

**TO BE READ IN CONJUNCTION WITH THE CONSULTATION PAPER**

**Part 13 of the Assisted Decision-Making (Capacity) Act 2015**

**Preliminary Draft Heads of Bill for Public Consultation Purposes Only**

- Head 1      Definitions**
- Head 2      Application and Purpose of this Part**
- Head 3      Person’s Capacity to Make a Decision to Live in a Relevant Facility in Advance of an Application to enter the Relevant Facility**
- Head 4      Procedure for Routine Admission of a Relevant Person to a Relevant Facility**
- Head 5      Procedure for Admission of a Relevant Person to a Relevant Facility in Urgent Circumstances**
- Head 6      Procedure for making an Admission Decision**
- Head 7      Persons Living in a Relevant Facility**
- Head 8      Transitional Arrangements for Existing Residents on Commencement of this Part**
- Head 9      Review of Admission Decisions**
- Head 10     Chemical Restraint and Restraint Practices**
- Head 11     Records to be Kept**
- Head 12     Regulations**
- Head 13     Offences**

## **Head 1 – Definitions**

In this Part-:

“admission” , in relation to a relevant facility, means entry to, or residence in, a relevant facility where the relevant person will be under continuous supervision and control and will not be free to leave.

“admission decision” means a relevant decision that a relevant person will live in a relevant facility where he or she will be under continuous supervision and control and will not be free to leave.

“appropriate person” means a person identified in accordance with regulations made by the Minister under Head 12(2) to make an application to court under Part 5 on behalf of a relevant person.

“chemical restraint” means the use of medication to control or modify a person’s behaviour when no medically identified condition is being treated, or where the treatment is not necessary for the medically identified condition or the intended effect of the medication is to sedate a person for convenience or disciplinary purposes or to ensure that a person is compliant or is not capable of resistance.

“Minister” means the Minister for Health

“other medical expert” includes a ..... [Note: The issue of “other medical experts” is included as a question in the associated consultation paper]

“person in charge” means the person in charge of the relevant facility.

“relevant facility” means:

- (a) a designated centre as defined in section 2(1)(a)(ii), 2(1)(a)(iii) and (c) of the Health Act 2007, as amended; or,
- (b) an approved centre as defined in section 2(1) of the Mental Health Act 2001; or,
- (c) an institution at which residential services are provided by the Health Service Executive, a service provider or a person that is not a service provider but who receives assistance under Section 39 of the Health Act 2004 to persons in receipt of mental health services as defined by section 2(1) of the Mental Health Act 2001 but does not include any of the following:
  - i. an institution managed by or on behalf of a Minister of the Government; and,
  - ii. that part of an institution in which the majority of persons being cared for and maintained are being treated for acute illness or provided with palliative care; and,
  - iii. an institution primarily used for the provision of educational, cultural, recreational, leisure, social or physical activities; and,
  - iv. a special care unit provided and maintained in accordance with section 23K of the Child Care Act 1991.
- (d) such other facility as the Minister may prescribe by regulation

“restraint practice” means the use of practices for non-therapeutic purposes that result in the intentional restriction of a person’s movement or behaviour and does not include chemical restraint.

“temporary admission decision” has the meaning assigned to it in Head 5.

“ward” means a relevant person in the wardship of a wardship court.

## **Explanatory Notes**

1. This Head sets out the main definitions for this Part of the Act.
2. The Heads do not define “deprivation of liberty” but deprivation of liberty is captured in the definition of “admission” and “admission decision” as meaning entry to or residence in a relevant facility where the relevant person will be under continuous supervision and control and will not be free to leave.
3. “admission decision” is defined because in order that the law be accessible and foreseeable the legislation needs to be made clear when a decision may be taken which will result in the relevant person being deprived of their liberty.
4. The introduction of “appropriate person” is intended to ensure that a mechanism is available whereby the Minister may have persons appointed to make applications to court under Part 5 on behalf of a relevant person if no one else makes such an application, i.e. as a last resort.
5. “chemical restraint” is as defined.
6. “other medical expert” is required to be defined so as to include experts who might not, strictly speaking, be considered “medical” but whose expertise is the appropriate one for decisions on the admission of certain categories of persons, e.g. psychologists. The case law of the European Convention on Human Rights (ECHR) requires medical evidence to justify a decision to deprive a person of their liberty under Article 5(1)(e).
7. The “person in charge” is the acting manager with overall responsibility at any given time. There is no relevant statutory definition of person in charge. The concept mirrors that of the person in charge referred to in S.I. No 415 of 2013 (Care and Welfare of Residents in Designated Centres for Older People) Regulations 2013 and in S.I. No 367 of 2013 (Care and Support Regulations for Designated Centres for Persons with Disabilities). In the majority of designated centres for older people, the person in charge would be a nurse. In designated centres for persons with disabilities the person in charge tends to be a nurse or social care professional. The person in charge also includes the clinical director of approved centres appointed by the relevant governing body.
8. A definition of “relevant facility” is required to differentiate it from a “designated centre” defined in section 2 of this Act because it is not intended to cover child care centres or institutions in the deprivation of liberty provisions of the Act. Relevant facility is the place where the relevant person is to be admitted pursuant to an admission decision. The inclusion of a definition of relevant facility is necessary for clarity as to which facilities are considered in this Part (i.e. nursing homes and care/residential accommodation in addition to approved centres under the Mental Health Act 2001). As a number of mental health residential facilities do not have a

statutory definition it is necessary to have a definition encompassing a number of these facilities. The definition includes the sections of the Health Act 2007.

9. There is currently no statutory definition of restraint practices. The definition is taken in part from a Department of Health policy document entitled ‘Towards a restraint free environment in nursing homes’ (page 6). As HIQA’s Guidance for Designated Centres: Restraint Procedures (updated April 2016) notes:  
*“Restrictive procedures should only be used in limited circumstances after other options to keep people safe have been exhausted. Such procedures should only be used in strict adherence to international human rights instruments, national legislation, regulations, policy and evidence-based practice guidelines. An unwise decision by a resident is not always evidence of lack of capacity or the need for restrictive procedures, nor is the use of such procedures in one instance a reason to use them later without trying all other options first.”*

## **Head 2 - Application and Purpose of this Part**

- (1) This Part applies in circumstances where it is proposed that a relevant person is to live in, or, is already living in a relevant facility and
  - (a) where he or she is or will be under continuous supervision and control; and
  - (b) is not or will not be free to leave; and
  - (c) there is reason to believe that the person lacks capacity to make a decision to live in the relevant facility
  
- (2) This Part does not apply to wards.
  
