal Investigator of the Essex Autonomy Project (EAP). EAP is a multi-disciplinary research and public policy initiative funded by the Arts and Humanities Research Council. Its aim is to investigate the ideal of autonomy (self-determination) in the practices of care (health care, psychiatric care, social care, elder care, etc.). Our research team conducts legal, ethical and clinical research relating to the concepts of mental and legal capacity, best interests, and the place of human rights in care-relationships. Further information about the project is available on our website: <http://autonomy.essex.ac.uk>.

Two particular areas of expertise in our research group are (a) the *Mental Capacity Act of England and Wales* (MCA) and (b) the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD). In 2014, I led a team that provided technical research support to the UK Ministry of Justice (MoJ) in developing a formal opinion as to whether the MCA complies with the requirements of the CRPD, to which the UK is a signatory.¹ Our group is currently engaged in a follow-on project in which we are looking at capacity legislation across the three jurisdictions of the UK (England and Wales, Scotland, Northern Ireland) in preparation for the expected UN review of UK compliance with the CRPD.

With these words of background and introduction, I turn to my comments on the Mental Capacity Bill currently under review by your Committee. I divide my comments into four sections:

- A) A General Comment about the Bill
- B) Proposal for Strengthening Clause 5: "Supporting Person to Make a Decision"
- C) Proposal for Strengthening Clause 7: "Best Interests"
- D) Proposal for Strengthening Clause 9: "Protection From Liability ..."

¹ Wayne Martin, Sabine Michalowski, Timo Jütten and Matthew Burch, *Achieving CRPD Compliance: A Report to the UK Ministry of Justice* (September, 2014); <http://autonomy.essex.ac.uk/uncrpd-report>.

I should note that the specific recommendations for amendments proposed below were developed jointly by myself and Alex Ruck Keene (39 Essex Chambers and University of Manchester), following a review of the Mental Capacity Bill by the core research group of the EAP “Three Jurisdictions” project. Specific amendments are proposed using the usual format of ~~strike through~~ for proposed deletions and underline for proposed additions.

A) A General Comment about the Bill

The research team associated with the Essex Autonomy Project welcomes the proposed Mental Capacity Bill in Northern Ireland. We believe it is critically important to establish a statutory basis in Northern Ireland for the treatment of persons who may suffer from mental incapacity. We believe that the approach taken by the proposed legislation builds on legislative accomplishments elsewhere in the UK, and represents an important advance in key areas, particularly in the attempt to define the obligation to provide support for a person in making their own decision (Clause 5), and in the attempt to ensure that appropriate regard is given to the views of a person lacking in capacity when constructing a best interests decision on their behalf (Clause 7). Our proposals are intended as “friendly amendments,” introducing refinements that we believe will help in implementing the Bill effectively and achieving its aims.

What are those aims? We find it useful to think of mental capacity legislation as establishing a framework whereby a society strikes a balance between two fundamentally important but sometimes conflicting aims in the provision of care. On the one hand, care-provision is meant to protect the care-recipient, and to advance their general welfare. But at the same time, care-provision must also empower care-recipients to make their own decisions wherever possible, and respect the autonomy and human rights of care-recipients. A large part of the challenge of regulating care in the 21st century is the challenge of adjudicating conflicts that arise when these two aims come into conflict. In considering the fine details of the legislation, it is important to appreciate the bearing of those details on the challenge of striking an appropriate balance between these two fundamentally important aims.

Traditional approaches to the regulation of care for persons with mental disorders or cognitive impairments have often emphasised protection over empowerment. But it is now very widely recognised that this traditional paternalism must be modified to leave greater scope for an approach that ensures respect for the rights, will and preferences of such persons, particularly in matters that pertain to the exercise of legal capacity. This does not mean that the preferences of a care-recipient must always prevail. Particularly in the context of mental disorder and serious cognitive impairment, circumstances arise where the protection of the rights and welfare of a care-recipient may require interference with that individual’s liberty. But any such interference should be seen as a last resort, and should operate in a broader context of regulation that (a) seeks to support persons with disabilities in making their own decisions wherever possible, and (b) ensures that, in those contexts where decision-making capacity is absent, safeguards are in place to ensure proper respect for the rights, will and preferences of disabled persons, as required by the CRPD.

