Northern Ireland
Assembly

COMMITTEE FOR JUSTICE

OFFICIAL REPORT
(Hansard)

Departmental Briefing on Mental Health (Northern Ireland) Order 1986

2 September 2010

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Lord Morrow (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Tom Elliott
Mr Paul Givan
Mr Conall McDevitt
Mr Alban Maginness
Mr John O'Dowd

Witnesses:
Ms Maura Campbell)
Mr Tom Haire) Department of Justice
Mr Gareth Johnston)

Dr Maura Briscoe) Department of Health, Social Services and Public Safety

The Chairperson (Lord Morrow):

We have with us today Mr Gareth Johnston, who is the head of the justice strategy division; Maura Campbell, who is the deputy director of criminal justice development; Tom Haire, from the criminal law branch in the Department of Justice; and Dr Maura Briscoe, who is the director of mental health and disability policy in the Department of Health, Social Services and Public Safety (DHSSPS). You are all very welcome. I know that it is not the first Committee meeting for some of you. It is certainly not your first meeting, Mr Johnston. I will hand over to you to

begin your presentation, and then perhaps you will be prepared to take questions at the end.

Mr Gareth Johnston (Department of Justice):

Thank you, Chairman, for the opportunity to brief the Committee on the legislative implications of the McDermott case. The Minister very much recognises the hurt and anguish that that disturbing and exceptional case has brought to bear on the victims and the wider Donagh community. However, we are pleased to present our proposals as they stand today and to take on board the Committee's comments.

If the Committee is content, I will say a few words to give you, first, some background information on the McDermott case, all of which is already in the public domain; secondly, to outline the key legislative issues that have arisen; thirdly, to relay our assessment of the legislative implications; and, finally, to set out what I hope will be our way forward in both the short and the longer term.

I must stress that there is a limit to what we will be able to discuss on the specifics of the case and the clinicians' assessments, which are matters for independent prosecuting authorities, for the courts and for the health and social care professionals who are engaged in treating two of the McDermott brothers. However, we will, of course, try to be as helpful as possible to the Committee.

The Committee will be aware that two of the four McDermott brothers accused of a litany of sexual offences were found by the judge to be unfit to plead, based primarily on evidence from the clinicians who had assessed them. The jury had concluded that the two brothers had committed the offences, but, given the finding of unfitness to plead, rather than impose a criminal conviction, under the Mental Health (Northern Ireland) Order 1986, the judge was then presented with four disposal options. Those were: (a) a hospital order; (b) a guardianship order; (c) a supervision and treatment order; or (d) an order for absolute discharge. Having dismissed absolute discharge as an option and having considered the medical evidence, the judge doubted that the criteria were met for awarding either a hospital order or a guardianship order and he concluded, therefore, that the supervision and treatment order was the most suitable means of dealing with the cases.

Under a supervision and treatment order, the person who has committed the act is put under

the supervision of a social worker or a probation officer and is obliged to undergo treatment with a view to improvement in his or her mental condition. It is not a criminal conviction. The judge explained that the supervision and treatment order would last for the maximum available time of two years, but he stated:

"I would have preferred to make the order for longer but the legislation does not allow for any longer period".

Having said that, the judge also made sexual offences prevention orders prohibiting the brothers from access to children and required them to sign the sex offender register for five years.

Subsequent to the case, the Justice Minister met the victims and representatives to listen at first hand to the concerns that were being expressed. He later said that he believes that it is inevitable that there will be changes to the law and that he is determined that his officials:

"will work with health officials to ensure that we get the best possible solution."

The Minister was grateful for the Committee's helpful letter of 7 July on the legislative implications of the case. Although he is keen to address as expeditiously as possible the legislative concerns that we have all heard, he would like to emphasise that he is in full agreement with the Committee about ensuring that any resulting changes are robust and fit for purpose.

With regard to next steps, we propose to move ahead on three tracks, the first of which is addressing the concerns that were expressed by the judge, and have since been echoed by others, about the maximum period for a supervision and treatment order. Although incorporated into the 1986 Mental Health Order, the legislative powers to vary the maximum period of a supervision and treatment order rest with the Department of Justice. That is because the supervision and treatment order was inserted into the 1986 Mental Health Order by the Criminal Justice (Northern Ireland) Order 1996 specifically to allow community-based supervision and treatment of people who were deemed to be unfit to be tried, rather than detaining them in hospital when their mental condition did not merit that approach.

As part of our research into legislation and practice elsewhere, we have established that Northern Ireland's maximum supervision and treatment order period mirrors that for supervision orders in England and Wales — two years — but is shorter than the three-year maximum for supervision and treatment orders in Scotland and is also shorter than the three-year maximum for probation orders.

