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Mental Capacity Bill: A disregard provision for “treatment”?

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In the Mental Capacity Bill consultation document, the Department of Health, Social Services and Public Safety (DHSSPS) proposed that it would consider *extending the disregard provision in Article 10 of the Mental Health (NI) Order (MHO) to include ‘detention for treatment’* for children under 16. Yet when the Mental Capacity Bill was published, no extension to disregard ‘treatment’ was included. This paper explores this complex issue and reflects on a number of stakeholder views.

Key Points

- At present, any question seeking health information in relation to an individual who has been detained **for assessment** (a medical examination) in hospital under the 1986 Mental Health Order (MHO) does not have to be disclosed, except in legal proceedings. This provision is contained within Article 10 of the MHO and is known as a **disregard provision**, because the detention for assessment is disregarded.
- However, a health question about a detention **for treatment** under the MHO (which requires more stringent medical criteria to be met) may need to be disclosed by the patient, or in some circumstances, disclosed by a third party - such as a G.P. (usually with patient consent), or the police.
- Compared with the rest of the United Kingdom and Republic of Ireland, the disregard provision for assessment is unique to Northern Ireland; it is not included in the legislation in these other jurisdictions.
- The law about the disregard provision does not expand upon when a disclosure (save for legal proceedings) is actually necessary.
- Research has failed to identify practical examples of when specific questions about 'detention for assessment' and 'detention for treatment' per se, are asked. Health related questions tend to be phrased more generally around whether the person has suffered from "mental ill health" in some form or another. This may, or may not, lead on to questions about detention, treatment and so forth. It is also unclear what happens if a person does not disclose such information if asked.
- In June 2015, the DHSSPS published the Mental Capacity Bill. The Bill fuses mental health and mental capacity legislation together into a single statutory framework. For those aged 16 and over, the MHO will be revoked. An amended MHO will still apply to children under 16.
- As part of the consultation on the Bill, the DHSSPS stated it would consider *extending the disregard provision in Article 10 of the MHO to include 'detention for treatment'* to those under 16.
- 9% of consultation respondents replied to this proposal. Most respondents were children's organisations. All were in favour of an extension of the disregard provision to include detention for treatment. Their view was particularly focused on the young person's perspective, in that it would reduce stigma and help to increase life opportunities for young people.
- Respondents indicated that disclosure was required for driving applications, insurance, travel purposes, jury service, courses and employment. Although it is impossible to explore every possible avenue where a disclosure may be warranted, the researcher is able to clarify that jury service, drivers licence applications, and undergraduate courses

at Northern Irelands two Universities do not require a detention for treatment to be disclosed.

- Yet there are instances where disclosures about detention under the MHO are required, such as for certain job roles. A key point is that a disclosure could be for legitimate reasons, especially where there could be a “risk to others”. For example, a person applying to adopt, those working with vulnerable adults, and those wishing to apply for a firearm.
- Disclosing a previous period of detention also does not necessarily mean that a positive outcome is not achieved for the individual concerned. Moreover, the MHO predates significant advances in the law in terms of equality, employment and anti-discrimination protections for people.
- In considering an extension of the disregard provision in the Mental Capacity Bill, the DHSSPS has taken legal advice, which concluded that: extending the provision is within the NI Assembly’s competence, but that the DHSSPS should proceed with caution, following consultation with medical experts. In light of this, the DHSSPS has not put forward an amendment to extend the disregard, largely due to what it refers to as a “number of unanswered questions”.
- Clause 59 of the new Bill largely replicates Article 10 of the MHO, and will apply to those over 16. This will mean that the circumstances around disclosure remain largely unchanged (bar the terminology) for both over 16s and under 16s. Yet a key difference is that a short or long term detention under the Bill for over 16s can relate to any illness (either mental or physical).
- Given that the MHO is so outdated, it could be argued that the DHSSPS should consider the wording of Article 10 in the MHO and Clause 59 so that it is absolutely clear about its intention concerning any disregard - and that any provision is in sync with current practices.
- It is evident that disclosing a detention for treatment is warranted in some cases, and extending the disregard provision to include treatment may be premature. Striking the balance - given the fused approach of the new Bill, will not be easy.

2. The Mental Health Order

Mental health legislation is traditionally founded upon the notion of reducing serious risk of harm to the patient or to other people. The Mental Health (Northern Ireland) Order (MHO, 1986) provides the current legal framework regarding the compulsory admission and treatment of patients suffering from a mental disorder in Northern Ireland.¹ The MHO applies to both children and adults.

2.1 Detention for Assessment and Treatment

Part 2 of the MHO outlines the processes through which a child or adult may be compulsorily admitted and detained in hospital for assessment and treatment.² This can occur provided certain criteria are met, and regardless of whether or not they have capacity.³

Criteria for admission into hospital for assessment (a medical examination),⁴ which is based on a medical recommendation (e.g. from a G.P.), are set out in **Article 4** of the MHO, which states that this may be made on the grounds that the patient is:

- Suffering from **mental disorder** (i.e. mental illness, mental handicap or any other disability of mind) of a nature or degree which warrants his detention in hospital for assessment (or for assessment followed by medical treatment); and
- Failure to so detain the person would create a substantial likelihood of serious physical harm to themselves or to other persons.⁵

The assessment period, which is detailed in Article 9, can last a maximum of 14 days.⁶ The detention for assessment occurs before a decision is taken whether or not a period of detention *for treatment* may be required. If the assessment shows this is not required, the person may not need to remain in hospital, or they may remain in hospital and receive treatment as a voluntary patient.⁷

