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Dear Kathryn

MENTAL CAPACITY BILL – PART 1

Thank you for your letter of 28th September setting out the Committee's initial position on Part 1 of the Bill.

The Department's response and comments on the issues raised are set out below.

Clause 1

The Department would not support the suggestion put forward by Disability Action that the principle in clause 1(4) should be re-drafted to read "the person must be supported to make a decision" for a number of reasons. Firstly, it would involve the imposition of a duty on the decision maker that in many cases would be impossible to comply with. The most obvious example would be if P were in a coma. Clearly, in that case, it would simply be impossible to support P to make a relevant decision.

Fundamentally, the wording suggested by Disability Action would also be incompatible with clause 1(1) which makes clear that the principles apply where a determination falls to be made of whether a person who is 16 or over lacks capacity in relation to a matter. If, as the suggested wording would infer, everyone could be supported to make a decision, the need for a determination of whether a person lacks capacity would never arise. This would clearly be at odds with the core purpose of the Bill which, as the long title states, makes new provision relating to persons who lack capacity.

The Department would also wish to advise the Committee that the framing of the principles, including clause 1(4), is intended to tie them directly to the definition of "lacks capacity" and the core decision making framework in Part 2 of the Bill. This is to ensure that the principles have practical effect on the ground.

Clause 4

The Department's view is that RCLT's proposed amendment to subsection (1) would make no difference to the legal effect of clause 4 and, therefore, is unnecessary. It is important to note that clause 4 links directly to clauses 1(4) and 5. If these clauses have not been complied with, the conditions in clause 9 (1)(c) and (d) will not have been met and the decision maker will not be protected from liability. In other words, when read together, these clauses already achieve the intention behind the proposed amendment as we understand it.

Clause 7

Essex Autonomy Project

The Essex Autonomy Project (EAP) has proposed a number of amendments to clause 7.

In sub-section (5), it has been suggested that "encourage and help" should be replaced with "support". The Department would not be supportive of this amendment. In drafting terms, it is the Department's view that the current wording relates better to "participate". The current wording also avoids any potential confusion with clause 5 and the role of others involved in the best interests decision making process, such as the nominated person and the independent advocate who have clear support functions under the Bill.

Turning to the amendment to subsection (6) and the new subsections (8), (9) and (10) proposed by the EAP, it is the Department's understanding that these are intended to create a rebuttable presumption that it will always be in the best interests, of a person who lacks capacity to make a particular decision, to act in accordance with that person's will and preferences. Compelling reasons amounting to serious adverse consequences for P would be required to rebut this presumption.

The Department's current view is that, bearing in mind the very wide range of decisions to which the Bill applies, the practical effect of these amendments could be to set such a stringent bar in all cases as to potentially make the framework provided for in the Bill unworkable on the ground. In the absence of any evidence to the contrary, it is also unclear whether the proposed amendments would in fact achieve in all cases what we understand to be the intention behind them i.e. to ensure that the rights of people who lack capacity are protected.

The Department would, however, wish to emphasise that the above points do not in any way mean that we are dismissive of, or do not share, the EAP's motivation in bringing forward the proposed amendments to clause 7. Rather, it is the Department's view that clause 7 as currently drafted, together with the additional safeguards in Part 2 of the Bill, already achieve the desired objective.

Evidence to support this view can be found in recent judgments of the Court of Protection in England and Wales, such as *Wye Valley NHS Trust v Mr B [2015 EWCOP 60]*. In that case, the judge applied the best interests test in section 4 of the Mental Capacity Act 2005 (MCA) and came to the conclusion that an enforced amputation would not be in Mr B's best interest, having placed considerable weight on Mr B's clearly expressed wishes. The Bill of course builds on section 4 of the MCA to provide even further protections by placing a clear and specific focus on the need to identify P's wishes and feelings through the use of "special regard" in clause 7(6)

and by requiring more to be done, through the additional safeguards in Part 2 in particular, where there are disputes to ensure that what is being proposed is necessary and proportionate taking account of all the relevant circumstances.

Law Society NI

The Department is of the view that there are likely to be situations in which consultation with an attorney acting under an EPA would be beneficial when a determination of best interests is being made under the Bill. The Department would therefore intend to bring forward an amendment to clause 7 for this point.

Mindwise

As the Bill requires a nominated person to be in place and consulted for serious interventions, it is assumed that the concern raised by Mindwise relates only to routine interventions proposed under the Bill in respect of which there is no such duty (although it is important to note that, if a nominated person were already in place, clause 7 would require consultation with him/her in respect of routine interventions too).

To require an independent advocate to be appointed and consulted where any routine intervention, such as washing or dressing someone, is proposed because the only relevant person under clause 7(11) is a family member would, in the Department's view, be unworkable. It could also potentially undermine the role of family carers. It is the Department's view that the proper application of clause 7 in each individual case will achieve a more proportionate response to the concerns Mindwise raise, bearing in mind that the requirement to consult relevant people does not apply if it is not appropriate to do so and even, if it is considered appropriate, their views are not determinative of best interests.

Commissioner for Older People (NI)

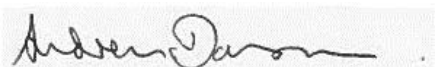
It is the Department's view that it would be impracticable to provide a statutory right of appeal in respect of every decision made under the Bill given its very wide scope. Instead, the Bill adopts a more proportionate and workable approach that aims to provide some of the most vulnerable in society with more protections than are available under the current law. This is explained below.

In essence, the Bill makes any act done in connection with a person's care, treatment or personal welfare subject to clause 9 where the person lacks capacity to make the particular decision him/herself. Clause 9 provides protection from liability but, crucially, only if the applicable safeguards have been met. The more serious the intervention being proposed, the more safeguards need to be met. For the most serious, authorisation is required and there is a right of review to an independent Review Tribunal.

The key point is that, if the applicable safeguards mentioned in clause 9 are not met, the decision maker will not be protected from liability and could be subject to criminal or civil legal proceedings as well as any internal or professional disciplinary processes. Ultimately, recourse to the High Court under Part 6 of the Bill is also available in respect of decisions made on someone's behalf. The High Court also has powers where an attorney acting under an LPA or a deputy is not acting in P's best interests.

The Code of Practice will provide further guidance on all aspects of the legal protections available to people who lack capacity under the Bill and how to avail of them.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Andrew Dawson", is centered on a light grey rectangular background.

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