Although we have been advised that the Ministry of Justice in England and Wales has not felt

the need to increase its maximum period, Mr Ford is minded, as an interim measure, to align the maximum period for Northern Ireland's supervision and treatment order with that in Scotland, so putting it on a par with the maximum period for probation orders. With regard to the evidence base for taking that step, we know that probation and social services professionals would be content with such a change. The necessary subordinate legislation could be introduced this calendar year through a negative resolution procedure. We anticipate consulting and engaging with the Committee in the near future on that proposed extension. That is the first track of the way forward.

The second track is to consider the merits of a new arrangement — a renewable supervision and treatment order, whereby an initial supervision period is set by the sentencer and then periodically reviewed and reassessed by the court. Officials from the Department of Justice and DHSSPS are exploring that option. Such a mechanism could potentially offer the court a more flexible approach that could be tailored to the circumstances of the case and to the progress made by the person concerned in treatment. That option would require primary legislation on a longer timescale, and it would need very careful consideration to ensure that appropriate protections to the rights of supervised persons were in place.

We are still at an early stage of examining the idea of a renewable order, so I cannot say, at this stage, that it is definitely the right option. However, we will be working closely with DHSSPS officials on exploring its workability, taking account of the judgement of professionals in the field and its compatibility with other disposals and relevant legislation, including the legislation on mental capacity, equality and human rights.

Those two possible changes to the law — extending the maximum period of a supervision and treatment order and introducing a renewable supervision and treatment order — would go some way to addressing the concerns raised by the judge. However, for the avoidance of doubt, I should mention that, like most criminal court disposals, they could not be applied retrospectively.

The third track that we are proposing is a more fundamental review of the law's provisions on unfitness to be tried. That would partly draw on work that the Law Commission in England and Wales has undertaken recently. That area will be properly considered in the context of the single mental capacity (health, welfare and finance) Bill, the work programme for which is being led by the Department of Health, Social Services and Public Safety. The Bill should be introduced in

the Assembly in 2011-12. We are working to the general principle that the Bill will apply to those who are subject to the criminal justice system as well as the health system. The Department of Justice is working closely with the Department of Health, Social Services and Public Safety on issues relating to the criminal justice interface. That work will give due consideration to the arrangements for unfitness to be tried and will build on evidence from other jurisdictions. A short-life working group will shortly be set up to take forward that element of reviewing the unfitness to plead provisions.

I wish to briefly say something about joint working. I can confirm that the Health Minister and the Justice Minister are agreed on the direction in relation to the legislative implications of the McDermott case. They plan to consider further details and working structures at their bilateral meeting on 7 September. I should also emphasise to the Committee the importance of our work alongside officials from the Department of Health, Social Services and Public Safety, as evidenced by Maura Briscoe's presence here. The benefits to be derived from collaborative working include the ability to consult with health and social care professionals, whose expertise is very valuable in determining a way forward.

I will sum up my presentation. First, the Justice Minister is proposing to introduce early subordinate legislation to amend the maximum period for a supervision and treatment order. Secondly, alongside that, we are examining the case for the introduction of a renewable supervision and treatment order through a suitable primary legislative vehicle. Thirdly, we feel that the longer-term solution rests in the development of the proposed single mental capacity (health, welfare and finance) Bill, which the Department of Health, Social Services and Public Safety is leading on and which will involve a wider review of the unfitness to be tried provisions. As I said, the Justice Minister and the Health Minister are meeting next week to discuss the detailed arrangements. We are pleased, Chairperson, to have been given this opportunity to present our proposals, and we are happy to take on board the Committee's comments.

The Chairperson:

Thank you, Mr Johnston. You outlined the three steps that the Department is taking; one is fairly immediate, one is intermediate and one is long term. Will the proposed early subordinate legislation deal with situations such as the one that arose in this case, whereby two brothers were returned to a home that was right beside a children's play park. That issue caused a lot of concern. Will the subordinate legislation deal with that sort of scenario?

Mr Johnston:

It will apply in that sort of scenario. However, the existing law applies in that sort of scenario as well. There will be an opportunity —

The Chairperson:

You say that existing law deals with that.

Mr Johnston:

The existing law applies and the new law would apply. A residence requirement is one of the provisions that can be put in a supervision and treatment order. The court will consider all the evidence and what requirements should be put in the order. We propose to change the length of the order so that it can last for three years rather than just two years, which is the case at present. The judge specifically criticised that point.

The Chairperson:

How early will the early subordinate legislation be?

Mr Johnston:

Hopefully, it will be in place before Christmas.

