
## Committee for Health, Social Services and Public Safety

# OFFICIAL REPORT (Hansard)

## The Mental Health (Private Hospital) Regulations (Northern Ireland) 2011

**14 March 2012**

NORTHERN IRELAND ASSEMBLY

# Committee for Health, Social Services and Public Safety

## The Mental Health (Private Hospital) Regulations (Northern Ireland) 2011

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**Members present for all or part of the proceedings:**
Ms Sue Ramsey (Chairperson)
Mr Jim Wells (Deputy Chairperson)
Ms Paula Bradley
Mr Mickey Brady
Mr Mark H Durkan
Mr Samuel Gardiner
Ms Pam Lewis
Mr John McCallister

**Witnesses:**

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| Ms Christine Jendoubi | Department of Health, Social Services and Public Safety |
| Dr Ian McMaster | Department of Health, Social Services and Public Safety |
| Mr Colin McMinn | Department of Health, Social Services and Public Safety |

**The Chairperson:** I welcome the departmental officials, who will give a presentation to the Committee, after which we will open up the session for questions or comments. Will you do the introductions, Christine?

**Ms Christine Jendoubi (Department of Health, Social Services and Public Safety):** Good afternoon, ladies and gentlemen. My colleague Colin McMinn heads up the mental health unit in the Department, and Dr Ian McMaster is our medical adviser.

I will speak very briefly about the paper on the response to the consultation. I am grateful to the Committee for the opportunity to provide members with an update on the Department's proposed private hospital regulations. Under current legislation, which, as you know, is the Mental Health (Northern Ireland) Order 1986, a private hospital may be registered to treat mentally ill patients. However, to permit private hospitals to treat mentally ill patients who are detained under the 1986 Order, the Department must make regulations under article 95 to extend the relevant provisions of the 1986 Order to such facilities. To date, there have not been any private providers of mental health inpatient care in Northern Ireland. A private hospital would be subject to registration and inspection by the Regulation and Quality Improvement Authority (RQIA). That is to ensure that the facilities and treatment that is provided are consistent with best practice. RQIA also carries out the functions of the former Mental Health Commission as regards patients' rights and welfare. Additionally, all patients

who are detained under the order have a right of appeal to the Mental Health Review Tribunal, which is a legally constituted body that was set up to independently review cases in which the patient is subject to detention or guardianship.

Under the proposed regulations, the same safeguards for the detention of patients will apply to private hospitals as apply to statutory ones. This requires compliance with the provisions of the order in respect of the process to be followed and the documentation to be used. It also involves a statutory obligation to notify the RQIA of all detentions. There is also a requirement under the code to the order to inform patients and their carers of the right to appeal to the Mental Health Review Tribunal. It is an offence to detain a person under the order unless there are clear medical reasons for doing so, and due process for detention has been followed.

In his response to the consultation, the Attorney General recommended that a medical practitioner not on the staff of the hospital should provide independent assurance of the detention of patients in private mental health hospitals. This requirement will be included in the proposed regulations. It is also our intention to make the provision of an independent advocacy service an important part of the registration process, and we are working with the RQIA to develop protocols to make those proposals work.

It is important to recognise that the Department is not proposing these regulations to facilitate the establishment of private facilities in Northern Ireland. Private providers can already open for business under the current legislation. The regulations would prevent a situation whereby someone in the care of a private facility becomes so unwell that they need to be detained and, under the current legislation, would need to be moved to another facility and another treatment team. We feel that would not be in the patient's best interests, particularly during a mental health crisis.

The Department consulted on the proposed regulations over the nine-week period to 23 January 2012. In addition to placing the consultation documents on our website — you have a copy of the consultation responses — over 500 consultation letters were issued to statutory, professional and voluntary sector bodies as well as individual MLAs. Twenty-one responses were received within the consultation period or by agreed extension, and have been considered in the Department's response document that has been submitted to you. A further two responses were received outside the period, and although we have not used the answers from them in the percentage figures in the response document, we have fully considered the comments they contained.

