Northern Ireland Assembly

Committee for Health, Social Services and Public Safety

# OFFICIAL REPORT (Hansard)

## Care Bill: Legislative Consent Motion

15 May 2013

# NORTHERN IRELAND ASSEMBLY

# Committee for Health, Social Services and Public Safety

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**Members present for all or part of the proceedings:**
Ms Sue Ramsey (Chairperson)
Mr Jim Wells (Deputy Chairperson)
Mr Roy Beggs
Ms Paula Bradley
Mr Mickey Brady
Ms Pam Brown
Mr Kieran McCarthy
Mr Conall McDevitt
Ms Maeve McLaughlin

**Witnesses:**

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|---|---|
| Mr Craig Allen | Department of Health, Social Services and Public Safety |
| Dr Maura Briscoe | Department of Health, Social Services and Public Safety |
| Ms Aideen O'Doherty | Department of Health, Social Services and Public Safety |
| Dr Michael Neely | Public Health Agency |

**The Chairperson:** Maura, will you introduce your team and make your presentation before we take questions from members?

**Dr Maura Briscoe (Department of Health, Social Services and Public Safety):** Thank you. I look to Craig Allen to introduce us, and he will be happy to lead from there.

**The Chairperson:** Apologies, Craig, I thought that Maura was leading.

**Mr Craig Allen (Department of Health, Social Services and Public Safety):** She is deferring to me for once. I do not know why.

Thank you very much for this opportunity to brief the Committee on those aspects of the Care Bill that relate to Northern Ireland and which require a legislative consent motion. I am Craig Allen from the legislation unit in the Department. With me today is Dr Michael Neely, the assistant director of Health and Social Care (HSC) research and development division in the Public Health Agency. Maura, as you know, is the director of mental health, disability and older people in the Department; and Aideen O'Doherty heads the Department's elderly and community care unit.

I plan to give you a brief background to the Care Bill and then focus on those parts of the Bill that require a legislative consent motion. The Care Bill had its First Reading in the House of Lords on 9 May. Its background is in a UK Government White Paper called 'Caring for Our Future: reforming care and support', which was issued in July 2012 and which set out a long-term programme of reform

of care and support in England. It also took on board recommendations by the Law Commission in its review into adult social care. That review said that most of the law on care and support is outdated and somewhat confusing at times. The purpose of the Bill is to modernise care and support law and also to take individual bits of legislation on that topic and consolidate them into one clear statute.

The Department of Health consultation on the draft Bill ran from 1 July 2012 until 19 October 2012; some 430 people responded. Generally, responses were positive and people supported the Department of Health's desire to modernise care and support legislation. Following that, a joint Committee at Westminster undertook a pre-legislative scrutiny of the Bill, which involved a joint Committee taking oral evidence from a wide range of stakeholders, including individuals, organisations and experts in the field of social care. They produced a report, and the Bill was presented to both Houses on 19 March.

The Bill is relatively big; it has 113 clauses and eight schedules. Most of its provisions relate to England only. However, as the Committee is aware, any Westminster Bill that seeks to legislate on a devolved matter requires the agreement of the Assembly through a legislative consent motion. It is those couple of provisions that I want to explain.

The first of the two aspects of the Bill that requires a legislative consent motion relates to the status of the Health Research Authority (HRA), which the Department of Health established as a special health authority on 1 December 2011. The purpose of the authority is to protect and promote the interests of the public in the field of healthcare research. The Bill proposes to abolish it as a special health authority but re-establish it as a non-departmental public body for two reasons: first, to give the Health Research Authority a greater degree of independence in carrying out its work; and, secondly, it will ultimately allow it to take on a greater range of functions. One of the provisions in the Bill requires the Health Research Authority to co-operate with the Department of Health, Social Services and Public Safety. The key thing to point out is that although the status of the Health Research Authority is changing, it will not change its relationship with Northern Ireland, nor will it alter the arrangements between the authority and the Department. In many ways, it will be business as usual between both bodies.

The second aspect of the Bill that requires a legislative consent motion refers to cross-UK care home placements between England, Scotland, Wales and Northern Ireland. At present, a health and social care trust is prevented by law from placing a person in a care home in England, Scotland or Wales. Those difficulties exist elsewhere in the UK. There is an informal extra-statutory arrangement in place for allowing placements, but the Care Bill proposes to provide a co-ordinated, clear, and, more important, statutory basis for such care home placements.

Each of the four UK countries has a power to make regulations to allow trusts or local authorities to place care home residents across the UK. Unfortunately, however, efforts to secure the necessary co-ordinated approach to do that have not been successful. In an attempt to inject some momentum into this —

**The Chairperson:** It has not been successful across trusts either.

**Mr Allen:** They have offered that the powers in different bits of UK legislation can be consolidated into one piece of legislation through the Care Bill.

