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The Mental Capacity Bill and Human Rights

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This paper briefly summarises the key human rights issues that have been raised in relation to the Mental Capacity Bill 2015. The paper primarily draws on evidence submitted to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill.

Executive Summary

This paper summarises some of the key human rights debates associated with the Mental Capacity Bill. These interlinked debates relate to:

- Substitute decision-making
- Best interests
- The capacity test
- Deprivation of liberty

The debates are discussed in relation to two international human rights instruments:

- The UN Convention on the Rights of Persons with Disabilities (UNCRPD)
- The European Convention on Human Rights (ECHR)

The Bill originates in the Bamford Review of Mental Health and Learning Disability, which took a human rights perspective, drawing on the ECHR. The Bamford Review reported in 2007 and the DHSSPS consulted on a legislative framework in 2009.

The UNCRPD was adopted in 2006 and the UK acceded to the treaty in 2009. Therefore, the policy developmental stages of the legislation largely preceded the UNCRPD coming into force.

The Explanatory and Financial Memorandum states that the Bill is ECHR compliant, but does not further elaborate.

Summaries of four human rights debates in relation to the Bill are as follows:

Substitute decision-making. The starting point of the Bill is that a person has capacity, and individuals are to be supported to make their own decisions. However, where this is not possible, decisions can be made on their behalf. This is substitute decision-making. It has been argued that any form of substitute decision-making breaches Article 12 of the UNCRPD.

Best interests. The Bill states that substitute decisions made on behalf of an individual have to be in her or his best interests. It has been argued that this contravenes Article 12 of the UNCRPD, which requires that states 'ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person'. It has been countered that, ultimately, the state has a responsibility under Article 2 of the ECHR, the right to life, that may in certain circumstances trump the will and preferences of an individual.

The capacity test. The capacity test has a functional aspect and diagnostic aspect, to show that a person (a) is unable to make a decision and (b) this is because of an impairment of, or a disturbance in the functioning of, the mind or

brain. It has been argued that the diagnostic aspect of the test indirectly discriminates against people with mental disabilities and therefore contravenes Article 12 of the UNCRPD, the right to legal capacity.

Deprivation of liberty. Where the capacity test is used in relation to an authorisation for deprivation of liberty, it has been argued that this may lead to a breach of Article 14 of the UNCRPD. Given the nature of the test of capacity, it has been argued that people with a mental disability are more likely to be deemed to lack capacity and therefore, albeit indirectly, deprived of their liberty on the grounds of their disability. Article 5 of the ECHR, however, allows deprivation of liberty to occur on the basis of unsoundness of mind, provided that certain procedural criteria are met.

It has been suggested that, while the Bill provides for deprivation of liberty on the basis of a lack of capacity (combined with other specified criteria), it is unclear if deprivation on this basis satisfies the requirements of Article 5. Uncertainty regarding compliance with Article 5 may have arisen given the apparent desire to avoid potentially stigmatising references to ‘mental disorder’ in the Bill.

In considering human rights compliance of the Bill, the following observations may be worth noting:

- The UNCRPD is a recent treaty and the international jurisprudence is in development
- The UNCRPD is not directly justiciable in the UK in the same way as the ECHR
- Issues around compliance with the UNCRPD have drawn on the interpretation of the UN Committee on the Rights of Persons with Disabilities

While the Northern Ireland Human Rights Commission has noted the apparent incompatibilities between the UNCRPD and the ECHR, it has not provided specific direction on how these incompatibilities should be managed within the Bill. Rather, it has recommended that a review of the operation of the legislation and its compatibility with human rights standards should commence within three years of its coming into force.

In England and Wales, the Law Commission, considering how the law should regulate deprivations of liberty involving people who lack capacity to consent to their care and treatment arrangements, has also recognised the apparent incompatibility between the UNCRPD and the ECHR. The Commission, in this context and proposing a different deprivation of liberty scheme, has proposed a scheme which is ‘Convention compliant’ and ‘supportive of the UN Disability Convention’.

In addition to the legal technicalities, how the Bill is implemented will have a major impact on human rights compliance. Compliance will require the allocation of adequate

resources to ensure the support and protections provided for within the Bill are delivered. In this context, it has been suggested that a new committee be formed within the Assembly to oversee the implementation of the legislation.

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1 Introduction

The Mental Capacity Bill was introduced in the Northern Ireland Assembly on 8 June 2015¹. The Bill provides for a ‘fusion’ of mental health law and mental capacity law in Northern Ireland, as explained in the Second Stage debate on the Bill²:

The Bill has brought into one piece of legislation the usual provisions of mental health law and mental capacity law. It is the first time that that fusion approach has been considered anywhere in the world.

In addition, the Bill provides for the extension of a mental capacity approach to healthcare decisions to the criminal justice system³.

Section 2 of this paper briefly tracks the origins of the Bill in the context of developments in human rights standards in this area.

The key human rights instruments that have been referenced in relation to the Bill have been the European Convention on Human Rights (ECHR)⁴ and the UN Convention on the Rights of Persons with Disabilities (UNCPRD)⁵. Section 3 briefly summarises these instruments and their relevance to mental capacity issues. The articles of the ECHR referred to in the critiques discussed in this paper are given at Appendix 1 and those of the UNCPRD at Appendix 2.

Section 4 considers the main human rights issues that have been raised in relation to the Bill, drawing primarily on evidence to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill⁶.

Human rights issues have been raised in respect of the Bill regarding children, but these are not considered in this paper.

The Northern Ireland Human Rights Commission has the statutory responsibility for advising the Northern Ireland Assembly on human rights issues⁷. This paper refers to the Commission’s views but should not be considered as a replacement for such advice⁸.

¹ Mental Capacity Bill 2015: <http://www.niassembly.gov.uk/assembly-business/legislation/primary-legislation-current-bills/mental-capacity-bill/>.

² Northern Ireland Assembly Official Report: Tuesday 16 June 2015: <http://aims.niassembly.gov.uk/officialreport/report.aspx?&eveDate=2015/06/16&docID=238200>.

³ Mental Capacity Bill, Explanatory and Financial Memorandum, p.2.

⁴ European Convention on Human Rights: <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm>.

⁵ UN Convention on the Rights of Persons with Disabilities: <http://www.un.org/disabilities/convention/conventionfull.shtml>.

⁶ Ad Hoc Joint Committee to Consider the Mental Capacity Bill: <http://www.niassembly.gov.uk/assembly-business/committees/ad-hoc-committee-to-consider-the-mental-capacity-bill/>.

