Committee for Justice

OFFICIAL REPORT (Hansard)

Mental Capacity Bill: DOJ Briefing

20 February 2014

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr William Humphrey
Mr Seán Lynch
Mr Alban Maginness
Ms Rosaleen McCorley
Mr Jim Wells

Witnesses:

Mr Tom Haire	Department of Justice
Mr Gareth Johnston	Department of Justice
Mr Michael Kelly	Department of Justice

The Chairperson: I welcome Mr Gareth Johnston, the deputy director of the criminal justice policy and legislation division, Tom Haire, the head of the criminal law branch, and Michael Kelly of the criminal justice policy and legislation division in the Department of Justice. I will hand over to Mr Johnston, who will take us through the briefing paper.

Mr Gareth Johnston (Department of Justice): Thank you, Chairman, for the welcome and for affording us the opportunity to provide an update on the new Mental Capacity Bill from a criminal justice perspective and to explain the consultation exercise on the Bill's contents, which we plan to launch jointly with the Department of Health, Social Services and Public Safety (DHSSPS).

You will recall that, when we gave evidence on the Bill in January 2013, we discussed the report on responses to the public consultation exercise we had undertaken in the summer of 2012. That was where we set out our initial proposals. Discussion with stakeholders since then has proved extremely helpful. Given that we have been working through a number of issues and that there have been pretty significant developments in our thinking in some areas, we believe that it is important to give stakeholders a further opportunity to comment on the proposals before they come to the Assembly as a Bill. That consultation will be in conjunction with the DHSSPS, which will itself consult on the draft Mental Capacity Bill. The proposals before you today represent a joint and agreed approach between the two Departments.

The proposed Bill represents a very new approach, not just for Northern Ireland. The fusion of mental health and mental capacity law has not been attempted in any other jurisdiction, and its extension to those subject to the criminal justice system is also unique. That has meant that it has been a very

complex exercise for us in policy terms, and it has been helpful for us to see what has emerged on the health side before trying to map that onto the criminal justice system. We have greatly benefited from a close working relationship with DHSSPS colleagues.

As you will be aware, the work emanates from the Bamford review into mental health and learning disability services. That review recommended a single legislative framework for the reform of mental health law in Northern Ireland. It advocated new mental capacity legislation for the jurisdiction and, crucially, that it should apply to people who are subject to the criminal justice system. The Justice Minister and the Health Minister signed up to that, and the approach was subsequently endorsed by the Executive.

The draft Bill will, therefore, introduce a new legislative framework governing all decision-making on the care, treatment, whether for a physical or mental illness, and the personal welfare, including welfare in financial matters, of persons aged 16 or over who lack the capacity to make a specific decision for themselves. The new approach will provide significant additional safeguards for such persons that go beyond those currently provided for, and, in doing so, it will replace the Mental Health (Northern Ireland) Order 1986. This is central to the Bamford report's vision of reducing the stigmatising effect of having separate mental health legislation.

The Bill will be based on a number of key principles. They include a fundamental principle of the existing common law that people aged over 16 have the right to make their own decisions, unless there is proof that they lack the capacity to do so. Significantly, it will also place an emphasis on helping and supporting people to exercise their capacity to make their own decisions when they can, rather than stepping in with substitute decision-making at an early stage. If, however, when all those supports have been put in place, a person still lacks the capacity to make a specific decision regarding his or her care, welfare or treatment, the Bill will require safeguards to be put in place before an intervention in any of those areas is carried out. In particular, any intervention in the life of a person lacking capacity must be in that person's best interests. These safeguards are designed to protect and support the person lacking capacity, and the more serious the proposed intervention in that person's life, the greater the safeguards that will need to be put in place for that person.

The real challenge for us has been to combine these principles with the statutory criminal justice powers that are exercised by the police, the courts and the Department to divert persons out of the criminal justice system and into the health system. I mentioned engagement with stakeholders, and those from the mental health and disability sectors, as well as the various criminal justice agencies, have been involved. This engagement has ranged from formal meetings of our departmental reference group and our steering group to meetings of the DHSSPS reference group, the interdepartmental project board and numerous workshop-type meetings with a range of stakeholders over the past year or so. Our objective throughout has been to try to ensure a consistent approach between the health and criminal justice systems while keeping our vital focus on public protection and on the duty of care that we have to vulnerable people in the justice system.

We have adopted the view implicit in the recommendations of the Bamford group that a capacity-based approach can and should be taken in the criminal justice system and that our stance should be one of no compulsory treatment for those with a capacity to refuse. We believe that that can be adopted with no detrimental impact to public protection or to the duty of care to those within the system. In other words, the mere fact that someone is in the justice system should not mean a lesser standard in the approach to their health and welfare. The health service now delivers healthcare in the criminal justice system, and it seems to us appropriate that it should do so in accordance with the same standards and procedures that it would apply generally within the community.