The practical outworkings of that may be best explained by an example. If someone is receiving a package of care in a residential nursing home in England, and, for whatever reason, they are sent to Northern Ireland, the sending Administration — in this case, England — would be responsible for bearing the cost of that person's package of care. However, the person would ultimately be treated as resident in the receiving Administration, which would be Northern Ireland, for the purposes of their general entitlement to health care, for example, if the person were to go into hospital. It means that the receiving Administration would have to bear the cost associated with any health care treatment beyond the person's agreed package of care.

Essentially, the Care Bill provides an enabling power to draft regulations. Each of the UK Administrations will have to work together in a co-ordinated way to produce those regulations. In many ways, the detail will be in the regulations, because they will provide the way in which the cross-border Administration operations will work in practice; they will also provide detail on arrangements for cases where there is resolution of dispute over a person's residency. The regulations will have to come to the Committee in due course.

It was hoped that there would be a provision in the Bill to deal with a situation where someone is placed in a home owned by a provider whose business subsequently fails; however, further discussions will take place between Administrations. That is not included in the Bill, but it is hoped that ongoing negotiations will allow a provision to be introduced at the amending stage. Unfortunately, that may require another legislative consent motion, but that is how it seems to have panned out.

Hopefully, the Department has tried to keep the Committee up to speed. I know that the Minister wrote to you at the beginning of August 2012, when he was approached by the then Secretary of State Andrew Lansley about the consultation, to inform the Committee that there was a likelihood that a legislative consent motion would be needed. More recently, on 26 April, he wrote to you again to say that he had been formally approached by Norman Lamb, Minister for Care and Support in the Department of Health, to say that he intended to introduce the Bill and to seek agreement on the legislative consent motion. The Minister has also sent an Executive paper to colleagues seeking their approval. We are still awaiting replies from a number of Departments.

As for next steps, without prejudice to the conversation today, we are required to prepare a legislative consent memorandum, which will come to the Committee. That will set out the wording of the motion to be debated and give the Committee some background to the Bill and the clauses. Subject to the Committee's approval, the Minister has to send that to the Business Office, which will trigger the arrangements to be put in place for a debate.

That is as much as I have to say by way of introduction. I am happy to deal with questions on the procedural side; Michael is happy to take questions on the Health Research Authority; and Maura and Aideen will take questions on the cross-border UK placements if that is OK.

**The Chairperson:** Thank you, Craig. The Minister's letter of 10 May says that it is almost impossible to reach final agreement on the clauses dealing with market oversight arrangement. What does that mean?

**Mr Allen:** That was what I was saying before, Chair. If somebody is sent to a care home that subsequently fails, it is trying to get agreement on that issue.

**The Chairperson:** Who would the final agreement be between?

**Mr Allen:** The four UK Administrations.

**The Chairperson:** Was there no agreement between the four of them?

**Ms Aideen O'Doherty (Department of Health, Social Services and Public Safety):** It was a timing issue more than anything else. We ran out of time because we were only doing it a few weeks ago.

**Mr Allen:** They were keen to get the Bill introduced soon, so there was not sufficient time to get the clause agreed.

**Dr Briscoe:** It is envisaged that if an individual was placed in a care home where there was market failure, that individual would not be at any disadvantage because of the market failure of the home.

**The Chairperson:** They would be. Are you talking about a failure of a home in the private sector?

**Dr Briscoe:** They could be operated by a range of providers.

**The Chairperson:** If there was failure in a home in the private sector, the individuals would need to move on.

**Dr Briscoe:** Yes. However, this is in the context of cross-jurisdiction placements; we are not talking about the wider issues on market failure. For example, if an individual from Northern Ireland was placed in a care home in England that suffered market failure, what is the responsibility in an unplanned failure in that care home? That has to be worked out, but the principle is that if one was responsible in Northern Ireland for the placement of an individual to meet their needs and their choice in a care home in England, we would need to work out what the arrangements were so that the individual would not be disadvantaged.

**The Chairperson:** OK. Give me a scenario of people who went from here to England to work but who now want to come home to family. Are you suggesting that England will pay for that person to come home?

**Dr Briscoe:** We are saying that —

**The Chairperson:** Let me just finish. We then pay if there is a need for nursing care.

**Dr Briscoe:** No. First, this relates to what we will call for, the purposes of this discussion, social care; we are not talking about health care. Secondly, if somebody was resident in Birmingham all their life, and Birmingham local authority was looking at the care needs of that individual, and the individual said that they would prefer to go back to their family in Northern Ireland, the responsibility for the arrangement of the care placement in Northern Ireland, as well as the funding arrangements and the assessment of those funding arrangements would be for Birmingham council, not Belfast Trust.