Mr McDevitt:

I appreciate, Mr Johnston, that we have to be careful not to talk about the specifics of the case. However, as you said, it is a matter of public record that both brothers were assessed by clinicians and found unfit to plead, that they were found not to warrant hospital or guardianship orders and that they were described in the judgement as having mental conditions that are such that:

> "they require and may be susceptible to treatment."

That is a matter of record. As you have said, in providing a supervision and treatment order here in Northern Ireland the judge would, as I understand it, have had the option of imposing a residence requirement or could have included provision for treatment in a specified hospital or nursing home or provision for inpatient treatment. I am just curious as to why that was not the case in this case. Can you comment on that?

Mr Johnston:

In this case, the supervision and treatment order had a residence requirement in the sense that the defendants should reside at an address that was approved by the supervising officer. An assessment would have been made by those involved locally in the case of what made for suitable accommodation. It is important to bear in mind — again, this is in the public domain — that in the risk assessment the two brothers are assessed as just category 1 sex offenders. That is the lowest of the three categories — 1, 2, and 3. So, an assessment of all of those issues would have been made, but, yes, in the supervision and treatment order, there is the requirement that the supervising officer should approve the residence arrangements.

Mr McDevitt:

Under the legislation as it stands, the state has the power not to return those gentlemen to a house next door to a children's playground. The power existed to do that. I took a trip down to Donagh this summer when I happened to be in Fermanagh, because I thought that it might be useful to do so. How did it come to be that a judge, annoyed with not having more power and saying so on the record, ended up not being able to exercise the powers available to him to make sure that these gentlemen were not returned to a place where they clearly could, potentially, have been in very close contact with vulnerable children?

Mr Johnston:

There was that requirement that residence would be approved. As regards the actions that the judge took, a sexual offences prevention order was imposed on the brothers as well, the terms of which, again, are a matter of public record. It included conditions that they would not be in areas that were designated in a map attached to the order and that they would not have unsupervised access to, or any association with, any young person aged under 16. It also included various restrictions on voluntary or employment activity, as would be normal in such cases. I have to be careful because I cannot answer for judicial decisions, but I can say that the judge put in place a package of measures that were designed to manage the risk in this particular case.

Mr McDevitt:

Ultimately, if we analyse the situation, we can see that the real failure here is not a legislative one but a systems failure. I welcome the fact that Mr Ford has made himself busy and wants to extend the order to three years. I suspect that there will be broad support for that in this Committee — I do not know, but I suspect that there will be. However, what went wrong here

was nothing to do with what is on the statute book; it was, yet again, the system failing to put the safeguarding of children at the heart of everything it does.

The Chairperson:

Before Mr Johnston answers that, I will add that that is a very important and salient point. We were always of the opinion that there was a loophole, a gap, in the legislation. We now discover that there really was not a gap in the legislation; it was in the administration.

Mr Johnston:

The judge certainly referred to what he felt was a gap in the legislation in that he would have liked to have imposed a longer supervision and treatment order. As I said at the start of my evidence, there is information about the particular case that it would not be appropriate for me to go into. My colleagues may want to comment, but I again come back to the fact that assessments were made of the risk that these individuals posed. Those assessments would have taken account of the fact that, while there was an horrific litany of abuse — and let us not understate that — the most recent offences are now rather old. They would also have taken account of the management arrangements that were in place; obviously, the judge and the orders imposed requirements. It would have taken account of the whole picture.

I very much recognise and understand the concerns of the local community in Donagh, but any decisions that were made were made on the basis of professional advice and full reports. I recognise that the Committee might have concerns about the decisions, but a full process was gone through.

Ms Maura Campbell (Department of Justice):

The case raised two sets of legislative issues. First, the judge commented directly on the duration of the supervision and treatment order. Hopefully, that is an issue on which we can make some progress. The judge's other point was that, in this case, two types of order — a hospital order and a guardianship order — were not, in his view, available to him, and he felt that he could not impose hospitalisation because of the difference between the threshold for being unfit to be tried or to plead and the one to meet the criteria for a hospital or guardianship order. We need to explore that area with respect to medium- and long-term action on future legislation.

Mr McDevitt:

But that is not an area that the Minister has identified for exploration.

Mr Johnston:

It is. It would be part of the third strand of work, which will take a more fundamental look at matters.

Mr McDevitt:

That would be the single mental health Bill.

The next step in this unfortunate series of events relates not to a further statutory failing but to the voluntary admission of the gentlemen to a hospital in Derry, ending up in them being in a hospital in very inappropriate and unfortunate circumstances. Again, there is an issue around a systems failure in the proper safeguarding of children. It strikes me that, although we can identify potential legislative gaps, fundamentally, we are dealing with a cultural issue. It is a fact that the system, whether at the level of the clinicians who made the first evaluation, the judge who took a particular view as to what might have been within his jurisdiction or the supervising officers and others involved, failed to understand the consequences of the actions that they were about to authorise. It would not have taken a rocket scientist to figure out that the residence to which the gentlemen were being returned was inappropriate. It would not meet the standards in the new safeguarding legislation; indeed, it would certainly not meet common-sense child-protection standards anywhere. In justice and health, what is happening today at departmental level to begin to dive deeply into systemic issues that are still of concern?