Our specific recommendations below are intended to bolster the provisions of the Bill that are designed to achieve these two objectives.

B) Proposal for Strengthening Clause 5: “Supporting Person to Make a Decision”

We welcome the provisions of clause 5 of the proposed bill, which we see as definite advance over the current legal arrangements elsewhere in the UK. Both the Scottish *Adults with Incapacity Act* (AWI) and the *Mental Capacity Act* in England and Wales (MCA) include provisions intended to ensure that persons facing decisions receive help and support in the decision-making process. But these legal provisions in the AWI and MCA suffer from a number of defects that have limited their impact in practice. The relevant requirement of the AWI (sec. 1.6) makes reference only to aids *to communication*. The relevant requirement of the MCA (sec. 1.3) is broader but remains vague; it fails to specify in any detail what form the requisite help or support should take. Moreover, in both cases, the requirement of support is cast *impersonally* or in the passive voice. That is, the statutes specify that support *should be provided*, but fail to specify *who has the obligation to provide it*.

Clause 5 of the Northern Ireland bill represents an important advance in articulating the content of the requirement of support. It enumerates a series of specific steps that should be taken (where practicable) in the provision of support for decision-making ability, prior to any finding of incapacity. This specification in statute of the support principle is very much to be welcomed.

However in one important dimension, the requirements of Clause 5 need to be strengthened. This additional dimension relates to *the involvement of other people* in the decision-making process. A key result of our own research into decision-making capacity is the identification of the phenomenon of *distributed decision-making capacity*.² The key point is this: making a decision *for oneself* is not something that one typically does *by oneself*. Other people in one’s “decision community” may provide critical aid in making a decision, as when the partner of an Alzheimer’s patient helps the patient “find the words” that he needs in order to communicate effectively with his doctor. But other people can also compromise decision-making capacity, as when an abusive partner interferes to prevent an individual with learning disabilities from receiving independent advice.³

We believe this is an area where there is an important opportunity to bolster the provisions of the Bill that are designed to empower persons who may suffer from disabilities or cognitive impairments. In particular, we propose that the specification of forms of support in Clause 5 should include qualified provisions to allow a person to either include or exclude persons of their choosing from situations where decisions have to be made or where decision-making capacity is to be assessed. Accordingly, we propose amendments to Clause 5 as follows:

Clause 5: Supporting Person to Make a Decision

- (1) *A person is not to be regarded for the purposes of section 1(4) as having been given all practicable help and support to enable him or her to make a decision unless, in particular, the steps required by this section have been taken so far as practicable.*
- (2) *Those steps are—*

² Wayne Martin and Ryan Hickerson, “Mental Capacity and Applied Phenomenology of Judgement”; *Phenomenology and the Cognitive Sciences* 12:1 (2013), 195-214; DOI: 10.1007/s11097-011-9242-y.

³ *A Local Authority v Mrs. A and Mr. A* (2010) EWHC 1549 (Fam).

- (a) *the provision to the person, in a way appropriate to his or her circumstances, of all the information relevant to the decision (or, where it is more likely to help the person to make a decision, of an explanation of that information);*
 - (b) *ensuring that the matter in question is raised with the person—*
 - (i) *at a time or times likely to help the person to make a decision; and*
 - (ii) *in an environment likely to help the person to make a decision;*
 - (c) *ensuring that persons whose involvement is likely to help the person to make a decision are involved in helping and supporting the person, including, in particular, anyone identified by the person as a person whose support they would wish to enlist (whether or not that other person occupies a formal role); -*
 - (d) *where the person has identified anyone who they would wish not to be present at the assessment, taking steps to require that that other person or people are not present (unless proper grounds exist to consider that their presence is essential to secure the interests of the person)*
- (3) *The information referred to in subsection (2)(a) includes information about the reasonably foreseeable consequences of—*
- (a) *deciding one way or another; or*
 - (b) *failing to make the decision.*
- (4) *Nothing in this section is to be taken as in any way limiting the effect of section 1(4).*