For health care, it is a different matter. If somebody comes back from Birmingham to live in Northern Ireland to meet their health care needs, they would need to register with a GP and they would need to have access to hospitals, so the HSC as an entity would be responsible for the health care needs of that individual.

**The Chairperson:** Can Birmingham decide that it does not have the money to bring them back? Is that the agreement?

**Dr Briscoe:** That is what the legislation is about; it is why, on a legal basis, it defines who has responsibility for what. If there were disputes, a dispute resolution process is accounted for the Bill. A dispute about who pays for what, for example, would be determined at departmental or Secretary of State level, depending on the jurisdiction. The principle is that the arrangements for care placement and the accommodation for the individual would rest with Birmingham council, for example.

**The Chairperson:** Craig, the paper that was sent to us states:

> *"Over 1,000 comments were received, with around 430 unique respondents".*

What does that mean?

**Mr Allen:** It means that 430 people responded, but they perhaps responded on different issues. There were 1,000 comments, but one of the respondents might have responded on 10 issues.

**The Chairperson:** You say that most of those who responded were supportive.

**Mr Allen:** From what we can see, most were supportive.

**The Chairperson:** You went on in the paper to say that, following the consultation, a joint committee took place in England. The paper states:

> *"The joint committee received oral evidence from a number of key stakeholders including experts and organisations involved in care and support."*

Was there a localised angle to that? Did any of our people take part?

**Ms O'Doherty:** I think that the clauses in respect of our work would have been drafted only in the past month or so. They would not have been part of the consultation.

**Mr Allen:** To the best of my knowledge, I do not think that there would have been.

**The Chairperson:** The clauses were drafted only within the past month, but the consultation finished on 19 October.

**Mr Allen:** They consulted on a draft version of the Bill from July to October last year. Following that, a joint committee undertook pre-legislative scrutiny of the draft Bill. People would have been giving evidence on the clauses at that stage.

**The Chairperson:** Have we not consulted on the clauses that relate to here?

**Ms O'Doherty:** Our piece is setting right something that we are doing through extra statutory authority at the moment. We have not had the time, either. We are just making things how they should be by trying to do something good for people.

**Dr Briscoe:** Through the Department of Finance and Personnel, we have an extra statutory authority that allows us to place individuals from Northern Ireland in a jurisdiction in Great Britain. However, the reverse does not obtain. This allows us to formalise in legal terms the process that already exists here. Of course, the regulations would have to be published and so on. The legislation gives us the powers to write regulations on the detail of how we would do it.

**The Chairperson:** I am not suggesting that I am opposed to it; I am ensuring that the public procedure has taken place. Are we getting many requests for people to come back from England?

**Ms O'Doherty:** We have placed 24 people in England.

**The Chairperson:** You have placed people from here in England?

**Ms O'Doherty:** Yes.

**The Chairperson:** What about the other way?

**Ms O'Doherty:** There is nobody we know of placed the other way because there is no power set up by local authorities there to place the other way.

**Dr Briscoe:** That said, of course, for people who choose to fund, that is not a care placement. They can come to wherever they wish. It affects only a very small number of people going from Northern Ireland to other jurisdictions.

**Mr McDevitt:** I am interested in this cross-border stuff. Someone from here living and working in GB who wants to retire here and who is entitled to a social care package does not have the right to do so.

**Dr Briscoe:** They do not have the legal right to do so.

**Ms O'Doherty:** They could acquire residence, possibly.

**Dr Briscoe:** With regard to the care placement — and we are talking about care placements here —

**Mr McDevitt:** Absolutely.

**Dr Briscoe:** — the authority, which would be the local council in England, would not have the legal right to place somebody here.

**Mr McDevitt:** Would the authority have the legal right to place them in another local authority in England, Scotland or Wales?

**Dr Briscoe:** They would, certainly in England.

**Mr McDevitt:** They could move to another local authority area and say, "My daughter lives in Essex now, and I want to" —

**Dr Briscoe:** That would be between local authorities.

**Ms P Bradley:** That happens here.

**Mr McDevitt:** I understand that. However, what I am trying to understand is that people living in England, Scotland and Wales right now do not have the right.

**Dr Briscoe:** Of course, they have the right to move —

**Mr McDevitt:** Yes, but they do not have the right to a social care —

**Dr Briscoe:** With regard to the care placement, this would give an organisation the legal authority to place the individual here.