- (3) Further to subhead (1), the purpose of this Part is to:
  - (a) establish a procedure for when a person, who is to be admitted to a relevant facility, is reasonably believed to lack the capacity to make a decision to live in a relevant facility;
  - (b) put in place safeguards for when a person is admitted to a relevant facility in the circumstances set out in subhead (1);
  - (c) establish a procedure for when a person, who is living in a relevant facility is reasonably believed to lack the capacity to make a decision to leave the relevant facility;
  - (d) establish a procedure for when a person, who is living in a relevant facility is reasonably believed to lack the capacity to make a decision to continue living in the relevant facility;
  - (e) establish transitional arrangements for persons who are living in relevant facilities on commencement of this Part;
  - (f) prohibit the use of chemical restraint in a relevant facility; and
  - (g) prohibit the use of restraint practices in relevant facilities unless there are exceptional circumstances and in accordance with regulations prescribed by the Minister.

## **Explanatory Notes**

1. Ireland signed the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and Optional Protocol in 2007. Existing legislation satisfies a number of Articles in the UNCRPD. Existing legislation in the form of the Assisted Decision-Making (Capacity) Act 2015 and the Mental Health Act 2001 do not provide a procedure for admitting persons without capacity to relevant facilities when they will be under continuous supervision and control and will not be free to leave, nor do they provide procedural safeguards to ensure that such persons are not deprived of their liberty unlawfully.
2. The policy is to meet the obligations of the UNCRPD by making legislative provision for the act of intervening to deprive a relevant person of their liberty in circumstances where the capacity to make a decision to live in a relevant facility is in question or is not present at that time, and to ensure the legislative provisions are aligned with Article 14 of the UNCRPD.
3. Subhead (1) provides that this Part of the Act is confined to circumstances which amount to deprivation of liberty. Deprivation of liberty is not synonymous with living in a residential facility as it requires in addition that the relevant person who lacks capacity be under continuous supervision and control and not be free to leave the relevant facility. This subhead provides that the safeguards in this Part will apply when a person has been or is being admitted to a relevant facility and where they are or will be under continuous supervision and control, will not or are not free to leave.
4. A UK Supreme Court ruling in March 2014 (“Cheshire West case”) made reference to the 'acid test' to see whether a person is being deprived of their liberty. If a person without capacity is under continuous supervision and control and is not free to leave then this amounts to a deprivation of liberty within the meaning of Article 5 of the European Convention on Human Rights.
5. Subhead (2) provides that this Part shall not apply to wards.
6. Subhead (3) sets out the purpose of this Part of the Act so as to clarify the point at which it applies, i.e. where a personal welfare decision is being taken under the Act that a relevant person should live in a relevant facility and where it is also necessary, for good and valid reasons, to take a further step to curtail their freedom or prevent them from leaving the relevant facility.

**Head 3 – Person’s Capacity to Make a Decision to Live in a Relevant Facility in Advance of an Application to enter the Relevant Facility**

(1) Where a healthcare professional, in accordance with the guiding principles of this Act under section 8 -

(a) determines that a relevant person requires admission to a relevant facility in line with the circumstances described in Head 2(1) and

(b) has reason to believe that he or she lacks the capacity to decide to live in the relevant facility,

the healthcare professional shall make enquiries as to whether:

(i) a registered co-decision making agreement in respect of personal welfare matters, including a decision that the relevant person should live in a relevant facility;

(ii) an order under section 37 (3) declaring lawful an intervention in respect of personal welfare matters, including a decision that the relevant person should live in a relevant facility;

(iii) an order under section 38(2)(a) in respect of personal welfare matters, including a decision that the relevant person should live in a relevant facility;

(iv) an order under section 38(2)(b) appointing a decision-making representative for the purposes of making a decision in respect of personal welfare matters, including a decision that the relevant person should live in a relevant facility;

(v) an interim order under section 48 making a decision in respect of personal welfare matters, including a decision that the relevant person should live in a relevant facility; or

- (vi) a registered enduring power of attorney or an enduring power of attorney under the 1996 Act conferring authority on the attorney in relation to personal welfare or personal care matters, including a decision that the relevant person should live in a relevant facility.

is in place.

- (2) Where a healthcare professional, following enquiries, believes that there is no admission decision in place but that a co-decision maker, a decision-making representative or an attorney has been appointed under a registered enduring power of attorney or an enduring power of attorney under the 1996 Act, he or she may, for the purpose of affording them the opportunity to make an application to court under Part 5 where necessary, notify such of them as have been appointed and the relevant person and any other person or persons that may be specified by the relevant person, in writing in the prescribed manner, of his or her determination that the relevant person requires to be admitted and that he or she has reason to believe that the relevant person lacks the capacity to decide to live in the relevant facility .
- (3) Where a healthcare professional, following enquiries, believes that there is no admission decision in place and that no co-decision maker, decision-making representative or attorney has been appointed, he or she may, for the purpose of affording them the opportunity to make an application to court under Part 5, notify the relevant person and any other person or persons that may be specified by the relevant person, in writing in the prescribed manner, of his or her determination that the relevant person requires to be admitted and that he or she has reason to believe that the relevant person lacks the capacity to decide to live in the relevant facility.

## **Explanatory Notes**

1. The purpose of this Head is to ensure that concerns about an individual's capacity are identified as early in the process of planning for admission to a relevant facility as possible (effectively at the time of the visit to the person's doctor or public health nurse, at which the need for residential care is determined). This aims to facilitate applications to court under Part 5 at an early stage and avoid situations where the first time the issue of capacity arises is as part of the admission as outlined in Heads 4 or 5.
2. It is anticipated that a campaign encouraging the use of the decision support mechanisms of the Assisted Decision Making (Capacity) Act and enduring powers of attorney will coincide with the commencement of the Act to avoid the need to attend court.
3. Subhead (1) provides that at the time that a healthcare professional determines, in line with the guiding principles of the Act, that admission to a relevant facility is required and the person will be under continuous supervision and control and not free to leave, and, having formed a view that the relevant person does not have capacity to make a decision in relation to where they will live, they should seek to ascertain whether any third party has legal authority to admit the person to a relevant facility. Section 8 of the Act, which sets out the principles, can be found at Appendix A.
4. Subhead (2) provides that, in situations where there is no admission decision but a decision-making representative, co-decision making agreement, EPA is in place, the healthcare professional is empowered to notify in writing any person appointed under those instruments as well as the relevant person and other specified people of their determination that the relevant person requires residential care and their belief that the relevant person lacks the capacity to make a decision to live in the relevant facility so to alert them to the need for an application to court under Part 5. This may result in such a third party applying to court for an admission decision. By making the application to court on behalf of the relevant person, legal aid can be availed of.
5. Subhead (3) provides that, in situations where there is no admission decision and no decision making representative, co-decision making agreement, EPA or an EPA under the 1996 Act in place, the healthcare professional may notify in writing the relevant person and other specified people of their determination that the relevant person requires residential care and their belief that the relevant person lacks the capacity to decide to live in a relevant facility so to alert them to the need for an application to court under Part 5. This may result in such a third party applying to court for an admission decision. By making the application to court on behalf of the relevant person, legal aid can be availed of.

