

Draft Mental Capacity Bill

Department of Justice

Written Response submitted by the Commissioner for Older
People for Northern Ireland

September 2014

Claire Keatinge

Commissioner for Older People NI

7-9 Shaftesbury Square

Belfast BT2 7DP

Introduction

The Commissioner for Older People for Northern Ireland (the “Commissioner”) welcomes the opportunity to comment and respond to the Draft Mental Capacity Bill.

The Bamford Review into the delivery of mental health and learning disability services in Northern Ireland outlined a number of key recommendations including the creation of new mental capacity legislation for Northern Ireland. The need for the introduction of specific capacity legislation in Northern Ireland that recognises the right of personal autonomy in a similar manner as legislation in other UK jurisdictions is evident¹.

The Commissioner recognises that a comprehensive legislative framework with human rights at its core will aim to enhance the standards of care, protection and treatment of many older people. There is a requirement for such legislation to be clear, well defined and contain clear guidance as to best practice in safeguarding the rights of all our older people.

Legislation should ensure that older people have access to appropriate mental health care to help them to maintain the optimum level of physical and mental wellbeing and to prevent or delay the onset of illness. The proposed Mental Capacity Bill should make sure that, where an older person is suspected to have diminished or fluctuating capacity, they are active participants in determining what treatment, care and support would be to their benefit.

The Mental Capacity Bill can have a significant positive impact on the lives of many older people by ensuring that their interests are placed at the heart of deciding what mental health care and assistance should be provided. The development of a robust and efficient independent advocacy service is a positive and appropriate measure to help protect the interests of older people which the Commissioner welcomes.

More people in Northern Ireland are living longer and healthier lives than ever before. However, when circumstances arise whereby older people require treatment or assessment under the Mental Capacity Bill they should play an active role in the decision making process. Respect for personal autonomy and human rights should be central tenets in ensuring the needs of older people are identified and met.

¹ Mental Capacity Act 2005 enacted in England provides for principle of autonomy

COPNI Background

1. The office of the Commissioner for Older People for Northern Ireland is an independent public body established under the Commissioner for Older People Act (Northern Ireland) 2011.
2. The Commissioner has an extensive range of general powers and duties which will provide the statutory remit for the exercise of her functions. In addition the Commissioner may provide advice or information on any matter concerning the interests of older people. Her wide ranging legal powers and duties include amongst others:
 - To promote and safeguard the interests of older people (defined as being those aged over 60 years and in exceptional cases, those aged over 50 years);
 - To keep under review the adequacy and effectiveness of law and practice relating to the interests of older people;
 - To keep under review the adequacy and effectiveness of services provided for older persons by relevant authorities (defined as being local authorities and organisations including health and social care trusts, education boards and private and public residential care homes);
 - To promote the provision of opportunities for and the elimination of discrimination against older persons;
 - To review and where appropriate, investigate advocacy, complaint, inspection and whistle-blowing arrangements of relevant authorities;
 - To assist with complaints to and against relevant authorities;
 - The power to bring, intervene in or assist in legal proceedings in respect of relevant authorities;
 - To issue guidance and make representations about any matter concerning the interests of older people.
3. The Commissioner's powers and duties are underpinned by the United Nations Principles for Older Persons (1991) which include Independence, Participation, Care, Self-fulfilment and Dignity.
4. The Commissioner welcomes the opportunity to comment on the proposals for a Draft Mental Capacity Bill (the "Bill").

Principles

5. The Commissioner welcomes the primary principle outlined in Clause 1 of the Mental Capacity Bill that a person is assumed to have capacity in relation to a matter unless it is established that the person lacks capacity in relation to the matter. This statutory presumption provides a clear guideline for practitioners making a determination on capacity as well as older people and their families.

6. The prohibition on practitioners making a decision on a person's capacity merely by referencing their age under Clause 1(5)(a) of the Bill is an essential statutory requirement. It is important that older people are treated fairly in the decision making process. The autonomy of older people should be strongly valued, respected and protected in any process to determine their capacity.
7. The Commissioner further welcomes the legislative guarantee under Clause 1(5)(b) of the Bill that an older person's capacity will not be determined by reference to a particular condition they may be living with. This clause is particularly relevant to many older people living with dementia. It is imperative that this particular group of older people are protected from arbitrary detention.
8. The legislation along with any accompanying Code of Practice needs to ensure that unfair assumptions are not made against older people because of a condition they are living with. We are unable to respond effectively on the full merits of this part of the legislative framework until the Code of Practice has been compiled and distributed accordingly.
9. The Code of Practice to accompany the legislation should be accessible, 'user friendly' and emphasise the need for increased engagement between older people and practitioners to enhance the decision making process. The process of providing support, as well as confirmation on which practitioners provide what specific support needs to be outlined in more detail within the accompanying Code of Practice.
10. It is unclear at present within the proposed legislation what review mechanism is in place to ensure that the support process is adhered to and followed. A clear review mechanism is required to be in place to assist in monitoring the general level of service provided and to identify potential issues or gaps that may need to be addressed.