⁷ Northern Ireland Human Rights Commission: <http://www.nihrc.org/>.

⁸ Northern Ireland Human Rights Commission (2015), *Mental Capacity (NI) Bill*, Belfast: NIHRC: <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-mental-capacity-bill/written-submissions/northern-ireland-human-rights-commission.pdf>.

2 Background to the Mental Capacity Bill and the Relevance of Human Rights

This section briefly tracks the origins of the Mental Capacity Bill.

Bamford Review

The origins of the Mental Capacity Bill lie in the Bamford Review of Mental Health and Learning Disability, which was set up in 2002 and reported in 2007⁹. The Review included a report on human rights and equality of opportunity, published in October 2006, which highlighted the Review's '*person-centred and rights-based vision for services and opportunities*'¹⁰. The report drew primarily on the standards of the European Convention on Human Rights (ECHR).

Consultations

In 2009, the Department of Health, Social Security and Public Safety (DHSSPS) consulted on a legislative framework derived from the Bamford Review. The document referred to human rights protections, but was specific with reference to the ECHR only in relation to the deprivation of liberty, as follows¹¹:

The Department will take account of the European Court of Human Rights judgement (HL v United Kingdom 2004, the Bournemouth case¹²) to ensure that additional safeguards are in place regarding the deprivation of liberty of an individual who lacks the capacity to consent to care in either a hospital or a care home but where it is in their own best interests to be deprived of their liberty. This will include the details of when and how deprivation of liberty may be authorised. These changes will be necessary to ensure that there is no breach of Article 5 of the European Convention of Human Rights.

In 2014, the combined DHSSPS and Department of Justice consultation on the draft Mental Capacity Bill reiterated the rights-based principles of the Bamford Review and also stated¹³:

A statement on compatibility with the European Convention on Human Rights and relevant international agreements, such as the UN Convention on the Rights of Persons with Disabilities, will be included in the Explanatory Notes accompanying the Bill when it is introduced to the Assembly.

⁹ Bamford Review of Mental Health and Learning Disability: <http://www.dhsspsni.gov.uk/bamford.htm/>.

¹⁰ Bamford Review of Mental Health and Learning Disability (2006), *Human Rights and Equality of Opportunity*, p.45: http://www.dhsspsni.gov.uk/human_rights_and_equality_report.pdf.

¹¹ Department of Health, Social Services and Public Safety (2009), *Legislative Framework for Mental Capacity and Mental Health Legislation in Northern Ireland*, Belfast: DHSSPS, p.10: <http://www.dhsspsni.gov.uk/legislative-framework-for-mental-capacity.pdf>.

¹² The case of H.L. v. the United Kingdom 2004 in the European Court of Human Rights: <http://www.bailii.org/eu/cases/ECHR/2004/720.html>.

¹³ Department of Health, Social Services and Public Safety and Department of Justice (2014), *Draft Mental Capacity Bill (NI): Consultation Document*, Belfast: DHSSPS and DoJ, pp.7, 71: http://www.dhsspsni.gov.uk/mental_capacity_bill_consultation_paper.pdf.

Again, there was specific reference in the consultation to deprivation of liberty safeguards in respect of Article 5 of the ECHR in response to the Bournemouth case (see above)¹⁴.

The UN Convention on the Rights of Persons with Disabilities (UNCRPD), referred to in the consultation document, was adopted in 2006, in force in 2008 and ratified by the UK in 2009. The UNCRPD was therefore not in force during the development of the Bill but there was a commitment to compatibility with the UNCRPD when the Bill was drafted. The UNCRPD will be discussed in the next section.

The consultation document also drew on learning from the operation of the Mental Capacity Act 2005¹⁵, which makes provisions for persons who lack capacity in England and Wales. This Act was subject to post-legislative scrutiny by the House of Lords Select Committee on the Mental Capacity Act 2005. The report from this review cited ECHR standards but did not assess the Act with regard to compatibility with the UNCRPD¹⁶. It should be stressed that there are limits to direct comparisons between the Bill and the 2005 Act, as it operates in tandem with separate mental health¹⁷ legislation. Similarly, comparisons have been made with the Assisted Decision-Making (Capacity) Bill¹⁸ in the Republic of Ireland¹⁹, but there too separate mental health legislation²⁰ is in force.

The ECHR and the UNCRPD are discussed in more detail in the next section.

¹⁴ Ibid., p.22. There was also specific reference to both the UN Convention on the Rights of Persons with Disabilities (UNCRPD) and the UN Convention on the Rights of the Child (UNCRC) in relation to the application of the 'best interests' principle to children, but as stated above, provisions for children will not be discussed in this paper.

¹⁵ Mental Capacity Act 2005: <http://www.legislation.gov.uk/ukpga/2005/9/contents>.

¹⁶ House of Lords Select Committee on the Mental Capacity Act 2005 (2014), *Mental Capacity Act 2005: post-legislative scrutiny*, 13 March 2014, p.32: <http://www.publications.parliament.uk/pa/ld201314/ldselect/ldmentalcap/139/139.pdf>.

¹⁷ The Mental Health Act 1993: <http://www.legislation.gov.uk/ukpga/1983/20/contents>.

¹⁸ Assisted Decision-Making (Capacity) Bill 2013: <http://www.irishstatutebook.ie/2001/en/act/pub/0025/>.

¹⁹ For example, Dr Eilionóir Flynn, Ad Hoc Joint Committee on the Mental Capacity Bill, meeting on Monday, 14 September 2015: <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=14845&evidID=8588>.

²⁰ The Mental Health Act 2001: <http://www.irishstatutebook.ie/2001/en/act/pub/0025/>.

3 International Human Rights Instruments: The European Convention on Human Rights and the UN Convention on the Rights of Persons with Disabilities

The UK is signatory to a range of international human rights instruments which set out minimum human rights standards to be upheld. However, the UK takes a dualist approach to human rights treaties in that, while human rights standards are taken as a guiding principle, the decisions of the UK Parliament take precedence²¹. The exception is the European Convention on Human Rights (ECHR)²², the substantive articles of which were brought into UK law by the Human Rights Act 1998²³. This means that the ECHR is directly justiciable in a UK court in ways that other international human rights instruments are not.