I will highlight one response that is of particular interest to the Department, and, I think, may be to the Committee. It was received from the Children's Law Centre (CLC), and members will recall that the centre gave evidence here previously. The CLC raised a number of valuable points, mainly in regard to the issues of safeguarding both for patients and admitting staff. My two colleagues, Colin and Ian, met representatives of CLC last week to talk through these concerns and the Department's proposed responses, in what was a very productive meeting, as I understand. The Department's response to the consultation was published on our website on Monday.

That is all I want to say at this stage, and we are all happy to take questions. Thank you, Chair.

**The Chairperson:** OK, thank you very much for your presentation, Christine. The paper you sent is quite useful also. I have a number of points to make before I open it up to other members. It is quite useful to get a breakdown of the consultation and where people sat on the relevant questions, but there is also an issue around some of the concerns that people raised. That is, in general, a good thing because, if we are consulting people, we need to know what their concerns are.

I understand that youse are going to say that it is not a policy change, but I cannot understand why more time and energy is being spent screening out proposals rather than putting them through an equality impact assessment (EQIA). That leads to people raising issues such as the lack of information in support of the policy, no evidence to suggest there is a need for it, freedom of information issues and the fact that the Department has not considered alternatives, among other things. My main question is this: why was it not put through an EQIA?

**Ms Jendoubi:** The EQIA screening process that we went through is appended to the consultation paper. We regarded that as quite a full screening exercise. Colleagues certainly showed it to representatives of the Children's Law Centre, and they did not have a difficulty with it. As you said, the purpose of the consultation was not on the policy of whether there should be private healthcare facilities for mental health patients in Northern Ireland. That has always been possible under the 1986 Order. The issue that we were consulting on was whether those private mental health facilities should be empowered and enabled to treat detained patients. Therefore, we did not include in the consultation paper a rationale for why there should be additional private mental health facilities in Northern Ireland, because that was not what we were consulting on.

**The Chairperson:** OK, but in general terms, more policies seem to be coming out of Departments, not just the Health Department, that are screened out rather than put through an EQIA. That is a concern.

**Ms Jendoubi:** In this instance, we asked, as part of the consultation, whether people had any evidence that the proposal to treat detained patients in private mental health facilities would adversely impact on any of the section 75 groups. The answer to that was 100% no. We asked whether they thought there was any disadvantage to it, even if they did not have evidence for it. I think that something like 79% said no. Was it more than that?

**The Chairperson:** It was 71%

**Ms Jendoubi:** In the main, the concern of those who said yes related to the policy rather than to the fact that detained patients would be treated. Overall, we did not feel that what they said would cause us to reconsider and do a full equality screening.

**The Chairperson:** OK. I am going to open up the meeting for other members.

**Mr Wells:** I have a copy of the response from the Royal College of Nursing (RCN), which, I am sure, you will have received by now. It was quite extensive and quite critical. Obviously, when we are dealing with such a well-known body, we have to take some cognisance of what it said. In addition to the issue of the impact assessment, their first complaint was that you should have issued the consultation document at the initial stages. I know that it is not a change of legislation or policy, but it is saying that it is a bit odd that you released a covering letter of several pages but did not issue the document. Is that not strange?

**Ms Jendoubi:** Sorry; we did not issue which document?

**Mr Wells:** It says that the Department of Health, Social Services and Public Safety did not release the consultation paper, but simply released a covering letter. That is the accusation from the RCN.

**Mr Colin McMinn (Department of Health, Social Services and Public Safety):** The only document that would have been released would have been the draft regulations. They will be altered and amended as a result of the consultation. Whatever draft regulations we would have prepared and issued would have been minimal in their range, scope and content, because we were relying on the consultation exercise to shape the final recommendations.

**Mr Wells:** Would it not have been normal to have released a consultation paper as well as a covering letter for something of this importance?

**Ms Jendoubi:** There was a consultation paper.

**Mr McMinn:** A questionnaire.

**Ms Jendoubi:** Yes; a questionnaire.

**Mr Wells:** A questionnaire asks for people's views. To me, a consultation paper is a discussion about the pros and cons of what you are about to do. There was quite a bit of supporting material on the shared services, in addition to the consultation paper to the actual questionnaire.