C) Proposal for Strengthening Clause 7: “Best Interests”

The concept of “best-interests decision-making” has in recent years become intensely controversial, with some critics claiming that the CRPD requires that the best-interests paradigm should be abolished.⁴ We shall not here reiterate our rebuttal of this interpretation of the CRPD.⁵ We believe that substitute decision-making under the best-interests standard can comply with the requirements of the CRPD, but that in order to do so, suitable safeguards must be in place to ensure that, in reaching a best-interests decision, the best-interests decision-maker respects the rights, will and preferences of the person in question.

The language in Clause 7.6 of the Bill represents an important step forward in trying to provide such safeguards. Unlike MCA sec. 4.6, which requires that the wishes, feelings, beliefs and values of the person be considered, the proposed language of Clause 7.6 in the Northern Ireland Bill requires “special regard” for those wishes, feelings, beliefs and values. But we believe that the notion of “special regard” requires greater specification. Our conviction on this point is born in no small part from our experience in providing training to frontline professionals who must implement legislation. In the context of such training, the question is sure to arise: what exactly does it mean to give “special regard”?

Accordingly, we propose the following amendments to Clause 7 of the Bill. Our intent is twofold. First, we propose to build into the language of the Bill the concept of “will and preferences” as used in the CRPD. Such language would not replace the language of wishes and feelings, beliefs and values; instead, our proposal is that a survey of wishes, feelings, beliefs and values is part of the process to be undertaken in seeking to ascertain the will and preference of the person lacking in capacity. Secondly, our proposal is that best-interests

⁴ CRPD, *General Comment No 1: Article 12: Equal Recognition before the Law*, UN Doc. CRPD/C/GC/1, 11 April 2014.

⁵ See *supra*, fn 1.

decision-maker operate with a “rebuttable presumption” that it is in the best interests of a person to act in accordance with their own will and preference.⁶

Clause 7: Best Interests

- (1) *This section applies where for any purpose of this Act it falls to a person to determine what would be in the best interests of another person who is 16 or over (“P”).*
- (2) *The person making the determination must not make it merely on the basis of—*
 - (a) *P’s age or appearance; or*
 - (b) *any other characteristic of P’s, including any condition that P has, which*
 - (c) *might lead others to make unjustified assumptions about what might be in P’s best interests.*
- (3) *That person—*
 - (a) *must consider all the relevant circumstances (that is, all the circumstances of which that person is aware which it is reasonable to regard as relevant); and*
 - (b) *must in particular take the following steps.*
- (4) *That person must consider—*
 - (a) *whether it is likely that P will at some time have capacity in relation to the matter in question; and*
 - (b) *if it appears likely that P will, when that is likely to be.*
- (5) *That person must, so far as practicable, support encourage and help P to participate as fully as possible in the determination of what would be in P’s best interests.*
- (6) *That person must, so far as practicable, seek to identify P’s will and preferences, making reference to—*
 - (a) *P’s ~~past and present~~ wishes and feelings (taking into account and, in particular, any relevant written statement made by P when P had capacity);*
 - (b) *the beliefs and values that would be likely to influence P’s decision if P had capacity; and*
 - (c) *the other factors that P would be likely to consider if able to do so.*
- (7) *That person must—*
 - (a) *so far as it is practicable and appropriate to do so, consult the relevant people about what would be in P’s best interests and in particular about the matters mentioned in subsection (6); and*
 - (b) *take into account the views of those people (so far as ascertained from that consultation or otherwise) about what would be in P’s best interests and in particular about those matters.*