**Head 4 – Procedure for Routine Admission of a Relevant Person to a Relevant Facility**

- (1) Subject to Head 5, no relevant person shall be admitted to a relevant facility where he or she will be under continuous supervision and control and will not be free to leave unless an admission decision has been made in their regard.
  
- (2) Subject to Head 5 where, in accordance with the guiding principles in section 8,
  - (a) it is determined, that it is necessary for a relevant person to be admitted to a relevant facility where he or she will be under continuous supervision and control and will not be free to leave, and
  - (b) the person in charge or healthcare professional on behalf of the person in charge has reason to believe that the relevant person lacks capacity to make a decision to live in a relevant facility

then -

(i) if evidence of

- (a) an order under section 37 (3) declaring lawful an intervention in respect of personal welfare matters, including an admission decision;
- (b) an order under section 38(2)(a) in respect of personal welfare matters, including an admission decision;
- (c) an interim order under section 48 making an admission decision

is produced to the person in charge or the healthcare professional on behalf of the person in charge,

or

(ii) if evidence of

- (a) an order under section 38(2)(b) appointing a decision-making representative for the purposes of making an admission decision; or

- (b) a registered enduring power of attorney conferring authority on the attorney in relation to personal welfare matters, including making an admission decision;

is produced to the person in charge or the healthcare professional on behalf of the person in charge and the intervener has made an admission decision,

the person in charge or the healthcare professional on behalf of the person in charge may admit the relevant person.

- (3) Subject to Head 5 where no evidence of any of the items listed in subhead (2) (a) and (b) is produced to the person in charge or the healthcare professional on behalf of the person in charge, then the person in charge shall inform any co-decision maker, a decision-making representative or an attorney appointed under an registered enduring power of attorney or an enduring power of attorney under the 1996 Act, for the purpose of affording them the opportunity to make an application to court under Part 5 where necessary, notify such of them as have been appointed and the relevant person and any other person or persons that may be specified by the relevant person, in writing in the prescribed manner, of his or her determination that the relevant person requires to be admitted and that he or she has reason to believe that the relevant person lacks the capacity to decide to live in the relevant facility and that the relevant person may not be admitted to the relevant facility in the absence of an admission decision.

## **Explanatory Notes**

1. This Head relates to the requirements for admission to the relevant facility in routine circumstances (i.e. the day the person arrives at the residential facility).
2. Subhead (1) provides that no relevant person should be admitted to a relevant facility without an admission decision, subject to Head 5 which addresses admissions to relevant facilities in urgent circumstances.
3. Subhead (2) provides that where there is concern that a relevant person lacks capacity and will be under continuous supervision and control and will not be free to leave, the person in charge cannot admit the relevant person unless they receive documentary evidence that (a) another person has the legal authority to admit the person and that person consents to admission or (b) an appropriate court order has been made.
4. Subhead (3) provides that where a decision-making representative under this Act has been appointed but no admission decision has been made, then the person in charge or healthcare professional on behalf of the person in charge will inform the decision-making representative or the attorney, as well as the relevant person and other specified persons that it has been determined that the relevant person requires to be admitted and the person in charge believes the relevant person lacks capacity. The purpose of the notification is to alert such persons to the position and give them an opportunity to make the relevant application to court. By making the application to court on behalf of the relevant person, legal aid can be availed of.

**Head 5 – Procedure for Admission of a Relevant Person to a Relevant Facility in Urgent Circumstances**

- (1) Where the person in charge of the relevant facility or a healthcare professional on behalf of the person in charge
  - (a) has reason to believe that the immediate admission of the relevant person is necessary—
    - (i) to prevent an imminent risk of significant harm to the person’s health or welfare, or
    - (ii) is necessary to prevent an imminent risk of significant harm to another person;
  - (b) has reason to believe, upon an application of the guiding principles in section 8, that the relevant person lacks capacity to decide to live in the relevant facility; and
  - (c) evidence of an admission decision is not produced;

the person in charge or the healthcare professional on behalf of the person in charge may make a temporary admission decision to admit the relevant person to the relevant facility under his or her authority.

- (2)
  - (a) In deciding whether to make a temporary admission decision the person in charge shall take into account any and all the medical evidence which may be available.
  - (b) The person in charge or the healthcare professional on behalf of the person in charge shall seek the advice of a registered medical practitioner or medical expert as soon as practicable but in any case, no later than 3 days of making the temporary admission decision and if advised by the registered medical practitioner or medical expert that the conditions in subhead (1) (a) or (b) have not been met the person in charge shall revoke the temporary admission decision.

(3) The person in charge of the relevant facility or the healthcare professional on behalf of the person in charge shall, no later than 5 days of making the temporary admission decision referred to in subhead (1), notify the relevant person and any other person or persons who may be specified by the relevant person in writing of

(a) the making of the temporary admission decision,

(b) the reasonable belief of the person in charge or a healthcare professional on behalf of the person in charge that the relevant person lacks capacity to make this decision; and

(c) the reasons for making the temporary admission decision, including the grounds for the necessity for the immediate admission of the relevant person.

(4) Where evidence of a

(a) a registered co decision making agreement in respect of personal welfare matters;

(b) an order under section 38(2)(b) appointing a decision making representative in relation to personal welfare matters; or

(c) a registered enduring power of attorney or an enduring power of attorney under the 1996 Act conferring authority on the attorney in relation to personal welfare matters;

is produced to the person in charge or the healthcare professional on behalf of the person in charge, the person in charge or the healthcare professional on behalf of the person in charge shall notify, within 5 days, the co-decision maker, the decision making representative or the attorney or attorney under the 1996 Act, or such of

them as have been appointed, of the matters set out in subhead (3), informing them that a formal admission decision is required.