The Northern Ireland Act 1998 provides that the Northern Ireland Assembly may not legislate in a way that is incompatible with Convention rights²⁴, that is, the rights contained within the ECHR. In addition, scrutiny of public bills in the Assembly from a human rights perspective takes place before introduction, during passage and prior to Royal Assent, primarily for compatibility with the ECHR, but also, arguably, for compliance with UK international commitments²⁵.

The position of the

Northern Ireland Executive with regard to compliance with other human rights obligations is summarised in the Memorandum of Understanding on Devolution between the Westminster and devolved administrations, which states²⁶:

The devolved administrations are responsible for implementing international, ECHR and EU obligations which concern devolved matters. In law, UK Ministers have powers to intervene in order to ensure the implementation of these obligations.

While other international human rights instruments might be engaged in relation to the Mental Capacity Bill²⁷, the ECHR and the UNCRPD are those that have been particularly discussed in this paper and are introduced below.

²¹ For a summary of the application of international human rights instruments in Northern Ireland, see Research and Information Service Research Paper 75/11 *Equality and Human Rights Legislation in Northern Ireland: A Review*, 8 August 2011, Section 4: <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2011/ofmdfm/7511.pdf>.

²² European Convention on Human Rights: http://www.echr.coe.int/Documents/Convention_ENG.pdf.

²³ Human Rights Act 1998: <http://www.legislation.gov.uk/ukpga/1998/42/contents>.

²⁴ Northern Ireland Act 1998, Section 6(1)(c): <http://www.legislation.gov.uk/ukpga/1998/47/contents>.

²⁵ See Research and Information Service Briefing Paper 20/14 *Human Rights and Equality Proofing of Public Bills*, 10 February 2014: http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2014/assembly_exec_review/2014.pdf.

²⁶ Devolution: Memorandum of Understanding and Supplementary Agreements (2010), Paragraph 21: http://www.ofmdfmi.gov.uk/memorandum_of_understanding_and_concordate_on_co-ordination_of_eu_issues_-_march_2010.pdf.

²⁷ For example, the International Covenant on Economic, Social and Cultural Rights and the UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

European Convention on Human Rights (ECHR)

The UK was one of the original eight countries to ratify the European Convention on Human Rights (ECHR) in 1950. However, it was not until 1998 that the substantive articles of the Convention were brought into UK law, through the Human Rights Act 1998, in force from 2 October 2000.

The Human Rights Act places the European Convention on a footing where²⁸:

- Legislation must be deemed compatible with the Convention when passed
- Public authorities must not act unlawfully in breach of the Convention
- Courts have power of remedy for a breach of the Convention

The remedies that can be pursued under the Human Rights Act are as follows²⁹:

- If the public body is acting lawfully according to primary legislation, a declaration of incompatibility with the Convention can be pursued
- If a decision of a public authority is being challenged, a judicial review can be pursued to quash the decision
- If the complaint refers to an ongoing activity, an injunction can be pursued to stop that activity
- If the action has caused harm, damages can be pursued
- If evidence is obtained in breach of a Convention right, the exclusion of evidence can be pursued

If satisfaction cannot be obtained domestically, a case can be brought to the European Court of Human Rights in Strasbourg.

As outlined above, the ECHR has particular salience in Northern Ireland through the Northern Ireland Act 1998, which provides that the Northern Ireland Assembly may not legislate in a way that is incompatible with the Convention.

Articles of the ECHR discussed in this paper are at Appendix 1.

UN Convention on the Rights of Persons with Disabilities (UNCPRD)

The 1971 United Nations Declaration on the Rights of Mentally Retarded Persons³⁰ recognised that people with mental disabilities have the same rights as other people³¹.

²⁸ David Hoffman and John Rowe (2006), *Human Rights in the UK*, London: Longman, p.55.

²⁹ *Ibid.*, p.80.

³⁰ United Nations Declaration on the Rights of Mentally Retarded Persons 1971: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/328/72/IMG/NR032872.pdf?OpenElement>.

³¹ Richard Jones (2012), *Mental Capacity Act Manual*, London: Sweet and Maxwell, p.6.

However, particularly in terms of mental capacity, a fundamental shift took place with the adoption in 2006 of United Nations Convention on the Rights of Persons with Disabilities³². The UNCRPD adopted the 'social model' understanding of disability, as indicated in the preamble, which stated that:

disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.

This shift reflects changes in attitudes to disability in general, that there has been a move away from a 'medical model', which concentrates on the limitations of the individual, to a 'social model', which identifies barriers created in society. Stereotyping is recognised as a significant form of discrimination and there is greater awareness of mental health problems and less social stigma attached to them³³.

The UNCRPD does not define 'disability', but there is a broad indication of what disability might encompass in Article 1:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

Consequently, the UNCRPD has been applied in connection with mental capacity.

The UNCRPD was adopted in December 2006 and entered into force in May 2008. The Committee on the Rights of Persons with Disabilities³⁴ is the body of independent experts which monitors implementation by countries which have ratified the Convention. In addition to regular sessions in which parties to the UNCRPD are examined in relation to implementation, an Optional Protocol allows for individuals and groups to complain to the Committee on the grounds of non-implementation, provided domestic remedies have been exhausted. The UK has not yet been examined by the Committee.

Article 33.2 of the Convention requires states to establish independent mechanisms to monitor the implementation of the Convention. In the UK this is the Equality and Human Rights Commission³⁵. Northern Ireland also has an independent mechanism, which is shared between the Equality Commission³⁶ and the Human Rights Commission³⁷.

³² UN Convention on the Rights of Persons with Disabilities: <http://www.un.org/disabilities/convention/conventionfull.shtml>.

³³ Gordon Ashton (2012), *Mental Capacity: Law and Practice*, Bristol: Jordan, pp.15-16.

³⁴ Committee on the Rights of Persons with Disabilities: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>.

³⁵ UN Convention on the Rights of Persons with Disabilities, Equality and Human Rights Commission, accessed 15 May 15: <http://www.equalityhumanrights.com/about-us/our-work/human-rights/international-framework/un-convention-rights-persons-disabilities>.

³⁶ UNCRPD, Equality Commission for Northern Ireland, accessed 15 May 2015: <http://www.equalityni.org/uncrpd>.

³⁷ About the United Nations Convention on the Rights of Persons with Disabilities, Northern Ireland Human Rights Commission, accessed 15 May 2015: <http://www.nihrc.org/advice-for-you/uncrpd>.

