Department of
Health, Social Services and Public Safety
www.dhsspsni.gov.uk

By email:
mentalcapacitybill@niassembly.gov.uk

Room D4.26
Castle Buildings
Stormont Estate
BELFAST
BT4 3SQ
Tel: 028 9052 2666

Dr Kathryn Aiken
Clerk
Ad hoc joint committee on the
Mental Capacity Bill
Room B32
Parliament Buildings
Stormont
Belfast
BT4 3XX

3 November 2015

Dear Kathryn

MENTAL CAPACITY BILL – PART 2 (clauses 35-66), PART 3 AND PART 4

Thank you for your email of 12 October, setting out the Committee's initial position on Part 2 (clauses 35-66), Part 3 and Part 4 of the Bill.

The Department's response is as follows.

Clause 62
It may be helpful to briefly recap on the purpose of clause 62.

Clause 62 explains when a situation is an emergency for the purposes of Part 2 of the Bill. It is needed because Part 2 requires additional safeguards to be met where a serious intervention is being proposed. The purpose of most of the additional safeguards is to check that what is being proposed is in the best interests of P.

In practical terms, it means that the decision maker must weigh up the risks involved in delaying the intervention to put in place the relevant additional safeguard or to check if it is in place against the risk of harm involved in proceeding without the safeguard in place. This exercise has to be done for each applicable additional safeguard as there may be time to put one or more of the safeguards in place but not others.

If the risk of harm involved in delaying the intervention is greater, the situation is an emergency and D can proceed without putting the relevant safeguard in place or checking if it is in place.

It is the Department's view that, given the purpose of the additional safeguards in Part 2 (i.e. to ensure what is being proposed is in the best interests of P), it has to be right that the assessment of risk required by clause 62 (to determine whether the safeguards should be complied with or not) should be focused on any harm that may

come to P. The Bill is after all a framework that aims to allow decisions to be made in the best interests of P: decisions that could otherwise be made by P (not by someone else) if P had capacity. In other words, it is the Department's view that there are limitations on the extent to which the interests of others can justifiably have a bearing on what should be done under this framework.

Notwithstanding the above, the Department would wish to make two related points that are relevant to the Committee's concern about this clause. First, for the purposes of the Bill and clause 62, harm has, after much careful thought, been defined in clause 293 to include any harm to P resulting from that person harming others. This mirrors a similar provision in clause 7 (see subsection (9)). Both of these provisions were modifications made to the Bill to address concerns similar to those raised here by the Committee: modifications that the Department considered could be justified without skewing the underpinning aims of the Bill as explained above.

In light of those modifications and looking specifically at the purpose of clause 62, it would be the Department's view that it is difficult to imagine a situation in which not complying with the safeguards (and proceeding with the intervention as an emergency) would create a risk of harm to others but not a risk of harm to P. Indeed to include a reference to harm to others in that clause might imply otherwise.

In light of the above, the Department would not support an amendment to this clause to reference harm to others.

Clause 84 and related clauses

Independence
The Department does not accept the proposition that the current provisions in the Bill would not allow for the appointment of advocates who could fulfil their role and functions under the Bill in an independent manner. As the Committee may already be aware, the majority of advocacy services are currently being commissioned by the HSC Trusts and delivered by a range of voluntary/community sector organisations. This arrangement allows the HSC Trusts to create services that best meet the specific needs of the local population. The key point, however, is that all of these services are being commissioned and delivered in accordance with Departmental guidance[1]. That guidance was issued by the Department in 2012 to build capacity within the community/voluntary sector and prepare the way for the new statutory right to independent advocacy in the Bill. It sets out a number of principles and standards for both the commissioning and delivery of advocacy services. Independence is one of those standards and is clearly explained in the guidance.

"Independent Mental Capacity Advocates"
While we would reiterate that the role of independent advocates under the Bill is different to, and broader than, the role of independent advocates under the Mental Capacity Act 2005 (MCA), the Department has no objections to exploring further with Counsel the suggestion made by the Law Centre to use the MCA term "independent mental capacity advocates" as a way of distinguishing on the face of the Bill between the new statutory service and other independent advocacy services.

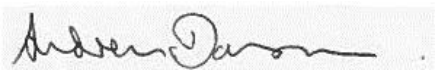
[1] DHSSPS: Developing Advocacy Service: A Policy Guide May 2012

Subsection (3)
The Department understands the rationale behind the Law Centre's suggestion that the words "so far as practicable" should be removed from this subsection. The Department will explore this issue further and discuss a possible amendment to this subsection with Counsel.

Clause 85
The role of independent advocates under the Bill relates directly to the core purpose of the framework in Part 2 of the Bill: to ensure that the particular decision that needs to be made under that framework in respect of the person who lacks capacity to make it him/herself is in that person's best interests. While the independent advocate is not responsible for making the best interests decision, it is made clear in clause 35 (and clause 53) that an independent advocate must be in place *to represent and support the person and be consulted and have his/her views taken into account when the determination of best interests is being made* where what is being proposed is, broadly speaking, a compulsory serious intervention. This is repeated in various clauses in Part 4. Regulations will set out what the independent advocates must do to fulfil this role. The Code of Practice will provide further guidance. It is the Department's view that nothing further is required on the face of the Bill.

Clause 90
As the Committee will be aware, health records or any other record may include a wide range of information, including information about matters that may not be relevant to a particular decision being made under Part 2 and in relation to which an independent advocate may be instructed. The purpose of the limitation in subsection (4) is to ensure that only relevant information is disclosed to the independent advocate. It is the Department's understanding that this is consistent with the Data Protection Act 1998 which requires the data controller (the person who holds the record) to only disclose information where relevant and where required by law to do so.

Yours sincerely,



Andrew Dawson
Mental Health Policy Unit / Mental Capacity Bill Project
Email: andrew.dawson@dhsspsni.gov.uk