- (5) Where a decision-making representative or attorney under a registered enduring power of attorney conferring authority on the attorney in relation to personal welfare matters has been appointed, the temporary admission decision shall be replaced by a formal admission decision given by the decision-making representative under section 44(6) or by an attorney under section 62 where the authorisation authorises restraint to the like extent as the temporary admission decision.
- (6) Where a temporary admission decision is in place, any person making an application to the court under Part 5 of the Act shall notify the person in charge of the making of the application.
- (7) Where the person in charge or the healthcare professional on behalf of the person in charge does not receive notice of an application under Part 5 within 10 days of the date on which the notification under subheads (3) and (4) was issued, the person in charge shall contact the Director and request that an appropriate person be assigned to make an application to court under Part 5 on behalf of the relevant person as soon as practicable but no later than a further 10 days.
- (8) A temporary admission decision shall continue in force until the expiration of 25 days from the date of its making and shall then lapse unless at the return date for an application made under Part 5 of the Act for an interim order or an order making an admission decision the court orders that the temporary admission decision shall continue until the court has disposed of the application.

## **Explanatory Notes**

1. This Head sets out the circumstances in which an exception may be made to the general principle set out in the previous Head that an admission decision is required before a person who lacks capacity may be admitted to a relevant facility, namely in situations of extreme urgency.
2. Subhead (1) provides that if the person in charge has concerns that the relevant person may not have capacity, that he or she shall apply the guiding principles in respect of that issue. If the person in charge has reason to believe that the relevant person lacks capacity, and if there is no court order, decision making representative or enduring power of attorney in place, they may admit that relevant person under their own authority if there is an imminent risk of significant harm to the person's health or welfare or an imminent risk of harm to another person, pending the making of an application to court under Part 5.
3. Subhead (2)(a) provides that medical evidence should be taken into account by the person in charge when making a temporary admission decision. Subhead (2)(b) provides that the person in charge should take account of any medical evidence available in making a temporary admission order.
4. Subhead (3) provides that the person in charge or a healthcare professional on behalf of the person in charge will give written notification within 5 days of the urgent admission of the relevant person, to the relevant person and other specified people. The written notification will detail the belief of the person in charge or healthcare professional that the relevant person lacks the capacity and requires to be admitted.
5. Subhead (4) provides that where the person in charge or a healthcare professional on behalf of the person in charge has evidence that there is a co-decision maker, decision making representative or attorney, that the person in charge will give written notification within 5 days of the urgent admission of the relevant person, to any co-decision maker, decision making representative or attorney who has been appointed. The written notification will detail the belief of the person in charge or healthcare professional that the relevant person lacks the capacity and requires to be admitted.
6. Subhead (5) provides that where there is a decision-making representative or attorney, that the temporary admission decision will be replaced by any formal admission decision which the decision-making representative or attorney may give or have given where this coincides in scope with the temporary admission decision. The purpose of this provision is to ensure that decisions are made, where possible, by the person closest to the relevant person.
7. Subhead (6) provides that where a person makes an application to court they shall notify the person in charge.

8. These notifications act as a safeguard and may lead to an application being made to the court under Part 5 by a co-decision maker, decision making representative, attorney or anyone with a bona fide interest in the relevant person. By making the application to court on behalf of the relevant person, legal aid can be availed of.
9. Subhead (7) provides that where the person in charge does not receive a notification that an application has been made to court within 10 days, the person in charge shall contact the Director and request that an Appropriate Person make the application within a further 10 days.
10. Subhead (8) provides that a temporary admission decision shall be valid for 25 days and shall then lapse unless the court makes an order continuing the decision. The term of validity of the temporary admission decision allows a court application to be made during the course of which the court may decide to continue with the temporary admission pending a determination of the application.

## **Head 6 – Procedure for making an Admission Decision**

- (1) Subject to subhead (2) and (3), a decision-making representative or attorney under a registered enduring power of attorney who is authorised to make an admission decision on behalf of the relevant person may do so only
  - (a) in accordance with the guiding principles set out in section 8; and
  - (b) where a medical expert is of the opinion that
    - (i) such a decision is necessary in order to protect the relevant person from significant harm and
    - (ii) that there is no other appropriate, practicable and less intrusive manner to protect the relevant person from harm.
- (2) For the purposes of making an admission decision under subhead (1) the decision-making representative may rely on the evidence provided by a medical expert to the court where the court has authorised the decision making representative to make an admission decision where that evidence is still relevant.
- (3) The court shall not make a declaration that an intervention which is or includes an admission decision under section 37(3) is lawful, make an order making an admission decision under section 38(2)(a) or make an order appointing a decision-making representative for the purposes of making an admission decision unless the court is satisfied, having considered the evidence of a medical expert, that
  - (a) an admission decision is necessary in order to protect the relevant person from harm and
  - (b) there is no other appropriate, practicable and less intrusive manner of to protect the relevant person from harm.
- (4) Where the court declares lawful an intervention which includes an admission decision or makes an order making an admission decision the court shall make an

order appointing a decision-making representative or shall amend an existing decision making representation order under section 38(2)(b).

## **Explanatory Notes**

1. This Head is intended to ensure that an admission decision is based on medical evidence, as required by the ECHR.
2. Subhead (1) specifies that an admission decision may be made by a decision making representative or attorney but only where there is medical evidence to that effect. It also requires the decision making representative or attorney to ensure the necessity and proportionality of the decision (in line with section 36(5)).
3. Subhead (2) allows a decision-making representative to rely on the medical evidence provided to the court where this is still relevant.
4. Subhead (3) requires the court, where it is making a declaration as to the lawfulness of an admission decision or when it is making an admission decision to consider medical evidence and to also consider the necessity and proportionality of the decision.
5. Subhead (4) obliges the court, when an admission order is declared lawful or an admission decision is made by the court, to appoint a decision making representative for the relevant person or amend an existing decision making representation order. This is intended to assist operationally by having the relevant person represented for any consequential decisions.
6. It will also be necessary to amend section 44 of the Act by the insertion of:

“(9) For the purpose of this section, a decision making representative for a relevant person does not restrain the relevant person if he or she makes an admission decision as provided for in and in accordance with Part 13, provided that such a decision has been specified in the decision-making representation order.”
7. Section 62 will also have to be amended by the insertion of:

“(4A) For the purpose of this section, an attorney does not restrain the donor if he or she makes an admission decision as provided for and in accordance with Part 13, provided that such a decision has been authorised by the enduring power of attorney.”