The notion of international conventions as ‘soft’ law, i.e. not directly justiciable, as opposed to ‘hard’ law, is not universally accepted. For example, the Joint Committee on Human Rights report on the Implementation of the Right of Disabled People to Independent Living in 2012 states³⁸:

The Government have characterised the obligations assumed by under the Disabilities Convention as "soft law". This Report regards this as indicative of an approach to the treaty which regards the rights it protects as being of less normative force than those contained in other human rights instruments. The UNCRPD is hard law, not soft law, and the Government should fulfil their obligations under the Convention on that basis, and counter any public perception that it is soft law.

The Government response to this was as follows³⁹:

*The Government recognises that the Convention is a legally binding instrument, and has made it clear that it is committed to its implementation. The evidence given to the Committee was intended to make the distinction that international treaties are generally not incorporated into UK domestic law. The Convention imposes legal obligations on the UK Government. The UK fulfils these obligations through existing domestic legislation, such as the Equality Act 2010, and through policy and programmes that impact upon the lives of disabled people. In this way, the rights contained in the Convention have practical effect.*⁴⁰

The Committee on the Rights of Persons with Disabilities has also issued guidance in the form of General Comments, which are the Committee’s interpretation of how the UNCRPD should be implemented. Comment No 1 addresses Article 12 of the Convention, equal recognition before the law⁴¹. Article 12 in particular has been engaged in relation to the Mental Capacity Bill, which is discussed in the next section.

The Law Commission has been consulting on how the law should regulate deprivations of liberty involving people who lack capacity to consent to their care and treatment arrangements. The consultation paper states the following with regard to the compatibility of the UNCRPD with the Mental Health Act in England and Wales and the

³⁸ House of Lords House of Commons Joint Committee on Human Rights (2012) *Implementation of the Right of Disabled People to Independent Living*, London: Stationery Office, p.61:

<http://www.publications.parliament.uk/pa/jt201012/jtselect/jtrights/257/257.pdf>.

³⁹ House of Lords House of Commons Joint Committee on Human Rights (2012) *Implementation of the Right of Disabled People to Independent Living: Government Response to the Committee’s Twenty-third Report of Session 2010–12*, London: Stationery Office, p.6: <http://www.publications.parliament.uk/pa/jt201213/jtselect/jtrights/23/23.pdf>.

⁴⁰ But see *R (on the application of SG and others (previously JS and others)) (Appellants) v Secretary of State for Work and Pensions (Respondent)* [2015] UKSC 16 18 March 2015 for a discussion on justiciability of UN conventions in the UK: <http://www.bailii.org/uk/cases/UKSC/2015/16.html>.

⁴¹ Committee on the Rights of Persons with Disabilities (2014), *General comment No. 1 (2014), Article 12: Equal recognition before the law*, 19 May 2014: <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement>.

interpretation of the Convention by the Committee on the Rights of Persons with Disabilities⁴²:

We are keen to ensure as far as possible that our system is not only compatible with the UN Disability Convention, but is supportive of its aims and aspirations. However, we are aware that some have pointed to discrepancies between the UN Disability Convention and the Mental Capacity Act. For example, article 12 sets out the right to legal capacity on an equal basis with others. The Committee on the Rights of Persons with Disabilities (which is responsible for monitoring the implementation of the UN Disability Convention) has clearly stated that systems of substituted decision-making deny legal capacity and are incompatible with article 12, and therefore must be replaced with systems of supported decision-making. Supported decision-making is a process of providing support to people whose decision-making ability is impaired to enable them to make their own decisions, whereas substituted decision-making involves someone making decisions on behalf of someone else on the basis of some objective standard such as best interests. If the Committee is correct, then the Mental Capacity Act clearly falls short: it provides for a substituted decision-making regime where decisions are made on behalf of the person in their best interests (for instance, by a court appointed deputy). The wishes and feelings of the person are just one factor to be considered alongside others, and are not attributed any “a priori weight or importance”.

The Law Commission proposes a scheme that is supportive of principles of the UNCRPD while being compliant with the ECHR.

In summary, it should be noted that

- the UNCRPD post-dates the development of the Mental Capacity Bill, but was in force when the Bill was drafted;
- the UNCRPD is not justiciable in UK courts in the same way as the ECHR;
- the UNCRPD is a relatively new treaty and, as such, international jurisprudence is still in an early stage of development; and
- the Committee on the Rights of Persons with Disabilities has provided interpretation of the UNCRPD which has been used to challenge the compatibility of mental health legislation with the Convention.

Articles of the UNCRPD discussed in this paper are at Appendix 2.

⁴² Law Commission (2015), *Mental Capacity and Deprivation of Liberty: A Consultation Paper*, Consultation Paper No 222, London: Law Commission, pp.23-4: http://www.lawcom.gov.uk/wp-content/uploads/2015/07/cp222_mental_capacity.pdf.

4 Human Rights and the Mental Capacity Bill

This section does not seek to encompass all the human rights issues relating to the Mental Capacity Bill. Instead, some key human rights-related debates will be summarised in relation to the Bill. These interlinked debates relate to:

- Substitute decision-making
- Best interests
- The capacity test, particularly the diagnostic element to the capacity test
- Deprivation of liberty

Statement of Compliance

As explained in Section 2 above, the Bamford Review and consultation documents leading up to the introduction of the Bill have stressed a human rights based approach to mental capacity. Some authors regard the Bill as entirely compatible with the UN Convention on the Rights of Persons with Disabilities (UNCRPD)⁴³. Indeed, some submissions to the Ad Hoc Committee have expressed the view that the Bill is compliant in its general approach⁴⁴, while challenging some aspects of the Bill. Others have considered the Bill compliant in certain details, such as recognising incapacity for reasons other than mental illness⁴⁵.

The Explanatory and Financial Memorandum for the Bill states⁴⁶:

The provisions of the Bill are compatible with the provisions of the Human Rights Act 1998, and European Convention on Human Rights.

There is no further explanation as to how this compatibility is demonstrated and the submission of the Human Rights Commission states⁴⁷:

The Commission advises the Committee to ask the Departments to set out the basis for the statement of compatibility.

Human rights standards will now be considered in relation to the four main debates listed above.

⁴³ For example, John Dawson (2015), 'A realistic approach to assessing mental health laws' compliance with the UNCRPD', *International Journal of Law and Psychiatry* 40, pp.77-8.

⁴⁴ Submission from the Law Centre (NI) to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill, July 2015, p.2: <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-mental-capacity-bill/written-submissions/law-centre-ni.pdf>.