Dr Maura Briscoe (Department of Health, Social Services and Public Safety):

Good afternoon, everyone. I assure you that the Western Health and Social Care Trust assures me that, prior to the brothers admitting themselves to hospital, pre-admission assessments were undertaken by appropriate clinicians and social workers, and further assessments have been undertaken since admission. I also assure you that there is a comprehensive plan in place, and this Department has sought the assurance of the Health and Social Care Board that the plan is appropriate to the circumstances of the case. It is a multi-faceted plan to deal with the many issues arising from the case in the community and, as you said, with respect to issues relating to child protection, vulnerable adults, survivors and community development. That cascade of information is encompassed in the Western Trust's plan, on which the Department, on behalf of

the Minister, has sought assurance, and that assurance has been given.

The Chairperson:

Have you had sight of those assessments?

Dr Briscoe:

No, I would not have sight of the clinical assessments.

Mr McDevitt:

The Western Trust's record in the past five years has, unfortunately, not been good. We have every reason to worry that yet another systemic failure has emerged.

Dr Briscoe:

I would not agree with that. Very early on, after the court pronouncement, the Department met the Western Trust, and it is in regular contact with the Western Trust and the board. I assure the Committee that a strategic group, which is chaired by Elaine Way, has been set up in the Western Trust along with a core multidisciplinary group. The solution is as much about sharing information, interface working, joint protocols between the police and the health sector, the involvement of social workers and GPs and the effect of all that on the community. A core group is leading that process, and it reports directly to the chief executive of the Western Trust. The board and the Department are in close contact on that.

Mr McDevitt:

The Minister of Justice met the survivors of Donagh. Has the Minister of Health, Social Services and Public Safety met them?

Dr Briscoe:

I was present along with —

Mr McDevitt:

Has the Health Minister met the survivors?

Dr Briscoe:

I am not aware that he has.

Mr Johnston:

The survivors requested the meeting with the Minister of Justice.

Mr McDevitt:

I understand that.

Dr Briscoe:

We have met other survivors in the Department of Health, Social Services and Public Safety separate from the Department of Justice.

Mr Elliott:

I have one difficulty with this issue. Although the judge was critical of some issues, I am more concerned about the public issues, because the public has to live in Donagh. In fairness, I would probably have taken the residents' advice rather than some of the clinical advice. However, we are where we are. Surely something could be done on the issue of whether they are allowed to stand trial. I have heard no mention of whether other options have been looked at to allow them to stand trial.

Mr Johnston:

We will certainly look at that under the third strand of work. Although they were judged unfit to stand trial, the jury assessed the facts of the situation and found that they did undertake the acts on the indictment. However, as part of the wider piece of work, we will certainly look at the whole gamut of circumstances in which people are unfit to be tried. The law on that goes back quite a few years. We will look at whether amendments could be made to those criteria and arrangements that would be useful in cases like this and elsewhere.

Mr Elliott:

Maura Campbell noted earlier that hospital or guardianship orders were not an option. Why was that?

Mr Johnston:

There are three requirements for a hospital order. First, there must be a mental illness or severe mental impairment. Secondly, it must warrant not only treatment but detention in hospital.

Thirdly, there is a requirement about medical treatments and a presumption that a person's condition will be susceptible to medical treatment.

In his judgement, the Crown Court judge said that he had considered the criteria on the advice from professionals and he had doubts that the criteria for a hospital order or a guardianship order had been met. He said that had those criteria been met, he would have had doubts whether he would be able to sustain someone and to keep them on one of those orders given the various appeal mechanisms that are open to individuals who are committed to hospital. Those are the requirements, but, on the advice of professionals, the judge felt that he could not stand over them in the current case. Again, we will be reviewing those requirements as part of the wider review of unfitness to plead.

Mr Elliott:

Could the judge have put in place a residence order? I need clarification on that, because it has been mentioned, but I am not sure whether the judge could have put a residence order in place.

Mr Johnston:

Residence requirements can be part of a supervision and treatment order. The residence requirement that was put in place was that the place of residence should be approved by the supervising officer, and that is what appears on the supervision and treatment order. However, yes, the supervision and treatment order has the scope to cover residence.

Mr Elliott:

There again, that could have been dealt with much better by the system not just by the judge. If the judge said that that had to be approved by social services, I assume, was it?

