LAW CENTRE (NI) SUBMISSION TO THE AD HOC JOINT COMMITTEE ON THE MENTAL CAPACITY BILL

JULY 2015

INTRODUCTION

About the Law Centre

The Law Centre is a public interest law non-governmental organisation. We work to promote social justice and provide specialist legal services to advice organisations and disadvantaged individuals through our advice line and our casework services from our two regional offices in Northern Ireland. It provides a specialist legal service (advice, representation, training, information and policy comment) in a number of areas of law, including community care and mental health law as well as social security, immigration and employment. Law Centre services are provided to member agencies across Northern Ireland. The Law Centre works with vulnerable clients who are likely to be affected by the Bill, including people with dementia, people with a learning disability, people with significant mental health issues (including people subject to the Mental Health Order), and their carers.

The Law Centre was a member organisation of the Bamford Review of Mental Health and Learning Disability, chaired the DHSSPS Mental Capacity Bill Reference Group and was a member of the DoJ Mental Capacity Bill Reference Group.

Comments on the United Nations Convention on the Rights of Persons with Disabilities

The Law Centre has no concerns about the compliance of the overall approach of the Bill with the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). It is progressive in human rights terms in replacing disability with impairment (causing loss of decision-making capacity) as a potential basis for detention or compulsory treatment.

It is important that the Bill be assessed in the light of the text of the UNCRPD as a whole, including its obligations: to protect the right to life (art. 10); to equal recognition before the law (art. 12); to liberty and security of person (art. 14); to freedom from torture, inhuman or degrading treatment (art. 15); to freedom from violence, exploitation and abuse (art. 16); to protection of the integrity of the person (art. 17); to live independently and be included in the community (art. 19); and the right to the enjoyment of the highest attainable standard of health (art. 25).

It is the clear view of the 157 states which have ratified the UNCRPD as of July 2015 that the Convention (and in particular article 12 on equal recognition before the law)does not rule out substitute decision-making in all circumstances.

Comments on the European Convention on Human Rights

The Law Centre believes that an impairment of, or disturbance in, the functioning of the mind or brain such as to cause a loss of decision-making capacity is likely to be compliant

with the requirements of article 5 of the European Convention on Human Rights as a basis for detention.

The Law Centre is concerned that the Bill may not be fully compliant with article 8 of the European Convention on Human Rights in its requirements of respect for private and family life. It is the interference with a Convention right which needs to be justified and removing someone's right to make a decision is such an interference in terms of article 8. It is the responsibility of the state to prove that the interference is lawful and justified. To be fully compliant it is likely that the Bill would need to include a presumption of respecting the wishes of P, even if P lacks capacity, unless there is sufficient good reason not to do so. Without such a presumption that state would not be sufficiently constrained by P's wishes and would have too much discretion in making decisions for P. In many actual situations, there will be no good reason why P could not be allowed to do what s/he wants even though she or he lacks the capacity to make the decision. What P wants should be the starting point of consideration of the appropriate outcome.

Proposed Amendments

PART 1 - PRINCIPLES

Amendment to Clause 1(3)(b)

Current Clause 1(3)

Whether the person is, or is not, able to make a decision for himself or herself about the matter—
(a) is to be determined solely by reference to whether the person is or is not able to do the things mentioned in section 4(1)(a) to (d); and
(b) accordingly, is not to be determined merely on the basis of any condition that the person has, or any other characteristic of the person, which might lead others to make unjustified assumptions about his or her ability to make a decision.

We propose that clause 1(3)(b) be amended to ensure conformity with the requirements of the UN Convention on the Rights of Persons with Disabilities (UNCRPD).[1] To comply with the UNCRPD it is not sufficient that 'disability' be explicitly excluded from the meaning of 'lacks capacity'; it should also be explicitly excluded as a potential basis for an assumption with respect to capacity. The UNCRPD requires that legislation be 'disability neutral' and the current Bill text is not sufficiently clear in this regard. Clause 1(3)(b) [Principles: Capacity] would be significantly strengthened by a clarifying change from 'any condition that the person has' to 'any condition, **disorder or disability** that the person has'.

This amendment would also mean coherence of clause 1(3)(b) with clause 3(3) which states: "It does not matter whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disturbance or disability'.

Proposed amended Clause 1(3)(b)

Clause 1, page 1, line 15, at end insert ", disorder or disability"

[1] In particular: ''Article 5 (1) States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law. Art. 5 (2) States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds." And: "Article 12 (1) 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law. Art. 12 (2) States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."