The criteria for detention in hospital for treatment are more stringent than those for the assessment.⁸ These are set out in **Article 12** as follows⁹:

¹ GAIN Guidelines on the use of the Mental Health Order, 1986 (October 2011) Available online at: http://www.gain-ni.org/flowcharts/downloads/GAIN_MENTAL_HEALTH.pdf p5. Website accessed 19.10.15

² These patients are referred to as "formal" or "involuntary patients"

³ Mental Capacity Bill (NIA Bill 49/11-16) EFM, p1. Available online at: <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity-bill---efm---as-introduced.pdf> Website accessed 12.10.15

⁴ Assessment occurs after an application is provided - which is founded on a medical recommendation. The application will only be made if the person meets the criteria for admission set out in the Order, and if there is no alternative to detention in hospital.

⁵ MHO 1986 Article 4 Part 2. *Admission for assessment*

⁶ Guidelines on the use of the MHO (1986) Introduction to pathways for compulsory admission to hospital for assessment and treatment (Part II). Available online at: <http://www.gain-ni.org/flowcharts/introduction-pathways.html> Website accessed 19.10.15

⁷ GAIN Guidelines on the use of the Mental Health Order, 1986 (October 2011). Available online at: http://www.gain-ni.org/flowcharts/downloads/GAIN_MENTAL_HEALTH.pdf p30. Website accessed 19.10.15

⁸ The general diagnosis of mental disorder is no longer sufficient for detention for treatment (it only applies to the assessment process). Regarding detention for treatment, it must be clearly stated that the patient suffers from mental illness, severe mental impairment, or from both.

⁹ Mental Health (NI) Order 1986; Article 12: Detention in hospital for treatment. Available online at: <http://www.legislation.gov.uk/nisi/1986/595> Website accessed 21.10.15

- The patient is suffering from **mental illness or severe mental impairment**¹⁰ of a nature or degree which warrants his detention in hospital for medical treatment; and
- Failure to detain the patient would create a substantial likelihood of serious physical harm to themselves or to other persons.

‘Detention for treatment’ requires that the patient be formally re-examined.¹¹ Following this, the patient may be:

- detained for treatment of a mental disorder;
- re-graded to a voluntary patient; or,
- discharged from hospital.

The maximum period of detention for treatment is 6 months, unless this is reviewed by the appropriate authority.¹² Patients and nearest relatives have a right to appeal against the detention via the Mental Health Review Tribunal.¹³

2.2 Declaring a period of detention (Article 10, MHO)

Central to this paper is Article 10 of the MHO (see Appendix 1). It relates to when a period of detention may, or may not need to be disclosed by the individual.¹⁴

- Article 10 states that any question seeking health information in relation to a person (child or adult) who has been ‘detained for assessment’ which has not immediately been followed by a period of ‘detention for treatment’ can be disregarded i.e. these periods of detention for assessment can be regarded as if they had never occurred, and there is no legal duty to disclose. (The only exception being for legal proceedings).
- Guidance on Article 10 also states that “*It should be noted that this provision relates to **periods of assessment only and does not extend to periods of detention for treatment which must be declared if required***”.¹⁵

With the exception of ‘for legal proceedings’, the MHO, the Code of Practice, and the MHO GAIN Guidelines, do not clarify the types of circumstances when a period of detention for treatment may need to be disclosed, or by whom. It is also unclear what happens if a person does not disclose a previous detention for treatment if required.

¹⁰ This is defined as “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.” GAIN Mental Health (NI) Order 1986 Guidelines; Pathways for compulsory admission to hospital, MHO Part II.

¹¹ By the responsible medical doctor, or a Part II Doctor. Guidelines on the use of the MHO (1986), p31.

¹² Guidelines on the use of the MHO (1986) Introduction to pathways for compulsory admission to hospital for assessment and treatment (Part II). Available online at: <http://www.gain-ni.org/flowcharts/introduction-pathways.html> Website accessed 19.10.15

¹³ The Mental Health Tribunal at present is the primary legal remedy to challenge detention.

¹⁴ MHO (1986), Article 10. Available online at: <http://www.legislation.gov.uk/nisi/1986/595> Website accessed 12.10.15.

¹⁵ GAIN Mental Health (NI) Order 1986 Guidelines, p34. Available online at: http://www.gain-ni.org/flowcharts/downloads/GAIN_MENTAL_HEALTH.pdf

3. The Mental Capacity Bill - Overview

The new Mental Capacity Bill for Northern Ireland will, for the first time ever, fuse together mental health law and mental capacity law into a single piece of legislation.¹⁶ Elsewhere in the UK, capacity legislation exists in statute;¹⁷ whereas capacity issues in Northern Ireland are largely governed by the common law. The main purpose of the Bill is to provide a coherent statutory framework for acting for and making decisions on behalf of people who lack capacity - and in doing so, provide additional safeguards. It is envisaged that the Bill will reduce the stigma associated with having separate mental health legislation so that people with mental illness are treated on an equal basis to those with physical illnesses. Crucially, it will also mean that people over 16 with a mental illness can no longer be compulsorily detained and treated against their will¹⁸ *unless* they are found to lack capacity. This will be ascertained through a formal test.¹⁹

3.1 Consultation – Disregard provision

A joint public consultation on the draft civil provisions and policy proposals on the criminal justice aspects of the Bill was launched in May 2014. The consultation closed in September 2014 and 121 formal responses were received.²⁰

This paper focuses on one part of the consultation process, namely where the DHSSPS stated that it would consider an “*extension of the Disregard Provision in Article 10 of the Mental Health Order, to include periods of detention for treatment.*”²¹ In effect, this would extend the current provision; meaning that a previous period of detention for assessment, in addition to a period of detention for treatment (if applicable), would not need to be disclosed.

