Preliminary Analysis of the CRPD-Compliance of the NI Mental Capacity Bill

Briefing Document

Principal Investigator: Wayne Martin

Co Investigators: Sabine Michalowski, Jill Stavert

Lead Author: Alex Ruck Keene

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Arts & Humanities Research Council

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Introduction

1. This preliminary analysis of the Mental Capacity Bill introduced into the Northern Ireland Assembly on 8 June ('the NI Bill')[1] is predicated upon the same approach as that set down in the EAP report, *Achieving UNCRPD Compliance*[2] ('the EAP report').

2. I should, however, note at the outset the following caveat:

    a. There are undoubtedly differences between the obligations imposed by what might at face value appear to be the terms of the CRPD and the obligations as interpreted by the Committee on the Rights of Persons with Disabilities. These differences are most marked in relation to Article 12, but I suspect may also arise in relation to Article 14.

    b. There is in relation to the NI Bill an opportunity that does not exist in relation to the legislation in either England or Scotland to seek to suggest amendments that may bring the Bill closer to compliance with the CRPD.[3] This means that the question of whether the Assembly should strive to meet the obligations of the CRPD as interpreted by domestic experts or the obligations as interpreted by the Committee is both very live, and, in the proper sense of the word, a political one.

3. With specific reference to the NI Bill therefore, assessing the validity of the Committee's interpretation of the UNCRPD (as does the EAP report and, indeed, does Adrian Ward's *Draft Paper 1*) assumes a particular importance.

4. However, as I did whilst participating in the EAP roundtables, I remain of the view that – for purposes of engaging with the Committee on the Rights of Persons with Disabilities – it will be necessary to be able to address the compatibility of the NI Bill and the CRPD as interpreted by that Committee.

5. For present purposes, however, I will conduct the preliminary analysis on the basis that the EAP Report has properly addressed the actual obligations of the CRPD.

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[1] http://www.niassembly.gov.uk/assembly-business/legislation/primary-legislation-current-bills/mental-capacity-bill/.

[2] http://autonomy.essex.ac.uk/uncrpd-report. I was a participant in the roundtable meetings; the views expressed in the report are those of the authors.

[3] Indeed, Wayne Martin and I sought to do just that when we attended and gave evidence to the Ad Hoc Committee considering the Bill. The draft amendments are included here as an Appendix.

Article 12

6. As the NI Bill is very much modelled on the MCA, I do not propose to rehearse the analysis set out in detail in the EAP report. Rather, it seems to me that the key question to answer in relation to compliance with Article 12 is whether the Bill is sufficiently different to the MCA to be able to succeed where the MCA fails in terms of compliance.

7. It will be recalled that the EAP found that:

    a. The definition of 'mental incapacity' in s.2(1) MCA 2005 violates the anti-discrimination provisions of CRPD Art. 5, specifically in its restriction of mental incapacity to those who suffer from 'an impairment of, or a disturbance in the functioning of, the mind or brain;' and

    b. The best-interests decision-making framework of s.4 MCA 2005 fails to satisfy the requirements of Art. 12 (4) CRPD, which requires safeguards to ensure respect for the rights, will and preference of disabled persons in matters pertaining to the exercise of legal capacity.

8. I am happy to associate myself with those two conclusions.

The capacity test

9. The NI Bill's definition of mental incapacity is found in clause 3. For comparison, I reproduce the material part of s.2 MCA 2005 alongside it

NI Bill	**MCA 2005**
3. 1) For the purposes of this Act, a person who is 16 or over lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself about the matter (within the meaning given by section 4) because of an impairment of, or a disturbance in the functioning of, the mind or brain. 2) It does not matter—	2. 1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain. 2) It does not matter whether the impairment or disturbance is permanent or temporary.

(a) whether the impairment or disturbance is permanent or temporary; (b) what the cause of the impairment or disturbance is. 3) In particular, it does not matter whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disorder or disability.	3) A lack of capacity cannot be established merely by reference to— (a) a person's age or appearance, or (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity. […]

10. It will be seen that clause 3(1) of the NI Bill is materially identical to s.2(1) of the MCA 2005. Although clause 4 of the NI Bill (the equivalent of s.3 MCA 2005), defining inability to make a decision is slightly different.[4]

11. However, the NI Bill differs in making it clear that, whilst the inability to make a decision must be because of an impairment of or disturbance in the functioning of the mind or brain, the cause of that impairment/disturbance is irrelevant, and, in particular, whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disability. There is also no equivalent of s.2(3) MCA 2005.