## **Head 7 – Persons Living in a Relevant Facility**

### Person who is living in a relevant facility either before or after commencement of this Part and wishes to leave it

(1)

(a) Where -

(i) a relevant person who is living in a relevant facility, whether they have entered and lived in the facility before or after commencement of this Part, expresses a desire to leave the relevant facility; and

(ii) the person in charge or a healthcare professional on behalf of the person in charge, in accordance with the guiding principles of the Act in section 8, has reason to believe that the relevant person lacks the capacity to make the decision to leave the relevant facility,

the person in charge, or a healthcare professional on behalf of the person in charge may temporarily prevent the relevant person from leaving the relevant facility under the authority of the person in charge provided that the conditions in Head 5(1) are met.

(b) The provision of Head 5 (2) to (8) shall apply, *mutatis mutandi*, as though the decision temporarily to prevent the relevant person from leaving the relevant facility were a temporary admission decision.

(2) Subheads (1) shall not apply where the person in charge or a healthcare professional on behalf of the person in charge reasonably believes, in accordance with the guiding principles in section 8, that the change in capacity is likely to fluctuate and that the loss of capacity will only last for a short period.

(3) A person in charge or a healthcare professional on behalf of a person in charge who acts in accordance with this section shall not incur any liability where, during the

time in which the relevant person is temporarily prevented from leaving is in place, the capacity of the relevant person fluctuates.

Person Who After Commencement of this Part Had Capacity to Decide to Live in a Relevant Facility and May Now Lack Capacity

- (4) Subject to subhead (8), where the person in charge or a healthcare professional on behalf of the person in charge, in accordance with the guiding principles of the Act in section 8, has reason to believe that a relevant person who voluntarily entered and lived in at relevant facility after commencement of this Part no longer has capacity to make a decision to continue to live in the relevant facility, the person in charge of the relevant facility, or a healthcare professional on behalf of the person in charge shall notify as soon as practicable, in writing in the prescribed manner, for the purpose of affording them the opportunity to make an application to court under Part 5, the relevant person and any other person or persons that may be specified by the relevant person, informing them that he or she has reason to believe that the relevant person lacks the capacity to make the decision to continue to live in the relevant facility.
- (5) A person making the application under Part 5 shall notify the person in charge or the healthcare professional on behalf of the person in charge of the making of the application.
- (6) Subject to subhead (8), where the person in charge or the healthcare professional on behalf of the person in charge does not receive notice of an application under subhead (5) within 3 months of the date on which the notification under subhead (4) was issued, the person in charge shall contact the Director and request that an appropriate person be assigned to make an application to court under Part 5 on behalf of the relevant person as soon as practicable but no later than a further 21 days.

- (7) Subheads (4) and (6) shall not apply where evidence of:
- (a) an interim order under section 48 authorising the admission of the relevant person;
  - (b) an order under section 37(3) declaring a proposed admission of the relevant person lawful;
  - (c) a decision-making order made under subsection 38(2)(a) authorising the making of an admission decision in respect of the relevant person;
  - (d) an order under section 38(2)(b) appointing a decision making representative in relation to personal welfare matters; or
  - (e) a registered enduring power of attorney authorising an attorney(s) to make an admission decision in respect of the relevant person

is produced to the person in charge or the healthcare professional on behalf of the person in charge.

- (8) Subhead (6) shall not apply in cases where the person in charge or a healthcare professional on behalf of the person in charge reasonably believes, in accordance with the guiding principles of the Act, that:
- (i) the change in capacity is likely to fluctuate and that the loss of capacity will only last for a short period, or
  - (ii) there is a high probability of the person's demise within a short period.

Person Who Previously Lacked Capacity and May Have Regained it

- (9) Where the person in charge or a healthcare professional on behalf of the person in charge has reason to believe, in accordance with the guiding principles in section 8, that a relevant person in relation to whom the court has made an order pursuant to section 37(1)(b), may have regained capacity to decide to live in the relevant facility the person in charge or the healthcare professional on behalf of the person in charge shall notify as soon as practicable, in writing in the prescribed manner, the relevant person and any decision making representative appointed under section

38, any attorney appointed under section 68 or attorney under 1996 Act, and the Director of his or her belief for the purpose of affording them the opportunity to make an application under section 49 for a review of the court order.

- (10) A person making the application under section 49 shall notify the person in charge or the healthcare professional on behalf of the person in charge of the making of the application.
- (11) Where the person in charge or the healthcare professional on behalf of the person in charge does not receive notice of an application under subhead (10) within 21 days of the date on which the notification under subhead (9) was issued, the person in charge shall or the healthcare professional on behalf of the person in charge contact the Director and request that an appropriate person be assigned to make an application to court under Part 5 on behalf of the relevant person as soon as practicable but no later than a further 21 days.
- (12) Subhead (11) shall not apply where the person in charge or a healthcare professional on behalf of the person in charge reasonably believes, in accordance with the guiding principles of the Act, that the change in capacity is likely to fluctuate and that the regaining of capacity will only last for a short period.

## **Explanatory Notes**

1. This Head outlines the safeguards for those people who live in relevant facilities. The Head sets out a procedure for:
  - (i) a relevant person (whether they have entered and lived in the facility before or after commencement of this Part) who desires to leave a relevant facility where the person's capacity to decide to leave is in question;
  - (ii) a relevant person who entered and lived in a relevant facility voluntarily after commencement of this Part but has lost capacity;
  - (iii) a person who is living in a relevant facility whom the court has determined lacks capacity, regains it.

### Person who is living in a relevant facility either before or after commencement of this Part and wishes to leave it

2. Subhead (1) provides that if a relevant person, who entered and lived in the relevant facility either before or after commencement of this Part, wishes to leave a relevant facility but the person in charge or healthcare professional on behalf of the person in charge has reason to believe that they lack capacity to make that decision, having applied the guiding principles, the person in charge may prevent the relevant person from leaving provided that the conditions in Head 5(1) are met, that is to say that it is necessary to prevent the relevant person from leaving in order to prevent an imminent risk of significant harm to the person's health or welfare or significant harm to another person.
3. Subhead (1) goes on to provide that the provisions of Head 5(2) to (8) shall then be applied as though the decision temporarily to prevent the relevant person from leaving were a temporary admission decision. These subheads require the person in charge to notify various people of the person in charge's decision to prevent the relevant person leaving, allow the substitution of the person in charge's decision with that of the decision-making representative or the attorney, where such is available, and allow the person in charge to seek the appointment by the Director of an appropriate person to make an application to court for a declaration of capacity and an admission decision when no one else has made such an application.
4. Subhead (2) provides that subhead (1) shall not apply where the capacity of the relevant person is fluctuating. This is required in order to avoid a situation where fresh applications are required to be made more frequently than the court can hear such applications.
5. Subhead 3 provides that a person in charge or healthcare professional on behalf of the person in charge shall not incur a liability should they not allow a relevant person to leave a relevant facility because the capacity of the relevant person fluctuates.

