

**MENTAL CAPACITY AND MENTAL HEALTH LEGISLATION:
OVERVIEW OF THE STATUS QUO & REFORM PROPOSALS ON THE HORIZON¹**

OVERVIEW OF RELEVANT LEGISLATION/FRAWORKS

	NORTHERN IRELAND	ENGLAND & WALES	SCOTLAND*	REPUBLIC OF IRELAND
CAPACITY	Mental Capacity Act 2016 (partially implemented re DoLS, research and money & valuables), otherwise common law test Enduring Powers of Attorney (NI) Order 1987	Mental Capacity Act 2005	Adults with Incapacity (Scotland) Act 2000 and ? common law necessity	Common law test Powers of Attorney Act 1996 Lunacy Regulation (Ireland) Act 1871
MENTAL HEALTH	Mental Health (Northern Ireland) Order 1986	Mental Health Act 1983; (Mental Health Measure 2010 (Wales)	Mental Health (Care and Treatment) (Scotland) Act 2003	Mental Health Act 2001
ON THE HORIZON	Mental Capacity Act 2016 (fusion) (not yet implemented outside DoLS)	Coming into force of Mental Capacity (Amendment) Act 2019 – Liberty Protection Safeguards Draft Mental Health Bill proposing amendments to MHA 1983	Independent Review of Mental Health Law	Full implementation of Assisted Decision-Making (Capacity) Act 2015 Deprivation of liberty provisions Amendment of MHA 2001

* NB: Not dealt with here, but note that Scotland has specific legislation dealing with adults who are vulnerable and at risk, whether or not they have capacity vulnerable (Adult Support and Protection Act 2007). The position in other jurisdictions in relation to vulnerable adults who have capacity is dealt with under the common law

CURRENT MENTAL CAPACITY LEGISLATION²

NORTHERN IRELAND **COMMON LAW TEST: RE C (1994); MENTAL CAPACITY ACT 2016**

Outside MCA 2016, common law – leading case Re C (1994): **decision-specific** and **functional** capacity test; whether the person is able to **understand and retain** the treatment information, **believe it, and sufficiently weigh** it to make a choice. If lack capacity in relation to decision requiring consent, then common law doctrine/defence of necessity, or application to court for exercise of inherent jurisdiction. **Best interests** features as part of defence of necessity/exercise of inherent jurisdiction.

Mental Capacity Act 2016 (partially implemented as administrative framework for **deprivation of liberty** on the basis of incapacity for non-mental health purposes, and implemented for research and money & valuables in residential care and nursing homes): **decision-specific** and **functional incapacity**

¹ This note is based on unpublished work Alex Ruck Keene carried out at King’s College London with Dr Gareth Owen and others.

² This relates to those aged 18 and above. There are nuances in relation those aged 16 plus (who are treated as ‘adults’ in Scotland for purposes of the Adults with Incapacity (Scotland) Act, and to whom the MCA 2005 in E&W and the MCA 2016 in NI apply, but alongside the common law preservation of the rights of those with parental responsibility).

test; whether the person is able to **understand, retain, appreciate** the relevance of, and **use** and **weigh** the relevant information, and **communicate** their decision (s.4). **NB** Incapacity requires causative nexus between cognitive impairment and functional inability (s. 3(1)).

Provision for **advance planning** in relating to property and affairs (Enduring Powers of Attorney (NI) Order 1987). No statutory provision at present for advance planning in relation to health and welfare matters, but common law would respect advance decision to refuse medical treatment.

ENGLAND AND WALES

MENTAL CAPACITY ACT 2005

Decision-specific and **functional** capacity test: whether person is able to **understand, retain, use and weigh** the relevant information, and **communicate** their decision (s.3(1)). **NB** Incapacity requires causative nexus between cognitive impairment and functional inability (s.2(1)).

If capacity is lacking, structure for decision-making which can be informal (s.5) or formal (decision by Court of Protection, or appointment of deputy). Basis of decision-making is **best interests** (s.1(5)).

Provision for **advance planning** by way of advance decision to refuse medical treatment (ss.24-6) or appointment of lasting power of attorney (can cover health and welfare as well as property and affairs).

Framework for administrative authorisation of **deprivation of liberty** in hospitals and care homes in MCA ('Deprivation of Liberty Safeguards'/'DoLS') based upon incapacity and best interests.

WALES

MENTAL CAPACITY ACT 2005

Main MCA 2005 is the same, and "the subject matter of mental capacity" a 'reserved' matter for Westminster Parliament under the Government of Wales Act, but Wales has separate DoLS regulations which mirror English provisions.

SCOTLAND

ADULTS WITH INCAPACITY (SCOTLAND) ACT 2000

Functional incapacity test, but includes concept of capability of acting as well as deciding: whether person is incapable of (a) **acting**; (b) **making** decisions; (c) **communicating** decisions; (d) **understanding** decisions; or (e) **retaining** the memory of decisions (s. 1(6)). **NB** Incapacity requires mental disorder or inability to communicate b/c of physical disability (s. 1(6))

If adult is incapable, then a structure for decision-making which is not based on best interests, but **principles set out in s.1 AWI**, including benefit to the person. In general, structure more formalised than MCA 2005 or NI, including medical treatment on the basis of a formal certificate (s.47) and appointment of guardians by the courts in relation to health/welfare/property and affairs. Outside structure, ? common law necessity.

Provision for **advance planning** by way of appointment of continuing or welfare powers of attorney (covering property and affairs/health and welfare respectively). No statutory ability to make advance decision to refuse medical treatment but ? common law would respect them.

No framework for administrative **authorisation of deprivation of liberty** in hospitals and care homes (or elsewhere) based upon incapacity. Either order of court required, or appointment of guardian, or ? grant of welfare power of attorney empowering attorney to consent.

