

RECOMMENDATIONS FOR BEST INTERESTS AS A STANDARD FOR DECISION-MAKING

1. Best interests should be codified as a standard for decision-making which should include:
 - a) taking into account the person's will and preferences, and all relevant circumstances, largely modelled on the best interests framework in s 4 of the MCA.
 - b) in determining what is in the person's best interests, the decision-maker would be required take a series of steps, including, so far as practicable, supporting the person to participate as fully as possible in the determination of what would be in their best interests.
 - c) consideration given to the establishment of a presumption in favour of the person's will and preferences in respect of a decision, where their preferences can be reasonably ascertained, unless there is compelling evidence that following their preferences would have serious adverse consequences for them.⁷¹⁷
 - d) a general principle of proportionality should apply: the greater the departure from the person's reasonably ascertainable will and preferences, the more compelling must be the reasons for such a departure.
2. The best interests standard would have to be followed by those required to make decisions for others. It would apply across the operation of revised adult guardianship legislation (a reformed PPPR Act), as well as in the operation of Rights 5, 6 and 7 of the HDC Code, where a person lacks capacity to consent to, or refuse health or disability services.
3. Appointment of health and disability advocates to provide support to the person who lacks capacity to assist them to participate as fully as possible in any relevant decision. This would complement the consultative aspect of supported decision-making.⁷¹⁸
4. An accompanying Code of Practice with guidance for decision-makers on the best interests standard, including how to assess a person's best interests in accordance with their rights, will and preferences, and how to support the person and their involvement in any decision that affects them.⁷¹⁹

⁷¹⁷ *S v S (Protected Persons)* [2009] WTLR 315, Hazel Marshall QC presumption test and proposal by the English Law Commission (see Ruck Keene and Auckland, above n 686 at 295), currently under consultation. Amendments to the 2015 Northern Ireland Mental Capacity Bill were proposed by researchers associated with the Essex Autonomy Project (University of Essex, England), in conjunction with its ongoing "three jurisdictions" study of approaches to capacity legislation in England and Wales, Scotland and Northern Ireland. The amendments were prepared by W Martin (Director of the Essex Autonomy Project) and A Ruck Keene (Thirty Nine Essex Chambers).

⁷¹⁸ See for example, the Independent Mental Capacity Advocates (referred as "IMCAs") appointed under s 36 of the MCA and accompanying regulations. This would be an expansion of the current role of health and disability advocates under the Health and Disability Commissioner Act 1994.

⁷¹⁹ See for example, *MCA Code of Practice*, above n 285 at Chapter 3: How should people be helped to make their own decisions?