For the definition of “the relevant people” see subsection (13H).
- (8) *Where P’s will and preferences ~~That person must, in respect of the relation to any act or decision that is being considered, have regard to whether the same purpose can reasonably be ascertained, the decision made must comply with P’s will and preferences unless there are compelling reasons to consider that doing so would have serious adverse consequences for P.~~*

⁶ What is operating in the background here is a substantive ethical assumption, viz., that it is generally a real harm to a person to overwhelm their will in a matter. Sometimes there are reasons for causing that harm in the interests of a larger good. Neither liberty nor autonomy are the only goods in human life. But because it is generally a real harm to overturn the will, the best-interests decision-maker needs to have substantial reason for finding that the overall best interests require such an overriding.

- (9) The greater the departure from P's reasonably ascertainable will and preferences as effectively achieved in respect of a decision to be made on their behalf, the more compelling must be the reasons for such a departure.*
- ~~(8)~~*(10) Where it is not possible reasonably to ascertain P's will and preferences in respect of the decision, the person making the decision shall minimise any restrictions on a way that is less restrictive of P's rights and freedoms consistent with making the decision that accords with P's best interests freedom of action.*
- ~~(9)~~*(11) That person must, in relation to any act that is being considered, have regard to whether failure to do the act is likely to result in harm to other persons with resulting harm to P.*
- ~~(10)~~*(12) If the 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.*
- ~~(11)~~*(13) In subsection (7) "the relevant people" means—*
- (a) any person who at the time of the determination is P's nominated person (see section 67);*
 - (b) if at the time of the determination there is an independent advocate who is instructed under section 89 to represent and provide support to P, the independent advocate;*
 - (c) any other person named by P as someone to be consulted on the matter in question or on matters of that kind;*
 - (d) anyone engaged in caring for P or interested in P's welfare;*
 - (e) any attorney under a lasting power of attorney granted by P; and*
 - (f) any deputy appointed for P by the court.*

D) Proposal for Strengthening Clause 9: "Protection From Liability for Acts in Best Interests of Person Lacking Capacity"

Finally, we return to a point we made above (page 3) concerning a weakness in current capacity legislation in England and Wales and in Scotland. As we noted, it is a weakness of the AWI and MCA that, while including a requirement of support, there is a failure to specify *who* should provide the requisite support.

We believe that the Northern Ireland Bill implicitly includes an answer to this question, but that this implicit answer should be made more explicit. Question: Who has an obligation to provide practicable support for decision-making capacity? Answer: Anyone who is claiming protection from liability under the provisions of Clause 9.

We believe that this answer to the "Who?" question is implicit in Clause 9.5, which makes reference to the conditions under which certain beliefs are to be recognised as reasonable. But we propose that this important principle needs to be given greater prominence in the statute, so as to emphasise that anyone claiming protection from liability for acts taken under the best interests standard must have fulfilled the requirements concerning practicable support as defined in Clause 5.

Accordingly, we propose the following amendment to Clause 9:

Clause 9: Protection From Liability for Acts in Best Interests of Person Lacking Capacity