Person Who After Commencement of this Part Had Capacity to Decide to Live in a Relevant Facility and May Now Lack Capacity

6. Subhead (4) provides that where a person entered and lived in a relevant facility voluntarily after commencement of this Part and on an application of the guiding principles in section 8 the person in charge has reason to believe that the relevant person may lack the capacity to make a decision to continue to live in the relevant facility, the person in charge or a healthcare professional on behalf of the person in charge shall, give written notification to the relevant person and other specified people of their belief that the relevant person lacks capacity to make a decision to continue to live in the relevant facility thereby affording them the opportunity to make an application to court under Part 5. Existing residents at the time of commencement (i.e. will not have been admitted since this Part was commenced) will be subject to the process as outlined in Head 8.
7. Subhead (5) provides that the person in charge must be notified of the making of an application to Court under Part 5.
8. Subhead (6) provides that where the person in charge does not receive notice of an application to court within 3 months of the date on which notification under subhead (4) issued, the person in charge shall contact the Director of the Decision Support Service to request that an appropriate person be assigned to the relevant person to make the application to court on behalf of the relevant person within a further 21 days. By making the application to court on behalf of the relevant person, legal aid can be availed of.
9. Subhead (7) provides that an application to court under subheads (4) and (6) does not need to be made if there is an enduring power of attorney or decision making representative authorised to make an admission decision or an admission decision is ordered by the court or declared to be lawful by the court.
10. Subhead (8) provides that the person in charge or healthcare professional on behalf of the person in charge is not obliged to issue a notification under subhead (4) or contact the Director under subhead (6) if they reasonably believe that the lack of capacity is fluctuating and the loss of capacity will only last for a short period or if there is a high probability of the person's demise within a short period.

Person Who Previously Lacked Capacity and May Have Regained it

11. Subhead (9) provides that if the person in charge or healthcare professional on behalf of the person in charge has reason to believe, in accordance with the guiding principles in section 8, that a relevant person in regard to whom the court previously declared they lacked capacity, has now regained capacity the person in charge shall inform the relevant person and the any decision making representative or attorney and the Director of his or her belief for the purpose of affording them the opportunity to make an application to the court for a review of its declaration.

12. Subhead (10) provides that the person in charge shall be notified of the application to the court to have the declaration of the court reviewed.
13. Subhead (11) provides that if the person in charge does not receive notice within 21 days of the issuing of the notification under subhead (9) that another person has made an application to court as provided for under subhead (10), the person in charge shall contact the Director to request that an appropriate person be assigned to the relevant person to make the application on behalf of the relevant person within a further 21 days. Legal aid is available for an application to be made on behalf of the relevant person.
14. Subhead (12) provides that the person in charge or healthcare professional on behalf of the person in charge is not obliged to inform the relevant person's decision making representative or attorney and the Director if they reasonably believe that the person's capacity is fluctuating and the regaining of capacity will only last for a short period.

**Head 8 – Transitional Arrangements for Existing Residents on Commencement of this Part**

- (1) Where, at the commencement of this Part, the person in charge or healthcare professional on behalf of the person in charge, in accordance with the guiding principles of the Act in section 8, has reason to believe that a person living in the relevant facility at the date of commencement lacks the capacity to make a decision to decide to live in the relevant facility in line with the circumstances as outlined in Head 2(2), the person in charge or a healthcare professional on behalf of the person in charge shall notify within 10 days, for the purpose of affording them the opportunity to make an application to court under Part 5, in writing in the prescribed manner, the relevant person and any other person or persons that may be specified by the relevant person, informing them that he or she has reason to believe that the relevant person does not have the capacity to decide to continue to live in the relevant facility.
- (2) A person making the application under Part 5 shall notify the person in charge or the healthcare professional on behalf of the person in charge of the making of the application.
- (3) Subject to subheads (4) and (5), if the person in charge or the healthcare professional on behalf of the person in charge does not receive notice of an application under subhead (2) within 12 months and 1 day of the date notification under subhead (1) was issued, the person in charge shall contact the Director and request that an appropriate person be assigned to make an application to court pursuant to Part 5 on behalf of the relevant person as soon as is practicable but no later than a further 21 days.
- (4) Subheads (1) and (2) do not apply in circumstances where evidence of
  - (a) an interim order under section 48 authorising the admission of the relevant person;

- (b) an order under section 37(3) declaring a proposed admission of the relevant person lawful;
- (c) a decision-making order made under subsection 38(2)(a) authorising the making of an admission decision in respect of the relevant person; or
- (d) a registered enduring power of attorney authorising an attorney(s) to make an admission decision in respect of the relevant person; or
- (e) an order under section 38(2)(b) appointing a decision-making representative for the purposes of making a decision in respect of personal welfare matters, including an admission decision.

is produced to the person in charge or the healthcare professional on behalf of the person in charge.

- (5) Subhead (1) shall not apply in cases where the person in charge or a healthcare professional on behalf of the person in charge reasonably believes that:
  - (i) the change in capacity is likely to fluctuate and that the loss of capacity will only last for a short period, or
  - (ii) there is a high probability of the person's demise within a short period.

## **Explanatory Notes**

1. This Head relates to those people who are resident in relevant facilities prior to the date of this Part of the Act coming into operation. Head 7, subheads (1) to (3) also applies where a person has entered and lived in a relevant facility before this Part commenced.
2. Subhead (1) provides that if a person in charge or healthcare professional on behalf of the person in charge has reason to believe that a relevant person who is living in the relevant facility lacks capacity to make a decision to continue to live in the facility, the person in charge or healthcare professional on behalf of the person in charge shall give written notification within 10 days of their belief to the relevant person and other specified people affording them the opportunity to make an application to court under Part 5.
3. Subhead (2) provides that the person in charge must be notified of the making of an application to Court under Part 5.
4. Subhead (3) provides that if the person in charge does not receive notification, within 12 months and 1 day of the issue date of notification that the relevant person lacks the capacity to make a decision as to their ongoing accommodation, the person in charge shall contact the Director to request that an appropriate person be assigned to the relevant person to make the application on behalf of the relevant person within a further 21 days. Legal aid is available for such an application.
5. Subhead (4) provides that the person in charge is not obliged to make an application to court under subhead (3) if a decision making representative or attorney with authority to make an admission decision or a court order making or authorising an admission decision is already in place.
6. Subhead (5) provides that the person in charge is not obliged to make an application to court under subhead (4) if they reasonably believe, on the application of the guiding principles in section 8, that the lack of capacity is fluctuating and the loss of capacity will only last for a short period or if there is a high probability of the person's demise within a short period.
7. The provisions of Head 7 subheads (1) to (3) also apply to existing residents on the commencement of this Part.

