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Dr Kathryn Aiken
Clerk
Ad hoc joint committee on the Mental Capacity Bill
Room 410
Parliament Buildings
Stormont
Belfast
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4 January 2016

Dear Kathryn

MENTAL CAPACITY BILL – ENDURING POWERS OF ATTORNEY

You will be aware that the relevant Departments continue to have concerns with the Committee's proposal to retain the current Enduring Powers of Attorney system alongside the new Lasting Powers of Attorney system.

The Department has discussed the Committee's proposal further with colleagues in the Department of Finance and Personnel and the Northern Ireland Courts and Tribunals Service who have provided an analysis of the difficulties that may arise from having this dual system in place. A copy is attached at **Appendix A** for the Committee's consideration.

Yours sincerely,

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Department of Finance and Personnel

The Mental Capacity Bill seeks to deliver a comprehensive framework for substitute decision-making which is fit for the 21st Century.

It is the product of an evidence-based approach and, not only does the Bill draw on developments in other jurisdictions, it has been informed by the experiences and views of users, carers, volunteers, professionals and a wide range of groups and organisations.

It has always been recognised that there are examples of strategic, policy and practice excellence in the current system. However, it has been determined that the arrangements for substitute decision-making should be radically overhauled. The provisions in the Bill, including the provisions relating to lasting powers of attorney, have been carefully constructed and balanced and are intended to address inequalities, promote human rights and secure respect for the inherent dignity of each individual.

The importance attaching to the legislative changes should not be undermined. The Bill is meant to signal a sea change in attitudes to capacity and that key message will be drastically undermined if the arrangements for substitute decision-making are only partially revised.

A dual system which allows people to opt for either an EPA or an LPA is superficially attractive. However, from an informed consent perspective, it would be extremely difficult to operate, not least because an EPA has a much more restricted range. Advisers would have to carefully explain the differences between the two and users would then have to weigh that advice and arrive at a determination. Fine legal distinctions can be difficult to grasp and a dual system will inevitably make difficult decisions all the more difficult.

Moreover, the challenge of producing clear, concise, user-friendly information will be even greater if we have to try and explain different, but overlapping concepts.

It is not just the practical, day-to-day difficulties that may arise from a dual system. The courts will have to deal with two separate pieces of legislation and there is a real danger that the case law on substitute decision-making will diverge. That could prove to be extremely problematic.

We appreciate that change is never easy and that it will take a little time for advisers to navigate the new system. However, this is not change for change sake and there are times when it is both right and necessary to say “out with the old and in with the new”.

We want to ensure that there is an integrated and co-ordinated approach to substitute decision-making and the new lasting power of attorney regime has been carefully crafted to meet the needs of users and protect their best interests.

Allowing for the continued creation of EPAs could, at best, prove disruptive and, at worst, produce gaps which will leave vulnerable people exposed.

Northern Ireland Courts and Tribunals Service (NICTS)

NICTS would be opposed to managing dual systems for both EPAs and LPAs. The current EPA system does work well for the purpose it is intended and the registration process is straight forward and not labour intensive. However, the Office of Care and Protection have confirmed that some customers do find the current process challenging to understand and on a daily basis receives a significant amount of calls from people who find it difficult to grasp what is required. To attempt to manage two similar systems that overlap in significant areas would only add confusion rather than simplifying the process.

There was concern that the LPA application form would be too onerous and complicated. It should be noted that the NI form has not been designed as yet and this presents an opportunity to draft a simple form that includes all relevant information. The NICTS will engage with stakeholders, such as the Law Society and interested groups to ensure their views are considered. Further to this the NICTS believe that the LPA forms currently used in England and Wales are simply designed and easy to follow.