The key phases of the criminal justice system in which statutory powers are currently exercised under the 1986 order will be brought into line with the capacity approach. There are three categories: first, police powers to remove persons from a public place to a place of safety; secondly, court powers to impose healthcare disposals at remand and sentencing or following a finding of unfitness to plead; and, thirdly, the powers by which the Department can transfer prisoners for inpatient treatment in a hospital. When an offender has the capacity to refuse an intervention in relation to his or her care, treatment or personal welfare, that decision will be respected. When that person lacks capacity, decisions will be made in accordance with the Bill's procedures, principles and safeguards.

I will explain that by way of an example. When a court is considering remanding a person for inpatient treatment or making an order for such treatment, the court will determine, by way of professional reports and advice, that the treatment is required and is available. That is step one. Step two is that, on the basis of those reports, it will also consider the capacity of the person to make a decision about

accepting that treatment. If the person has capacity, the order will be made only if he or she consents to the treatment. If the person lacks capacity about the treatment, the order will be made only if the treatment is in his or her best interests. If the person lacks capacity, the court will also consider any risk of harm to the person and to the public if treatment were not given. If detention for treatment is required, a court will then have to be satisfied that inpatient delivery in a hospital is the most suitable way to provide it. It might, in the first instance, consider and prioritise release on bail with conditions, as is the case in the criminal law more generally. I stress, however, that the model that we are developing will see the courts, the police and the Prison Service retain their overarching statutory powers around detention as distinct from treatment. Detention for an offence may be imposed regardless of capacity, but treatment will be based on the capacity principles.

The project has also examined the law on fitness to plead. We commissioned the Northern Ireland Law Commission to examine the current test for fitness. It found that the elements of a mental capacity approach could enhance the test, and the Department, therefore, proposes to incorporate that revised test in the capacity framework.

I said that the way in which we marry the capacity approach with the public protection and other responsibilities of the justice system has been a key issue for us. There could be a very rare situation in which a person has been unfit to plead, is found by a court to have committed the act in question, poses a high risk and requires treatment in hospital but yet, by the time the decision comes around, has capacity to refuse such treatment. Given that the person is unfit to plead, the option of prison would not be available to a court and nor would the treatment-based options, yet a potentially serious risk would remain, and, in effect, that person would be in something of a legislative vacuum. To cater for that potential gap, the Department is considering the concept of a protection order to allow such a person to be detained for protection rather than for treatment. In such, albeit potentially rare, circumstances, the court would be able to impose a protection order requiring the person to be detained in a care-based environment until the level of dangerousness had reduced. The protection order would be of limited but renewable duration, and the Department is considering an initial six months, with provision to extend the order thereafter. The Department recognises the difficulties involved and the interests that must be balanced with such a disposal, and we are particularly seeking views on that area through the consultation exercise.

We would also welcome views on the approach to under-16s. The DHSSPS takes the view — we agree — that the Bill cannot be applied to under-16s. Fundamental to the Bill is the presumption of capacity, and applying that to young people would undermine the role of parents and have a significant impact on the current legal framework, which is designed to protect children and to govern decision-making for them. We acknowledge, however, that the current legal framework is complex and that there is also a need to give further consideration to the emerging capacity of children, and the Department of Health has therefore proposed that a separate project should be undertaken to consider that in the context of a review of the Children (Northern Ireland) Order 1995 in the next Assembly mandate. Pending that review, it is proposed that the Mental Health (Northern Ireland) Order 1986 will continue to apply to those aged under 16 who require detention for assessment or for treatment of mental disorder. Those powers are rarely used in the criminal justice system.

In addition to the protections in the 1986 order, it is proposed to make amendments to it through the draft Bill to insert additional protections for children to whom it may apply. In parallel with our consultation, the DHSSPS will be consulting on what those protections should be.

That leads me on to equality issues more generally. We recognise the overarching impact of under-16s not being included in the current mental capacity framework. We screened the proposals accordingly and screened them in as requiring a full equality impact assessment (EQIA) on the grounds of age. That assessment has been prepared by the Department on its criminal justice proposals and will be published with the consultation. I understand that there is a copy in your packs.

The EQIA not only recognises the impact regarding under-16s but sets out the mitigating effect of the proposed additional safeguards being brought into the 1986 order and the more fundamental and wide-ranging review of the Children Order 1995 that will include consideration of emerging capacity.

Subject to the Committee's approval, the criminal justice consultation proposals will form part of a joint consultation pack, which will include the DHSSPS's consultation on the civil Bill and the proposals for under-16s. As the consultation is a cross-cutting issue, it will go to the Executive shortly. It is envisaged that a 12-week consultation will commence in March, which would allow for combining the civil and criminal justice parts of the Bill in the autumn with a view to introduction into the Assembly in January 2015. That would allow the Bill to pass before the end of the current mandate.