12. It will be recalled that the EAP report found the MCA 2005 to 'fail' because it limited the definition of incapacity to those who suffer from 'an impairment of, or a disturbance in the functioning of, the mind or brain,' and recommended that these words be deleted from s.2(1). It should also be noted that the Assisted Decision-Making (Capacity) Bill in Ireland that has now progressed to Committee stage provides (in at least the form that I can find at present on the internet[5]):

    3.

[4] Putting aside stylistic difference, the most important differences are
1. in relation to clause 4(c), which provides that a person will be considered to be unable to make a decision for him or herself if he/she "is not able to appreciate the relevance of that information and to use and weigh that information as part of the process of making that decision." These words do not appear in s.3(1)(c) MCA 2005.
2. There is no equivalent to s.3(3) MCA 2005, which provides that the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make that decision.

I do not address either of these differences further here, save to note that it is not instantly obvious what improvement the failure to reproduce s.3(3) MCA 2005 brings to the MCA 2005.

[5] I do not reproduce further qualifications to the definition contained in the balance of Clause 3: the most recent version can be found at: http://www.oireachtas.ie/documents/bills28/bills/2013/8313/b83a13d.pdf . The term 'mental capacity' does not appear in the Irish Bill.

(1) Subject to Subject to subsections (2) to (6), for the purposes of this Act (including for the purposes of creating a co-decision-making agreement, enduring power of attorney or advance healthcare directive), a person's capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time.

(2) A person lacks the capacity to make a decision if he or she is unable –

(a) to understand the information relevant to the decision,

(b) to retain that information,

(c) to use or weigh that information as part of the process of making the decision, or

(d) to communicate his or her decision (whether by talking, writing, using sign language, assisted technology, or any other means) or, if the implementation of the decision requires the act of a third party, to communicate by any means with that third party.

13. In other words, the Irish Bill, also, proceeds on the basis that the 'diagnostic element'[6] is removed.

14. My preliminary view is that:

a. the approach adopted in the NI Bill is less obviously discriminatory than that in s.2(1) MCA 2005 because it makes clear that disability is but one route into lacking capacity; but that

b. there remains a considerable question-mark over whether it does not constitute indirect discrimination. Because the concept of capacity in clause 3(1) is 'medicalised' by making specific reference to the mind or brain, the class of persons who are likely to be considered to lack capacity are disproportionately likely to include those with disabilities affecting the functioning of their mind or brain. Albeit at one remove, therefore, the diagnostic threshold remains a critical part of the test;

c. If we are into indirect discrimination territory then, for essentially the same reasons as identified by the EAP in relation to the MCA 2005, the retention of even a watered down diagnostic threshold renders the Bill non-compliant with the CPRD.

[6] This term does not appear in the MCA 2005, but is commonly used as a short hand.

15. It is important to note that the NI Bill goes very much further than (and in my view is a substantial improvement on) the MCA 2005 and, indeed, the AWI in terms of the requirements to ensure that support is given to a person to enable them to make a decision (clause 5; see also clauses 13 and 14 in relation to a formal capacity assessment in relation to serious interventions, clause 14 (3)(d) requiring the statement of incapacity to identify "any help or support that has been given to P, without success, to enable P to make a decision in relation to the matter"). My preliminary view, however, is that those steps would not suffice to cure the incompatibility identified above, because that incompatibility is rooted in the very definition of capacity contained in the Bill.

16. Finally, I should emphasise that from my perspective there is a very large question about whether a move to a purely functional test for mental capacity (or decision-making capacity) is desirable in policy terms. Most obviously, it has the potential effect of dramatically widening the scope of those who could be 'caught' by the capacity net to include those who are vulnerable by virtue of the influence of others (in English terms, it would lead to a near-complete conflation of the jurisdiction of the Court of Protection and the inherent jurisdiction of the High Court to protect vulnerable but capacitous adults confirmed in *Re L (Vulnerable Adults with Capacity: Court's Jurisdiction)* [2013] Fam 1). It is important to recognise in this regard that this would enable decisions to be made on behalf of such individuals potentially against their will (the inherent jurisdiction of the High Court being generally recognised as to be deployed in a 'facilitative rather than dictatorial' fashion so as to secure their ability to make their own decisions). However, viewed strictly through the prism of compliance with the CRPD, there must be a question-mark over whether clause 2 goes far enough to overcome the difficulties identified with the MCA 2005.