⁴⁵ Submission to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill from Alex Ruck Keene, University of Manchester, and Cressida Auckland, University of Oxford, p.2: <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-mental-capacity-bill/written-submissions/alexander-ruck-keene.pdf>.

⁴⁶ Explanatory and Financial Memorandum, p.83: <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity-bill---efm---as-introduced.pdf>.

⁴⁷ Human Rights Commission submission, p.6.

Substitute Decision-Making

Clause 1 (2) of the Bill states that:

a person is not to be treated as lacking capacity unless it is established that the person lacks capacity in relation to a matter.

Clause 5 provides that all practical help and support must be given to an individual before they can be considered unable to make a decision for themselves. Where a person is deemed to lack capacity to make a decision, as defined in Clauses 3 and 4, then a decision may, provided a number of criteria are met, be made on the person's behalf.

The interpretation of the Committee on the Rights of Persons with Disabilities of Article 12 of the UNCRPD states the following with regard to substitute decision-making⁴⁸:

On the basis of the initial reports of various States parties that it has reviewed so far, the Committee observes that there is a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention. Indeed, there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision making.

The Committee continues⁴⁹:

States parties' obligation to replace substitute decision-making regimes by supported decision-making requires both the abolition of substitute decision-making regimes and the development of supported decision-making alternatives. The development of supported decision-making systems in parallel with the maintenance of substitute decision-making regimes is not sufficient to comply with article 12 of the Convention.

In submissions to the Ad hoc Committee, it has been argued that the Bill violates Article 12 in that it does not adopt a fully supported decision-making model⁵⁰ and that the UN Committee calls for the abolition of substitute decision-making⁵¹. These views echoed some of the views from the consultation on the draft Bill⁵², although it was also

⁴⁸ Committee on the Rights of Persons with Disabilities (2014), *General comment No. 1 (2014), Article 12: Equal recognition before the law*, 19 May 2014, p.1.

⁴⁹ *Ibid.*, p.6.

⁵⁰ Submission to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill from the Patient and Client Council, 15 September 2015, p.2: <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-mental-capacity-bill/written-submissions/patient-and-client-council.pdf>.

⁵¹ Submission to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill from Professor Bernadette McSherry, p.2: <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-mental-capacity-bill/written-submissions/professor-bernadette-mcsherry.pdf>.

⁵² For example, response to the Department of Health, Social Services and Public Safety and Department of Justice by Voypic, September 2014, pp.13-14: <http://www.dhsspsni.gov.uk/voice-of-young-people-in-care.pdf>.

acknowledged that the Bill takes account of a need to shift from substitute to supported decision-making⁵³.

The Centre for Disability Law and Policy has presented a case for a model for supported decision-making that it regards as compatible with Article 12 of the UNCRPD. Acknowledging that there are 'hard cases' where establishing the will and preferences of an individual may not be possible, the Centre argues that this should nevertheless not impact on a broader system based on supported decision-making⁵⁴.

Best Interests

Clause 2 of the Bill sets out the 'best interests' principle, where an act is done or a decision made on behalf of a person:

The act must be done, or the decision made, in the person's best interests.

Clause 7 sets out the process of establishing what is in a person's best interests.

Article 12.4 of the UNCRPD refers to safeguards to prevent abuse of an individual, explaining that:

Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person.

The UN Committee's General Comment interprets this respect of the 'rights, will and preferences' in the following terms⁵⁵:

Where, after significant efforts have been made, it is not practicable to determine the will and preferences of an individual, the "best interpretation of will and preferences" must replace the "best interests" determinations. This respects the rights, will and preferences of the individual, in accordance with article 12, paragraph 4. The "best interests" principle is not a safeguard which complies with article 12 in relation to adults. The "will and preferences" paradigm must replace the "best interests" paradigm to ensure that persons with disabilities enjoy the right to legal capacity on an equal basis with others.

There is a clear rejection of a 'best interests' principle by the UN Committee in favour of 'will and preferences'.

A number of submissions to the Ad Hoc Committee were generally in accord with this approach⁵⁶ and this was a position given in an evidence session to the Ad Hoc Committee⁵⁷:

⁵³ Response to the Draft Mental Capacity Bill (NI) by the School of Nursing, University of Ulster, 24 August 2014, pp.2-3: <http://www.dhsspsni.gov.uk/school-of-nursing-university-of-ulster-mcb.pdf>.

⁵⁴ Centre for Disability Law and Policy, Northern Ireland Department of Justice Department of Health and the Social Services and Public Safety in Northern Ireland, Submission September 2014, pp.8-11, 14: <http://www.dhsspsni.gov.uk/centre-for-disability-law-and-policy-mcb.pdf>.

⁵⁵ Committee on the Rights of Persons with Disabilities (2014), *General comment No. 1 (2014), Article 12: Equal recognition before the law*, 19 May 2014, p.5.

In 2015, we should not consider best interests as a principle that is appropriately applied to adults. Instead, I urge the Committee and the Assembly as a whole to consider reframing this clause based on respect for the individual's will and preferences as required by article 12 of the UN convention. While efforts can, of course, be made, as may be explained by other witnesses today, to incorporate respect for will and preferences within a definition of best interests, I firmly believe that a break with the paternalistic overtones of best interests language is required to achieve the desired effect of promoting the individual's autonomy. That would make the legislation more human rights compliant, and evidence from other jurisdictions suggests that a focus on legal capacity and respect for will and preferences is ultimately more cost-effective.

Not all submissions to the Ad Hoc Committee agree with the rejection of 'best interests'. It is argued, rather, that the principle can comply with the UNCRPD provided there are suitable safeguards⁵⁸. Indeed, one submission states⁵⁹:

If it can be shown that the substance rather than the form of the decision making process provides for any decisions to be taken by a substitute decision-maker appropriately to respect to the rights, will and preference of the person concerned, then it seems to me that there is a proper argument that the use of the term is not fatal here as regards compliance with the CRPD.

Furthermore, it has also been argued that, while it is acknowledged that 'best interests' is paternalistic and in contravention of the UNCRPD, there is a clinical reality that some views cannot be ascertained⁶⁰.