'Best Interests'

11. Placing the 'best interests' principle on a statutory footing as defined by Clause 6 of the Bill can, in the right circumstances, provide significant safeguards for older people. Clear guidance as to what constitutes 'best interests' should also be defined. Any process to confirm an older person's 'best interest' should start from a position which respects the decision and wishes of the older person.
12. The Commissioner welcomes the prohibition on determinations being reached solely on the basis of age. As indicated above, the autonomy of older people needs to be protected and respected. The legislation and accompanying guidance should outline definitively what practical steps will be taken to ensure that older people will be supported to participate fully in the process to determine their 'best interests'.

13. The current wording of the Draft Bill at Clause 6 indicates that the older person must be helped and encouraged insofar as practicable to participate in the determination process². What is meant by 'help' and 'encouragement' requires further clarification and definition. Both terms are subjective and the draft Bill would be enhanced by the provision of clear guidance to ensure that there is a uniformity of approach.
14. Additionally, in circumstances where an older person fundamentally disagrees with the decision made in their 'best interests' a form of statutory right of appeal or challenge to enable the older person directly or through their independent advocate would be a welcome addition to the Bill. This will enhance the existing safeguards outlined within Clause 6 of the proposed Bill.
15. It is unclear whether or not sanctions for non-compliance with the statutory steps to determine 'best interests' are not adhered to would apply. The use of sanctions may help to ensure that the guidelines are followed and could help to provide additional safeguards to older people involved in the determination process.

Independent Advocate

16. The Commissioner welcomes the formal introduction of an Independent Advocacy Service. This service could provide much needed additional support and assistance to many older people. In particular, older people who have no relatives or friends to advocate on their behalf require an additional level of support that is not provided for within the current legislative framework.
17. An older person should have the right to request the assistance of an independent advocate. At present the legislation allows for the involvement of an independent advocate once requested by an appropriate healthcare professional.³ It is important that whilst the older person has the authority to decline assistance they have no statutory right to request the assistance of an independent advocate. The Commissioner feels that this is a gap in the proposed Bill.
18. It is unclear from the proposed legislation what role an advocate will play in the event that the older person already has a solicitor or legal representative. The role of the independent advocate should add value to any legal representation already in place.

² Clause 6(5) Mental Capacity Bill

³ Clause 85(1) Mental Capacity Bill

19. The effectiveness of an independent advocate should be subject to review to ensure that an older person is receiving a sufficient level of advice and assistance. The legislation should provide for a formal review body to monitor the advocacy service provided to older people. Independent advocates should be suitably trained, registered and subject to continuing professional development to ensure that the highest level of support is provided to older people.
20. The independent advocate should have a right of access to all information in the possession, power and control of the relevant Health and Social Care Trust relating to an older person's medical history, treatment plan, medication and personal welfare. The proposed legislation indicates that all records that the person holding the documents deems relevant should be disclosed⁴. The independent advocate should, with the consent of the older person, have access to whatever information is necessary to adequately advocate for the older person. It should not be at the discretion of the custodian of the records to decide the relevancy of the information in their possession.
21. The cost for the advocate is to be resourced through the Health and Social Care Trust⁵. It should be made clear that there will be no cost to the older person should they wish to take up the option of an independent advocate. In addition, the older person should be advised that they ultimately have the authority to revoke the involvement of the advocate if necessary under Clause 87 of the Bill. An effective information and communication campaign should follow the introduction of an independent advocate service.

Deprivation of Liberty

22. The Commissioner asserts that the deprivation of an older person's liberty should only occur in controlled circumstances that are lawful, proportionate and in accordance with human rights principles and case law.⁶
23. The Draft consultation document indicates that an accompanying Code of Practice will provide guidance based on the sorts of circumstances that have to date been found by the courts to constitute a deprivation of liberty. It is essential that any guidance to practitioners is clear, unambiguous and free from complexity. The House of Lords Select Committee on the Mental Capacity Act 2005 indicated that

⁴ Clause 84(5)(b) Mental Capacity Bill

⁵ Clause 83(2) Mental Capacity Bill

⁶ HL v The United Kingdom 2004 ECHR 471 – Bournemouth Case

Deprivation of Liberty Safeguards needed to set out clearly why they are needed; be much easier to understand, fit in with the rest of the Mental Capacity Act and make sure that everyone who needs it has the protection of the rules⁷. The Commissioner believes that this is a rational and sensible approach that should be followed in a similar manner with the drafting of guidance for practitioners in Northern Ireland.