Best interests

17. The question of what, precisely, the CRPD prohibits when it comes to the making of decisions on behalf of others is contested. Over and above the question of whether the General Comment on Article 12 accurately reflects the obligations imposed by that Article, there is also a further and frankly entirely unhelpful lack of clarity as to whether paragraph 27 of the General Comment on Article 12 is, in fact, conjunctive. Whilst I understand that it is said that there is a typographical error, such that the three elements set out there are disjunctive, it seems to me that this defies the common sense reading of the paragraph.

18. This therefore means that the NI Bill will fail (on the Committee's terms) if it:

    a. Allows legal capacity to be removed from a person, even if this is in respect of a single decision;

    b. Allows for a substitute decision-maker to be appointed by someone other than the person concerned, and this can be done against his or her will; and

    c. Requires any decision made by a substitute decision-maker to be based on what is believed to be in the objective "best interests" of the person concerned, as opposed to being based on the person's own will and preferences.

19. The NI Bill will fail on the EAP's narrower terms, I think that I am right in summarising, if it does not provide for the decision in (c) to be founded upon sufficient respect for the person's rights, will and preferences.

20. I will proceed in this part of the analysis that (a) it is highly unlikely that the governments of the United Kingdom will seek to implement legislation (whether by introduction or amendment) that makes (where such are identifiable) the will and preferences of the person determinative; (b) and that this is, not, in fact, required by the obligations of the CPRD. However, as per the caveat above, we need to recognise that (b) is unlikely to be accepted by the Committee.

21. I note immediately that, if one was being uncharitable, one might describe the decision to use the term 'best interests' as one that may cause unnecessary complications vis-à-vis the Committee. The approach adopted both in Scotland (s.1(1) AWI and in the Irish Bill (clause 8) is one based upon interventions in respect of an adult, and both of these (the former presciently and the latter no doubt deliberately) do not use the phrase.

22. However, if it can be shown that the substance rather than the form of the decision-making process provides for any decisions to be taken by a substitute decision-maker to pay appropriate respect to the rights, will and preference of the person concerned, then it seems to me that there is a proper argument that the use of the term is not fatal here.

23. It will be recalled that the 'charge' levelled against the MCA by the EAP in this regard (a charge the EAP found to be made out) is that it does not provide sufficient safeguards to ensure respect for the rights, will and preferences of the person concerned.

24. Again, it is useful to carry out a comparison between the terms of (here) clause 7 of the NI Bill and s.4 MCA 2005.

NI Bill	MCA 2005
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, 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 have special regard to (so far as they are reasonably ascertainable) – (a) P's past and present wishes and feelings (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	4. 1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of— (a) the person's age or appearance, or (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests. 2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps. 3) He must consider— (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and (b) if it appears likely that he will, when that is likely to be. 4) He must, so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him. 5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death. 6) He must consider, so far as is reasonably ascertainable— (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity), (b) the beliefs and values that would

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 (11). 8) That person must, in relation to any act or decision that is being considered, have regard to whether the same purpose can be as effectively achieved in a way that is less restrictive of P's rights and freedom of action. 9) 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) 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) [definition of relevant people]	be likely to influence his decision if he had capacity, and (c) the other factors that he would be likely to consider if he were able to do so. 7) He must take into account, if it is practicable and appropriate to consult them, the views of— (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind, (b) anyone engaged in caring for the person or interested in his welfare; (c) any donee of a lasting power of attorney granted by the person, and (d) any deputy appointed for the person by the court, as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6). 8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which— (a) are exercisable under a lasting power of attorney, or (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity. 9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned. 10) "Life-sustaining treatment" means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life. 11) "Relevant circumstances" are those— (a) of which the person making the determination is aware, and (b) which it would be reasonable to regard as relevant.

25. It will be seen that there are substantial similarities between clause 7 of the NI Bill and s.4 MCA 2005. For present purposes, however, the critical question is whether it can be said that the requirement to have "special regard" to (so far as they are reasonably ascertainable) P's past and present wishes and feelings goes far enough to constitute 'respect' for purposes of Article 12(4) CPRD.

26. For my part, it seems to me there must be substantial grounds to doubt whether it does. I would have said that there would be much better grounds upon which to defend clause 7 if it included a specific requirement to justify departure from the identifiable wishes and feelings of P (the greater the departure, the more compelling the justification required). In this, I am following in the EAP's footsteps, but with a slight modification.[7] It also seems to me that there may be merit, given that the legislation is still in train, in considering whether the words of the CRPD (i.e. 'will and preferences') should not be used here.