Mr Johnston:

The supervising officer.

Ms M Campbell:

It would have been the trust.

Mr Johnston:

Yes.

Mr Elliott:

In other words, could the trust have put more definitive residential criteria or recommendations into that?

Mr Johnston:

The trust has a range of options, on which Maura may want to comment, but what the trust did was based on the professional advice that it received.

Dr Briscoe:

Based on professional advice, the judge indicated that the treatment and management could be achieved in the community. My understanding is that the initial supervision and treatment order did not specify the residency but that has subsequently been respecified, so it is now clear that the supervising officer can approve or disapprove the residence of the individual concerned.

Mr Elliott:

Sorry, who?

Dr Briscoe:

The supervising officer who, in this case, is the social worker.

Mr Elliott:

Why was that not carried out under a stricter regime than was applied in this case? Why could they not have said that residence must be in a particular place but not here?

Dr Briscoe:

As I understand it, the supervision and treatment order that was issued initially did not specify the residency arrangements, but subsequently —

Mr Elliott:

I suggest that surely that came about only as a fault of the recommendation from the social worker.

Dr Briscoe:

It was not clear initially, but the supervision and treatment order has been reissued by the court to

make that clear.

Mr Elliott:

I am concerned that that supervision recommendation did not specify that they should not be returned to Donagh. However, as soon as the judge made his recommendations and the brothers were returned to Donagh, one of the first things that the trust tried to do — because the trust told me it was the only way it could do it — was to try to have the two brothers voluntarily remove themselves from the area. Did it realise that only after the event? Surely, it must have taken all that into consideration before it made the recommendation to the courts.

Dr Briscoe:

As I understand it, the opinion provided to the court was that the treatment and management of the individuals could be achieved in the community. That was the professional opinion given to the courts.

Mr Elliott:

So, did the trust change its mind when the court judgement was made? Clearly, it must have, because the first thing that it tried to do was remove the brothers from the community.

Dr Briscoe:

No. There was engagement between the individuals and the supervising officer. I am not privy to that engagement, but one must be clear that the brothers admitted themselves to hospital: each is a voluntary admission.

Mr Elliott:

I accept that, but my point is that, as soon as they were put back into the community of Donagh, the trust made efforts to remove them on a voluntary basis. One of the first things that the supervisory officers tried to do was to remove them from that community. I cannot understand why that could not have part of the recommendation in the first place.

Dr Briscoe:

I emphasise again that the brothers admitted themselves to hospital. It was not the case that the social worker removed them to hospital. The brothers admitted themselves to hospital.

Mr Elliott:

Would you not also accept that the trust's supervisory officer tried to encourage them to —

Dr Briscoe:

I do not wish to comment on that. I was not part of the interface on that discussion between the brothers and the supervising officer.

Mr Elliott:

It is public knowledge.

The Chairperson:

The thing that I find very difficult to understand, Dr Briscoe, is that this case is about two brothers who were unable or unfit to plead in court, but were quite capable of requesting that they be removed from position A to position B. I find that amazing. How did they have the capacity to do that?

Dr Briscoe:

Well, again, it comes down to clinical opinion regarding fitness to plead. Generally, fitness to plead — whether individuals would have the capacity to instruct solicitors, understand charges or participate in court proceedings — is determined by clinical judgement. However, just because an individual, potentially, has a learning disability and does not have the capacity in one scenario, does not mean that he or she does not have the capacity in another scenario. That, of course, is what the new mental capacity legislation is all about; decisions about an individual's capacity or non-capacity must be specific rather than generalised.

The Chairperson:

The bottom line is that all the stress and strain that was put on that local community was avoidable.

Dr Briscoe:

The clinical opinions that were provided were given by expert medical witnesses in evidence to the court. From memory, four clinical opinions were given, followed by social worker reports. One has to respect the judgement and expertise of the people who gave those four opinions and evidence to the court.

The Chairperson:

Those were the same four medical experts who said that it was appropriate and safe to place the brothers where they were placed.

Dr Briscoe:

The clinical opinion related to the assessment of the individuals.

The Chairperson:

Yes. I do not have a problem with that. However, it does not change anything.

Dr Briscoe:

The social workers' evidence to the court made it clear. The court was aware of the location of the home in Donagh in relation to the environment — the playing fields, the play group, and so on. As I understand it, the court was aware of those circumstances arising from the evidence given to it.

Mr O'Dowd:

I want to follow Mr Elliott's line of questioning. Under the revised supervision order, the supervising officer can designate where the brothers live. Is that correct?

Dr Briscoe:

The supervising officer is required to approve the residency of the individuals.