## **Head 9 – Review of Admission Decisions**

- (1) Where, pursuant to section 49(1), the court specifies the intervals at which it shall review a declaration under section 37(1), the court shall also make an order specifying the intervals at which an admission decision shall be reviewed by the court.
- (2) Where, having reviewed the admission decision and having heard medical evidence in its regard, the court is satisfied that an admission decision is no longer required the court may
  - (a) make an order revoking or amending, as appropriate, the declaration under section 37(3)
  - (b) make an order varying or discharging, as appropriate, a decision-making order or decision making representation order which makes or authorises the making of an admission decision, and
  - (c) give such directions as it thinks appropriate for the order or orders to have full effect.
- (3) Where, having reviewed the admission decision, the court is satisfied having heard medical evidence that an admission order remains necessary in order to protect the relevant person from significant harm and that there is no other appropriate, practicable and less intrusive manner of protecting the relevant person from significant harm the court shall make an order confirming the admission decision.
- (4) Where a relevant person has been admitted to a relevant facility the person in charge or the healthcare professional on behalf of the person in charge shall monitor and keep under review the degree and extent of supervision and control and lack of freedom to leave the relevant facility to which the relevant person is subject and inform relevant decision making representative or attorney of the need to make a decision to adjustment to the degree and extent of supervision and

control and lack of freedom to leave the relevant facility to accord with the needs and interests of the relevant person.

## Explanatory Notes

1. The ECHR requires that where a person is deprived of their liberty the decision depriving them of their liberty should be subject to regular review and that the person should be entitled to challenge the lawfulness of their deprivation of liberty to a court. The review need not be a judicial one but as the Act already provides for a review of capacity, and as the lack of capacity is what gives rise to the deprivation of liberty, it seems appropriate to hook the deprivation of liberty review to the review of capacity.
2. Subhead (1) incorporates the review of the admission decision into the review of capacity under section 49. This is done because (a) the deprivation of liberty of the relevant person only arises because they lack capacity and (b) in order to minimise the number of court applications and appearances required.
3. Subhead (2) allows the court to discharge or vary an admission decision where there is medical evidence that it is no longer necessary.
4. Under subhead (3) allows the court to confirm an admission decision but only where, on the basis of, *inter alia*, medical evidence, an admission decision is necessary. The ECHR requires that there be medical evidence.
5. Subhead 4 puts in place a continuing obligation on the person in charge to monitor and inform the decision making representative or attorney of the need to make a decision to adjust the degree and extent of the deprivation of liberty to which an admitted relevant person is subject in line with their needs and interests.

## **Head 10 - Chemical Restraint and Restraint Practices**

- (1) The Court, decision-making representative, or attorney shall not authorise the person in charge or healthcare professional on behalf of the person in charge to administer a medication which is not necessary for a medically identified condition, with the intention of controlling or modifying the relevant person's behaviour or ensuring that he or she is compliant or not capable of resistance.
- (2) The person in charge or healthcare professional on behalf of the person in charge shall not administer or cause to be administered a medication which is not necessary for a medically identified condition, with the intention of controlling or modifying the relevant person's behaviour or ensuring that he or she is compliant or not capable of resistance.
- (3) The person in charge or the healthcare professional on behalf of the person in charge shall not subject a relevant person or cause a relevant person to be subjected to a restraint practice unless there are exceptional circumstances and such practice is in accordance with Regulations prescribed by the Minister under Head 12.

## **Explanatory Notes**

1. Subhead (1) prohibits the Court, decision making representative or attorney from authorising a person in charge or healthcare professional on behalf of the person in charge from the use of chemical restraint in a relevant facility. Subhead (2) prohibits the use of chemical restraint in a relevant facility. The use of chemical restraint is in breach of Article 3 of the European Convention on Human Rights as inhuman and degrading treatment.
2. Subhead (2) provides that persons in charge or healthcare professionals on behalf of the person in charge are prohibited from the use of chemical restraint in a relevant facility.
3. Subhead (3) provides that a person should not be subjected to a restraint practice unless there are exceptional circumstances and such practice is in accordance with Regulations prescribed by the Minister.
4. It will also be necessary to amend section 44 and 62 to ban outright the use of chemical restraint.

## **Head 11 – Records to be Kept**

- (1) The Minister may prescribe by regulations the categories of records to be kept by relevant facilities and other persons under this Part to facilitate verification of compliance with this Part.
- (2) The categories of records which may be required to be kept by Regulations made by the Minister under subhead (1) may include
  - (a) records relating to the process whereby the person in charge or a healthcare professional on behalf of the person in charge had reason to believe that a person lacked the capacity to make a decision to consent to admission in accordance with the guiding principles of the Act;
  - (b) records relating to the process whereby the person in charge or healthcare professional on behalf of the person in charge had reason to believe that a person that had capacity to make a decision to consent to admission to a relevant facility and subsequently lost it;
  - (c) records relating to the process whereby the person in charge or healthcare professional on behalf of the person in charge had reason to believe that a person who lacked capacity and subsequently regained it;
  - (d) records relating to the process whereby the person in charge or a healthcare professional on behalf of the person in charge formed the view that any change in capacity was likely to fluctuate and that the gaining or loss of capacity would only last for a short period as well as a record setting out the frequency of the loss and regaining of capacity;
  - (e) the documentary evidence to be provided on admission under Head 4(2);
  - (f) the basis upon which it was determined that immediate admission was required under Head 5(1);
  - (g) the basis upon which it was determined that the person required to be admitted;
  - (h) the notifications issued to the relevant person and other specified people under this Part; and

- (i) the requests made to the Director in relation to appropriate persons.
  
- (3) The Regulations shall specify to whom the person in charge or the healthcare professional on behalf of the person in charge shall make any of the records prescribed by regulations made under subhead (1) available for inspection.

### **Explanatory Notes**

1. This Head sets out the records that must be kept for inspection by HIQA and the Inspector of Mental Health as part of their regular inspections of relevant facilities.
2. Subhead (1) provides that the Minister may make regulations setting out the type of records that must be kept and indicates that the purpose of the record keeping is to facilitate verification of compliance with this Part.
3. Subhead (2) sets out the types of records that the Minister may, by regulation, determine that a relevant facility must keep. The records required to be kept are those evidencing the various decisions and notifications which a person in charge may or is required to make.
4. Subhead (3) provides that the regulation shall prescribe to whom the records under subhead (1) must be made available.

