

**Briefing Paper on the:**

**Draft Mental Capacity Bill (NI)**

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**Age NI Briefing Paper on the Draft Mental Capacity Bill (NI)**

**Who We Are?**

Age NI touched the lives of over 42,000 older people last year through its advice and advocacy service, as a care provider and through its policy and engagement work. We work in partnership with 11 Sub-Regional Networks, who represent over 2,000 older peoples groups, reaching almost 70,000 older people across Northern Ireland. This gives us a strong mandate to represent the voices and experiences of older people. Age NI unapologetically calls for the voice and experience of older people to be central and at the heart of any changes and this is fundamental to the proposals in the Draft Mental Capacity Bill (NI).

**Why it Matters for Older People?**

Northern Ireland, like the rest of the UK is experiencing demographic shifts in terms of ageing and life expectancy. Older people’s reliance on a range of services, including health and social care, to maintain their independence with appropriate services will become paramount no matter where they live within the UK.

Older people who may lack mental capacity have little or no voice and are among the most excluded groups in society today. They are all too frequently deprived of their human rights to freedom, respect, equality, dignity, and autonomy.

**What is the Draft Mental Capacity Bill?**

* The Draft Mental Capacity Bill is the new proposed legislation covering mental health and mental capacity. It came about as a result of the Bamford Review.
* This new Bill will bring together, into a single framework, legislation covering decisions around care, treatment, (physical and mental illness) and personal welfare for people over the age of 16 who lack capacity.
* The Mental Health (NI) Order 1986 will no longer exist.
* The Draft Mental Capacity Bill is divided into 12 parts, contains 162 clauses and 8 schedules!

**What Does it Say?**

* It is assumed that people have the capacity to make decisions about all aspects of their lives. Where this is not possible due to a mental illness, stroke, dementia, brain injury or any other issue, the person must be fully supported to make decisions.
* A person cannot be assumed to lack capacity merely on the basis on age, appearance, condition or behaviour. People can also make unwise decisions.. If a person has capacity then to interfere would be a criminal offence on the part of the person (s) interfering in that person’s life.

**What Decisions Does This Cover?**

* Care and treatment: visiting the dentist, taking drugs, staying in hospital for treatment or surgery; moving to a care home or other accommodation.
* Personal welfare: what to wear, eat for lunch, go to church, social life.
* Money matters – such as property, bank accounts and savings, pensions.
* It does not cover whether a person can marry, divorce, sexual relationships, adoption or voting.

**How is it Decided that a Person May Lack Capacity?**

* The Bill makes it clear that before a person can be said to lack capacity, they must be given all the practical help and support that they may need to help them make decisions about aspects of their life.
* There is a 2-stage process for deciding if someone lacks capacity:
  1. The person has something wrong in the way their mind works. This can be because of a stroke, an acquired brain injury or dementia. This can also be short-term and be caused by drugs or alcohol.
  2. The person is unable to understand or hold on to the information relevant to the issue at hand or to be able to communicate a decision.
* It is also clear in the Bill that a determination that someone lacks capacity is issue and time specific. In other words it does not apply to every aspect of that person’s life, but only to what is happening at that moment in time.
* The safeguards in place depend on the level and seriousness of the interventions or decisions. The more serious the intervention or decision the greater the safeguards. This could include being deprived of your liberty in a hospital setting or a move to a care home.

**Who Can Make Decisions on Someone Else’s Behalf?**

* There are provisions in the Bill on who can make decisions on behalf of a person who has been deemed to lack capacity.
* This can be a nominated person, an independent advocate, anyone named by the person, an attorney, anyone engaged in the persons care or someone who is appointed by the Court.
* If someone else is making decisions on behalf of another person, after it has been determined that they do not have capacity, then decisions must be made in that persons best interests.
* The Bill also provides for a Lasting Power of Attorney and this will replace the current Enduring Power of Attorney. This means that a person can put in place decision making arrangements for a time in the future when they may lack capacity to make decisions for themselves. This can cover health and welfare decisions as well as financial.

**Key Issues for Age NI**

* Age NI welcomes this Bill as it creates a fundamental shift in how personal autonomy is respected. All too often older people have told us that they feel invisible and silenced by professionals.
* It is vital that the core principle of the presumption of capacity is adhered to when assessments of capacity are being made. In practice stereotyping often leads to assumptions being made about lack of capacity to make a particular decision simply because someone is older, has dementia or is frail.
* Professionals may also have a lack of appreciation that older people may regain capacity or have fluctuating capacity. This is particularly important where decisions are taken with long-term consequences, for example treatment decisions or a move to a care home.
* Older people must have access to a range of supports to ensure that any decision or intervention is made in their best interests and reflects their beliefs and values as well as past and present wishes and feelings. This includes access to independent advocates.
* Awareness raising and training in the Mental Capacity Act is essential for any staff who may hold responsibilities under its provisions.
* Decision making involving older people often takes place in times of crisis, under time pressure. More effective publicity of Lasting Powers of Attorney and advance decision making, including via GPs, social workers and solicitors is required to enable people to help ensure that Mental Capacity Act procedures are able to operate more effectively in such circumstances.
* The use of the deprivation of liberty safeguards should be regularly scrutinised to assess whether they are being under-applied and effective action taken where this is identified.
* Anyone who is determined to come under the provisions of the Mental Capacity Act and is detained either in a hospital setting or in a nursing or residential home must not be subject to charging. In addition HSC Trusts must not remove the protections of the Mental Capacity Act from people simply because their care is being met in a nursing or residential accommodation as is currently happening under the Mental Health (NI) Order 1986.

**Timeframes for the Draft Bill**

* The Draft Bill is only one component of the development of the single legislative framework.
* The Draft Bill will be laid in the Northern Ireland Assembly by January 2015 and subject to the usual legislative process including scrutiny by the Health, Social Services and Public Safety and Justice Committees.
* The Bill will be followed by subordinate legislation, code of practice guidelines and implementation plans. A project manager has been appointed to carry this through to Royal Assent by March 2016, the end of this current Assembly’s mandate.
* Commencement is expected in 2016/2017.

**How to Respond**

* The Draft Mental Capacity consultation document and the accompanying documentation, including an easy read version can be found at the flowing link: <http://www.dhsspsni.gov.uk/showconsultations?txtid=68523>
* The deadline for responses is Tuesday 2nd September 2014

**ENDS**

**30th July 2014**