3.2 Consultation responses relating to the Disregard Provision

The researcher examined the consultation responses to ascertain the views of respondents. Only those that specifically commented on Article 10 in relation to extending the disregard provision - which equated to 9% of the total respondents, are presented in Table 1.²²

¹⁶ The main purpose of the Bill is to provide a coherent legislative framework for acting for and making decisions on behalf of people aged over 16 who lack capacity in relation to specific decisions about the care, treatment (for a physical or mental illness) or personal welfare. The Bill will introduce a rebuttable presumption of capacity in people over 16.

¹⁷ Mental Capacity Bill (NIA Bill 49/11-16) EFM, p1. However elsewhere in the UK, case law continues to evolve, particularly in relation to the Bournemouth gap and Deprivation of Liberty (DoL).

¹⁸ If someone is mentally disordered and presents a risk of harm to others but retains the capacity to make decisions about medical treatment and refuses it, they **cannot** be forcibly treated.

¹⁹ Any assessment of capacity will be decision specific.

²⁰ Mental Capacity Bill (NIA Bill 49/11-16) EFM, p3. Responses available online at: http://www.dhsspsni.gov.uk/analysis_of_responses.doc

²¹ DHSSPS (May 2014) Draft Mental Capacity Bill (NI) Consultation Document, p40.

²² Bill Consultation Responses. Available online at: http://www.dhsspsni.gov.uk/analysis_of_responses.doc Website accessed 26.10.15.

Table 1. Comments from consultations responses concerning the disregard provision

Consultation Respondent:	Respondent's views on extending the Disregard Provision in the MHO to include periods of detention for treatment;
Children's Law Centre	This is a very welcome development as the obligation on young people to declare periods of detention for treatment for a mental illness for insurance and driving purposes, travel, to employers and for jury service , has an extremely detrimental impact on the child's life and future. Given that the UNCRC defines children as, "...every human being below the age of eighteen" we wish to see provision being extended to include 16 and 17 year olds under the Bill. We would further wish this to operate retrospectively to include all persons who have been detained in childhood under the 1986 Order since its enactment.
Include Youth	The extension of the disregard provision to include periods of detention should apply to all children under 18 and retrospectively to anyone detained for treatment as a child. We welcome the proposal to amend the MHO in this regard as we know that having to declare periods of detention for treatment of mental illness for various reasons, such as driving, insurance, to employers etc. can have a negative impact on a young person's life.
Law Centre NI	We welcome the proposal to extend the disregard provision to include periods of detention for treatment.
NI Approved Social Worker Training Programme	We welcome the intention to amend the Order and provisions of additional "safeguards" in relation to the extension of the Disregard Period;
NIACRO	Article 10 calls for assessment periods to be disregarded "otherwise than in judicial proceedings", and for clarity, we recommend that the legislation uses the same terminology. We welcome the move to extend this provision, as declaring periods of detention can have long term negative impacts as children grow into adulthood and can affect their opportunities for employment, education, training, travel and access to goods and services such as insurance . The Youth Justice Review called for young people to be allowed to apply for a 'clean slate' at the age of 18 (Recommendation 21): we therefore recommend that this provision should be extended to cover young people aged 17 & 18 too, to counter the lasting barriers and stigma that disclosing periods of detention can have.
NI Association of Social Workers	The Article 10 disregard of the MHO was a very positive aspect of that law and it would be important to see it included and extended, to cover all assessment processes, in the new law.
NICCY	NICCY welcomes the intention to extend this provision to include periods of treatment and would request that it is also extended to include 17-18 year olds who will be included under the remit of the draft Bill.
Parenting NI	The extension of the disregard provision to include periods of detention should apply to all children under 18 and retrospectively to anyone detained for treatment as a child.
Voice of Young People in Care (VOYPIC)	VOYPIC welcomes the extension of the disregard provision to include under 16 year olds. The obligation on young people to declare periods of detention for treatment for a mental illness for insurance and driving purposes, travel, to employers and for jury service , has a detrimental impact on the child's life and future. We would also like to see the provision being extended to include 16 and 17 year olds under the Mental Capacity Bill. We believe that the disregard provision should operate retrospectively to include all persons who have been detained in childhood under the 1986 Order since its enactment.
VOYPIC (Beechcroft CAMHS inpatient feedback group)	No young person should ever have to declare that they have been in hospital because of their mental health, either when they were under or over 16. <ul style="list-style-type: none"> ▪ "Treatment shouldn't have implications for the rest of your life, particularly when you were under 18, a child who didn't make proper life decisions" ▪ "Having to declare periods of detention for treatment is like a punishment"

Consultation Respondent: (continued)	Respondent's views on extending the Disregard Provision in the MHO to include periods of detention for treatment;
Youth@clc (Part of Children's Law Centre)	<p>Youth@clc welcomed the proposal by the DHSSPS that under 16s should not have to declare periods of detention for treatment in hospital. They however expressed concerns that this should be extended to include all under 18s who are detained in hospital for treatment.</p> <p>Youth@clc also felt that if a young person challenges their detention to the Mental Health Review Tribunal and is successful then they should not have to declare their detention in hospital for treatment.</p> <p>They further felt that to have to declare your detention in hospital for treatment was:</p> <ul style="list-style-type: none"> ▪ "undermining the treatment that they have been given. If they have been released after they have been detained, they are obviously being presumed to be better. They still have to declare so that is like they are still some form of a hazard, always presuming that it is only a temporary measure. Especially, like they stereotype people who suffer mental illness. People think it is all people who are crazy, lunatics that is the way people perceive it, like you do not understand. It could be people that suffer from depression and stuff which is really common, but people when they hear mental illness, like something goes off in their heads that would make them think it is a kind of image of crazy people. Just think the stigma is attached to it and nothing can be done to remove the stigma."