Mr O'Dowd:

Technically, the supervising officer could state that if the McDermott brothers choose to leave hospital, they cannot return to Donagh. If they have the option to approve residency, they also have the option not to approve it.

Mr Johnston:

They can decline to approve that.

Mr O'Dowd:

Therefore, that is now contained in the revised order.

Mr Johnston:

Yes.

Mr O'Dowd:

I am not sure whether I can go down the following line of questioning, but I will take guidance from the Chairperson. Were the McDermott brothers known to social services or the justice system prior to the most recent charges?

Dr Briscoe:

My understanding is that the McDermott brothers were not known to social services prior to 2008.

Mr O'Dowd:

There have clearly been decades of abuse in Donagh. I do not know the full circumstances of the case, and I will not go into it here. However, I suspect that there have also been decades of abuse in the McDermott home. People around the table have talked about a systems failure. I suspect that there has been a systems failure in relation to the implementation of the supervision order but also as regards the decades previous and how the abuse in the family make-up of the McDermott home and the broader abuse were not brought to attention earlier. I know that there are a number of factors. Obviously, the victims and survivors of that abuse have to come forward, and that is a very difficult journey for many people. Maybe it is a broader question of why society did not pick it up or why social services and the agencies around it did not pick it up earlier. There is as much of a need for a further inquiry into that as anything else.

The McDermotts were brought into a criminal process and were unfit to plead. However, as the submission states, "following a trial of the facts", information was sent to the jury and so on. I may not be technically right. However, if a criminal case goes through the courts and a judge passes sentence about which there is public disquiet, is it the Attorney General who has the right to ask for the judiciary to review that sentence? If so, could the Attorney General or whoever it may be ask for a similar trial and for circumstances to be looked at again by the judiciary?

Mr Johnston:

Since the devolution of justice, those responsibilities now lie with the Director of the Public

Prosecution Service rather than with the Attorney General. My understanding is that those would only kick in once there had been a conviction after a trial for a more serious offence and a sentence. The supervision and treatment orders or, indeed, any of those orders following a finding of unfitness to plead, are not criminal convictions. My understanding is that the unduly lenient sentence provisions would not apply there.

Mr O'Dowd:

OK. Chairman, could we perhaps seek clarification at the end on whether that does apply?

Mr Johnston:

I am happy to go back and check that.

Mr O'Dowd:

It appears that there has been some form of criminal process, but where does the criminal process end?

Mr Johnston:

I am happy to check the chapter and verse and to write to the Committee.

Mr O'Dowd:

How many supervision and treatment orders are issued in a year? Is this a regular occurrence or an exception to the rule?

Mr Johnston:

None of this is a particularly regular occurrence. The number of defendants who are found to be unfit to be tried is quite small and only a proportion of those get supervision and treatment orders.

Mr O'Dowd:

From listening to you and reading through the paperwork, I suspect that it is a matter of how the orders are interpreted by the various agencies. If they are not dealing with regular circumstances and come across a ruling, it is about how those agencies interpret the letter of the ruling. It comes down to how the supervision order was implemented and how, in this case, the two brothers ended up back in Donagh.

I see from your notes that the Dublin Government is also reviewing its mental health Acts. Has there been any liaison with the Dublin Government on your new proposals? We do not want a similar case to arise in a number of months or years in which someone can skip across the border and different regulations will be applied to that person.

Mr Johnston:

Because we have been working fairly rapidly on that over the summer, there has not been the opportunity specifically to discuss them, but we do have meetings coming up with our Irish counterparts, and I expect that those will feature on the agenda.

I can give some figures on the number of people who were unfit to plead and who were subject to various orders. In 2009, there were eight, of whom five got a supervision and treatment order, and three a hospital order. Of those eight, three were sex offenders.

Mr McCartney:

We did not get an answer to John's question about the Attorney General's role, but if the answer is that he has not got the power, is that something that the Minister should be considering as part of your next steps?

Mr Johnston:

We can certainly look at that. There is a distinction between a criminal conviction and a sentence, which can then be reviewed by the Court of Appeal, and a different sort of disposal and whether that fairly fundamental distinction makes it difficult for the unduly lenient sentence provisions to get in. However, that is certainly an issue we can look at.

Mr McCartney:

Moving away from the particular case, if people had not presented themselves to the hospital in that instance, where would we be today? How do we resolve the question if people had said no, there will be no self-admission, particularly if you conclude that a supervision and treatment order is not sufficient? How do you change and upgrade the order if the two particular people had said no and that they were following this to the letter of the law? You still have the public aspect, so how will that be resolved in future? If those two people decided today to leave, the supervision order can now be upgraded to prevent them from going back to Donagh. However, if

there had not been the public controversy, that may not have been the case. How do we protect those who need protecting in such circumstances if we do not have some examination of the sentence?