**Mr McMinn:** The fundamental question we were going to the public on was this: should a private hospital be allowed to treat detained patients? That was the core question. The consultation questionnaire posed a range of questions and asked what issues that proposal might raise, and then the regulations would have dealt with those concerns.

**Mr Wells:** I will read you a paragraph from the RCN's response, which needs to be dealt with. It says:

> *"the RCN does not believe that there has been an appropriate level of public debate and consultation on the underlying policy issues deriving from this legislative proposal. In particular, there needs to be a full consideration of how the proposal fits with the Bamford ethos and implementation strategy, the workforce implications, and the question of whether the process of amending legislation that is about to be superseded (by the new Northern Ireland single mental health and mental capacity Bill)".*

Implicit in that is that it is saying that we are about to pass the regulations, but the whole thing may be overtaken by proposals in the Bamford legislation.

**Ms Jendoubi:** It may do, but on current plans, that legislation will not be enforced for another three years. The private hospital may well be on the ground well before then. We need to have provision in place, if it is there, to allow that private hospital to treat detained patients so that they are not being moved about. With regard to the question of whether there should have been a consultation exercise on the policy, it depends if what the RCN means by "the policy" is whether there should be private mental health facilities in Northern Ireland. As the Chair said earlier, that policy is in place and has been in place since the 1986 Order and well before it. The point is that there have never been private mental health facilities in Northern Ireland, but, unless we actually change the 1986 Order now, there is nothing that we can do to prevent a private provider opening mental health facilities in Northern Ireland. We have to put in place regulations, protocols, procedures, registration processes and safeguards to ensure that, when, or if, such a facility opens, it does so with all the safeguards that would be available in the statutory sector, and, if necessary, more.

**Mr Wells:** I am not taking sides in this issue, but I believe that, if the RCN has said that, it must have some weight because some of its members could end up serving in the institution if it is ever built. Therefore, it is a very authoritative voice of the profession.

**Ms Jendoubi:** Absolutely.

**Mr Wells:** Therefore, it is important that we place some weight on what the RCN is saying. I know that a lot of people have philosophical problems with private provision in this field. I am easy, but I know that others feel that it should be an entirely state-run function because of the very sensitive nature of it. However, I accept that the 1986 Order enables it. Of course, that Order was passed under direct rule when there was no democratic input whatsoever into that decision. Therefore, it is a bit unfortunate that we were left with a done deal, as it where.

The RCN is suggesting that you should go back to the drawing board and have a full consultation paper that explores the issues in more detail and allows for large-scale public debate on the issue. Do you think that the consultation has been adequate, given the importance of the decision that you are about to make?

**Ms Jendoubi:** I will say again that the decision here is whether a private mental health facility, should there be one, should treat detained patients. If the RCN is suggesting that we should have a full public consultation on whether there should be private mental health facilities in Northern Ireland, that is a different question entirely, and it is one that would need to be put to the Minister. However, there are already a number of private mental health facilities across the water, and we regularly use them for extra statutory referrals. Northern Ireland may wish to open a debate on whether we should go down a different route, but it is a different question for a different day.

**Mr Wells:** I think that the public accept that, in very exceptional circumstances, the state has to detain someone against their will in a mental health facility. There is an uneasiness when that is being done by a private company rather than by a person who is employed directly by a trust. That is where the uneasiness comes from. However, we are left with that unusual situation. On a technical point: will the facility be checked, examined and scrutinised by the RQIA in the normal way?

**Ms Jendoubi:** Yes.

**Mr Wells:** So, exactly the same safeguards that apply to a state-run institution will apply here?

**Ms Jendoubi:** Yes.

**Mr Wells:** Will there be at least two visits a year, and will there be reports?

**Ms Jendoubi:** Yes.

**Mr Wells:** That reassures me that we at least know that there will be that independent assessment of what is going on. Do we know the likelihood of this facility opening? Will it happen? This has been floated for several years, yet nothing concrete has happened. Are we bringing in legislation that may not even be required?

**Ms Jendoubi:** That is possible. We do not know. It is a private provider, and it will be up to it to make the business case, secure the funds and build the facility. All that we had was the intention. It has received planning approval, but I do not know what stage it is at now.