Removal of legal capacity

27. A final matter to note here is that, if the wording of paragraph 27 of the General Comment is, indeed, intended to be disjunctive, then the NI Bill may be vulnerable to a further charge of incompatibility. It will be recalled that the first of the three elements of impermissible substitute decision-making regime was identified as being the potential for removal of legal capacity to be removed from a person, even if this is in respect of a single decision. There is room for = debate about whether the NI Bill removes legal capacity from anyone, or recognise a functional lack of capacity. However, if it is considered to remove such capacity,[8] and if this element, alone, constitutes incompatibility with Article 12, then the NI Bill fails also on this ground.[9]

Article 14

28. One issue that was only very lightly touched upon the EAP Report is Article 14 which in the view of the Committee[10] provides (materially) for:

[7] For more on this, see the article "*More presumptions please? Wishes, feelings and best interests decision-making*" that I have co-written and should be appearing in the next issue of the Elder Law Journal.
[8] For instance, by a declaration that a person does not have capacity to marry under clause 111(1)(a) (the court could not consent on the person's behalf to marry: clause 273(1)(a)).
[9] As would also the MCA. The position in relation to the AWI may be different but is outside the scope of this paper.
[10] Statement on article 14 of the Convention on the Rights of Persons with Disabilities (September 2014): http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E

(1) The absolute prohibition of detention on the basis of disability. There are still practices in which state parties allow for the deprivation of liberty on the grounds of actual or perceived disability. In this regard the Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived disability. However, legislation of several states party, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived disability, provided there are other reasons for their detention, including that they are dangerous to themselves or to others. This practice is incompatible with article 14 as interpreted by the jurisprudence of the CRPD committee.

(2) Mental health laws that authorize detention of persons with disabilities based on the alleged danger of persons for themselves or for others. Through all the reviews of state party reports the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on presumptions of risk or dangerousness tied to disability labels is contrary to the right to liberty. For example, it is wrong to detain someone just because they are diagnosed with paranoid schizophrenia.

(3) Detention of persons unfit to plead in criminal justice systems. The committee has established that declarations of unfitness to stand trial and the detention of persons based on that declaration is contrary to article 14 of the convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.

29. It is perhaps important to note that (as with Article 12) the Committee's views as to the meaning of Article 14 are not necessarily in line with the approach adopted by other UN treaty bodies. For instance, the Human Rights Committee in its General Comment on the right to liberty and security of the person enshrined in Article 9 of the International Covenant on Civil and Political Rights[11] has a rather different approach, and one that is very much closer to that enshrined in Article 5(1)(e) ECHR:

> *19. States parties should revise outdated laws and practices in the field of mental health in order to avoid arbitrary detention. The Committee emphasizes the harm inherent in any deprivation of liberty and also the particular harms that may result in situations of involuntary hospitalization. States parties should make available adequate community-based or alternative social-care services for persons with psychosocial disabilities, in order to provide less restrictive alternatives to confinement. <u>The existence of a disability shall not in itself justify a deprivation of liberty but rather any deprivation of liberty must be necessary and proportionate, for the purpose of protecting the individual in question from serious harm or preventing injury to others.</u> It must be applied only as a measure of last resort and for the shortest appropriate period of time, and must be accompanied by adequate procedural and substantive safeguards established by law. The procedures should ensure respect for the views of the individual and ensure that any representative genuinely represents and defends the wishes and interests of the individual. States parties must offer to institutionalized persons programmes of treatment and*

[11] Published on 28 October 2014. Anecdotally I understand that the Committee on the Rights of Person's 'statement' on Article 14 of the CRPD was issued in the knowledge that this General Comment was forthcoming.

> *rehabilitation that serve the purposes that are asserted to justify the detention. Deprivation of liberty must be re-evaluated at appropriate intervals with regard to its continuing necessity. The individuals must be assisted in obtaining access to effective remedies for the vindication of their rights, including initial and periodic judicial review of the lawfulness of the detention, and to prevent conditions of detention incompatible with the Covenant.* (footnotes omitted)

30. Further, there is – it appears generally to be accepted – a frank incompatibility between Article 14 of the CRPD and Article 5(1)(e) ECHR.[12] Which is to take precedence as regards the obligations of the United Kingdom is a question of some importance, but – again – viewed strictly through the prism of Article 14 CRPD, the NI Bill would appear to be vulnerable to a charge of incompatibility:

    a. By the fact that disability can be a ground for deprivation of liberty (if that disability gives rise to a material lack of capacity, and the deprivation of liberty satisfies the criteria in clauses 9 and 24);

    b. By the very virtue of the fact that (as it must) it seeks to ensure that it is compliant with Article 5(1) ECHR, tying, for instance, the concept of deprivation of liberty directly to the definition in the ECHR;[13]

    c. And, similarly, by the fact that I cannot see how an Article 5(1)(e) compliant construction of the NI Bill can be achieved other than by making it a requirement that any person deprived of their liberty must satisfy the *Winterwerp* criteria.[14] The obvious bind is that the *Winterwerp* criteria, by definition, require the presence of the very 'unsoundness of mind' that constitutes an impermissible disability for purposes of the Committee's interpretation of the CRPD;

    d. Because the Bill provides for detention of those considered unfit to plead: clause 205.

