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3 November 2015

Dear Kathryn

## **MENTAL CAPACITY BILL – PART 12 AND SCHEDULE 8**

Thank you for your letter of 20 October setting out the Committee's initial position on Part 12 of the Bill and the related Schedule 8.

The Department's comments and responses are set out below.

### Clause 254

The Department confirms that in the period 1 April 2014 to 31 March 2015, **seven** children aged 16 or 17 were detained in adult psychiatric or learning disability wards.

Of these:

- **one** child aged 16 was detained for one night before being transferred to Beechcroft;
- **four** children aged 17 were detained in adult wards as there were no beds available in Beechcroft, with a total detention time in adult wards of three, eight, eight and 27<sup>1</sup> days respectively; and
- **two** children aged 17 were detained in adult wards as risk assessments or their behaviour made it unsafe to detain them in children's wards. They were detained for thirteen and 61 days respectively.

In my letter of 13 October, I stated that the number of these detentions was, in fact, six. The additional case became apparent as a result of clarifying the figures with the HSC Trusts. Information on compulsory admissions detailed in this response is collected routinely from HSC Trusts and is based on data extracted from their administrative systems on a specific date each quarter. As these administrative

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<sup>1</sup> The child was detained for 27 days in the year 2014-2015 and had as of 21 October 2015 been detained for 229 days in an adult learning disability ward.

systems are live databases which are consistently being updated and amended, the data may subsequently change after submission to the Department. To ensure that the information released is correct and up to date, the Department will carry out an end of year validation exercise with HSC Trusts, whereby HSC Trusts will, if necessary, submit amended information.

In relation to the difference between RQIA figures, and those provided by the Department, I understand that the RQIA has written to the Committee to provide clarification on its figures.

### Clause 255 and Schedule 8

#### *Separate project*

Resources within the Department have been focused during the current Assembly mandate on securing the introduction of the Mental Capacity Bill for those currently without legislative safeguards and, at the same time, strengthening the existing protective framework that is already in place for children (of which the Mental Health Order is part). It therefore remains the Department's position that the separate project to consider the issue of emerging capacity in children in a health and welfare context is a matter to be taken forward in the next Assembly mandate.

#### *Disregard*

The Department is grateful for the opportunity to further comment on the disregard provision in the Mental Health (NI) Order 1986. As requested, a briefing paper on the issue is attached at Annex A. Prompted by legal advice and discussion with professional colleagues, the Department's concern as reflected during the evidence session on 5<sup>th</sup> October, is that the proposal to extend the disregard may not be as straightforward as originally envisaged. The Department's intention, however, remains clear: the Department wishes to ensure that the legislation achieves a fair outcome for the individuals concerned while also ensuring that they and others are protected.

#### *Independence - advocacy*

The Department does not accept the proposition that the current provisions would not allow for the appointment of advocates who could fulfil their role and functions under the (amended) 1986 Order in an independent manner. As the Committee may already be aware, the majority of advocacy services are currently being commissioned by the HSC Trusts and delivered by a range of voluntary/community sector organisations. This arrangement allows the HSC Trusts to create services that best meet the specific needs of the local population. The key point, however, is that all of these services are being commissioned and delivered in accordance with Departmental guidance<sup>[1]</sup>. That guidance was issued by the Department in 2012 to build capacity within the community/voluntary sector and prepare the way for the new statutory right to independent advocacy. It sets out a number of principles and standards for both the commissioning and delivery of advocacy services. Independence is one of those standards and is clearly explained in the guidance.

#### *Under 16s – detention on adult psychiatric wards*

The Department understands that two under 16s were detained in adult psychiatric wards in 2014/15. One was detained for 16 days and one for three days. The Department understands that both of these detentions were due to a lack of beds at Beechcroft.

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<sup>[1]</sup> DHSSPS: Developing Advocacy Service: A Policy Guide may 2102

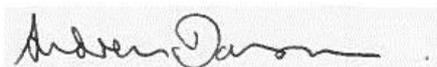
*Register*

The Department has considered RQIA's evidence regarding the requirements in Article 118(4) and is content to omit paragraph 56(4) to Schedule 8 to keep the age limit at 18.

*Review Tribunal*

Please see separate response issued to the Committee on 27 October 2015.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Andrew Dawson", is placed on a light grey rectangular background.

**Andrew Dawson**

**Mental Health Policy Unit / Mental Capacity Bill Project**

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## Annex A

# DISREGARD

### Introduction

1. This paper sets out the Department's position on whether the disregard provision in the Mental Health (NI) Order 1986 ("the 1986 Order") should be extended for children under the age of 16, to include periods of detention for treatment of mental disorder.

### Background

2. It is worth explaining at the outset the full effect of the disregard provision in Article 10 of the 1986 Order which is reproduced at **Annex 1** for ease of reference.
3. Article 10 allows a person who has been detained for assessment (under Article 9) but not immediately detained for treatment (under Article 12), to disregard that assessment period in response to any question seeking information about a person's health or circumstance, or obligation to disclose such information imposed by law. The circumstances in which such information could be requested or required by law are not provided for in the 1986 Order. It could however include checks made by potential employers, landlords or schools for example.
4. The Article provides that, if questioned, any failure to declare that information will not subject that person to liability or other prejudice. In other words, the person is under no legal duty to declare that they have been detained for assessment (not immediately followed by detention under Article 12) except in the case of judicial proceedings.
5. It goes on to provide that, the fact that a person has been detained for assessment shall not be a proper ground for dismissing a person or excluding that person from any office, profession, occupation or employment. It provides that any disqualification or prohibition contained in any rule of law or statutory

provision applying to persons who have been detained does not include those who have been detained for assessment.