24. The process and criteria for authorising the deprivation of an older person's liberty should be clear, well defined and thorough. In the event that a deviation from the approved criteria occurs there should be no protection from liability for practitioners.
25. If liberty is to be deprived to prevent a risk of 'serious harm' to an older person under Clause 23 of the Bill or to prevent 'serious physical harm' to others then 'serious harm' needs to be defined within the legislation. The proposed legislation does not give any indication as to this defined level of harm.
26. The proposed legislation indicates that consideration is to be given to 'evidence that the person has behaved violently towards other persons'⁸ when deciding whether a risk of serious harm to others exists. It is not clear what form this evidence will be presented in? In the interests of fairness and natural justice the older person should be permitted to challenge this assertion. Consideration should be given to whether a time limit should apply during which the appeal panel should sit, and whether it should consider an allegation of historic violent conduct.
27. The mechanisms in place for depriving someone of their liberty should be clear, well defined with robust safeguards in place. The panel authorising the detention will require all relevant information to be available to them. The older person, along with their advocate and legal representative should have early and meaningful involvement in this decision making process.
28. A review and appellate body which could hear appeals from older people quickly and efficiently would safeguard against Human Rights principles being breached⁹.
29. The panel making the initial decision to detain should only do so after hearing representations from the older person. The draft legislation obligates the panel to provide the older person with prescribed information¹⁰. Whilst there may be regulations introduced there is no specific requirement to request that the older

⁷ [www.mentalhealthlaw.co.uk/House of Lords Select Committee on the Mental Capacity Act 2005](http://www.mentalhealthlaw.co.uk/House_of_Lords_Select_Committee_on_the_Mental_Capacity_Act_2005)

⁸ Clause 58(2) of Mental Capacity Bill

⁹ Art 5(4) ECHR

¹⁰ Part 4 Clause 13(1)(a) Mental Capacity Bill

person appears in front of the panel, in so far as it is reasonable and practicable to make formal representations. The Commissioner is concerned that a decision which potentially affects the liberty of an older person may be reduced to a paper exercise.

Future Decision Making Arrangements

30. The Commissioner notes the proposal under Clause 93 of the Bill to introduce Lasting Powers of Attorney (LPA). The legislative framework extends existing powers to allow the 'attorney' the authority to make decisions, not just in relation to financial matters but also welfare and health matters.
31. In principle, the provision for an LPA provides an opportunity for many older people to ensure that their future wishes and instructions are respected and adhered to. The procedure, if effectively managed, will allow older people to lay the foundations for future decision making arrangements that will aim to satisfy their 'best interests' and help them to feel they have control over decisions made.
32. On a practical level the process for obtaining an LPA should aim to be straight forward and free from complexity. The cost for obtaining the authority should also be affordable to older people. If the process for obtaining an LPA is kept straight forward it will lessen the time needed to engage professional legal advice thus keeping costs incurred as low as possible.
33. The Commissioner notes under Part 2 Clause 4(1) of the Bill that the LPA must be registered with the new Office of Public Guardian (OPG). Given the new extended authority provided by the LPA stringent safeguards should be in place to ensure that applications to the OPG are *bona fide*. The new OPG needs to have effective and robust powers of investigation to review complaints and allegations of fraud.
34. In the proposed legislation, where a person makes a false statement and knows or is reckless as to whether it is a false statement that person, is liable, on summary conviction, to a sentence of 6 months imprisonment¹¹. In the Mental Capacity Act 2005 a person, who makes a false statement in the registration of an LPA, is liable, on summary conviction, to receive a maximum sentence of 12 months¹². The Commissioner believes that this disparity should be corrected in the proposed legislation. There is a need for strong deterrents to be in place which ensure that a prospective 'attorney' acts in an honest manner that corresponds with the 'best interests' of the older person.