As can be seen, all respondents who replied on this issue welcomed the proposal to extend the disregard provision. The majority of these respondents are children's organisations. The main reasons they offered in support of an extended disregard are to mitigate stigma and increase life opportunities. The responses cited instances when a person may have to make such a declaration include: for insurance, driving purposes, travel, employment, education and for jury service.

3.2 The Bill – as introduced

The Mental Capacity Bill²³ and its accompanying Explanatory and Financial Memorandum²⁴ were introduced to the Northern Ireland Assembly in June 2015.²⁵

The Bill will mean a number of significant changes of relevance to this paper, namely:

- The Bill is not written to give certain people powers to intervene in a person's life (as is the case in the MHO), rather it is written to put in place certain procedures that have to be followed in order to protect the person intervening from civil and criminal liability.²⁶
- The Bill will revoke the MHO and it will no longer apply to those over 16. Any decisions regarding the detention or compulsory assessment or treatment of

²³ Mental Capacity Bill, [as introduced]. Available online at: <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity---as-introduced.pdf> Website accessed 21.10.15.

²⁴ Mental Capacity Bill: Explanatory and Financial Memorandum. Available online at: <http://www.niassembly.gov.uk/globalassets/documents/legislation/bills/executive-bills/session-2014-2015/mental-capacity/mental-capacity-bill---efm---as-introduced.pdf> Website accessed 16.10.15.

²⁵ NI Assembly: Mental Capacity Bill. Available online at: <http://www.niassembly.gov.uk/assembly-business/legislation/primary-legislation-current-bills/mental-capacity-bill/> Website accessed 26.10.15.

²⁶ The effect of not complying with the safeguards means the person intervening cannot rely on the legal protection under Part 2 of the Bill and could be held liable for the act.

persons with mental disorder aged 16 or over will be governed by the provisions of the Bill, not the MHO.²⁷

- The Bill will also apply to a small number of children under 16 who require compulsory assessment or treatment of a mental disorder. Clause 255 and Schedule 8 of the Bill restricts and amends the application of the MHO – as an interim measure, solely to children under 16, who require assessment or treatment for a mental disorder.²⁸ Schedule 8 also makes provision for additional safeguards for children in the MHO, such as independent advocates and age appropriate accommodation.²⁹ Schedule 8 has not included an amendment to extend the disregard provision to treatment.
- For those over 16, a disregard provision for detention is contained within Part 2 of the Bill in Clause 59 (See Appendix 2).³⁰ Like those under 16, this has not been extended to include detention for treatment (i.e. a Schedule 1 detention). Any Schedule 2 (short-term) detention still does not have to be disclosed, save for legal proceedings, which is in keeping with the MHO. Any detention must be authorised and certain safeguards met.
 - Schedule 1 of the Bill deals with the authorisation of serious interventions - such as a detention to enable a child or adult to receive treatment. Certain criteria to authorise treatment that must be satisfied.³¹ Any detention must be decided by a Trust Panel and can last up to 6 months unless revoked. Schedule 1 also makes provision for interim authorisations.³²
 - Schedule 2 deals with authorisations of short-term detentions - that is, an examination of a child or adult in hospital.³³ Such detentions may be authorised via a report by an appropriate healthcare professional.³⁴ Schedule 2 outlines the criteria that must be satisfied.³⁵ Authorisations

²⁷ DHSSPS (May 2014) Draft Mental Capacity Bill (NI) Consultation Document, Available online at: http://www.dhsspsni.gov.uk/mental_capacity_bill_consultation_paper.pdf p14. Website accessed 12.10.15.

²⁸ The DHSSPS advocate that it is not possible to assess capacity in children in the same way as adults because of their developmental stage. As a result, the capacity test criteria applied to those over 16 will not be used.

²⁹ Mental Capacity Bill as introduced, Schedule 8: Amendments of Mental Health Order, pp207-221.

³⁰ Mental Capacity Bill, [as introduced], Part 2, Clause 59; Disregard of certain detention, p32.

³¹ Schedule 1 Treatment Criteria to be met:

- (a) that P lacks capacity in relation to the treatment;
- (b) that it would be in P's best interests to have the treatment; and
- (c) if P's nominated person has reasonably objected to the proposal to provide the treatment and has not withdrawn that objection, that the prevention of serious harm condition is met. The prevention of serious harm condition is—
 - (a) that failure to provide the treatment to P would create a risk of serious harm to P or of serious physical harm to other persons; and
 - (b) that carrying out the treatment would be a proportionate response to (i) the likelihood of harm to P, or of physical harm to other persons; and (ii) the seriousness of the harm concerned.

³² These can last up to 28 days.

³³ Mental Capacity Bill (2015) Schedule 2. Authorisation of short-term detention in hospital for examination, p170.