## **Head 12 – Regulations**

- (1) The Minister may prescribe by regulations the following matters:
  - (a) Records to be kept under Head 11 to facilitate verification of compliance with this Part;
  - (b) Regulations in relation to restraint practices under Head 10;
  - (c) The manner in which the person in charge or the healthcare professional on behalf of the person in charge shall notify the relevant person and other specified people under this Part.
  
- (2) The Minister may, following consultation with the Director, by regulation prescribe –
  - (a) the procedure whereby a person in charge or the healthcare professional on behalf of the person in charge shall request the Director to appoint an appropriate person,
  - (b) the qualifications of, and procedure for appointment of, an appropriate person who may make an application under Part 5 on behalf of a relevant person,
  - (c) the establishment by the Director of a panel of suitable persons willing and able to act as appropriate persons,
  - (d) the procedure whereby the Director will provide the names of appropriate persons.

## **Explanatory Notes**

1. The Minister requires regulatory power in order to put in place rules setting out the procedures for the implementation of the processes described in this Part.
2. This Head provides that the Minister may make regulations to fill out the detailed requirements to give effect to the provisions of this Part. The Head also provides that the Minister, following consultation with the Director, shall make regulations setting out the procedure for the establishment of a panel of appropriate persons to act for relevant persons under this Part. It will also be necessary to amend certain provisions in Part 9 to give full effect to this additional function being conferred on the Director.

### Head 13 – Offences

(1) A person who—

- (a) admits a relevant person to a relevant facility in deliberate contravention of Head 4, 5, or 6;
- (b) prevents a relevant person from leaving a relevant facility in deliberate contravention of Head 7; or
- (c) uses or authorises the administration in a relevant facility of a medication which is not necessary for a medically identified condition, with the intention of controlling or modifying the relevant person’s behaviour or ensuring that he or she is compliant or not capable of resistance ;

commits an offence and shall be liable -

- (i) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or
- (ii) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years, or both.

(2) A person who –

- (a) knowingly creates, falsifies or alters a document knowing that a person in charge or healthcare professional on behalf of the person in charge will rely on the document to make a temporary admission decision or to prevent a relevant person leaving a relevant facility; or
- (b) gives to a person in charge particulars or information which he or she knows to be false or misleading for the purpose of obtaining, or enabling another person to obtain, an admission decision or a decision to prevent a relevant person leaving a relevant facility;

commits an offence and shall be liable -

- (i) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or

- (ii) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years, or both.

## **Explanatory Notes**

1. In line with other parts of the Assisted Decision Making (Capacity) Act 2015, offences in relation to the procedures applicable to the deprivation of liberty are included here.
2. Subhead (1) provides that a person who deliberately contravenes the safeguards in Heads 4, 5, 6, or 7 commits an offence.
3. Subhead (2) provides that a person who furnishes false information or tampers with a relevant document will be guilty of an offence.

**Appendix A – Section 8 of the Assisted Decision Making (Capacity) Act 2015**

**PART 2**

Principles that Apply before and during Intervention in respect of Relevant Persons

**Guiding principles**

- 8.(1) The principles set out in subsections (2) to (10) shall apply for the purposes of an intervention in respect of a relevant person, and the intervener shall give effect to those principles accordingly.
- (2) It shall be presumed that a relevant person who falls within paragraph (a) of the definition of “relevant person” in section 2(1) has capacity in respect of the matter concerned unless the contrary is shown in accordance with the provisions of this Act.
- (3) A relevant person who falls within paragraph (a) of the definition of “relevant person” in section 2 (1) shall not be considered as unable to make a decision in respect of the matter concerned unless all practicable steps have been taken, without success, to help him or her to do so.
- (4) A relevant person who falls within paragraph (a) of the definition of “relevant person” in section 2 (1) shall not be considered as unable to make a decision in respect of the matter concerned merely by reason of making, having made, or being likely to make, an unwise decision.
- (5) There shall be no intervention in respect of a relevant person unless it is necessary to do so having regard to the individual circumstances of the relevant person.
- (6) An intervention in respect of a relevant person shall—
- (a) be made in a manner that minimises—
    - (i) the restriction of the relevant person’s rights, and
    - (ii) the restriction of the relevant person’s freedom of action,
  - (b) have due regard to the need to respect the right of the relevant person to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property,
  - (c) be proportionate to the significance and urgency of the matter the subject of the intervention, and
  - (d) be as limited in duration in so far as is practicable after taking into account the particular circumstances of the matter the subject of the intervention.

- (7) The intervener, in making an intervention in respect of a relevant person, shall—
- (a) permit, encourage and facilitate, in so far as is practicable, the relevant person to participate, or to improve his or her ability to participate, as fully as possible, in the intervention,
  - (b) give effect, in so far as is practicable, to the past and present will and preferences of the relevant person, in so far as that will and those preferences are reasonably ascertainable,
  - (c) take into account—
    - (i) the beliefs and values of the relevant person (in particular those expressed in writing), in so far as those beliefs and values are reasonably ascertainable, and
    - (ii) any other factors which the relevant person would be likely to consider if he or she were able to do so, in so far as those other factors are reasonably ascertainable,
  - (d) unless the intervener reasonably considers that it is not appropriate or practicable to do so, consider the views of—
    - (i) any person named by the relevant person as a person to be consulted on the matter concerned or any similar matter, and
    - (ii) any decision-making assistant, co-decision-maker, decision-making representative or attorney for the relevant person,
  - (e) act at all times in good faith and for the benefit of the relevant person, and
  - (f) consider all other circumstances of which he or she is aware and which it would be reasonable to regard as relevant.
- (8) The intervener, in making an intervention in respect of a relevant person, may consider the views of—
- (a) any person engaged in caring for the relevant person,
  - (b) any person who has a bona fide interest in the welfare of the relevant person, or
  - (c) healthcare professionals.
- (9) In the case of an intervention in respect of a person who lacks capacity, regard shall be had to—
- (a) the likelihood of the recovery of the relevant person’s capacity in respect of the matter concerned, and

- (b) the urgency of making the intervention prior to such recovery.
- (10) The intervener, in making an intervention in respect of a relevant person—
- (a) shall not attempt to obtain relevant information that is not reasonably required for making a relevant decision,
  - (b) shall not use relevant information for a purpose other than in relation to a relevant decision, and
  - (c) shall take reasonable steps to ensure that relevant information—
    - (i) is kept secure from unauthorised access, use or disclosure, and
    - (ii) is safely disposed of when he or she believes it is no longer required.