



Essex Autonomy Project

29 June, 2015

The following amendments to the Northern Ireland Mental Capacity Bill are proposed by researchers associated with the Essex Autonomy Project (University of Essex), in conjunction with its ongoing “Three Jurisdictions” study of approaches to capacity legislation in England & Wales, Scotland, and Northern Ireland. The amendments were prepared by Prof Wayne Martin (Director of the Essex Autonomy Project) and Alex Ruck Keene (39 Essex Chambers and University of Manchester) and are designed to:

- (1) Build upon practical experience of the Mental Capacity Act 2005 in England and Wales
- (2) Bring the Bill closer to compliance with the Convention on the Rights of Persons with Disabilities

Clause 5

- (1) A person is not to be regarded for the purposes of section 1(4) as having been given all practicable help and support to enable him or her to make a decision unless, in particular, the steps required by this section have been taken so far as practicable.
- (2) Those steps are—
 - (a) the provision to the person, in a way appropriate to his or her circumstances, of all the information relevant to the decision (or, where it is more likely to help the person to make a decision, of an explanation of that information);
 - (b) ensuring that the matter in question is raised with the person—
 - (i) at a time or times likely to help the person to make a decision; and
 - (ii) in an environment likely to help the person to make a decision;
 - (c) ensuring that persons whose involvement is likely to help the person to make a decision are involved in helping and supporting the person, including, in particular, anyone identified by the person as a person whose support they would wish to enlist (whether or not that other person occupies a formal role); -
 - (d) where the person has identified anyone who they would wish not to be present at the assessment, taking steps to require that that other person or people are not present (unless proper grounds exist to consider that their presence is essential to secure the interests of the person)
- (3) The information referred to in subsection (2)(a) includes information about the reasonably foreseeable consequences of—
 - (a) deciding one way or another; or
 - (b) failing to make the decision.
- (4) Nothing in this section is to be taken as in any way limiting the effect of section 1(4).

[...]

Clause 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
 - (c) might lead others to make unjustified assumptions about what might be in P's best interests.
- (3) That person –
- (a) must consider all the relevant circumstances (that is, all the circumstances of which that person is aware which it is reasonable to regard as relevant); and
 - (b) must in particular take the following steps.
- (4) That person must consider—
- (a) whether it is likely that P will at some time have capacity in relation to the matter in question; and
 - (b) if it appears likely that P will, when that is likely to be.
- (5) That person must, so far as practicable, ~~support encourage and help~~ P to participate as fully as possible in the determination of what would be in P's best interests.
- (6) That person must, so far as practicable, seek to identify P's will and preferences, making reference to have special regard to (so far as they are reasonably ascertainable) –
- (a) P's ~~past and present~~ wishes and feelings (taking into account and, in particular, any relevant written statement made by P when P had capacity);
 - (b) the beliefs and values that would be likely to influence P's decision if P had capacity; and
 - (c) the other factors that P would be likely to consider if able to do so.
- (7) That person must –
- (a) so far as it is practicable and appropriate to do so, consult the relevant people about what would be in P's best interests and in particular about the matters mentioned in subsection (6); and
 - (b) take into account the views of those people (so far as ascertained from that consultation or otherwise) about what would be in P's best interests and in particular about those matters.
- For the definition of “the relevant people” see subsection (13).
- (8) Where P's will and preferences~~That person must, in respect of the relation to any act or decision that is being considered, have regard to whether the same purpose can reasonably be ascertained, the decision made must comply with P's will and preferences unless there are compelling reasons to consider that doing so would have serious adverse consequences for P.~~
- (9) The greater the departure from P's reasonably ascertainable will and preferences as effectively achieved in respect of a decision to be made on their behalf, the more compelling must be the reasons for such a departure.
- ~~(8)~~(10) Where it is not possible reasonably to ascertain P's will and preferences in respect of the decision, the person making the decision shall minimise any restrictions on a way that is less restrictive of P's rights and freedoms consistent with making the decision that accords with P's best interests~~freedom of action.~~
- ~~(9)~~(11) That person must, in relation to any act that is being considered, have regard to whether failure to do the act is likely to result in harm to other persons with resulting harm to P.
- ~~(10)~~(12) If the determination relates to life-sustaining treatment for P, the person making the determination must not, in considering whether the treatment is in the best interests of P, be motivated by a desire to bring about P's death.
- ~~(11)~~(13) In subsection (7) “the relevant people” means—

Formatted: Indent: First line: 0.38 cm

- (a) any person who at the time of the determination is P's nominated person (see section 67);
- (b) if at the time of the determination there is an independent advocate who is instructed under section 89 to represent and provide support to P, the independent advocate;
- (c) any other person named by P as someone to be consulted on the matter in question or on matters of that kind;
- (d) anyone engaged in caring for P or interested in P's welfare;
- (e) any attorney under a lasting power of attorney granted by P; and
- (f) any deputy appointed for P by the court.

[...]

Clause 9

- (1) This section applies where—
 - (a) a person (“P”) is 16 or over;
 - (b) another person (“D”) does an act in connection with the care, treatment or personal welfare of P;
 - (c) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter, [including those steps identified in section 5](#);
 - (d) when doing the act, D reasonably believes—
 - (i) that P lacks capacity in relation to the matter; and
 - (ii) that it will be in P's best interests for the act to be done; and
 - (e) D would have been liable in relation to the act if P had had capacity in relation to the matter and D had done the act without P's consent
- (2) D does not incur any liability in relation to the act, apart from such liability, if any, as D would have incurred in relation to it even if P—
 - (a) had had capacity to consent in relation to the matter; and
 - (b) had consented to D's doing the act.
- (3) But subsection (2) has effect subject to the additional safeguard provisions (each of which imposes a safeguard, additional to those in subsection (1)(c) and (d), and more than one of which may apply in a given case).
- (4) The additional safeguard provisions are—
 - (a) section 12 (conditions for any act of restraint);
 - (b) sections 13 and 15 (formal assessment of capacity, and consultation of nominated person, required for serious interventions);
 - (c) sections 16 and 17 (second opinion required for certain treatment);
 - (d) sections 19, 22, 24, 26, 28 and 30 (authorisation required for serious treatment where there is objection from P's nominated person or compulsion, and for deprivations of liberty and certain other measures);
 - (e) section 35 (independent advocate required for certain serious interventions).
- (5) The principles in sections 1(3) to (5) and 5 (P not to be treated as lacking capacity on irrelevant grounds, or where practicable help and support not given) and section 7 (best interests) apply in particular for the purposes of determining whether a belief mentioned in subsection (1)(d) is reasonable.
- (6) Where P is under 18, in subsection (1)(e) “without P's consent” is to be read as “without P's consent and without any consent that could be given by a parent or guardian of P”.