**The Chairperson:** To pay for it?

**Dr Briscoe:** It would be subject to the arrangements for funding in a local authority.

**Mr McDevitt:** There is a separate debate on welfare reform and the contribution that people may be expected to make. It is very unlikely, I would have thought, that the House will support the draconian proposals that will land on elderly people in England being applied here. I want to be clear about this. A situation could emerge where we do this, which, in my opinion is the right thing to do, and we give someone the right and we give their local authority the legal mechanism through which to uphold or fulfil their right, but they may have to make a £75,000 contribution under the new welfare reform stuff.

**Dr Briscoe:** It would be the responsibility of the local authority to determine the needs and assessment arrangements and all other arrangements. The detail would have to be worked out through regulations. However, the principle is that the local authority, whether in England, Scotland or Wales, would be responsible for the care placement, and all that goes with it, when placing somebody here. Should there be financial consequences for the local authority as a result of a care placement, the responsibility rests with the referring local authority as opposed to the local trust here.

**Mr McDevitt:** I understand that. I am surprised that no one has taken a case on this, given the huge number of Irish people who left here to find work and who would now, for all sorts of familiar reasons, be looking to spend their last few years here.

**Dr Briscoe:** There was a judicial review in England in the mid-2000s, and I think that Craig referred to it. There have been attempts in the past to look at the situation, and this, effectively, will make a sound legal basis for it. It is right to say that this has come up before.

**Mr Beggs:** It seems right that we should facilitate older people who want to locate closer to their family and friends if that is what they wish to do in their latter years so that they have more company and people to visit them. I take it that we are talking about facilitating the wishes of an individual only rather than that of a council or body?

**Dr Briscoe:** It certainly enhances the individual's choice of where they want to reside to be close to family, for example. The arrangements remain the responsibility of the referring authority.

**Mr Beggs:** It seems to be common sense that we regularise and give clarity to what is already happening.

**Ms P Bradley:** Have any time frames been put on it? From working in social services, I know that there are ways around everything; I have seen it before. I agree that people want to be near their family and with those who can take care of them and call with them. That is how it should be. However, there have been occasions when people come over to, say, my daughter's house, stayed there for a week or two and then phoned social services because they could not cope. The Northern Trust or the Southern Trust, for example, would then pick up the tab. Have you looked at that? It happens.

**Dr Briscoe:** In the context of this Bill, which is what we are talking about, the situation on residency —

**Ms P Bradley:** It could be someone who has been in residential care, and people in residential care are still quite able.

**Dr Briscoe:** Are you saying that they had to leave residential care?

**Ms P Bradley:** Yes, leaving residential care. There was a break in it.

**Dr Briscoe:** If somebody is in residential care in a local authority in England and wants to transfer to an equivalent here, it would be the responsibility of the local authority to look at the placement of that individual.

**Ms P Bradley:** Over here, if a resident in the Northern Trust wants to be placed in a home in the Southern Trust because their daughter lives there, the Northern Trust would foot the bill. That is the way it works anyway.

**Dr Briscoe:** Do you want to add anything?

**Ms O'Doherty:** Hopefully, having a clear set of responsibilities for the sending authority will help to avoid situations in which people resort to unusual means to get what they need. This is, therefore, very positive.

**Ms P Bradley:** We know that if you are private-paying you can do whatever you want to do, and we know that some people go into private nursing care due to a brain injury or whatever when they are relatively young and then live for a very long time. What happens if they move from England to here, are private-paying, but their money goes below the threshold, which, incidentally, has nothing to do with welfare reform?

**Ms O'Doherty:** With the kind of time frame that you are talking about, the person would probably be resident here anyway. I am not too sure about the fine detail.

**Dr Briscoe:** We need to tease out that sort of issue in regulations. Before somebody moves, one would expect a needs assessment to be done on the individual and that due process would follow. This is only primary legislation, and the detail, particularly on the funding arrangements and so on, needs to be teased out. There is a dispute resolution arrangement in the primary legislation so that in the very unusual circumstances — and we are only talking about a very small number of people — in which resolution could not be mediated, it would go through a formal resolution process.

**Ms O'Doherty:** Those sorts of processes are very unlikely to apply if a person is running under their own steam.

**The Chairperson:** I am conscious that members need to leave, and I do not want to not have a quorum for the rest of the meeting. Maura, on that last point about the threshold, you talked about teasing things out. Can you check it out and give us more information?

**Dr Briscoe:** The principle is that the local authority has responsibility for the placement. We have our own consultation process here for the future of adult social care. It is called 'Who Cares? The Future of Adult Care and Support in Northern Ireland' and we are only at stage 1. I assure you that as we move through the process, which is what you are talking about, we will apprise the Committee at all stages.

**The Chairperson:** OK. Thanks very much for coming and for trying to clear up some of this in our heads.