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Dr Kathryn Aiken
Clerk, Ad Hoc Joint Committee on Mental Capacity Bill
Room B32, Parliament Buildings,
Ballymiscaw, Stormont,
BELFAST BT4 3XX

Dear Dr Aiken,

Mental Capacity Bill.

Thank you for the opportunity to comment on the draft Clauses of this long and complex Bill. We apologise in advance if our response is not in the "correct" format; as a small, entirely voluntary organisation, we do not have the resources to pay for our views to be translated into legalese.

We have previously provided comments to the Departments in response to their consultation; and we are grateful for the opportunity to reiterate concerns, where we feel these have not been adequately dealt with in the draft Clauses now before the Assembly; and indeed to comment on fresh issues, which have emerged in the drafting.

First, some overall points, about which we expressed concern in the consultation process, will provide context to our detailed remarks on those individual clauses in Parts 1 to 4 inclusive, which we have had the time and resource to comment upon.

We expressed concern that in the focus on "autonomy", the other underpinning principles, of justice, best interests, and least harm, had been sacrificed. The drafting of the current Bill, which seems, virtually throughout, to give priority to "autonomy" and to relegate the other principles to a very secondary position, has increased that concern.

We asked that, because of the need for all decision making to be based on sound assessment of capacity, and understanding and diagnosis of underlying causative conditions, that a clear requirement for decisions to be taken by appropriately qualified and experienced personnel should be made on the face of the Bill. This has not been done.

We are concerned that the focus throughout the Bill (in stark contrast to the approach in the Mental Health Act 1983) is on the "wishes and desires", and on the "welfare" of P, including his/her psychological welfare; without adequate consideration of the welfare of others, or of the duty of the State to protect life, and to safeguard public safety and public order. This gives rise to a twofold concern, that in circumstances where such considerations arise, P will be dealt with:

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Solely by the criminal law, without reference to his/her mental capacity, and without regard for the psychological harm he/she may be causing to others; and

That public safety will be put at risk, by preventing information on his/her mental state being made available, e.g. to employers. The recent tragic suicide, and mass murder of 149 people in an air crash, shows that it is essential that full information about mental issues has to be provided to employers in certain circumstances.

In addition, we note that throughout the Bill, the permissive phrasing "may" is used in relation to the powers of regulation or prescription. In our view, many of these requirements are of such importance that they MUST be set out in Regulations, and accordingly the prescriptive "shall" is required.

Please find attached at Annex A detailed comments on a Clause by Clause basis of the draft Bill's provisions, insofar as we, an entirely voluntary organisation, have been able to consider them, in the time allowed.

Yours Sincerely,

Christine Collins

Christine Collins

Chairperson

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ANNEX A

Clause 1 (5) Clarification is needed to ensure that a decision that will lead to foreseeable, preventable, and significant harm, either to P or to others, is not regarded as merely "unwise".

Clause 7(9) This is an example of where the Bill places P's autonomy at a premium over the safety and well-being of others. A balanced consideration and judgement is required; perhaps achievable if the Clause were to be amended to read:

The person must, in relation to any act that is being considered, have regard to whether failure to do the act is likely to resulting harm to P, or harm to other persons with resulting harm to P, or harm to other persons.

Clause 13 (3); Clause 14; Clause 16, 17 and 18; and see also Clauses 60 to 66

Sub clause 13(3), and Clause 14, together with Clauses 16, 17 and 18 attempt to ensure that the quality of the formal capacity assessments and second opinions is high enough to provide a sound basis for a serious intervention. However, they deal with only one of the three legs of the quality of a formal capacity statement- that of near contemporaneity with the proposed act. It is necessary to deal also with the other two legs:

- The qualifications and experience of the assessor/provider of the second opinion (especially important where rare conditions may be present, whether as part of the causative sequence or as irrelevant to it)
- The adequacy of the assessment process, and in particular its thoroughness, and its consideration of behaviours and abilities over a period of time, sufficient to allow any transient signs or symptoms to be detected.

Reference to all these three legs of the requirements to ensure the quality of a formal capacity statement and of a second opinion should be included on the face of the Bill.

Clause 14 (4) should be amended to read:

Regulations shall prescribe the procedures to be followed under sections 13, 16 and 17 to ensure the quality of any formal capacity assessment under section 13, and of any second opinion under section 16 or section 17, as well as the qualifications and experience of the practitioners who will be regarded as competent to perform it; and also set time limits within which such an assessment will be regarded as valid.

Clauses 19 and 21; 60 to 66 and elsewhere in the Bill: The prevention of serious harm provisions.

These Clauses discriminate between P and other persons, allowing treatment to given to P if failure to do so would create a risk of "serious harm" to P, whether physical or not; and only if failure to do so would create a risk of "serious physical harm" to any other person. This flies in the face of the Bill's attempt to equalise the seriousness with which physical and other forms of "harm" are regarded; and places P in a privileged position as against other affected persons. So for example, if P's behaviour, untreated, were such as to drive his/her partner to a nervous breakdown, this would not be sufficient to justify treatment. Only if P's untreated behaviour would lead to a risk of suicide in his/her partner; or if P's untreated behaviour was sufficiently physically violent to cause a risk of serious physical harm to his/her partner, could treatment be justified. So if P were merely to repeatedly slap his/her partner, even in front of their children, causing significant trauma, this would not be sufficient to permit treatment.

Clause 21 should be amended to remove references to "physical harm" replacing these with references to "harm". Similar amendments should be made to the equivalent wording where it appears elsewhere in the Bill.