³⁴ For example, an approved Social Worker or a relevant person designated by the managing authority of the hospital.

³⁵ Schedule 2: Criteria for authorisation of detention for examination are:

- (a) P has an illness or there is reason to suspect that P has an illness;
- (b) failure to detain P in a hospital in circumstances amounting to a deprivation of liberty, for the purposes of examination or of examination followed by other treatment or care, would create a risk of serious harm to P or of serious physical harm to others;
- (c) detaining P in the hospital in circumstances amounting to a deprivation of liberty, for those purposes, would be a proportionate response to: (i) the likelihood of harm to P, or of physical harm to other persons; and (ii) the seriousness of the harm concerned;
- (d) P lacks capacity in relation to whether he or she should be so detained; and

under Schedule 2 can last up to 28 days (this was previously 14 days under the MHO, but has been extended to address fluctuating capacity).

The EFM states that Clause 59 is the equivalent of Article 10 of the MHO.³⁶ It also states that it:

*...applies to any person who has been detained in circumstances amounting to a **deprivation of liberty** under the Bill **apart from under Schedule 1** (in other words short-term detention for examination of an illness only) and does not subsequently become liable to be detained in hospital under that Schedule. In such cases, the effect of the clause is that the detention does not have to be disclosed where information is being sought about the person's previous health other than in judicial proceedings. The detention or failure to disclose it can also not be used as grounds for dismissing or excluding the person from any office etc. or prejudicing the person in any way in any occupation or employment. Any disqualification, disability, prohibition or penalty relating to the fact that P* has been liable to be detained under the Bill also does not apply.³⁷*

[*P refers to the person lacking capacity to make a decision]

Table 2 summarises how the disregard provision for declaring a previous detention will apply in the new Mental Capacity Bill and the MHO.

Table 2. Disregard provision for under and over 16s (MHO and Mental Capacity Bill)

Children under 16 - Article 10 Mental Health Order (MHO)		
Type of detention	Purpose of detention	Need to disclose?
Assessment	Relates to a mental disorder (Article 9)	No. Does not have to be disclosed – except for legal proceedings if it is not followed by a period of detention for treatment under Article 12.
Treatment	Relates to a mental illness, or severe mental impairment. (Article 12)	Possibly may have to be disclosed, if asked for in the future. This has not been extended under Schedule 8 of MC Bill.

Persons over 16 - Clause 59 Mental Capacity Bill		
Type of detention	Purpose of detention	Need to disclose?
Assessment	Relates to examination of any illness (short term Schedule 2 detention).	No. Does not have to be disclosed – except for legal proceedings.
Treatment	Detention relates to long term detentions/deprivation of liberty concerning treatment (Schedule 1 detention).	Possibly. A Schedule 1 detention may have to be disclosed if asked for in the future.

(e) it would be in P's best interests for him or her to be so detained.

³⁶ Mental Capacity Bill, EFM, p23.

³⁷ Mental Capacity Bill, EFM, p23.

4. Ad Hoc Joint Committee Evidence

On the 5 October, 2015, the Ad Hoc Joint Committee on the Mental Capacity Bill took evidence from a number of witnesses³⁸ on the disregard issue.³⁹ Witnesses re-iterated their concerns that not extending the disregard provision in the MHO could give rise to stigma and possible restrictions on an individual's life opportunities, especially for young people.

One witness gave the example of a young person who is detained for treatment and makes an application to the Mental Health Review Tribunal. If they win the case, or are re-graded to 'voluntary' patient status, they will still need to declare the previous detention for treatment. The witness went on to highlight that if someone is detained for a short period of treatment, they are obliged to declare it. *"It is very unfair for someone who is detained for treatment for a week or two weeks to be stuck with that obligation for years. It is not a criminal conviction."*⁴⁰

Witnesses also spoke of the difficulties where a disclosure is required, for example for immigration or visa purposes. As these are not within the legislative competence of the Northern Ireland Assembly, they cannot be changed and are somewhat outside of this debate:

*"My understanding is that the Department is looking at its legislative competence in terms of the disregard provision because, obviously, we will not have control over some of the legislation that it applies to, such as US immigration legislation. That may be an issue, but NICCY certainly urges the Department to introduce the legislation as far as the legislative competence of the Assembly extends. In relation to insurance purposes, driving and anything that we have control over, we absolutely should do it."*⁴¹

When asked about the disregard provision, the DHSSPS responded in the evidence session by highlighting the complexities surrounding the disregard provision, and, given that the fused approach of the Bill is pioneering, there might be unforeseen consequences:

*"It is not as straightforward an issue as we would all maybe like it to be. We reflected in the consultation report that we would look at it....At the moment, it applies to detention for assessment, which is why the criteria are mental illness and risk to others or self. However, it seemed to us that there might be a question around having a special rule beyond that detention for assessment where there is no equivalent special rule, such as where a child is being treated for a very serious **physical** condition on a long-term basis, for example. We think that it is something*

³⁸ Children's Law Centre, NICCY, Northern Ireland Human Rights Commission, DHSSPS.

³⁹ NI Assembly Official Report (5 October 2015) Mental Capacity Bill: Part 12. Available online at: <http://data.niassembly.gov.uk/HansardXml/committee-15219.pdf> Website accessed 20.10.15.

⁴⁰ Children's Law Centre: NI Assembly Official Report (5 October 2015) Mental Capacity Bill: Part 12. Available online at: <http://data.niassembly.gov.uk/HansardXml/committee-15219.pdf> Website accessed 20.10.15. p9.