REPUBLIC OF IRELAND

LUNACY REGULATION (IRELAND) ACT 1871/COMMON LAW TEST: FITZPATRICK V FK (2009)

Lunacy Regulation (Ireland) Act 1871: capacity test: whether the person is of unsound mind and incapable of carrying on his business and affairs.

Common law – leading case Fitzpatrick v FK (2009): decision-specific and functional capacity test (to consent to medical treatment only): whether the person sufficiently **understands** the **nature, purpose** and **effect** of the proffered treatment and the **consequences** of accepting or rejecting it in the context of the choices available (including any alternative treatment) at the time the decision is made? **NB** Incapacity requires an implicit causative nexus between cognitive impairment and functional inability.

If capacity is lacking, then either reliance on common law doctrine/defence of necessity, or application to court for exercise of Wardship under Lunacy Regulation (Ireland) Act/inherent jurisdiction. **Best interests** features as part of defence of necessity/exercise of inherent jurisdiction.

No framework for administrative authorisation of **deprivation of liberty** in hospitals and care homes (or elsewhere) based upon incapacity. Supreme Court decision upholding short term usage of doctrine of necessity followed by admission to Wardship (*AC v Cork University Hospital* [2019] IESC 73).

Provision for **advance planning** in relating to property and affairs (Powers of Attorney Act 1996). No statutory provision at present for advance planning in relation to health and welfare matters, but common law would likely respect advance decision to refuse medical treatment.

CURRENT MENTAL HEALTH LEGISLATION³

NORTHERN IRELAND

MENTAL HEALTH (NORTHERN IRELAND) ORDER 1986

Patients may be detained for assessment/medical treatment for their mental disorder if patient poses risk of **serious physical harm** to self or others. Provision after admission for leave from hospital but no compulsory community treatment provisions. Provision for community guardianships in relation to residence and property & affairs, and to require patient to attend for medical treatment. Not capacity based. Framework based upon administrative detention followed by possibility of challenge to Tribunal.

ENGLAND AND WALES

MENTAL HEALTH ACT 1983

Patients may be detained for assessment/treatment for their **mental disorder** is of a nature or degree and if assessment/treatment is in the **interests** of patient's health or safety or with a view to the protection of other persons. There is provision after admission for compulsory treatment in the community. Not capacity based. Framework based upon administrative detention followed by possibility of challenge to Tribunal (with automatic reference if no challenge for specified period of time).

WALES

MENTAL HEALTH ACT 1983/ MENTAL HEALTH MEASURE 2010

MHA 1983 applies in Wales. The Mental Health Measure (Wales) adds some nuances to the MHA 1983 (incl. rights to greater advocacy), and Wales has its own Code of Practice, but the core criteria for detention and treatment are identical.

SCOTLAND

MENTAL HEALTH (CARE AND TREATMENT) (SCOTLAND) ACT 2003

Patients may be detained in hospital for assessment/medical treatment for their mental disorder if treatment would alleviate or prevent deterioration in the mental disorder and patient poses **risk to health, safety or welfare** of self or others. They can also be subject to compulsory treatment in the community. Requirements for 'significantly impaired decision-making ability' caused by the disorder, and that the order should be 'necessary'. Framework based upon detention by order of a Tribunal for all cases over 28 days.

³ For reasons of space, this overview does not address the position in relation to forensic patients, i.e. those diverted from the criminal justice system. In each jurisdiction, there are and will remain more restrictive provisions in relation to such patients.

REPUBLIC OF IRELAND

MENTAL HEALTH ACT 2001

Patients may be detained for medical treatment for their mental disorder (excluding personality disorder), severe dementia or significant intellectual disability if patient poses immediate and serious **risk of harm** to self or others, **or** their condition may worsen if untreated and their mental disorder impairs their judgment. Not capacity based, but requirement for mental illness seriously to impair the mental function of the person. Framework based upon administrative detention followed by possibility of challenge to Tribunal (with automatic reference if no challenge for specified period of time)

ON THE HORIZON

ENGLAND AND WALES

Independent Review of the Mental Health Act 1983 (2018) and draft Mental Health Bill (2022)

Review recommended updates to the MHA, with greater emphasis on capacity. Did recommend fusion at this stage, but gave confidence tests for potential move to fusion. Draft Mental Health Bill published 2022, taking forward many (but not all) of the proposals, as well as proposing exclusion of learning disability and autism from longer-term detention provisions of the MHA 1983.

SCOTLAND

Independent Review of Mental Health Law (2022)

Consideration of all three legislative instruments (Mental Health (Care and Treatment) (Scotland) Act 2003, Adults with Incapacity Act 2000, and Adult Support and Protection Act 2007). Proposing move towards legislation predicated upon positive rights. Not fusion.

REPUBLIC OF IRELAND

Assisted Decision-Making (Capacity) Act 2015

Act is still to be substantially commenced. Includes a **decision-specific** and **functional** capacity test: whether the person is unable to **understand, retain, use, or weigh** the relevant information or **communicate** the decision. **NB** capacity test is purely functional (no impairment or causative nexus requirement)

Deprivation of Liberty provisions

New draft is still awaited. An expert advisory group was established in January 2023 and is expected to report by summer 2023. The Supreme Court decision in *AC v Cork University Hospital* [2019] IESC 73 lessened some of the urgency to create a new framework, but the commencement of the 2015 Act will mean that the only mechanism for authorising deprivation of liberty will be the inherent jurisdiction of the High Court.

Amendments to Mental Health Act 2001

A draft was sent for review to Mental Health Commission which provided extensive feedback. Government response awaited, bill publication date TBA. Separate mental health legislation will remain in place, with greater emphasis on support through integration of certain elements of 2015 Act (as well as binding advance healthcare directives in some situations involving involuntary patients).