Mr Johnston:

One option at which we are looking is the renewable order. That would mean that, if there were doubts about how rigidly people in that situation were going to stick to treatment or there was a feeling that their condition and assessment may change over time, they could be brought back to court to look again at whether the order needed to be extended and what conditions would be placed on it for the second period. That would give an added level of scrutiny, if you like.

Ms M Campbell:

It would also be possible for the police to return to court to ask for additional restrictions to be placed on individuals through a sexual offences prevention order.

Mr McCartney:

That is understandable in the wider context. However, if two people presented themselves tonight to Lakeview Hospital and said that they wanted to self-admit, they may be told no. The circumstances in that case allowed that to happen. I do not want to say "convenient", but it was the best solution at that time. However, if the hospital had not had enough beds, what would the response have been? If they had presented themselves to Lakeview and the hospital told them that they had no beds and could not clinically stand over the fact that they were in the hospital, how would that be resolved?

Dr Briscoe:

Although bed management is important, in a case such as that, it would be down to the pre-admission assessment of the individuals. Should it be deemed necessary, based on assessed need, for any patient to be admitted to hospital, a bed would be found. That may not, as you say, be in Lakeview, but there are alternatives. If it is clinically appropriate to admit someone to a hospital, a bed would be found.

Mr McCartney:

However, it was not clinically appropriate to put a hospital order on them in the first instance. That is where I see the gap. Say there had been no public outcry about the case and two people

presented themselves to Lakeview, are you saying that they would have been admitted irrespective of the circumstances, or was it the circumstances that allowed them to be committed?

Dr Briscoe:

It was based on the clinical assessment of the circumstances that were presented at that time. When it was initially proposed — this information is in the public domain so I am happy to say it — to admit the brothers to hospital, an application for judicial review was brought against the trust. That did not proceed but, nonetheless, shows the complexity of such conditions. I do not mean the individuals concerned but the legislation as a whole. Members talked about a systems failure, but the trust, as a corporate body, has to think of the best interests in the wider circumstances. I want the Committee to be aware that there was a potential application for judicial review and, as a consequence, the brothers admitted themselves to hospital on 22 July.

The Chairperson:

Dr Briscoe, you outlined the circumstances explicitly. However, although I appreciate that an attempt could have been made to judicially review any decision taken by the Western Trust or any other trust, the authorities also have a duty of care towards the victims.

Dr Briscoe:

Of course.

The Chairperson:

I suspect that, if one side can take a judicial review, the process must be open to other sides who feel that an issue needs to be addressed.

Dr Briscoe:

The trust complied with the supervision and treatment order as authorised by the court and continues to do so. That is very important because the initial understanding was that the individuals could be managed in the community.

The Chairperson:

We accept that the trust complied with the court order. However, we still go back to the original position whereby we were led to believe that there was a loophole in the legislation. I am no longer convinced that that loophole existed.

Mr McDevitt:

Who was the potential applicant for the judicial review?

Dr Briscoe:

The McDermott family.

Mr McDevitt:

Therefore, counsel had the capacity to seek judicial review. Does anyone have in loco parentis for the brothers who are unfit? Was the person who instructed counsel to seek a judicial review acting as their guardian?

Dr Briscoe:

I am not party to the papers on the judicial review.

Mr McDevitt:

OK. I asked that question out of curiosity.

We now understand that the supervision and treatment order was amended. That is probably the best way to put it. What new evidence came to light that was not available to the court that gave social workers, the supervising officer or any other authorised officer grounds to seek amendment to introduce the residence order?

Mr Johnston:

As I read it, the residence requirement was enumerated in the judge's judgement but, for whatever reason, did not find its way on to the first version of the supervision and treatment order. It was, essentially, a correction.

Mr McDevitt:

Ok. Let us be crystal clear: there was a systemic failing. The circumstances that enabled those two brothers to return to Donagh represented a fundamental systemic failure. It was an administrative error, not a legislative failing.

Mr Johnston:

A clerical error seems to have affected the first version of the order. But, I cannot say that, if that error had not been made, it would have fundamentally changed the decisions, which were based on the best professional evidence and of people who were involved in the case.

Dr Briscoe:

I think that that is right.

Mr McDevitt:

The outstanding question is: if a residence order had been properly incorporated in the first supervision and treatment order, is it your understanding that that would not have ensured that the brothers did not return to Donagh?

Mr Johnston:

We are talking in very hypothetical terms.

Mr McDevitt:

We are indeed and that is why I believe that this is a systemic failure and not a legislative one.

Mr Johnston:

I mean, all that I can come back to say — sorry, Maura.