The reasoning behind the forced "assumption" in Clause 21(3) is unclear. As it stands, the assumption that if the treatment in question is not provided to P, then another (implicitly efficacious) and treatment without serious consequences for P ***"will be provided as soon as practicable"*** seems to be both simplistic and dangerous. There may be no alternative; and even if there is, it is (given the parlous state of health resources) dangerously unrealistic to disallow treatment based on an "assumption" without any evidence base, that such efficacious and non-serious treatment exists,

and that it can (and will) be provided in a reasonable time scale to meet the needs of the situation, which may be an emergency.

If the intention is to provide a safeguard, ensuring that treatment with serious consequences for P is considered only after other possibly non serious alternatives have been considered and rejected- either because there are none, or because there are none available within a reasonable time- then it should be possible to state this in clear language: perhaps along the following lines:

21(3) In considering whether or not to provide the treatment in question to P, consideration must be given to what alternative, efficacious treatments, without serious consequences to P, are available, and can be provided within a reasonable time.

Clause 32: Duty to revoke Community residence requirement where criteria no longer met

The processes for revocation of a community residence requirement are at marked variance with those surrounding its imposition; and in particular the Social Worker is given an effectively unfettered discretion. This is inappropriate, since the original imposition of the residence requirement had at its heart the protection and best interests of P; and required the provision and consideration of evidence. Yet the revocation process contains no requirement to consider these issues; nor to give notice or make appropriate alternative provision for P.

At the least, the Clause should be amended to require the approved social worker in charge of the case to:

Obtain an up to date assessment of P's capacity from the medical professional who originally provided the report (or another suitably qualified and experienced medical practitioner);

Seek the views of P's nominated person, and P's independent advocate; and

Ensure that appropriate alternative provision is in place for P.

Clause 37 (3) the definition of "the period" should be amended to read

"*The period of an authorisation means the period at the end of which the authorisation (unless previously extended or revoked) expires*.

Clauses 52 and 53: meaning of "emergency" should be amended to include reference to an unacceptable risk of harm to others, as well as to P him/her self. The Bill's failure to take into account the existence of unacceptable risks to others, as well as to P, make it likely that those individuals with mental capacity issues who may pose an unacceptable risk to others will be dealt with under the criminal law, instead of being dealt with under the Bill's provisions. This is likely to result in less than appropriate treatment for them; as well as posing unacceptable risks for others.

Clause 59: Disregard of certain detention: This Clause must be extensively amended to make it clear that disclosure of the fact that the detention took place, and the circumstances, must be made in circumstances where the question is asked on grounds of protecting public safety, public order, or national security; including where the question is asked by private sector as well as public sector bodies or individuals. Although it is appreciated that those who have been subject to such detention may not wish to draw attention to the fact for fear of the stigma associated with it, the protection of life and prevention of harm to members of the public is the priority; and disclosure is required in order to enable a proper judgement to be reached on the risks (if any) posed by that individual to the safety of others. The provision should be cast so as to require disclosure to e.g. private employers (child-care; personal care under Direct Payment Schemes) as well as bodies corporate (e.g. including airline and other transport companies) to professional bodies (e.g. including the General Medical Council; the Royal College of Nursing; and other professional regulatory bodies; and to Government Departments, as well as to the courts in judicial proceedings.) Provision should be included here imposing a strict duty to consider the relevance of that information, and the risk posed, in all the circumstances of the case; and to record the reasons for their decision. There should also be an avenue of appeal to an appropriate judicial body.

Clause 62 Meaning of "emergency' in relation to safeguard provisions

As previously stated, a balance is required between the interests of P and the interests of others. As it stands, even if P's behaviour is such as to create a risk of harm or serious consequences to others, then no emergency is triggered. It is only if a

delay would create an "unacceptable risk of harm to P" (of whatever magnitude of harm) that urgent action can be taken.

Clause 62(2) (a) and (b) should both be re-drafted to include the words *"or to others"* after the words *"create an unacceptable risk of harm to P"*

Clause 65: References to treatment "likely" to be treatment with serious consequences

With this Clause, the Bill achieves an Alice in Wonderland dimension. "Likely" is defined in the Oxford English Dictionary to mean "probable" or "such as well might happen" ; equating perhaps to "on the balance of probabilities".

The new definition of "likely" attempts to distort the meaning to "a risk which is more than negligible". "Negligible" is defined in the OED as "insignificant; so small as to be not worth considering". So the "new" definition gives a very low threshold indeed, without giving any upper limit. This is confusing, unworkable in practice and risky in itself.

One simple solution would be omit the Clause completely, and rely as elsewhere in the Bill, on the normal meaning of the word "likely".

Alternatively, the Clause could be reshaped as follows:

65(2) Any question on whether such treatment is to be regarded as "likely" to be treatment with such consequences shall be decided on the balance of probabilities.

65(3) to be omitted

Clause 70 Resignation; Clause 76, Notice declining to be a person's nominated person

This Clause allows a nominated person to resign simply by giving notice in writing to "the appointer". [N>B> Itb is unclear why there is this departure from the "person" and "P" nomenclature used elsewhere in the Bill]?

This is a very scanty provision, given the likelihood that such notice could be difficult for the appointer to understand. At the least, equivalent provision to that in Clause 5(2) (a) and (b) should be made: the following could be inserted after the words "to the appointer" in Clause 70

'*and by providing to the person, in a way appropriate to his or her circumstances, of this information, together with an explanation of it, at a time and in an environment likely to help the person understand it; and to ensure that persons whose involvement is likely to help the person do deal with the information are involved in helping and supporting the person".*

Comparable provision is required in Clause 76 (although here the terminology reverts to the customary "P")

Clause 78(5)(a): (meaning of a qualifying person) replace the words *"healthcare professional" with " health or social care professional"*