**Mr Wells:** But there should be a business case somewhere, if it is to go ahead.

**Ms Jendoubi:** It will be its internal business case.

**Mr McMinn:** Because the Department, trust and board have not asked a private provider to come here, it does not need to provide us with a business case. The decision to set up shop here is purely a commercial one. The most recent information that I have from the private provider was that the archaeological survey of the site had been done. I honestly do not know whether any groundwork has started.

**Mr McCallister:** This is probably the most that we have ever looked at a statutory rule. It is getting quite an airing. To broadly follow up on Jim's point: I do not have any difficulty with private provision. If it were to happen, I think that, from the state's perspective, it may provide the best of both worlds. If you run out of facilities here, rather than send young people across the water, I think that it is more desirable that the trust buys in that provision as and when it is needed or when space becomes available. Our debate on this at Committee meetings centred on whether that could be abused if business was not as good as anticipated. That would be of huge concern to not only the Committee but to society, because detaining someone — as Jim, rightly, said — is a serious business. You are adding into this rule what the Attorney General suggested —

**Ms Jendoubi:** Yes.

**Mr McCallister:** — to give that extra assurance. So, there will be more safeguards than the state sector has as regards detaining people.

**Ms Jendoubi:** Would it be helpful if Dr McMaster went over the procedure for how people would get to the stage of being admitted to or a facility such as this and the procedures around detention?

**Mr McCallister:** I detected that to be the crux of the Committee's concern. In particular, when she was Chair, Michelle Gildernew went over whether any of that could be abused. If that were to be the case, it is widely accepted that we would all be appalled. It is about making sure that procedures are in

place to make such an event very difficult and unlikely to ever happen. That, I think, is the reassurance that the Committee would like to hear.

**Dr Ian McMaster (Department of Health, Social Services and Public Safety):** Perhaps, I could consider it in a series of layers. To begin with, there is the professional layer that Royal College of Psychiatrists members should be acting in the patient's best interest and should not detain people unless doing so is indicated, and not for longer than required. Also, as Christine outlined, the hospital, like any statutory facility, would have to be registered with the RQIA. That applies to not just the premises but to the operating procedures — how people would be brought into the hospital, treated and, if necessary, detained. Equally, doctors working in that hospital would have to be registered with the RQIA, in the same way as are consultants in the statutory sector. They would have to have appropriate qualifications and experience. They would have to undergo an appraisal system, which would review their knowledge, continuing professional development, participation in audit and other such things.

The detention process begins with an application of assessment. That is completed by a nearest relative of the patient, an approved social worker and the patient's GP, all of whom would be independent of the private hospital. It is only when the person comes through the door that they would be seen by a doctor or psychiatrist employed by the private hospital. We are suggesting that that doctor's decision to detain, either for assessment or, at a later stage, for treatment, would be promptly reviewed by a doctor appointed by the RQIA, an independent, not previously known to the patient and not funded by the private organisation.

**Mr McCallister:** So, effectively, this is the safeguard that the state would have in its duty of care to people.

**Ms Jendoubi:** Yes.

**Dr McMaster:** There is a precedent for that in the Mental Health (Northern Ireland) Order 1986, Part IV, whereby, for patients who are detained in the statutory sector for a period beyond three months on medical treatment, or indeed, for some treatments that are considered quite serious, like ECT, there would be an RQIA appointed doctor who would go in and assess the need for that treatment and approve the care plan before it could proceed.

Equally, as part of registration, as Christine has pointed out, we would be asking for an independent advocacy service to be provided, not just to detained patients, but to all patients within private hospitals to advise them of their rights, such as appeal to the Mental Health Review Tribunal. The commissioners are aware that, if it goes ahead, this will be a very expensive facility. They are focused on outcomes and, akin to the ECR process, it would be funded through a central approval procedure, which would look at length of stay and outcomes from those units, to ensure that people were not staying longer than necessary and were not being detained without benefit to themselves.

**Mr McCallister:** I feel that that goes a long way to addressing the concerns that have been raised here. I thank the Department for that.

**Ms Lewis:** My question is more of a technical one. Was the RCN response was received on time? Was it is included in the stats?

