



80/90 North Street
Belfast
BT1 1LD

Tel: 028 9026 2400
Email: consultation@pbni.gsi.gov.uk
Web: www.pbni.org.uk

 twitter.com/PBNINews

Date 3rd July 2015

Cheryl Lamont, Director of Probation

The Committee Clerk
Room 144
Parliament Buildings
Stormont Estate
Belfast
BT4 3XX

Reply sent via mentalcapacitybill@niassembly.gov.uk

RE THE MENTAL CAPACITY BILL

The Probation Board for Northern Ireland (PBNI) wishes to thank the Ad Hoc Joint Committee for the opportunity to respond to the development of this Bill. PBNI would also welcome the opportunity to contribute further to the development of the Code of Practice, as this relates to those sections of the Bill (relevant to criminal justice), and, in particular, the statutory functions of PBNI, as well as on any relevant paperwork on the Subsidiary Legislation. PBNI has been represented on various working groups relevant to the development of this Bill, including those established on the foot of the Bamford Review and Lord Bradley's report.

PBNI's responses are based on PBNI's statutory role and functions within Northern Ireland's criminal justice system, including the provision of Pre-Sentence Reports, as well as the organisation's experience of cases where the defendant has been assessed as Unfit to Plead, and thus as lacking in capacity. Please find attached (Appendix 1) for your consideration comments from the Probation Board for Northern Ireland in respect of the earlier consultation on the draft Bill, including further comment which we assess to be relevant at this stage.

In conclusion, PBNI would once again like to thank the Ad Hoc Joint Committee for the opportunity to comment on the Mental Capacity Bill. PBNI welcomes the draft legislation and looks forward to the opportunity to assist the Department in the development of the Code of Practice and any further resources that may be required to support effective implementation.

Appendix 1

Edited extract from Probation Board for Northern Ireland's response 'RE PROPOSALS FOR NEW MENTAL CAPACITY LEGISLATION – PUBLIC CONSULTATION 2014' dated 5th September 2014:

Principles Base

It is PBNI's position that the Draft Mental Capacity Bill (the Bill) provides a progressive and comprehensive framework with regard to the issue of capacity and how this will be dealt with, in order that a culture of respect is engendered and the principle of personal autonomy is upheld. This includes the provision of comprehensive safeguarding, to ensure, as far as possible, that in cases where a person is considered to be lacking capacity, decisions are taken that are in his/her best interests. However, it is PBNI's view that the development of the Code of Practice to accompany the Bill, will be crucial to ensuring that there is the necessary clarity and consistency of approach underpinning decision making at all levels, as it pertains to the Bill.

The Bill addresses the discrimination implicit in separate Mental Health Legislation, by bringing together all decision making into the same legislative framework, which is welcomed by PBNI.

Name of Legislation

PBNI proposes that the legislation should be called 'the Capacity Bill', and as such, that the word 'mental' is removed from the title. We note that at *Part 14* of the Bill 'The Mental Health Review Tribunal for Northern Ireland constituted under Article 70 of the Mental Health Order is renamed the Review Tribunal.'

Children

With regard to children and young people, PBNI considers that whilst there may be some positives to retaining the current legislation for under 16 year olds, there is a need to address the capacity issues relating to children under the age of 16. Therefore, PBNI welcome the acknowledgement that this will occur, but are concerned about the likely time frame for any such developments.

It is of particular concern that children under the age of 16 remain subject to the Mental Health Order. The proposed amendments to the MHO, in particular the Best Interest Principle and the use of advocacy, are welcomed by PBNI.

It is proposed that the Bill could readily apply to children over the age of 14 and as such include more children within the current framework.

Formal Assessment of Capacity

PBNI proposes that the Code of Practice, and any relevant subsidiary legislation, should indicate that practitioner psychologists are 'suitably qualified' to complete an assessment of capacity, and to produce a 'Statement of Incapacity'. However, PBNI do not consider that its' Social Work qualified staff should undertake such an assessment of capacity.

Criminal Justice Policy: Courts and Sentencing

The PBNI supports the three key positions proposed at 4.11 of the consultation document:

- i. A fully capacity-based approach to care, treatment and personal welfare in respect of persons subject to the criminal justice system;
- ii. The removal of potentially stigmatising references in legislation to "mental disorder"; and
- iii. Reflecting those positions in criminal justice legislation.

Given that there are an expanded range of healthcare based options to provide courts with flexibility, PBNI anticipate that some of these will have important and significant implications for PBNI's role in assessing clients at the Pre-Sentence stage, as well as in the supervision of clients post-sentence. Specifically, where Restriction Orders, Protection Orders and Community Residence Orders are concerned, PBNI would welcome greater clarity as to the possible role, if any, for PBNI with regard to the management and enforcement of these disposals. Where appropriate, PBNI would also welcome the opportunity to contribute to the further development of these disposals, as well as to the accompanying Code of Practice.

Furthermore, PBNI is concerned about the proposals laid out at 4.49-4.63 of the consultation document in relation to "unfitness to plead". PBNI is interested to consider how other disposals can be made more robust; for example, that a Restriction Order could be used in conjunction with a Protection Order, to require a specific place of residence and attendance for treatment. PBNI welcomes the detailed approach in the Bill to Public Protection Orders with and without restrictions (*Pt. 10 Ch 2 through 6*).

With regard to the particular issue of Supervision and Treatment Orders (STO), it is PBNI's position that it is increasingly the case that STOs are being considered as appropriate disposals in cases where there does not appear to be clearly defined treatment needs. Whilst client consent is not a prerequisite for such an order being made, some level of motivation to engage is necessary for any such order to be practically workable. Furthermore, in the event that a client is reluctant or refuses to engage, there is no mechanism in place by which a client may be compelled to engage, or, alternatively, for the STO to be returned to Court. This has obvious implications not only for the protection of the public in the case of clients who are considered to be high risk, but also with respect to the client's assessed treatment needs remaining unmet. It is therefore considered that the Draft Bill represents an opportunity, along with the development of the Code of Practice, for both the mechanism by which STOs are made, as well as the Orders themselves, to be evaluated and further developed as necessary.