

FROM THE MINISTER OF HEALTH



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Our Ref: COR-0420-2026

Date: 13 March 2026

Dear Philip,

Thank you for your correspondence on the 6 March which included a number of questions following committee deliberations on 5 March 2026 in respect of the Adult Protection Bill. I have detailed responses to the questions below:

- 1. Clauses 11 & 17:** Further details on how assessments of capacity will be conducted, including: the type of assessment that will be used; who will be able to carry this out; at what point it will be done; and what the procedure will be in an emergency or expedited scenario.

The Bill Team have taken advice from the Office of Legislative Counsel regarding this query.

The Mental Capacity Act 2016 (MCA) outlines that formal capacity assessments should be carried out when serious interventions (such as deprivation of liberty) are being considered. Capacity decisions under MCA are typically made by those taking direct action, and except in an emergency, the MCA requires formal assessment and documentation to be completed before action is taken. Notably, the formal capacity assessment under the MCA is only required where there is to be a “serious intervention” as defined in the MCA. Additionally, the formal capacity assessment provisions in sections 9 and 13 of the MCA are presently in force only for the limited purposes of deprivation of liberty, so replicating them in the Adult Protection Bill for all interventions would go over and beyond current Mental Capacity law.

The interventions under the Adult Protection Bill are closer to the basic intervention level in section 9(1)(c) and (d) of the MCA. Section 9(1)(c) and (d) of the MCA only requires a person to take reasonable steps to establish whether the adult lacks capacity and reasonably believes that is the case. It is only at a higher level of intervention (a serious intervention) that clause 13 of the MCA requires the additional safeguard of a formal assessment.

Under the Adult Protection Bill as currently drafted, there is no requirement for a formal assessment process during an initial visit; rather, reliance is placed on the reasonable belief and on-the-spot assessment of the relevant social worker or medical professional.

The Adult Protection Bill does require a more formal assessment of capacity for the purposes of seeking Magistrate approval for the use of the protection orders. The situation in clause 17(2)(a) of the Bill is different to that in section 9(1) and 13 of the Mental Capacity Act in that it is initially a court (and not the person taking direct action in relation to the adult) which has to take the decision as to whether the adult lacks capacity. The Adult Protection Bill therefore places an obligation on the trust applying for the protection order to place reliable professional evidence on capacity before the court. In practice, this could take the form of presenting to the court something equivalent to the formal capacity assessment under the MCA. It is the view of the Department that those responsible for completing that assessment should be social workers and health care professionals as defined within the Bill.

- 2. Clause 12:** To set out how a Banning Order under Clause 12 of the Bill will differentiate from a non-molestation order under existing legislation, and to outline any consideration that has been given to the rights of the person served with the Banning Order.

Both orders offer a form of protection to a person who is at risk of harm. The persons who can apply for the order are different, the courts who can grant the order are different, the procedures for making the order are different, the grounds on which the order can be made are different, the persons that can be protected by the order are different, the provisions which the order can contain are different and the consequences of non-compliance with the order are different. OLC are content to expand on the technical detail or explain any particular matter of concern to the Committee.

Regarding the rights of the person served, there is a right of appeal for both the Banning Order and the Temporary Banning Orders. The Bill also provides that Legal Aid is available with regard to the Orders. Both Statutory Guidance and Trust procedures will direct social workers to have regard to the welfare of the person being served the Banning Order, particularly when the serving of the Order would result in that person becoming at risk due to being removed from their home.

3. **Clause 22:** In their evidence to Committee, the Nursing and Midwifery Council has suggested an amendment to add “*professional regulators*” to the list of those who should be consulted about guidance produced under Clause 22(3). Can the Department assess what the impact would be of this potential amendment?

The Adult Safeguarding Transformation Board have agreed to ask OLC to draft an amendment to Clause 22(3) to add professional regulators to the list of those who should be consulted about guidance produced under Clause 22(3). (A copy of the amendment drafted by OLC is provided with this letter).

4. **Clause 23:** Examples of what may constitute “*reasonable excuse*”, as referenced at Clause 23(1).

The purpose of the “without reasonable excuse” provision is to prevent actions being categorised as criminal where they could technically amount to obstruction, but they are taken in circumstances where the actions can be viewed as reasonable and not deserving of punishment.

The application of the provision is entirely dependent on the facts of a given case and there is no list of acceptable excuses. The circumstances where the provision might come into play include - those where the accused acts in ignorance of, or under a misapprehension as to, actual events; those where the accused is reacting in a reasonable manner to an emergency or perceived emergency; those where the accused performs a normal everyday activity (e.g. discarding documentation) which has the unintended result of obstruction or prevention.

The practical application of the provision in the case of clause 23 is likely to be rare and involve some exceptional circumstances; but the purpose of the provision is to prevent conviction in such a rare or exceptional case where there is genuine and reasonable excuse as to why the accused acted as they did.

I hope you find this information helpful.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Mike Nesbitt', with a horizontal line underneath the name.

Mike Nesbitt MLA
Minister of Health