Insertion between clauses 1(5) and 1(6)

We propose that an additional principle be inserted between clauses 1(5) and 1(6).

Amongst the opening principles of the England and Wales Mental Capacity Act 2005, there is a principle of 'least restrictive option':

> Before the act is done, or decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action. [section 1(6)]

It is clear that in the Mental Capacity Act 2005 this principle was intended to function to avoid the need for any compulsory intervention or substitute decision with respect to P. For example, a change in the environment (such as locking dangerous substances in a cupboard) might mean it is not necessary to intervene to restrict P's access to certain areas (such as a kitchen).[2] The 'least restrictive' alternative may often be to change something in the environment or to achieve the purpose of the proposed intervention in another way. Such measures could thus avoid the need for a decision or intervention with respect to P at all. The Report of the House of Lords Select Committee on the Mental Capacity Act 2005 concluded that in practice: 'The least restrictive option is not routinely or adequately considered.'[3] For these reasons we propose that the principle of seeking the least restrictive alternative from the Mental Capacity Act be added to the Bill.

Proposed amendment to Clause 1

Clause 1, page 2, line 8, insert "( ) Before any act is done, or decision made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action."

Clause 4(1)(c) – Meaning of 'unable to make a decision'

Current Clause 4.—
(1) For the purposes of this part a person is "unable to make a decision" for himself or herself about a matter if the person—
…
(c) is not able to appreciate the relevance of that information and to use and weigh that information as part of the process of making the decision; or

[2] The example is from the Parliamentary Under-Secretary of State for Constitutional Affairs (St.Comm.A, col. 25) as cited in Richard Jones, *Mental Capacity Act Manual*, 6th edition, (London: Sweet & Maxwell, 2014), pp. 17-18.
[3] Select Committee on the Mental Capacity Act 2005, *Mental Capacity Act 2005: post-legislative scrutiny*, HL Paper 139, (London: The Stationery Office, 13 March 2014), para. 104, p. 50.

Clause 4(1)(c) as currently drafted uses a different basis for lack of capacity than that of clause 3(1)(c) in the Mental Capacity Act 2005 in that it adds the concept of 'appreciation'.

We consider that any value in the notion of 'appreciation' is as an articulation of the content of 'use or weigh'. Thus it is a redundant addition which adds complexity to no good effect. Further, mental health service users have concerns about the use of the term in clinical practice which we share: namely, that disagreement by a person with clinical opinion is often too readily taken to mean 'lacks appreciation of their illness'. The term is thus best avoided in the Bill.

Proposed amendment to Clause 4(1)(c)

Clause 4, page 2, line 38, leave out "to appreciate the relevance of the information and"

Clause 7 – Best interests

Clause 7(2)(b)

Current Clause 7(2)(b)

7.— (1) This section applies where for any purpose of this Act it falls to a person to determine what would be in the best interests of another person who is 16 or over ("P").

(2) The person making the determination must not make it merely on the basis of—

(a) P's age or appearance; or

(b) any other characteristic of P's, including any condition that P has, which might lead others to make unjustified assumptions about what might be in P's best interests.

A similar amendment (and for similar reasons) to that proposed above for clause 1(3) is needed to Clause 7(2)(b) [Best interests] from 'any condition that P has' to 'any condition, disorder or disability that P has'.

The amendment would ensure conformity with the UNCRPD which requires that decisions not be made simply on the basis of a person's disability. This amendment would also mean coherence within the Bill between clause 7(2)(b) and clause 3(3) which states: "It does not matter whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disturbance or disability'.

Proposed Amendment to Clause 7(2)(b)

Clause 7, page 4, line 16, after "condition" insert ", disorder or disability"

Clause (7)5

Current Clause (7)(5)

That person must, so far as practicable, encourage and help P to participate as fully as possible in the determination of what would be in P's best interests.

Clause 7(5) should be 'support, encourage and help'. This is to better match clauses 1(4) and 5(1) and to ensure compliance with the requirements of article 12(3) of the UN Convention on the Rights of Persons with Disabilities.

Proposed amendment to Clause (7)(5)

Clause 7(5) should be amended by addition from 'encourage and help P to participate' to 'encourage, help and support P to participate'.

Clause 5, page 4, line 28, after "practicable," insert "support,"

PART 2 – LACK OF CAPACITY: PROTECTION FROM LIABILITY, AND SAFEGUARDS

We propose an amendment to add a safeguard in Part 2.