When the House of Lords Select Committee on the Mental Capacity Act 2005 considered the best interests principle, it likewise heard significant evidence rejecting best interests as an underlying principle. However, the Select Committee concluded that it was the implementation of the principle that was problematic, not the principle itself⁶¹:

We recommend the Government work with professional regulators and the medical Royal Colleges to ensure that the Act is given a higher profile. This work should

⁵⁶ For example, submissions from Professor Penelope Wheeler (p.9), Centre for Disability Law and Policy (p.7), Disability Action (p.3), Mencap (p.2), etc.

⁵⁷ Dr Eilionóir Flynn, Ad Hoc Joint Committee on the Mental Capacity Bill, meeting on Monday, 14 September 2015: <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=14845&evidID=8588>.

⁵⁸ Submission to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill from the Essex Autonomy Project, p.4: <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-mental-capacity-bill/written-submissions/essex-autonomy-project.pdf>.

⁵⁹ Submission to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill from Alex Ruck Keene and Cressida Auckland, p.4: <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-mental-capacity-bill/written-submissions/alexander-ruck-keene.pdf>.

⁶⁰ Submission to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill from the Royal College of Psychiatrists in Northern Ireland (p.7): <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-mental-capacity-bill/written-submissions/royal-college-of-psychiatrists-in-northern-ireland.pdf>.

⁶¹ House of Lords Select Committee on the Mental Capacity Act 2005 Mental Capacity Act 2005: post-legislative scrutiny, 13 March 2015, p.10.

emphasise the empowering ethos of the Act, and the best interests process as set out in section 4 of the Act.

A representative for the DHSSPS explained to the Ad Hoc Committee that, ultimately, the state owes individuals a duty of care in order to be compliant with the ECHR⁶²:

There are issues around people who may pose a risk to themselves and others. That activates article 2, the right to life and the right to not be harmed. The issue is really where you place the limits. [...] There are issues around people who may pose a risk to themselves and others. That activates article 2, the right to life and the right to not be harmed. The issue is really where you place the limits.

Ultimately, it is argued, the right to life in Article 2 of the ECHR supersedes the right to personal autonomy implied by Article 12 of the UNCRPD.

The two positions are not necessarily mutually exclusive, as one contribution in the same evidence session explains⁶³:

The phrase is not "respect for will and preferences". It is:

"respect for rights, will and preferences"

and that includes things like the right to life. Nobody has the right to opt out and consent to have their human rights violated. The state has positive obligations to protect the right to life, to protect you from abuse and to protect people's health. The phrase "respect for rights, will and preferences" is fine and that is the position that I am arguing from in interpreting it.

The argument is also not a clear cut choice between compliance and non-compliance under Article 2 of the ECHR, as the right to life does not constitute an absolute right in all circumstances⁶⁴.

The Capacity Test

While the Bill takes a presumption of capacity as its starting point (Clause 1(2)), Clauses 13 and 14 provide for a formal assessment of capacity, as defined in Clauses 3 and 4. This is explained as follows⁶⁵:

"Formal capacity assessment" is defined in clause 14 as an assessment carried out by a "suitably qualified person" to be defined in regulations. "Statement of incapacity" is also defined in clause 14. It means a statement in writing by the assessor, certifying that in the assessor's opinion, P lacks capacity in relation to the serious intervention. The statement must also specify, among other things, which of the functional aspects of the capacity test set out in clause 4 P is not able to do because

⁶² Chris Matthews, Ad Hoc Joint Committee on the Mental Capacity Bill, meeting on Monday, 14 September 2015.

⁶³ Dr Colin Harper, Ad Hoc Joint Committee on the Mental Capacity Bill, meeting on Monday, 14 September 2015.

⁶⁴ For example, recent case law: *Wye Valley NHS Trust v B*, [2015] EWCOP 60, 28 September 2015:

<http://www.bailii.org/ew/cases/EWCOP/2015/60.html>.

⁶⁵ Explanatory and Financial Memorandum, p.13.

of an impairment or disturbance in the functioning of P's mind or brain. Also, importantly, the statement must specify any help or support given to P, without success, to enable P to make the decision for him or herself.

The Bill does not specify the process for assessing capacity, but such a test must demonstrate that a person is:

- unable to make a decision for himself or herself (functional); and
- this is because of 'an impairment of, or a disturbance of the functioning of, the mind or the brain' (diagnostic).

Submissions to the Ad Hoc Committee have noted that a diagnostic element renders the Bill vulnerable to challenge on the basis that it indirectly discriminates against those with a disability⁶⁶. By this argument, a diagnostic element to the test is more likely to find a person with a mental disability to lack capacity than a person without, as a person without a mental disability is more likely to pass the diagnostic test.

The removal of a diagnostic element to leave only a functional test may also have its pitfalls, as it was pointed out that without a diagnostic limb there is a risk that merely indecisive people could be found to lack capacity⁶⁷.

The UN Committee's General Comment addressing, amongst other things, the use of a functional approach states that⁶⁸:

In most of the State party reports that the Committee has examined so far, the concepts of mental and legal capacity have been conflated so that where a person is considered to have impaired decision-making skills, often because of a cognitive or psychosocial disability, his or her legal capacity to make a particular decision is consequently removed. This is decided simply on the basis of the diagnosis of an impairment (status approach), or where a person makes a decision that is considered to have negative consequences (outcome approach), or where a person's decision-making skills are considered to be deficient (functional approach). The functional approach attempts to assess mental capacity and deny legal capacity accordingly. It is often based on whether a person can understand the nature and consequences of a decision and/or whether he or she can use or weigh the relevant information. This approach is flawed for two key reasons: (a) it is discriminatorily applied to people with disabilities; and (b) it presumes to be able to accurately assess the inner-workings of the human mind and, when the person does not pass the assessment, it then denies him or her a core human right — the right to equal recognition before the law. In all of those approaches, a person's disability and/or decision making skills are taken as legitimate grounds for denying his or her legal capacity and lowering his or her status

⁶⁶ Submissions to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill from Alex Ruck Keene and Cressida Auckland (pp.2-3), the Law Society (p.2), etc.

⁶⁷ The Law Society of Northern Ireland (2014), *Response to the Mental Capacity Bill (NI) Consultation*, Belfast: Law Society NI, p.3: <http://www.dhsspsni.gov.uk/law-society-ni-mcb.pdf>.

⁶⁸ Committee on the Rights of Persons with Disabilities (2014), *General comment No. 1 (2014), Article 12: Equal recognition before the law*, 19 May 2014, p.4.

as a person before the law. Article 12 does not permit such discriminatory denial of legal capacity, but, rather, requires that support be provided in the exercise of legal capacity.