[12] As identified several years ago by Philip Fennell and Urfan Khaliq, 'Conflicting or complementary obligations? The UN Disability Rights Convention, the European Convention on Human Rights and English law', *European Human Rights Law Review*, No 6 (2011): pp662–674.

[13] Clause 293 providing that "'deprivation of liberty' means a deprivation of liberty within the meaning of Article 5(1) of the Human Rights Convention […]." Whether this is a sensible course of action to adopt in light of the tangles into which the equivalent definitional provision in the MCA has led the courts in England and Wales is a different question.

[14] *Winterwerp v Netherlands* (1979) 2 EHRR 387. In that decision, the European Court held that, except in emergencies, depriving the liberty of someone of unsound mind can only be lawful under Article 5(1)(e) if three minimal conditions are satisfied – (1) the authority responsible for the deprivation of liberty must establish through objective medical expertise that the person is of unsound mind; (2) it must be established that the mental disorder is a kind or degree warranting compulsory confinement; (3) the validity of continued confinement depends upon the persistence of mental disorder.

Conclusion

31. There may very well be other areas in which the NI Bill could be challenged as regards its compatibility with the CRPD. By comparison with the Irish Bill, for instance, the absence of statutory provisions for assisted or co-decision-making (a particular passion of the Committee) is particularly striking. It is also undoubtedly the case that the NI Bill could be framed in terms which are less obviously 'old paradigm.' However, for present purposes, the critical question is whether in substance (as opposed to form) the Bill is incompatible with the obligations of the CRPD. For the reasons set out above, my provisional view is that:

    a. The NI Bill looks vulnerable to a charge that it is not compatible as regard the founding of the capacity test upon a diagnostic element that is likely to represent (unjustified) indirect discrimination against those with disabilities. This could be remedied by removing the diagnostic element;

    b. The NI Bill also looks vulnerable to a charge that it is not compatible as regards the basis upon which decisions are taken on behalf of those who lack capacity, as it does not ensure sufficient respect is paid to the rights, will and preferences of the adult. This could be remedied by amending the wording of clause 7, although whether the Bill can or should be remedied by requiring any such decision to be 'based' upon the wishes and feelings/will and preferences of the person is ultimately a political question.

    c. The NI Bill is undoubtedly incompatible with Article 14 CRPD as interpreted by the Committee. It would not be possible to remedy this incompatibility without rendering the Bill incompatible with the ECHR.

ALEXANDER RUCK KEENE
39 Essex Chambers/University of Manchester
28 August 2015

Appendix

The following amendments to the Northern Ireland Mental Capacity Bill were 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

Proposed deletions are marked in ~~strikethrough font~~; proposed additions are <u>underlined</u>.

Clause 5: "Supporting Person to Make a Decision"

(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: "Best Interests"

(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 –
   (d) P's age or appearance; or
   (e) any other characteristic of P's, including any condition that P has, which
   (f) might lead others to make unjustified assumptions about what might be in P's best interests.

(3) That person –
   (c) 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
   (d) must in particular take the following steps.

(4) That person must consider—
   (c) whether it is likely that P will at some time have capacity in relation to the matter in question; and
   (d) if it appears likely that P will, when that is likely to be.

(5) That person must, so far as practicable, support 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–
   (d) P's wishes and feelings (taking into account any relevant written statement made by P when P had capacity);
   (e) the beliefs and values that would be likely to influence P's decision if P had capacity; and
   (f) the other factors that P would be likely to consider if able to do so.

(7) That person must –
   (c) 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
   (d) 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 in respect of the decision 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 in respect of a decision to be made on their behalf, the more compelling must be the reasons for such a departure.

(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 P's rights and freedoms consistent with making the decision that accords with P's best interests.

(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.

(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.

(13) In subsection (7) "the relevant people" means—
  (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: "Protection From Liability for Acts in Best Interests of Person Lacking Capacity"

(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
  (e) treatment where there is objection from P's nominated person or compulsion, and for deprivations of liberty and certain other measures);
  (f) 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".