6. The Department understands that a provision similar to Article 10 does not exist in the rest of the UK and Ireland.

## **Consultation**

7. As a result of views expressed during the consultation period, the Department gave a commitment to consider extending the disregard provision in Article 10 of the 1986 Order (which will in the future apply to children under the age of 16) to include periods of detention for treatment.<sup>1</sup> That consideration involved seeking legal advice to determine whether such an amendment would be within the competence of the NI Assembly.
8. The advice confirmed that extending the disregard as suggested would be within competence: the fact that the application of the exemption, in a certain set of circumstances, may involve an excepted matter (armed forces) or a reserved matter (civil aviation or firearms and explosives), does not prevent the provision from being a transferred matter. However, that advice also stated that the Department should proceed with caution on this matter and carefully consider the consequences of an extended disregard provision in consultation with medical professionals.
9. That engagement identified that there are no special rules for patients receiving long term treatment for serious physical conditions: the Disability Discrimination Act 1995 being relevant. A comparison which naturally gave rise to broader questions around equivalence although the Department has not at this point explored this issue further.

## **Current position**

10. It is fair to say that this is not a straightforward issue. Further detailed consideration is required as deliberation thus far has raised as many questions as answers.

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<sup>1</sup> DHSSPS & DoJ Consultation Summary Report January 2015

11. It seems to the Department that there do appear to be sound reasons for including within a disregard provision any period of detention for assessment for mental disorder (defined broadly in Article 3 as *'any disorder or disability of the mind'*). This is because clearly it is envisaged that during the assessment period the condition of many patients will become less acute and it will be possible either to continue their treatment on a voluntary basis or to discharge them.

12. It is quite a separate matter some might argue, to include within a disregard provision any detention for the purposes of treatment, the criteria for which are significantly narrower than assessment. The patient must be suffering from either mental illness or severe mental impairment as defined at Article 3(1):

*"mental illness" means a state of mind which affects a person's thinking, perceiving, emotion or judgment to the extent that he requires care or medical treatment in his own interests or the interests of other persons;*

*"severe mental impairment" means a state of arrested or incomplete development of mind which includes severe impairment of intelligence and social functioning and is associated with abnormally aggressive or seriously irresponsible conduct on the part of the person concerned.*

13. Perhaps, therefore, the limitation applied to the disregard at the time the 1986 Order was drafted (to only cover assessment) was intended to achieve the protection and safety of the individual who may pose as a risk to themselves but also to others. This raises the question of whether different considerations apply in the case of a person who has been detained for treatment which is reserved for the more serious cases.

## **Conclusion**

14. There is strength in the arguments being put forward by stakeholders but analysis to date has been inconclusive and we would want to be very clear about the consequences of providing for something of this nature. Northern

Ireland is already unique in having a disregard in relation to assessment which, it could be argued, already strikes the right balance in achieving a fair outcome for the individuals concerned while also ensuring that they and others are protected.

**Department of Health, Social Services and Public Safety**

**October 2015**

***Disregard of assessment period for certain purposes***

10.—(1) This Article applies to any person who—

(a) is admitted to hospital for assessment and detained there by virtue of Article 9 for any period (in this Article referred to as “the assessment period”); and

(b) at the end of the assessment period does not become liable to be detained for treatment by virtue of Article 12.

(2) Where a question seeking information with respect to the previous health or circumstances of any person to whom this Article applies is put to him or to any other person, otherwise than in judicial proceedings—

(a) the question shall be treated as not relating to the assessment period and the answer thereto may be framed accordingly; and

(b) the person questioned shall not be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose the assessment period in his answer to the question.

(3) Any obligation imposed on any person by any rule of law or by the provisions of any agreement or arrangement to disclose any matters to any other person shall not extend to requiring him to disclose—

(a) the assessment period for which he was detained, if he is a person to whom this Article applies; or

(b) the assessment period for which any other person to whom this Article applies was detained.

(4) The fact that a person to whom this Article applies has been detained in hospital for assessment or any failure to disclose that fact shall not be a proper ground for dismissing or excluding that person from any office, profession, occupation or employment, or for prejudicing him in any way in any occupation or employment.

(5) Any disqualification, disability, prohibition or other penalty which by virtue of any rule of law or statutory provision other than this Order attaches to or is imposed on any person by reason of the fact that he has been liable to be detained under this Part of this Order shall not attach to or be imposed on a person to whom this Article applies.

(6) In paragraph (2) “judicial proceedings” includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person having power—

(a) by virtue of any statutory provision, law, custom or practice;

(b) under the rules governing any association, institution, profession, occupation or employment; or

(c) under any provision of an agreement providing for arbitration with respect to questions arising there under, to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question.