- (1) *This section applies where—*
 - (a) *a person (“P”) is 16 or over;*
 - (b) *another person (“D”) does an act in connection with the care, treatment or personal welfare of P;*
 - (c) *before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter, including those steps identified in section 5;*
 - (d) *when doing the act, D reasonably believes—*
 - (i) *that P lacks capacity in relation to the matter; and*
 - (ii) *that it will be in P’s best interests for the act to be done; and*
 - (e) *D would have been liable in relation to the act if P had had capacity in relation to the matter and D had done the act without P’s consent*
- (2) *D does not incur any liability in relation to the act, apart from such liability, if any, as D would have incurred in relation to it even if P—*
 - (a) *had had capacity to consent in relation to the matter; and*
 - (b) *had consented to D’s doing the act.*
- (3) *But subsection (2) has effect subject to the additional safeguard provisions (each of which imposes a safeguard, additional to those in subsection (1)(c) and (d), and more than one of which may apply in a given case).*
- (4) *The additional safeguard provisions are—*
 - (a) *section 12 (conditions for any act of restraint);*
 - (b) *sections 13 and 15 (formal assessment of capacity, and consultation of nominated person, required for serious interventions);*
 - (c) *sections 16 and 17 (second opinion required for certain treatment);*
 - (d) *sections 19, 22, 24, 26, 28 and 30 (authorisation required for serious*
 - (e) *treatment where there is objection from P’s nominated person or compulsion, and for deprivations of liberty and certain other measures);*
 - (f) *section 35 (independent advocate required for certain serious interventions).*
- (5) *The principles in sections 1(3) to (5) and 5 (P not to be treated as lacking capacity on irrelevant grounds, or where practicable help and support not given) and section 7 (best interests) apply in particular for the purposes of determining whether a belief mentioned in subsection (1)(d) is reasonable.*
- (6) *Where P is under 18, in subsection (1)(e) “without P’s consent” is to be read as “without P’s consent and without any consent that could be given by a parent or guardian of P”.*

Sincerely,



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Essex Autonomy Project

29 June, 2015

The following amendments to the Northern Ireland Mental Capacity Bill are proposed by researchers associated with the Essex Autonomy Project (University of Essex), in conjunction with its ongoing “Three Jurisdictions” study of approaches to capacity legislation in England & Wales, Scotland, and Northern Ireland. The amendments were prepared by Prof Wayne Martin (Director of the Essex Autonomy Project) and Alex Ruck Keene (39 Essex Chambers and University of Manchester) and are designed to:

- (1) Build upon practical experience of the Mental Capacity Act 2005 in England and Wales
- (2) Bring the Bill closer to compliance with the Convention on the Rights of Persons with Disabilities

Clause 5

- (1) A person is not to be regarded for the purposes of section 1(4) as having been given all practicable help and support to enable him or her to make a decision unless, in particular, the steps required by this section have been taken so far as practicable.
- (2) Those steps are—
 - (a) the provision to the person, in a way appropriate to his or her circumstances, of all the information relevant to the decision (or, where it is more likely to help the person to make a decision, of an explanation of that information);
 - (b) ensuring that the matter in question is raised with the person—
 - (i) at a time or times likely to help the person to make a decision; and
 - (ii) in an environment likely to help the person to make a decision;
 - (c) ensuring that persons whose involvement is likely to help the person to make a decision are involved in helping and supporting the person, including, in particular, anyone identified by the person as a person whose support they would wish to enlist (whether or not that other person occupies a formal role); -
 - (d) where the person has identified anyone who they would wish not to be present at the assessment, taking steps to require that that other person or people are not present (unless proper grounds exist to consider that their presence is essential to secure the interests of the person)
- (3) The information referred to in subsection (2)(a) includes information about the reasonably foreseeable consequences of—
 - (a) deciding one way or another; or
 - (b) failing to make the decision.
- (4) Nothing in this section is to be taken as in any way limiting the effect of section 1(4).

[...]

Clause 7

- (1) This section applies where for any purpose of this Act it falls to a person to determine what would be in the best interests of another person who is 16 or over (“P”).
- (2) The person making the determination must not make it merely on the basis of –

- (a) P's age or appearance; or
 - (b) any other characteristic of P's, including any condition that P has, which
 - (c) might lead others to make unjustified assumptions about what might be in P's best interests.
- (3) That person –
- (a) must consider all the relevant circumstances (that is, all the circumstances of which that person is aware which it is reasonable to regard as relevant); and
 - (b) must in particular take the following steps.
- (4) That person must consider—
- (a) whether it is likely that P will at some time have capacity in relation to the matter in question; and
 - (b) if it appears likely that P will, when that is likely to be.
- (5) That person must, so far as practicable, ~~support encourage and help~~ P to participate as fully as possible in the determination of what would be in P's best interests.
- (6) That person must, ~~so far as practicable, seek to identify P's will and preferences, making reference to have special regard to (so far as they are reasonably ascertainable)~~—
- (a) P's ~~past and present~~ wishes and feelings (~~taking into account and, in particular,~~ any relevant written statement made by P when P had capacity);
 - (b) the beliefs and values that would be likely to influence P's decision if P had capacity; and
 - (c) the other factors that P would be likely to consider if able to do so.
- (7) That person must –
- (a) so far as it is practicable and appropriate to do so, consult the relevant people about what would be in P's best interests and in particular about the matters mentioned in subsection (6); and
 - (b) take into account the views of those people (so far as ascertained from that consultation or otherwise) about what would be in P's best interests and in particular about those matters.