⁴¹ NICCY: NI Assembly Official Report (5 October 2015) Mental Capacity Bill: Part 12. Available online at: <http://data.niassembly.gov.uk/HansardXml/committee-15219.pdf> Website accessed 20.10.15. p9.

that needs to be thought about very carefully, and we need to be clear about what the impact might be on the ground. We can see the strength of the arguments that are being put forward by the stakeholders, but we would want to be very clear about the consequences of doing this and providing for something of this nature. For us, the initial thinking was around the equivalence of not requiring one set to disclose information but requiring it of another. That would be one situation. It is about whether that would actually be legal.”⁴²

5. Why did the DHSSPS not include an extension of the disregard provision for under 16s?

To gain a better insight of the DHSSPS’s perspective and its decision not to extend the disregard provision, the researcher met with Departmental Officials on 14 October 2015. The following is a summary of the salient points from that meeting.

The DHSSPS did as it proposed; it considered an extension of the disregard provision for under 16s. As part of its deliberations, the DHSSPS sought legal advice on the issue.

That advice recommended that an extension of the disregard provision was within the legislative competence of the NI Assembly. It also stated that the DHSSPS should proceed with caution on this matter, following consultation with medical experts.

However, consultation with medical experts has given rise to more questions than answers which, together with the legal advice, have made the DHSSPS reluctant to extend the disregard at present. Some of those issues include:

- Possibility of “unintended consequences” e.g. in terms of risks to the individual and to others if the detention is disregarded.
- A lack of clarity about what life chances that are being limited i.e. when does detention actually have to be disclosed and when would it be relevant?
- There are no special rules for those with serious long term physical conditions and what impact, if any, does the Disability Discrimination Act 1995 have on the issue?
- Could an extension of the disregard provision have the perverse effect of perpetuating stigma rather than reducing it?⁴³

6. Possible Impact

There is no doubt that there is a strong social stigma surrounding mental ill health. Importantly, in terms of an impact on an individual, disclosing a previous period of detention, although stigmatising, does not necessarily mean that a positive outcome (say a job offer or placement) is not achieved. Conversely, there may additional impacts, such as increased insurance premiums e.g. for life or health insurance. In

⁴² DHSSPS NI Assembly Official Report (5 October 2015) Mental Capacity Bill: Part 12. Available online at: <http://data.niassembly.gov.uk/HansardXml/committee-15219.pdf> Website accessed 20.10.15. p18.

⁴³ Meeting of author and DHSSPS Officials.

sum, each situation and circumstance is different and has to be considered on a case by case basis.

It is also important to highlight that health questions today are less likely to ask a specific question about 'detention for treatment' or 'detention for assessment' under the MHO. Rather, health related questions tend to be phrased more generally around whether the person has suffered from mental ill health in some form or another. This may or may not lead on to questions about detention, treatment and so forth.

In addition, the following points must be borne in mind:

- The MHO predates significant advances in the law in terms of equality, employment and anti-discrimination protections.
- Health professionals also have a duty of confidentiality in that they should not disclose information about a patient without their consent (e.g. when completing medical questionnaires).⁴⁴

7. What types of disclosures are / are not required?

It is not possible to present every possible scenario when a disclosure for detention for treatment under the MHO would have a negative impact on a young person's life. However, a number of organisations have been contacted for the purposes of this paper to help clarify the types of circumstances where a disclosure may be required.

7.1 Examples where a disclosure is not required:

The following do not require a disclosure about a previous detention for treatment under the MHO:

Driver and Vehicle Agency

The Driver and Vehicle Agency (DVA) have stated that there is **no requirement** to be informed that an applicant has been detained under the MHO.⁴⁵

*There is **no requirement** for DVA to be informed that an applicant for, or holder of, a driving licence has been detained under the Mental Health Order or Act. However, all applicants for, and holders of licences are required to inform the Department if they suffer from (or have suffered from at any time) a relevant or prospective disability which may affect their ability to drive a motor vehicle safely. Where such a declaration is made, DVA (in conjunction with the Department's medical advisors, the Occupational Health Service) may conduct medical enquiries, and may require the applicant to provide details of previous medical treatment. Declaration of a MHO Detention Order is not, however, specifically required.*

Jury Service

The NI Courts Service has also stated that that there is **no requirement** to be informed that an applicant has been detained under the MHO (see table in Appendix 3).⁴⁶

⁴⁴ Exceptions include for legal proceedings or public interest cases.

⁴⁵ Personal correspondence with author and S. Monaghan, DVA. Response dated 13.10.15.

*Jurors are **not asked** if they have been detained for assessment or detained for treatment for a mental disorder/illness. If a juror discloses he/she believes he/she is unfit to attend for juror service the juror will be asked to submit a letter from his/her medical practitioner advising they are unfit to attend for jury service (the medical practitioner is not required to outline the nature of the illness) – this applies for any reason a medical practitioner believes the juror is unfit, and not solely for mental health reasons. The juror would then be excused.*

Admission to academic courses

Neither of the Universities in Northern Ireland ask specifically about detention under the MHO. The following response was received from the Head of Admissions at Queen's University Belfast.⁴⁷