**Mr Wells:** The date on it is 23 January, if that is any help to you.

**Mr McMinn:** It was received on time. It is listed in appendix 1 of the consultation response document on page 16.

**Ms Lewis:** OK. It is just that, in your document, it says that 100% answered yes to question 2. I notice that, in the RCN response, the organisation has not ticked the box, though I suppose the first half of the response is fairly positive. Was it just taken as a yes? As well as that, neither the "Yes" nor "No" box has been ticked for question 3. The response is more specific: the RCN declined to answer the question.

**Ms Jendoubi:** We did not list abstentions.

**Ms Lewis:** Yes. In your consultation, it says that 50% voted yes and 50% voted no, but it does not —

**Mr McMinn:** A number of the consultation respondents did not complete the questionnaire as such. They provided a response by way of detailed letter. We have taken implied views from letters that were provided, rather than responses to the consultation.

**Ms Lewis:** I have a printout of the actual consultation document. You have put the response in the box, but the RCN did not tick the "Yes" or "No" box.

**Ms Jendoubi:** It may be that our compiler has assumed a response from what the organisation said in the comments box.

**Ms Lewis:** You cannot assume a response when the organisation said that it declined to answer.

**Ms Jendoubi:** Perhaps we should have listed abstentions.

**The Chairperson:** I hope your screener-outer did not assume that this did not need to be equality-proofed as well. That is a concern that I have. More people seem to be employed in Departments to screen out policies than to put them through an EQIA.

No other members want to ask questions. Christine raised a valid point, and the Deputy Chair also referred to it. The policy existed from 1986, but there was no Assembly at that time. This Committee is being asked to agree to the passing of these regulations and endorse a policy that would mean that private hospitals should or can treat mentally ill patients.

**Mr McMinn:** It may be helpful to say that the Department's policy on the treatment of people with a mental illness has not changed and is not changing as a result of these regulations. We are still firmly wedded to the Bamford vision, which is that people should be treated in the community and that admissions to hospital will be reduced.

Over the past five years, admissions to psychiatric hospitals in adult services has reduced by 29%. We have taken 23% of adult psychiatric beds out of the system, so community care is working. There is no evidence that we need significant numbers of additional beds, as a reader of the regulations might take from that. We are still working on the basis of developing community care. Just because a bed or new facility are available, there will still be a clinical decision by a psychiatrist on whether in-patient treatment is appropriate. Where in-patient treatment is required in a private facility, it has to be sanctioned by the Board because it is an expense outside the statutory health care system.

**The Chairperson:** I appreciate what you are saying, Colin; but on the basis that we are looking at the Bamford recommendations and at moving people from the acute sector to the community, your point that there is no evidence that we need extra beds raises the question of why is there a need to pass these regulations for a private facility. However, we are also faced with the fact that we are sending people to England. The reality is that this Committee will have to say, based on the evidence that others provide to us, that it is content that the Department prepares the rule.

**Mr Wells:** I notice that 71% of respondents to question 7 did not believe that the regulations would afford an opportunity to promote equality of opportunity. You state in your paper that they did not expand on that and say why they felt that way. It strikes me that there seems to be unease that so few people thought that it was a good thing, but that you are slightly at a loss to understand why they said that. Clearly, they were not that enthusiastic.

More fundamentally; am I right in thinking, as one consultee said, that the new facility, unlike a trust facility, will not be subject to the Freedom of Information Act? Is that not a major impediment? If we are talking about a private concern, then that is not a public body. If we ask an Assembly Question about provision, will we simply get a response saying that it is purely a private company and that it is none of our business? Would that not cause unease?

**Ms Jendoubi:** Registration includes the requirement on a private health facility to provide the Department with such reports and returns as it requires for the purposes of its operation under the Mental Health Order. Failure to provide that information will constitute an offence.

**Mr Wells:** Is that exactly the same information that would be available if it were a state-run institution?

**Mr McMinn:** The same information will be provided by that facility to the RQIA each time someone is detained there. So, the Freedom of Information Act will apply equally to the RQIA, the Board and any trust that places people in that facility. However, as Christine said, article 93(1)(e) of the Mental Health (Northern Ireland) Order 1986 provides that the Department and other bodies can obtain whatever information they want from a private organisation and that that organisation must provide it because it is an offence not to do so.