The Committee's interpretation is that any assessment that tests a person's decision making skills (the functional approach), with or without a diagnostic element, is likely to affect people with disabilities more than people without. If this assessment is then used as a basis for depriving an individual of the right to make decisions then this indirectly discriminates against people with disabilities in depriving them of legal capacity. By this argument, to be compliant with the UNCRPD, there needs to be a separation of disability from assumptions with respect to capacity. In other words, the Bill needs to be entirely disability neutral⁶⁹.

The intention of the Bill is to be disability neutral, as explained in the Explanatory and Financial Memorandum:

The definition focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates. It is not an assessment of a person's ability to make decisions generally. A person may lack capacity in relation to one matter but not in relation to another matter. The clause also makes it clear that a person can "lack capacity" even if the loss of capacity is only temporary. It also does not matter what the cause of the impairment or disturbance is. It may be caused by a disorder or disability but equally it may not.

The Bill is therefore presented as not treating people with disabilities any differently than people without. It is asserted in some submissions however, that even a watered down diagnostic test indirectly discriminates against people with disabilities and therefore renders the Bill non-compliant with the UNCRPD⁷⁰.

Deprivation of Liberty

Clauses 24 to 27 and Schedules 1 and 2 of the Bill concern the deprivation of liberty⁷¹. This refers to an act under Clause 9(1) of the Bill, where this constitutes a deprivation of liberty due to a lack of capacity. As discussed above, the inclusion of a diagnostic element in the capacity test – that the inability of a person to make a decision has to be 'because of an impairment of, or a disturbance in the functioning of, the mind or brain' – threatens to breach Article 14 of the UNCRPD on the grounds that a person with a mental disability is more likely to be deemed to lack capacity than a person without a mental disability and that this can result in a deprivation of liberty.

⁶⁹ Submission to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill from the Law Centre, p.4: <http://www.niassembly.gov.uk/globalassets/documents/ad-hoc-mental-capacity-bill/written-submissions/law-centre-ni.pdf>.

⁷⁰ Submission to the Ad Hoc Joint Committee to Consider the Mental Capacity Bill from Alex Ruck Keene and Cressida Auckland, p.3.

⁷¹ See Research and Information Service Briefing Paper 96/15, *Mental Capacity Bill: Deprivation of Liberty Safeguards*, 16 September 2015: <http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2015/hssps/9615.pdf>.

This potentially comes into conflict with Article 5 of the ECHR, which sets out the limited circumstances under which a person may be deprived of liberty, one of which is unsoundness of mind. To conform with the requirements of the ECHR to justify deprivation of liberty, a test has to demonstrate that a person is of 'unsound mind'. This may indirectly discriminate against persons with mental disability and thus comes into conflict with the UNCRPD. This is explained by a representative of the Northern Ireland Human Rights Commission in the following terms⁷²:

An alternative approach which could be taken is to delete the reference to impairment or disturbance in the functioning of the brain, therefore providing an open-ended test which, potentially, any person could meet. However, as the Bill covers matters such as deprivation of liberty, the commission does not recommend that approach at this time. To do so would render the clauses of the Bill relating to the deprivation of liberty incompatible with the European Convention on Human Rights article 5(1)(e), which requires an individual to be "of unsound mind" before they may be deprived of their liberty on public protection grounds.

Written submissions to the Ad Hoc Committee have also identified this potential conflict⁷³ and, in the instances where the two standards might clash, it has been pointed out that the ECHR takes precedence⁷⁴ (see Section 3 above). The Bill and the Explanatory and Financial Memorandum, however, are not explicit in prioritising the ECHR on this point.

The European Court of Human Rights advises⁷⁵:

The term "a person of unsound mind" does not lend itself to precise definition since psychiatry is an evolving field, both medically and in social attitudes. However, it cannot be taken to permit the detention of someone simply because his or her views or behaviour deviate from established norms.

The guidance goes on to define the three minimum conditions that should be satisfied for a deprivation of liberty⁷⁶:

1. the individual must be reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required;
2. the individual's mental disorder must be of a kind to warrant compulsory confinement. The deprivation of liberty must be shown to have been necessary in the circumstances;

⁷² Colin Caughey, Ad Hoc Joint Committee on the Mental Capacity Bill, meeting on Monday, 14 September 2015.

⁷³ E.g. submissions to the Ad Hoc Committee from Alex Ruck Keene and Cressida Auckland (p.6), Northern Ireland Human Rights Commission (p.12), etc.

⁷⁴ Evidence to the Ad Hoc Committee on 29 June 2015 by Alex Ruck Keene, Professor Phil Fennell and Professor Wayne Martin: <http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=14404&evidID=7803>.

⁷⁵ European Court of Human Rights (2014), *Guide on Article 5 of the Convention: Right to Liberty and Security*, Strasbourg: Council of Europe, p.17: http://www.echr.coe.int/Documents/Guide_Art_5_ENG.pdf.

⁷⁶ *Ibid.*, p.18.

3. the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

It has been suggested that, while the Bill provides for deprivation of liberty on the basis of a lack of capacity (combined with other specified criteria), it is unclear if deprivation on this basis satisfies the first two conditions set out above. The apparent desire to avoid potentially stigmatising references to 'mental disorder' in the Bill may have created uncertainty regarding compliance with Article 5.

Giving evidence to the Ad Hoc Committee, one expert noted that⁷⁷:

... it looks to me like you have the ability to say that someone can be deprived of their liberty on the basis of a lack of capacity, but for the purposes of the European Convention, you have to have someone who can be deprived of their liberty only if they are of "unsound mind", which is the test that article 5 requires. Article 5(1)(e) says that you can detain someone on the basis of mental disorder, which is the exception that we have, only if there is objective evidence of a mental disorder of a nature and degree warranting detention. Unless I have entirely missed something, I do not think that the Bill quite provides for that, which it would need to.

Factors for Consideration

This complex Bill has clearly generated a certain degree of debate. There are also additional factors that need to be taken into account when considering human rights compliance. There are no agreed understandings with reference to human rights compliance of the Bill. Indeed, there are competing interpretations of the international human rights instruments in relation to mental capacity.