Whilst the requirement for a formal assessment of capacity in clauses 13 and 14 is welcome, it does not provide a safeguard at the stage of the determination of best interests once a formal lack of capacity has been established. The content of a decision as to what is in P's best interests has a greater impact on P's life than the initial finding of a lack of capacity which requires that such a best interest decision be made. Disputes about what is in a person's best interests need to be resolved, but it is important that such processes and the resolution be formally recorded to protect P's rights and interests. A lack of formality to the best interest determination makes it difficult in practice to challenge the decision by any party, including by P him or herself. It is a particularly serious intervention for P when P is not in agreement with the conclusions of a best interest determination and/or is resisting the intervention which is being carried out on that basis.

We therefore propose an additional safeguard for inclusion in Part 2, namely: a 'Formal assessment of best interests' and an associated 'Statement of best interests'. The clauses of our proposed amendment are modelled on clauses 13 and 14 relating to the formal assessment of capacity and incorporate reference as appropriate to the factors relevant to 'Establishing what is in a person's best interests' as laid out in clause 7. A 'Formal assessment of best interests' should be required in circumstances where an act is, or is part of, a serious intervention which is resisted by P.

Proposed Amendment to Part 2 Chapter 2

To be insert the following new Clauses—

ADDITIONAL SAFEGUARD: FORMAL ASSESSMENT OF BEST INTERESTS

"Section 1: Formal assessment of best interests

(1) This section applies where—
(a) section 9(1)(a) and (b) apply; and
(b) the act mentioned there is, or is part of, a serious intervention (see section 60) which is resisted by P.

(2) Where this section applies the condition in section 9(1)(c) is to be regarded as met only if, before the act is done, a formal best interests assessment is carried out.

(3) The formal best interests assessment must have been carried out, and the statement of best interests made, recently enough before the act is done for it to be reasonable in all the circumstances to rely on them.

(4) This section does not apply where the situation is an emergency (see section 62).

(5) See section 2 for the meaning of "formal best interests assessment" and "statement of best interests".

Section 2: formal best interests assessments and statements of best interests

1) This section supplements section 1.

(2) A "formal best interests assessment" means an assessment carried out by a suitably qualified person (who may be D if D is suitably qualified) of what is in P's best interests in relation to the matter in question.

(3) A "statement of best interests" means a statement in writing, by the person who carried out the formal best interests assessment ("the assessor")—

(a) recording the fact that the assessment was carried out, by whom it was carried out and when;

(b) certifying that, in the opinion of the assessor, a specific intervention or act is in the best interests of P within the meaning of this Act in relation to the matter in question;

(c) specifying which of the things mentioned in section 7(3) to 7(9) have been considered and how they have impacted on the decision;

(d) specifying any help or support that has been given to P in keeping with section 5; and

(e) specifying any help or support that has been given to P in the determination of their best interests by an Independent Advocate (see Section 84(1)).

(4) Regulations may prescribe the descriptions of persons who are "suitably qualified" for the purposes of this section."

CHAPTER 4 – AUTHORISATION NEEDED FOR CERTAIN INTERVENTIONS

Clause 22(2) Resistance etc by P to provision of certain treatment

Current Clause 22(2)

Section 9(2) (protection from liability) applies to the act only if the provision of the treatment to P is authorised (and the conditions of section 9(1)(c) and (d), and any other conditions that apply under this Part, are met in relation to the act).

The prevention of serious harm condition (article 21) applies in the event of an objection from P's nominated person to treatment with serious consequences (article 19).

The Law Centre believes that the prevention of serious harm condition should have to be met in order to receive authorisation for the provision of treatment with serious consequences in the event of P resisting. We believe it is unfair to P for the prevention of serious harm conditions to not be required to be met in these circumstances. The resistance of P should have at least the same effect as the objection of the nominated person in terms of the safeguards required and conditions to be met for an intervention to be lawful.

Clause 22(2) should therefore match clause 19(2) which relates to treatment with serious consequences where there is an objection from the nominated person.

Proposed Amendment

Clause 22, page 13, line 38, after "authorised" insert "and the prevention of serious harm condition is met in relation to the act"

PART 4 – INDEPENDENT ADVOCATES

The use of the term 'independent advocates' is potentially misleading as there will continue to be 'independent advocates' who are not carrying out the statutory role in the Bill. It is important that there be no confusion between an advocate who is providing a general advocacy service and an advocate who is fulfilling a statutory role. We therefore suggest changing this name of this role from 'Independent Advocate' to 'Independent Mental Capacity Advocate' throughout the Bill. This will also ensure that the role is properly understood through making use of the corresponding Mental Capacity Act 2005 term.