For the definition of “the relevant people” see subsection (13+).

- (8) ~~Where P's will and preferences~~ That person must, in respect of the relation to any act or decision ~~that is being considered, have regard to whether the same purpose can reasonably be ascertained, the decision made must comply with P's will and preferences unless there are compelling reasons to consider that doing so would have serious adverse consequences for P.~~
- (9) ~~The greater the departure from P's reasonably ascertainable will and preferences as effectively achieved in respect of a decision to be made on their behalf, the more compelling must be the reasons for such a departure.~~
- (10) ~~Where it is not possible reasonably to ascertain P's will and preferences in respect of the decision, the person making the decision shall minimise any restrictions on a way that is less restrictive of P's rights and freedoms consistent with making the decision that accords with P's best interests freedom of action.~~
- (11) That person must, in relation to any act that is being considered, have regard to whether failure to do the act is likely to result in harm to other persons with resulting harm to P.
- (12) If the 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.
- (13) In subsection (7) “the relevant people” means—

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- (a) any person who at the time of the determination is P's nominated person (see section 67);
- (b) if at the time of the determination there is an independent advocate who is instructed under section 89 to represent and provide support to P, the independent advocate;
- (c) any other person named by P as someone to be consulted on the matter in question or on matters of that kind;
- (d) anyone engaged in caring for P or interested in P's welfare;
- (e) any attorney under a lasting power of attorney granted by P; and
- (f) any deputy appointed for P by the court.

[...]

Clause 9

- (1) This section applies where—
 - (a) a person ("P") is 16 or over;
 - (b) another person ("D") does an act in connection with the care, treatment or personal welfare of P;
 - (c) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter, including those steps identified in section 5;
 - (d) when doing the act, D reasonably believes—
 - (i) that P lacks capacity in relation to the matter; and
 - (ii) that it will be in P's best interests for the act to be done; and
 - (e) D would have been liable in relation to the act if P had had capacity in relation to the matter and D had done the act without P's consent
- (2) D does not incur any liability in relation to the act, apart from such liability, if any, as D would have incurred in relation to it even if P—
 - (a) had had capacity to consent in relation to the matter; and
 - (b) had consented to D's doing the act.
- (3) But subsection (2) has effect subject to the additional safeguard provisions (each of which imposes a safeguard, additional to those in subsection (1)(c) and (d), and more than one of which may apply in a given case).
- (4) The additional safeguard provisions are—
 - (a) section 12 (conditions for any act of restraint);
 - (b) sections 13 and 15 (formal assessment of capacity, and consultation of nominated person, required for serious interventions);
 - (c) sections 16 and 17 (second opinion required for certain treatment);
 - (d) sections 19, 22, 24, 26, 28 and 30 (authorisation required for serious
 - (e) treatment where there is objection from P's nominated person or compulsion, and for deprivations of liberty and certain other measures);
 - (f) section 35 (independent advocate required for certain serious interventions).
- (5) The principles in sections 1(3) to (5) and 5 (P not to be treated as lacking capacity on irrelevant grounds, or where practicable help and support not given) and section 7 (best interests) apply in particular for the purposes of determining whether a belief mentioned in subsection (1)(d) is reasonable.
- (6) Where P is under 18, in subsection (1)(e) "without P's consent" is to be read as "without P's consent and without any consent that could be given by a parent or guardian of P".