*I can confirm that while applicants are asked to disclose disabilities, medical conditions or special requirements, **this specific question is not asked**. Applicants who do disclose are considered on the basis of the normal academic criteria and, if made an offer, are provided with a questionnaire to complete and return to Disability Services. This is primarily to ensure support requirements are in place but, if it is considered necessary, a risk assessment may be undertaken. In addition, Nursing and Dentistry students are required to complete a medical questionnaire and/or attend for a medical with Occupational Health*

The response from the Director of Student Administration at the University of Ulster also stated⁴⁸:

***"We do not ask specifically if an applicant has had a period of detention for a mental illness/disorder in the past.** Applicants are asked to declare on the application form if they have a disability and depending on the answer and nature of the disability, systems are put in place to assist them during their time at University, once they are formally registered students. In addition some courses in subjects allied to Medicine, students are required to have a health check prior to enrolment on the course."*

7.2 Examples where a disclosure may be required

It is important to highlight that legitimate reasons also exist for disclosing a previous detention, but again, the exact circumstances when this is asked for, when it is relevant and how this is asked for are not clear.

A disclosure is especially important where a "risk to others" needs to be taken into account. This *might* arise if:

- A person (and their family members) is applying for adoption, child-minding;
- A person is involved or working with vulnerable adults;
- Those working in health and social care roles, teachers, police;
- Drivers of heavy good vehicles, lorries or buses⁴⁹;
- Becoming a member of a professional body – e.g. Chartered Institutes;
- A person wishes to apply to possess a firearm.

⁴⁶ Personal Correspondence with author and A. McCann, Belfast Crown Court. Response dated 15.10.15.

⁴⁷ Personal Correspondence with author and QUB Head of Admissions, J. Dwyer. Response dated 27.10.15

⁴⁸ Personal Correspondence with author and UU Director of Student Administration, R. Wasson. Response dated 28.10.15

⁴⁹ Medical questionnaires for Lorry and Bus licence holders <http://www.nidirect.gov.uk/medical-questionnaires-for-lorry-and-bus-licence-holders>

Employment

In terms of employment, prospective employers should only seek information from job applicants and employees about their health when they have good reasons for doing so. According to the Equality Commission website, it is good practice not to include questions about job applicants' health or medical history in the application form.⁵⁰ However, certain professions may require that once a person has been offered a job, medical checks/assessments or other checks will be carried out. Such checks may be conducted by AccessNI, which is a criminal records disclosure service.⁵¹ They do not hold criminal records themselves, but will:

“...do a preliminary search, which may need to be forwarded to a 3rd party (UK police or PSNI) for more searches to be carried out. When the searches are complete, whatever information is disclosed by the 3rd party; would be printed on the disclosure.

*If a person has committed an offence and the disposal was that they were detained under Article 10 of the Mental Health Order (1986) then this could be recorded on the Police National Computer and would be routinely disclosed on the disclosure (AccessNI) certificate, subject to filtering. Should the police have intelligence that a person was detained under this Order [MHO], which is not linked to a conviction, they **may consider disclosing the information if they believe it to be relevant and ought to be disclosed in accordance to the position applied** for on the disclosure certificate. However there is a quality assurance framework and statutory guidance that the information would have to be passed through before a decision to disclose would be made.”⁵²*

The PSNI has also confirmed that it is an extremely rare occurrence for the police to disclose information relating to an individual's detention (if they know about it) if not linked to a criminal act.⁵³

Firearms Certificate

It is illegal to own a firearm or ammunition in Northern Ireland without permission from the police.⁵⁴ People wishing to possess a firearm must apply for a certificate from the PSNI. All applicants must give permission on the application form to the police to obtain factual medical history. One question on the form which is time limited, and may impact on the disregard provision is: *“Have you attended a medical professional in the*

⁵⁰ Equality Commission for NI website. Medical questionnaires and assessments. Available online at: <http://www.equalityni.org/Employers-Service-Providers/Small-Business/Hiring-new-staff/Hiring-staff-Factors/Medical-questionnaires-assessments>

⁵¹ Access NI. Available online at: <http://www.nidirect.gov.uk/accessni-criminal-record-checks>

⁵² Personal Correspondence with author and M Campbell, AccessNI. Response dated 30.10.15

⁵³ Personal Correspondence with author and PSNI Officer on 3.11.15.

⁵⁴ PSNI Website: Firearm certificate. Available online at: http://www.psni.police.uk/firearm_certificate

last 5 years for treatment of depression or any other kind of mental or nervous disorder?”⁵⁵

8. What happens in neighbouring jurisdictions?

In their evidence session with the Ad Hoc Joint Committee in October 2015, DHSSPS Officials stated that:

- The disregard provision in respect of assessment (for both adults and children) is a unique safeguard to Northern Ireland, which already goes beyond what happens in other nearby jurisdictions.
- The disregard provision does not exist anywhere else in the United Kingdom or Republic of Ireland. However, it is not comparing like with like; legislation in England, Wales and Scotland has separate mental health and mental capacity legislation; hence the fused approach of the Mental Capacity Bill and the amended MHO for under 16s in Northern Ireland is not directly comparable.⁵⁶

The researcher also contacted nearby jurisdictions to confirm that a disregard provision is not included in their laws. Unfortunately given the timeframe for this paper, these responses are still outstanding.

