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**Health, Social Services
and Public Safety**

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10 November 2015

Dear Kathryn

Thank you for your letter of 3 November setting out the Committee's initial position on Parts 6, 7, 8, 11, 13, 14 and 15.

The Departments' comments and responses are set out below.

Clause 116

The Committee has noted that clause 116(5) does not refer to a decision made by an attorney under an enduring power of attorney. DoJ is content to make this amendment.

Clause 119

The Committee has requested that DoJ provides a view in relation to clause 119 not giving the court the power to obtain financial records. The purpose of clause 119 is to allow the court to call for reports to be made that may assist the court during the proceedings under Part 6 of the Bill. DoJ does not consider that the court requires a power under this clause to obtain financial records. Clause 122(2)(k) makes provision for Court Rules to make provision for the conduct of proceedings, including authorising or requiring the production of documents and the provision of information from parties to the proceedings. It is considered that this provision adequately facilitates the production of financial information for the court.

Clause 125

This clause does not currently give the Public Guardian power to obtain financial information from banks or other financial institutions. DoJ considers that financial information should be provided to the Public Guardian by an attorney or a deputy. A deputy appointed by the court or an attorney who has functions in relation to financial matters will have access to financial records by virtue of their position. If the deputy or the attorney refuses to share these records with the Public Guardian, then there has to be a real concern over the activities of that individual. Such concern could be justification for an application to be made to the Court under Part 6 of the Bill, as

clause 112(8) gives the court power to revoke the appointment of a deputy or to vary the powers bestowed upon him or her. The Court also has power to revoke a lasting power of attorney or terminate the appointment of an attorney if that attorney has behaved in a way which is not in the donor's best interests (see clause 108).

The Committee also requested that clause 125(5) is reviewed to ensure that there are no unintended gaps in terms of the Public Guardian being able to access records from a range of facilities, namely residential care homes, nursing homes and supported living facilities. The Departments are working to explore how this provision can adequately cover all these facilities and will keep the Committee updated as to our progress.

Clause 126

The Committee has asked DoJ whether a duty is placed on residential care homes, nursing homes and supported living facilities to notify the Public Guardian if a person living in such a facility lacks capacity in relation to care, treatment, personal welfare or property matters and the powers of the court under clause 112 ought to be exercised, but an approach to the court has not been made. The Committee's attention is drawn to the definition of "care home" in clause 293 of the Bill.

Living arrangements for vulnerable people are delivered in Northern Ireland in a variety of ways, with HSC Trusts commissioning services or working in partnership with other organisations or statutory bodies. Clause 126 places a duty on a number of authorities to notify the Public Guardian if there are concerns about an individual's welfare and there is a need to involve the court in those matters. Particularly, a duty is placed on HSC Trusts. Since those living in supported living arrangements will have an interface with social services if they require extra assistance with their needs, it is appropriate that the duty to notify the Public Guardian lies with the HSC Trusts, which is currently provided for by clause 126(2). It is the view of the Departments therefore that no amendment to clause 126(2) is required.

Clauses 132 and 133

DHSSPS would wish to advise the Committee that the approval safeguard provided for in clause 132 must be met in advance of any research project being commenced. In other words, Part 8 is drafted on the basis that project participants will not be contacted or approached until the research proposal has been approved. It would not therefore be practicable to include in Part 8 the pre-condition for approval suggested by the Information Commissioner's Office.

Instead, subsection (7) requires that reasonable arrangements *must* be in place to ensure the additional requirements in clauses 133 and 135 *will* be met. To be clear, this means that the researcher in applying for approval will have to describe a clear plan for identifying or appointing consultees in accordance with clause 133 and providing information to and seeking advice from them, otherwise the appropriate body cannot approve the project.

Furthermore, any appointment of a consultee will have to adhere with guidance to be issued by the Department. Examples of such consultees might include other clinical staff, social workers or lay persons not connected with the project. The guidance is also likely to set out the principles to which researchers must adhere when appointing

such consultees and provide advice on ways of meeting this requirement in different research settings.

Clause 256

Inclusion of EPA

DHSSPS agrees with the Committee that a reference to an EPA would be appropriate and we are liaising with Counsel to bring forward such an amendment.

Length of sentence on summary conviction

Following the evidence session on 19th October, it is now DHSSPS's understanding that although the maximum penalty in Northern Ireland on summary conviction is normally limited to 6 months, this can be increased in exceptional circumstances. The Committee will wish to be aware that, in such cases, Article 29 of the Magistrates' Courts (NI) Order 1981 will apply. This gives the offender the option to ask for a jury trial, with concomitant implications for costs and court time.

In light of the above, the Department considers it necessary to liaise further with DoJ and the Court Service to understand the circumstances in which a maximum penalty greater than 6 months can be specified and the full implications of doing so, before providing a final response on this matter to the Committee. In the meantime we note the Committee's views and will endeavour to update the Committee as soon as possible.