Dr Briscoe:

All I can say on that is that the understanding was, based on the evidence given to the court, that the individuals could be managed in the community. That is my understanding.

Mr McDevitt:

But, in your reply to either Mr McCartney or Mr O'Dowd, you made it clear that they would not be authorised to return to the community, so what has changed?

Mr Johnston:

I do not —

Mr McDevitt:

Apart from the outcry, what has changed from their point of view? They are vulnerable adults to whom you have a duty. What has changed from their point of view that means that you will now apply a residence order in a way that you would not have applied on the day of the judgement?

Dr Briscoe:

We need to be clear. We are talking in general about the residence order and whether to highlight that the supervising officer was required to approve the place of residency. It is quite a different matter to say retrospectively whether that would have altered where the brothers should reside. I understand, after all, that they were resident in Donagh throughout the trial. They were in the community from 2008 when these cases came to light. I think it would be difficult for us to now say that the supervision order might have changed things had it been different. Those individuals were in the community throughout the whole proceedings.

Mr McDevitt:

Chairman, I do not wish to pursue this matter much further, but I think the piece of information that Mr Johnston has provided about the administrative error that took place at court is a serious piece of information and one that we may want to follow up on. But, it is —

The Chairperson:

I think it is one that the Committee has noted and it is one that perhaps, Mr Johnston, we will want to pursue a little further at another time.

Mr O'Dowd:

Dr Briscoe, to state that the two brothers were suitable for treatment in the community is not the same as saying that the two brothers had to be returned to Donagh. Even the point made to Mr McDevitt that the two brothers and the other brother were living in Donagh before the case is irrelevant, because in the eyes of the law, those men were innocent and had no judicial sanctions against them. Therefore, they had a perfect right to live wherever they wanted. However, once the judicial case had taken place, in whatever form, and the jury had accepted that they were guilty of the crimes that they were accused of, even though they could not plead, responsibility fell to the various agencies involved. It is just amazing the fall down has come in the administration area in the issuing of the judgement. The failing comes when the supervision order was revised and the supervising officer, without pinpointing that person, but the agency

involved, did not recommend that the brothers be moved.

Dr Briscoe:

I want to make two points on that. First, the brothers have not been convicted of any crime. Secondly, as I understand it, throughout the whole of the court proceedings, they were present in the community. Thirdly, as I understand it, the supervision and treatment order has only recently been amended, at which stage the brothers were in hospital.

Mr O'Dowd:

Yes. Well, I am going to be careful with my words. If I did say that they were convicted of a crime, I retract that. There has been a judicial process that enabled a judge, under the law, to impose sanctions against the brothers, right? That may not be the same as being convicted of a crime, but before that judgement the circumstances were completely different. The judge has imposed sanctions on the two brothers through his judicial mandate.

The more I listen to this, the more I am of the view that there is no real need for a change in the law, other than, perhaps, the comments of the judge. My party colleagues and I will certainly review the evidence and the papers that we have been given today and come back with a more informed decision. However, the trauma that the Donagh community has been put through is not down to a loophole in the law, it is down to an administrative error and the trust's failings, on this occasion, to implement the order in such a way that would have allowed the brothers to be moved to an area where they would not have been the focus of such a media spotlight either, and where, I imagine, their treatment in the community could have been carried out with a lot more success than the brothers being in the spotlight of such media and public attention.

We now learn that this was an administrative error. I am aware that all the elected representatives in Fermanagh and South Tyrone were lobbying very strongly for this issue to be resolved and resolved quickly. As a result, if a change were required to the law, the matter, quite rightly, would be brought to the attention of this Committee, which has found out that no change to the law is required, other than, perhaps, the comment of the judge who said that he would like to have extended the order to three years instead of two.

The Chairperson:

Members, we will stop there. I am not cutting you off.

Mr O'Dowd:

That is OK.

The Chairperson:

I think that it is an appropriate time to stop. On the note that you have sounded, we want to get a look at the full Hansard report of this case. We will take a look at that and have the matter back on the agenda so that we can come to some consensus in the Committee and move on from there. Do members agree with that?

Members indicated assent.

Mr Johnston:

If I could just say, in relation to the two versions of the supervision and treatment order, the judge issued a written judgement in the case that was made available and published. It had all the requirements that were put on the two brothers. In practice, I hope that the availability of that information on paper limited any disadvantage that an incorrect first version of the supervision and treatment order caused.

The Chairperson:

It is that sort of thing, Mr Johnston, that we want to get another look at in light of everything that has gone on and been said here today by members and by your team. Therefore, we will stop there.

Mr A Maginness:

Chairperson, may we have a copy of that judgement?

The Chairperson:

Yes, that is very reasonable.

Mr Johnston, I thank you and your team for attending the Committee today.