9. Conclusion

- The DHSSPS has considered extending the disregard provision of the MHO to include not only detention for assessment, but detention for treatment for children under 16.
- This is a complex issue and the DHSSPS has decided not to extend the provision in the Bill - largely due to a number of unanswered questions and the potential for “unintended consequences”.
- Nearby jurisdictions do not have a similar disregard provision in place. Part of the difficulty is that legislation elsewhere is contained in separate Acts and not directly comparable. Perhaps they have not included any sort of disregard for reasons linked to safeguarding others.
- A key issue is that disclosure of information relating to mental ill health may be asked for in different ways. This paper has highlighted some examples where individuals may, or may not, need to declare or disclose such information.
- It is apparent that a balance needs to be struck in terms of reducing stigma and protecting others, but this is difficult given the fused nature of the Bill and the unique circumstances of the MHO which will still apply to under 16s.

⁵⁵ PSNI Website: Form 30-1 Application for a firearm certificate. [Form 30-1: Application for a firearm certificate](http://www.psni.police.uk/8730-0-form_30-1_-_application_for_a_firearm_certificate_1_.pdf) Question A16. Available online at: http://www.psni.police.uk/8730-0-form_30-1_-_application_for_a_firearm_certificate_1_.pdf

⁵⁶ DHSSPS: NI Assembly Official Report (5 October 2015) Mental Capacity Bill: Part 12. Available online at: <http://data.niassembly.gov.uk/HansardXml/committee-15219.pdf> Website accessed 20.10.15. p19.

Appendix 1: Mental Health (Northern Ireland) Order (1986): Article 10

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 thereunder,

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.

Appendix 2 Mental Capacity Bill: Clause 59; Disregard of certain detention

59. (1) In this section a “person who has been subject to short-term detention” means a person who—

- (a) for any period, has been detained under this Part in a hospital in circumstances amounting to a deprivation of liberty other than under an authorisation under Schedule 1; and
- (b) at the end of that period, did not become liable to be detained in a hospital in circumstances amounting to a deprivation of liberty under an authorisation under Schedule 1.

(2) In this section “the relevant detention” means the detention mentioned in subsection (1)(a).

(3) Where a question seeking information with respect to the previous health or circumstances of a person who has been subject to short-term detention is put to that or any other person, otherwise than in judicial proceedings—

- (a) the question is to be treated as not relating to the relevant detention and the answer may be framed accordingly; and
- (b) the person questioned is not to be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose the relevant detention in answering the question.

(4) An obligation imposed on a person (“A”) by any rule of law or by the provisions of any agreement or arrangement to disclose any matters does not extend to requiring disclosure of the relevant detention of a person who has been subject to short-term detention (whether A or another person).

(5) The fact that a person who has been subject to short-term detention has been subject to the relevant detention, or any failure to disclose that fact, is not a proper ground for dismissing or excluding the person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

(6) Any disqualification, disability, prohibition or other penalty which, by virtue of any rule of law or statutory provision other than this Act, attaches to or is imposed on any person by reason of the fact that the person has been liable to be detained in circumstances amounting to a deprivation of liberty under this Act is not to attach to a person merely because he or she is a person who has been subject to short-term detention.

(7) In subsection (3) “judicial proceedings” includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person that has 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 under the agreement, 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.

Appendix 3: Persons ineligible for Jury Service (NI)

SECTION B PERSONS INELIGIBLE FOR JURY SERVICE
PERSONS CONCERNED WITH THE ADMINISTRATION OF JUSTICE
Persons holding or who have at any time held any paid, judicial or other office belonging to any court of justice in Northern Ireland.
Lay Magistrates.
The Chairman or President, the Vice-Chairman or Vice-President and the registrar and assistant registrar of any Tribunal.
Barristers at law and solicitors whether or not in actual practice as such.
Solicitors' clerks.
Students of the Inn of Court of Northern Ireland or of the Law Society of Northern Ireland.
The Director of Public Prosecutions for Northern Ireland, the Deputy Director of Public Prosecutions for Northern Ireland and the members of staff of the Public Prosecution Service for Northern Ireland.
The Chief Inspector of Criminal Justice in Northern Ireland and members of his staff.
Officers of the Northern Ireland Office or of the Ministry of Justice.
Officers of the Department of Justice.
Court Security Officers.
Governors, chaplains and other officers of, and members of independent monitoring boards for, the following establishments -
(a) a prison within the meaning of the Prison Act (Northern Ireland) 1953;
(b) a juvenile justice centre or attendance centre within the meaning of the Criminal Justice (Children) (Northern Ireland) Order 1998; or
(c) a remand centre or young offenders centre within the meaning of the Treatment of Offenders Act (Northern Ireland) 1968
The warden or a member of the staff of a bail hostel as defined in article 2(2) of the Probation Board (Northern Ireland) Order 1982.
Members of the Probation Board for Northern Ireland.
Probation Officers and persons appointed to assist them.
A person appointed for the purposes of Article 7(6) of the Treatment of Offenders (Northern Ireland) Order 1976.
Police Officers and any other person employed in any capacity by virtue of which he has the powers and privileges of a constable.
Members and Staff of the Policing Board.
The Police Ombudsman for Northern Ireland and persons employed by him.
Persons in charge of, or employed in, forensic science laboratory.
Prisoner custody officers within the meaning of section 122(1) of the Criminal Justice and Public Order Act 1994.
Members and employees of the Criminal Cases Review Commission.
Persons who at any time within the past ten years have been persons falling within any of the foregoing descriptions (except the first) of persons concerned with the administration of justice.
THE FORCES
Persons serving on full pay as members of any of the naval, military or air forces of the Crown raised in the United Kingdom.
Members of the Royal Irish Regiment.
OTHER PERSONS
Persons suffering from mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986.
Persons unable to understand the English Language.