Introduction of an offence of wilful neglect as proposed by the NIHRC

It is DHSSPS's view that such an offence would be outwith the scope of the Mental Capacity Bill which is creating a legislative framework for persons who lack capacity.

The introduction of an offence of wilful neglect and other legislative developments in other parts of the UK were acknowledged in the course of consultation on new adult safeguarding policy. The policy consultation paper also outlined and sought views on recommendations for legislative change made by COPNI. The response to consultation made it clear that more time was needed to consider and reconcile views on the COPNI proposals; those who responded weren't always in agreement with what was proposed by the Commissioner. On that basis, it is not possible to implement legislative change to potentially strengthen safeguards for adults at risk in the current mandate. This is the position taken consistently by both DHSSPS and DOJ, which jointly developed, consulted on and published the adult safeguarding policy.

Clause 257

Comments in relation to clause 256 above refer.

Clause 261

DHSSPS's rationale is largely based on the existing penalty associated with the offence of obstruction in Article 125 of the Mental Health (NI) Order 1986. That offence also provides for a maximum sentence on summary conviction of 3 months imprisonment and excludes prosecution on indictment.

Clause 278

Lay Magistrate

DHSSPS is liaising with Counsel to amend the Bill as suggested.

Approved Social Worker

The Department can see merit in the suggested amendment that would allow an approved social worker to enter the private property with the constable and is discussing this further with Counsel.

Ill-treatment and neglect / assessment of premises

The Department does not understand the suggestion around the assessment of premises but would advise that concerns about a person's living conditions will clearly be relevant for the purposes of clause 278. Clause 278 originates from Article 129 of the Mental Health (NI) Order 1986 which contains provision similar to the second suggestion made by Southern HSC Trust and the NI Approved Social Worker Training Programme. The Department is currently liaising with Counsel to clarify clause 278 so that its effect and scope is clearer on the face of the Bill.

Clause 280

The Southern HSC Trust and the NI Approved Social Worker Training Programme are concerned that clause 280 does not require the PSNI to support medical practitioners and social workers when bringing a person to hospital for detention. It should be noted that clause 280 only covers individuals who are being removed from any place, or being taken to or detained in any place, under Part 9 of the Bill, or individuals being taken to or detained in any place under Part 10 of the Bill.

In relation to Part 9, the individual will *always* be accompanied by a PSNI officer.

In relation to individuals who are subject to Part 10, it is envisaged that these patients will be conveyed between healthcare and justice settings by a range of different professionals, as is currently the case.

The HSC Trusts are currently responsible for transferring prisoners subject to transfer to direction orders from a healthcare setting to court hearings. Where there are risks involved in transporting a patient, a police officer will transport the patient along with a member of healthcare staff if necessary.

When patients are sent to prison from Court, the Prisoner Escorting and Court Custody Service (PECCs) will transport the prisoner to prison, unless this happens in a 'special' court sitting i.e. a Saturday or Bank Holiday (with the exception of Laganside Court where PECCs do provide this service) .

PECCs staff are also responsible for transporting prisoners who are returning from an external healthcare facility to prison, although on occasions they may be accompanied by Trust nursing staff depending on the capacity of the prisoner.

Clause 283

It is DHSSPS's view that such matters are most appropriately dealt with in regulations. However, in light of the Committee's comments, we would wish to consult further with relevant colleagues on the detail before providing a final view on the matter.

Clause 285

DHSSPS would wish to advise the Committee that clause 285 is a qualifying provision and must be viewed together with the operative provisions in the Bill, of which there are many. For example, clause 24(2)(c) which read with clause 25(5)(a) and (b), requires that detention is a proportionate response to the likelihood of harm to P, or of physical harm to other persons and the seriousness of the harm concerned. For that purpose a predictive judgement is therefore required and future actions can be considered.

Clause 288

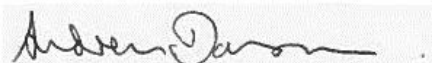
The inclusion of a regulation making power in this clause is intended to provide a mechanism for promptly rectifying any unintended consequences or loopholes that may be inadvertently created by a Bill of this size. It is both novel and complex and has not yet been attempted in any other jurisdiction.

The types of scenarios that clause 288 would cover include, for example:

- Amendment of the Health and Personal Social Services (Quality, Improvement and Regulation) (NI) Order 2003 to align the Regulation and Quality Improvement Authority's role with the requirements of the Bill.
- Transitional arrangements in respect of children turning 16 years of age.
- Consequential amendments to include (but not limited to): Health and Personal Social Services (NI) Order 1972; The Registered Homes (NI) Order 1992; The Industrial Relations (NI) Order 1987; The Child Support (NI) Order 1991; The Pensions (NI) Order 1995; The Adoption (NI) Order 1987.

However, the concerns raised in relation to this clause are noted, and officials are currently liaising with Counsel with a view to bringing forward suggestions to the Committee as requested.

Yours sincerely,



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