¹¹ Clause 134(4) Mental Capacity Bill

¹² Schedule 2 s.4(4) Mental Capacity Act 2005

35. In circumstances where an older person has an LPA registered which relates to health and welfare matters, a formal requirement to involve a registered medical officer should be needed before the 'attorney' can act. This proactive safeguard would help to ensure that authority only passes once a formal medical consultation has taken place.
36. In the proposed legislation an LPA is revoked in circumstances where an 'attorney' is declared bankrupt.¹³ Consideration should also be given to the potential to revoke the LPA where an 'attorney' has been convicted of a criminal offence of dishonesty or sentenced to a prison term of a prescribed period. Given the growth in the prevalence of reported financial abuse and the extended powers introduced by the proposed LPA it is imperative that older people are adequately protected from persons who may not have their 'best interests' at heart.
37. Advance decisions, as defined in Clause 95 of the Bill, will provide older people with the authority to advise medical practitioners of particular types of treatment which they do not wish to be the subject of in the future. The proposed legislation does not codify the Common Law rules in relation to Advance Decisions. The Mental Capacity Act 2005 outlines in clear statutory terms the meaning, effect and validity of Advance Decisions¹⁴. In an attempt to avoid confusion and to clearly set out the mechanisms and parameters for an Advance Decision there should be appropriate clauses placed on the face of the draft Bill. At present, the draft legislation does not include sufficient detail on the face of the Bill. The Commissioner would suggest that this is an area which should be reviewed by the legislative drafting team.
38. Any legislative outline of Advance Decisions should be accompanied by an accessible and easy to understand practical guide to assist older people to make reasoned and informed choices regarding advance decisions. Health practitioners should, on a case by case basis, explain to older people their right to make an advance decision. An effective communications campaign should be undertaken to ensure that older people are informed of this right and where they can find out more about it.
39. Alongside the right to make an advance decision stringent safeguards to ensure that the 'advanced decision' making process is free from third party interference should be implemented. The procedure should be clear and well defined and should involve the option of having a private and confidential interview in order to confirm the wishes of the older person. Any concern of undue influence being placed on an older

¹³ Schedule 5 Clause 17(1)(c) Mental Capacity Bill

¹⁴ Ss 24, 25 26 Mental Capacity Act 2005

person should be raised with an appropriate review body. A legislative duty placed on appropriate health practitioners could help to alleviate any concerns about older people being pressurised into making certain 'advance decisions'.

Mental Health Review Tribunal

40. The Commissioner notes the proposal to rename the Mental Health Review Tribunal as the Review Tribunal.
41. At present within the proposed legislation, under Clause 48, there is a duty on the HSC Trust to refer a review case to the Tribunal after a prescribed period of time. In line with this duty there should also be a legislative duty on the HSC Trust to inform an older person of their right to refer their own case to the Review Tribunal. A record of when this information is communicated should be maintained to ensure compliance with the statutory duty. This duty would help to ensure that older people are fully informed of their right to challenge a decision made to detain them and to have their detention reviewed at the earliest opportunity.

Offences

42. The Commissioner welcomes the introduction of a specific criminal offence of ill-treatment or neglect of a person who lacks capacity¹⁵. The draft legislation indicates that the relevant section may apply to a person who has been appointed as an attorney under an LPA. For the avoidance of doubt the legislation should also apply to a person who has been appointed under an active enduring power of attorney. As proposed the offence can be committed by a person with an LPA but not a person with enduring power of attorney. This anomaly should be addressed. The Mental Capacity Act 2005 covers circumstances where an enduring power of attorney is in existence¹⁶.
43. The Commissioner recognises the importance of proportionate sanctions where criminal conduct is in evidence. When allegations of ill-treatment or neglect are proven the judiciary should have sufficient scope to deal adequately with these serious cases. At present the draft legislation places a maximum sentence, on summary conviction, of 6 months.¹⁷ This compares to 12 months under the Mental

¹⁵ Clause 133 Mental Capacity Bill

¹⁶ S.44(1)(b) Mental Capacity Act 2005

¹⁷ Clause 133(3) Mental Capacity Bill

Capacity Act 2005 for a similar fact conviction.¹⁸ Evidently there is a need for a uniform approach and it is imperative that older people are equally protected and that perpetrators should receive similar sanction wherever the offence happens to be committed within the UK. As such, an extension of the current maximum sentence, on summary conviction, contained within the Draft Bill would be required.

44. The Draft Bill outlines an offence of 'Obstruction' which should assist practitioners in carrying out their duties effectively and in a timely manner. The sanction for obstructing an examination or investigation is currently proposed to be for a period of 3 months on conviction¹⁹. An act of Obstruction which has the aim of preventing or unnecessarily delaying an investigation into an older person's capacity should entail serious and significant consequences. At present an offence of obstructing police in the execution of their duty carries a sentence of up to 6 months on summary conviction or up to 2 years on indictment²⁰.
45. The Draft Bill does not allow for a prosecution on indictment. Whilst hopefully a rarely needed sanction the legislation should permit a prosecution, in the most serious of circumstances dealing with a vulnerable older person as an injured party, to proceed by way of indictment. The impact of obstructing a live inquiry and investigation could have serious safeguarding implications and this should be reflected within the draft legislation.
46. The introduction of formal corporate neglect offences, under Clause 139 of the Bill, is an important step in ensuring that protection is central to those organisations providing care and support to older people. The sanctions for breaching relevant legislation should be proportionate and act as a real and meaningful deterrent.

**The Commissioner for Older People
Equality House
7-9 Shaftesbury Square
Belfast
BT2 7DP
Tel: 028 90 890 892
Email: info@copni.org**

¹⁸ S.44(3) Mental Capacity Act 2005

¹⁹ Clause 138(3) Mental Capacity Bill

²⁰ S.66 Police Act NI 1998