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**Health, Social Services
and Public Safety**

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Dear Kathryn

MENTAL CAPACITY BILL – CLARIFICATION ON PARTS 7, 13 & 15

Thank you for your letter of 20 October requesting clarification on Parts 7, 13 and 15 of the Bill.

The Department's comments and responses are set out below.

Part 7

Clause 124

The Departments draw the Committee's attention to paragraph 16 of Schedule 5 to the Bill. Paragraph 16(4) gives the High Court power to direct the Public Guardian to cancel the registration of the enduring power of attorney in a number of circumstances, including if the Court is satisfied that the attorney is unsuitable or that fraud or undue pressure was used to induce the donor to create the enduring power of attorney.

Clauses 125(5) and 126(2)

In light of the Committee's comments, the Department intends to undertake a further analysis of these clauses to ensure that there are no unintended gaps.

Part 13

Clause 256

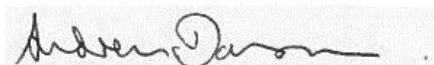
As the Committee will be aware, mental capacity in adults is distinct from child competence, not least because children are in the process of gaining capacity whereas for adults, capacity is assumed. This is reflected in the existing common law formulated by the courts which includes a competence test for children under 16 (known as Gillick competence) and will presumably apply for the purposes of determining whether an offence has been committed under this clause. However, there is also nothing preventing the courts from adopting aspects of the capacity test in the Bill for this purpose if appropriate - appropriate, that is, having regard to the existing principles of the common law.

Part 15

Clause 285

The Department is still considering the query raised by the Committee in relation to this clause. Following further discussions with legal and professional colleagues, we will revert to the Committee as soon as possible.

Yours sincerely,



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