We aim to report back to you following our analysis of consultation responses and before moving to introduction. That may be an opportune point for the Assembly to consider putting into place the Ad Hoc Committee arrangements for the Bill, which were discussed by both Committees.

Thank you for allowing us to set out our proposals and apologies that, at this hour, it was at some length, but it is complex legislation.

The Chairperson: Apologies that our previous evidence session took so long and that we are a little bit behind schedule. I understand why it took a bit of time to get through the presentation.

Mr McCartney: We will return to the detail, but I want to talk more about the process. Two consultations will be running alongside each other. If one impacts on the other, how do we resolve that?

Mr Johnston: We have been working closely with the DHSSPS on the two consultations. The consultations will be presented as different chapters of one pack. We have taken careful account, and the DHSSPS has shared with us all the drafts that it produced. Although two Departments are involved, and we thought it sensible to identify the health proposals and the criminal justice proposals, in practice, we have been working very closely together.

Mr McCartney: If there is a public meeting, will there be officials from both Departments?

Mr Johnston: Those meetings will be done jointly. We are planning a joint consultation plan that will include public meetings.

Mr McCartney: You say that there will be a separate process for under-16s. Is that being taken forward by one or both Departments?

Mr Johnston: Again, both Departments will be involved. It will be led by the DHSSPS, but we will input to that process with regard to young people in the justice system.

Mr McCartney: If aspects of the initial consultation process impact on the Children Order 1995, we will not be doing that until the next mandate.

Mr Johnston: We can do things in the current Bill on strengthening protections for young people, and those can be inserted into the 1986 order. Wider issues on emerging capacity in children would be the focus of the bigger project in the next mandate.

Mr McCartney: Do you have a timeline proposal for dealing with the under-16s?

Mr Johnston: The Bill that will be introduced to the Assembly in January 2015 will contain additional safeguards, which that Bill will insert into the 1986 order, so that will be dealt with as part of this process. In the new mandate from 2016, we envisage that a wider review of the Children Order 1995 will take place.

Mr Tom Haire (Department of Justice): Part of the consultation pack will have a chapter on under-16s that both Departments will have contributed to.

Mr McCartney: So there will be provision in the Bill to make sure that the amendments are in place if required. That is fine. On the wider process, particularly for under-16s, will the equality impact assessment be built into all aspects?

Mr Johnston: The DHSSPS and the DOJ have undertaken equality impact assessments. Both assessments have taken account of under-16s and recognised the mitigating factors that need to be put into place in the meantime.

Mr Wells: Are you absolutely confident of meeting that timeline for January 2015?

Mr Johnston: A great deal of progress has been made. We have sent instructions to legislative counsel, and we will be following those up with instructions in further areas. The timetable has been agreed by the two Departments.

Mr Wells: This is the fifth date that you have given us for introduction of the Bill.

Mr Johnston: Indeed, yes, but the date is closer. At one stage, there was an indication that the Bill might be introduced later into 2015, which would have made it difficult to get it through the Assembly stages in time. So we have looked at it again and been able to move it forward.

Mr Wells: I am also on the Health Committee, so I put the same proposition to your equivalent in the Department of Health, Social Services and Public Safety. I asked him whether he would give £500 to my favourite charity if he did not meet that deadline.

Mr Johnston: I wish I could remember the response that Seán gave, because it was a lot cleverer than the response that I am going to give. *[Laughter.]* Suffice to say, we have strengthened our resources in the Department, and we are working very hard.

Mr Wells: I did say that the Jim Wells benevolent fund was the charity that I had in mind, but he was not so happy with that one. Being serious, this is very complex legislation that has to bring together an Ad Hoc Committee made up of members from the Health and Justice Committees. I know who will be unlucky enough to sit on it. I can see that coming my way, which means that, effectively, I will be sitting on three Committees until this legislation is through. The same thing was done with a Bill from the Department for Social Development, and we know what that was like. If you do not deliver the Bill's introduction in January, the Assembly will be in big trouble with this legislation. It has to go through by the end of this mandate or else we will have to pick up the threads in the following mandate.

Mr Johnston: That message has certainly been understood. Between the two Departments, we have just appointed a programme manager for the Bill, whose job is to keep us all right with timescales and to ensure that things happen when they need to happen.

Mr Wells: Is that person known? Has he or she been announced?

Mr Johnston: Yes, he has. Andrew Dawson from the DHSSPS is taking it forward.

Mr Wells: I really hope that it happens because there have been so many false dawns with the Bill. It is desperately important legislation, particularly on the health side, which is where the vast majority of the expenditure will be. I would feel terribly let down — to put it mildly — if it were not to happen. The present legislation, which dates from 1986, is terribly out of date. The Bill would bring protection to a lot of very vulnerable people, and we support the principle of what you are trying to do. I would like it to happen before I retire.

The Chairperson: We look forward to more progress. Thank you very much.