**Mr Wells:** I understand that, but does that mean that the information will be available to the public in the normal way under FOI, within the restrictions that we are bound by? Or can you just say: "Because we have the information from a private company, we cannot divulge it to you or to an MLA"?

**Mr McMinn:** In my view, if the Department holds information about a private facility, we would be required to provide it.

**Mr Wells:** I had a situation in Downpatrick recently in which the council was provided with private information by a business that wished to open a tourism facility. Had it been a council project, it would have been entirely transparent. However, because the contractor comprised a private group of people, the argument was made, and was sustained by the Information Commissioner, that the council was under no obligation to reveal it, full stop. The council held the information and knew what it said, but because the body concerned was not a public body, I, as an MLA, had no right to access any of it. I am slightly worried that it could happen in this case also.

**Ms Jendoubi:** If we hold information about a private healthcare facility that is exempt under one of the exemptions of the Freedom of Information Act — for example, commercial in confidence — we would not be obliged to reveal it. However, in the normal course of events, we are obliged to reveal the information we hold about any organisation anywhere, unless that information is exempt under one of the FOI exemptions. The same would apply to the RQIA.

**Mr Wells:** You know how sensitive the issue is and the history of psychiatric mental institutions throughout the world, not just in the United Kingdom. Obviously, we hope and pray that we are worrying about nothing. However, just in case, I want to be able to know that, if something goes wrong and we start getting worrying reports, we, as public representatives or private citizens, can get to the bottom of them. I might follow up that technical issue with a note to the Minister. I think that a private healthcare facility could provide you with information on the basis that is not revealed beyond the Department or the trust. I think that it would be within its rights to do that. However, it would mean that a public representative might not be reassured that everything is OK. It is just a slight technical issue: it is not a big matter.

**Ms Jendoubi:** Chair, I want go back to the point you made about what the Committee is being asked to do in respect of approving this statutory rule. The consequence of not approving the statutory rule will have no effect on whether a private mental health facility is built and operated in Northern Ireland. All it will mean is that if a private mental health facility is built and comes into operation in Northern Ireland, it will not be able to treat detained patients and that those patients will have to be transferred to another facility.

**The Chairperson:** OK. That is useful.

The information you are giving today on how people can be detained is useful. However, What happens when doctors want to detain somebody who has paid to go into a private clinic voluntarily, or, indeed, when their parents have paid for them to do so? For example, somebody may decide to put their child

in a facility for a week or two. Where is the crossover between the child being there voluntarily and being detained, and who pays?

**Dr McMaster:** The clinicians carry out an initial risk assessment and decide whether that risk warrants detention for treatment. As soon as the assessment is made, the person concerned can be held in a hospital for up to 48 hours to allow for the proper assessment process, as I said, involving the nearest relative, a GP and a consultant psychiatrist. The presumption is that once the decision to detain has been made, the person is no longer a private patient but is like another citizen in the community who requires treatment because of significant risk, and, therefore, should be paid for by the state. From that point on, the person is treated as though they had been detained in the community and sent in from home.

**The Chairperson:** So, these regulations will protect and safeguard, and people will not be detained for longer than is needed. A point was made earlier about the history we have come through.

**Dr McMaster:** That is quite correct. This is not just professional good practice. There are elements in the Mental Health (Northern Ireland) Order 1986 that make it an offence to detain a person for longer than is warranted. Such people have the right to appeal.

**The Chairperson:** Who makes that decision in a private facility?

**Dr McMaster:** If you are talking about when a person should be regraded to "voluntary" and may, therefore, leave, then the decision would normally be made by the responsible medical officer who is an employee of the private hospital. However, the patient would have access to the mental health tribunal, which is independent and has legal, lay and professional members who can assess a case and ensure that the person is being detained appropriately.

**The Chairperson:** Are safeguards in place so that people are not detained longer than necessary.

**Dr McMaster:** Yes.

**The Chairperson:** Are there any other questions or comments? Once again, Christine, Ian and Colin, thanks for the paperwork and the presentation today.