Proposed amendment across the Bill

Leave out "independent advocate" and insert "independent mental capacity advocate" throughout the Bill.

Clause 84(3) Independent Advocates

Current Clause 84(3)

In making arrangements under subsection (1), and instructing an independent advocate under section 89, an HSC trust must have regard to the principle that a person to whom a proposed act would relate should, so far as practicable, be represented by someone who is independent of any person who will be responsible for the act if it is done.

Clause 84(3) accepts a weak form of independence for an advocate in stating that 'a person to whom a proposed act relates should, **so far as practicable**, be represented by a person who is independent of any person who will be responsible for the act'. This would permit an advocate to be appointed who was not independent of the person responsible for the act. We do not believe that such a potential conflict of interest would be permitted in other areas of life and thus it should not be permitted with respect to independent advocates.

Advocacy services can be commissioned in a way that would ensure genuine independence would always be possible in practice through the possibility of instruction from a pool of suitably qualified advocates. Given that independence is essential is to the effective operation of advocacy provision as a safeguard of the interests of P, the 'so far as practicable' should be removed.

Proposed Amendment to Clause 84(3)

Clause 84, page 45, line 16, leave out ",so far as practicable,"

Clause 85(3) – Functions of independent advocates: provision of support, etc

Clause 85(3) mirrors the provisions of section 36 of the Mental Capacity Act 2005, but omits the provision at section 36(2)(e) which enables regulations to be made to require an advocate to take steps for the purpose of 'obtaining a further medical opinion where treatment is proposed and the advocate thinks that one should be obtained'. We think that this could usefully be included in the Bill.

Proposed Amendment to Clause 85(3)

Clause 85, page 46, line 7, at end insert "( ) obtaining a further medical opinion where treatment is proposed and the advocate thinks that one should be obtained;"

Clause 293(1) Definition of Deprivation of Liberty

Current Clause 293(1)

…
"deprivation of liberty" means a deprivation of liberty within the meaning of Article 5(1) of the Human Rights Convention (and for the purposes of any reference to a deprivation of liberty , it does not matter whether the deprivation of liberty is done by a public authority or not);
…

A deprivation of liberty is defined in clause 293(1) as being "within the meaning of Article 5 (1) of the Human Rights Convention". The UK Supreme Court has recently ruled that the key determination of whether or not a deprivation of liberty has taken place relates to the nature and degree of supervision and control and whether or not the individual is free to leave, irrespective of the location that it occurs in.[4]

There is great value in having clear definition within the Bill as to what exactly constitutes a deprivation of liberty as not doing so is likely to lead to confusion and problems of effective, efficient and fair implementation. We therefore propose that clause 293(1) be amended in the light of recent Supreme Court jurisprudence to include such a definition.

[4] P v Cheshire West and Chester Council and another (Respondents); P and Q v Surrey County Council [2014] UKSC 19, at 49-50.

Proposed Amendment to Clause 293(1)

Clause 293, page 156, line 40, leave out "a deprivation of liberty within the meaning of Article 5(1) of the Human Rights Convention (and for the purposes of any reference to a deprivation of liberty , it does not matter whether the deprivation of liberty is done by a public authority or not);" and insert "that a person is under continuous supervision and control and is not free to leave (and for the purposes of any reference to a deprivation of liberty , it does not matter whether the deprivation of liberty is done by a public authority or not);"

SCHEDULE 1 – AUTHORISATION BY PANEL OF CERTAIN SERIOUS INTERVENTIONS

PART 2 – APPLICATIONS FOR AUTHORISATION

Paragraph 9 – Criteria for treatment

Current Paragraph 9(1)

9.—(1) In relation to the provision to P of particular treatment, the criteria for authorisation are—
(a) that P lacks capacity in relation to the treatment;
(b) that it would be in P's best interests to have the treatment; and
(c) if P's nominated person has reasonably objected to the proposal to provide the treatment and has not withdrawn that objection, that the prevention of serious harm condition is met.

In keeping with our proposed amendment to clause 22(2) above, we believe that the criteria for authorisation of treatment should include the 'prevention of serious harm condition' where P is resisting the treatment. It is not acceptable that the views of P's nominated person be given significance in these criteria when the views of P are not.

Proposed Amendment to Paragraph 9(1)

Schedule 1, page 163, line 24 insert "( ) if P has resisted the proposal to provide the treatment and has not withdrawn that resistance, that the prevention of serious harm condition is met; and"