The UNCRPD as a recent treaty

The UNCRPD is the most recent of the major international human rights treaties. The implications and operation of the standards are still being developed, as is the international jurisprudence associated with the treaty. On this basis, the Northern Ireland Human Rights Commission has advised that a review of the operation of the legislation be carried out within three years after it is passed⁷⁸. In addition, the Commission⁷⁹:

would be very much in favour of the establishment of a Standing Committee to review the Act as it is implemented and all the secondary pieces of legislation that are proposed within it. In that way, you would have your level of expertise developed within the Assembly in working on what is a very complex topic. We would be very much in favour of the establishment of a new Standing Committee on this Act.

⁷⁷ Evidence to the Ad Hoc Committee on 29 June 2015 by Alex Ruck Keene:

<http://aims.niassembly.gov.uk/officialreport/minutesofevidencereport.aspx?AgendaId=14404&evidID=7803>

⁷⁸ Submission to the Ad Hoc Committee by the Human Rights Commission, p.10.

⁷⁹ Colin Caughey, Ad Hoc Joint Committee on the Mental Capacity Bill, meeting on Monday, 14 September 2015.

The UNCRPD and the Committee for the Rights of Persons with Disabilities

The UNCRPD is an international human rights treaty and the UN Committee is a group of experts charged with examining the compliance of states parties to the Convention. The UN Committee has interpreted the standards of the UNCRPD in its examinations and also in General Comments. General Comment No 1, which interprets Article 12 of the UNCRPD, has been cited in submissions when compatibility with the Convention is being considered. It is a matter of debate as to how much weight should be given to the interpretation of the UN Committee in relation to the standards agreed by the states ratifying the treaty.

The UNCRPD and the ECHR

As stated above, the standards of the ECHR are directly justiciable in UK courts through the Human Rights Act 1998. In addition, the Northern Ireland Assembly may not legislate in a way that is incompatible with the ECHR. Where there are potential inconsistencies which cannot be resolved, the ECHR takes precedence.

However, such a stark conflict between the two international human rights instruments may be less of an issue than suggested. Increasingly, the UNCRPD has been used in the European Court of Human Rights to guide judgements under the ECHR where the rights of people with disabilities are being considered⁸⁰.

Implementation

The House of Lords review of the operation of the Mental Capacity Act 2005, rather than finding the Act itself in breach of human rights standards, concluded primarily that the provisions of the Act were not being adequately implemented⁸¹:

Our findings suggest that the Act, in the main, continues to be held in high regard. However, its implementation has not met the expectations that it rightly raised. The Act has suffered from a lack of awareness and a lack of understanding. For many who are expected to comply with the Act it appears to be an optional add-on, far from being central to their working lives. The evidence presented to us concerns the health and social care sectors principally. In those sectors the prevailing cultures of paternalism (in health) and risk-aversion (in social care) have prevented the Act from becoming widely known or embedded. The empowering ethos has not been delivered. The rights conferred by the Act have not been widely realised. The duties imposed by the Act are not widely followed.

While the main discussions on human rights standards have been regarding the Bill as primary legislation, the House of Lords review suggests that secondary legislation,

⁸⁰ European Union Agency for Fundamental Rights (2013), Legal capacity of persons with intellectual disabilities and persons with mental health problems, Vienna: FRA, p.18: <http://fra.europa.eu/sites/default/files/legal-capacity-intellectual-disabilities-mental-health-problems.pdf>.

⁸¹ House of Lords Select Committee on the Mental Capacity Act 2005 (2014), *Mental Capacity Act 2005: post-legislative scrutiny*, p.6.

regulation, guidance and implementation will be key factors in human rights compliance.

As mentioned above, direct comparisons of the Bill with the 2005 Act are not always helpful. But the importance of how the provisions of the Bill are implemented has some relevance here.

Resources

In 2010 the Equality Commission for Northern Ireland commissioned research into the shortfalls in Northern Ireland relating to the UNCRPD. The report stated of the Bill⁸²:

For the Mental Capacity Bill to be a means of promoting and protecting the rights of people with disabilities in Northern Ireland, such programmes need to be adequately resourced. Without the proper resourcing of such services, it is possible that the Mental Capacity Bill will create a worsening experience for disabled people as they will be left more to make decisions themselves in all areas of their life, yet they will not be receiving the support necessary to enable them to realise their mental capacity to make such decisions.

Consequently, regardless of the provisions of the Bill itself, the level of resource given to the implementation of the provisions and to address the implications of the provisions will be a key component in compliance with international human rights compliance.

Without adequate support, particularly in the context of a bill which puts a premium on autonomy, the risk, to coin a phrase used by DA Treffert, is that people will be 'dying with their rights on'⁸³.

⁸² Dr Bronagh Byrne, Dr Colin M Harper, Rebecca Shea Irvine, Hannah Russell and Barry Fitzpatrick (2014), *UNCRPD: Shortfalls in public policy and programme delivery in Northern Ireland relative to the Articles of the UNCRPD*, Belfast: ECNI, p.23: http://www.equalityni.org/ECNI/media/ECNI/Publications/Delivering%20Equality/RES1314-05_UNCRPD_Final-Report-v1_-130614.pdf.

⁸³ Darold Treffert (1973), 'Dying with their Rights On', *American Journal of Psychiatry* 130 (9), 1041.

Appendix 1: Articles of the European Convention on Human Rights Relevant to the Mental Capacity Bill

Article 2: Right to Life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- in defence of any person from unlawful violence;
- in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- in action lawfully taken for the purpose of quelling a riot or insurrection.

Article 3: Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 5: Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to

exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

Article 8: Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Article 13: Right to an effective remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Appendix 2: Articles of the UN Convention on the Rights of Persons with Disabilities Relevant to the Mental Capacity Bill

Article 3 - General principles

The principles of the present Convention shall be:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- b. Non-discrimination;
- c. Full and effective participation and inclusion in society;
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- e. Equality of opportunity;
- f. Accessibility;
- g. Equality between men and women;
- h. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Article 7 - Children with disabilities

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Article 12 - Equal recognition before the law

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Article 14 - Liberty and security of the person

1. States Parties shall ensure that persons with disabilities, on an equal basis with others:
 - a. Enjoy the right to liberty and security of person;
 - b. Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.
2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of this Convention, including by provision of reasonable accommodation.

Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.
2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

Article 16 - Freedom from exploitation, violence and abuse

1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.
2. States Parties shall also take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, inter alia, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive.
3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.
4. States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs.
5. States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

Article 17 - Protecting the integrity of the person

Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

Article 19 - Living independently and being included in the community

States Parties to this Convention recognize the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community, including by ensuring that:

- a. Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement;
- b. Persons with disabilities have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community;
- c. Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.