Committee for Health, Social Services and Public Safety

OFFICIAL REPORT (Hansard)

Mental Capacity (Health, Welfare and Finance) Bill: Northern Ireland Commissioner for Children and Young People

9 May 2012

NORTHERN IRELAND ASSEMBLY

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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
Ms Pam Brown
Mr Gordon Dunne
Mr John McCallister
Mr Kieran McCarthy
Mr Conall McDevitt

Witnesses:

Mrs Patricia Lewsley-Mooney	Northern Ireland Commissioner for Children and Young People
Ms Colette McIlvanna	Office of the Northern Ireland Commissioner for Children and Young People

The Chairperson: Patricia and Colette, you are more than welcome. I will hand the meeting straight over to you because the Department is due in after you. Please give your presentation, after which I will open up the meeting to questions and comments. Thank you for your briefing paper.

Mrs Patricia Lewsley-Mooney (Northern Ireland Commissioner for Children and Young People): I thank the Committee for the invitation to contribute to members' deliberations on the current proposals for the Mental Capacity (Health, Welfare and Finance) Bill and, specifically, the proposal to exclude under-16s in general from its scope. Our presentation will be based on the paper that we have already submitted to the Committee. Another member of my team, who has been taking the lead on the Bill, was supposed to be present. Unfortunately, however, she is sick.

As you may be aware, the principal aim of my office, as set out in legislation, is to safeguard and protect the rights and best interests of children and young people. As part of my remit, I have a mandate to keep under review the adequacy and effectiveness of law, policy and practice and services relating to the rights and best interests of children. Furthermore, the Northern Ireland Commissioner for Children and Young People (NICCY) bases all its work on the United Nations Convention on the Rights of the Child (UNCRC).

In adhering to that remit, I have monitored the development of the policy proposals relating to the mental capacity legislation since the first proposals were issued in 2009. Since then, my staff and I have met officials from the Department of Health, Social Services and Public Services (DHSSPS) on various occasions to discuss the ongoing development of that legislation. We have also engaged with other stakeholder bodies, including organisations in the children's sector, to consider the issues.

We understand that the Department, following its consideration of the various perspectives and relevant issues, has decided not to extend the provisions of the Bill to under-16s. Having reviewed the Department's proposals, we acknowledge the complexity of the legislation and the challenge of introducing a fused Bill that combines mental health and mental capacity legislation. We are aware that the Bill will contain important provisions and protections for those currently included within its scope, including young people aged 16 to 21, who fall within my remit. We also recognise that the extension of the Bill's provisions to under-16s required consideration of the potential legal implications for age limits and the operation of other key legislation and case law, specifically the Children (Northern Ireland) Order 1995, the Gillick competence and the age of majority. We are aware that that has highlighted complex legal issues, particularly with how the different provisions might operate in practice. Although we acknowledge the complexities of the legislative context, we are disappointed by the Department's decision to exclude under-16s from the Bill. We also have a number of concerns about the provisions for young people who, it is proposed, will be included within the scope of the legislation.

I will begin by highlighting a number of concerns that I have about the proposed scope of the legislation, specifically the rationale underpinning the decision to exclude under-16s. The Department has indicated that the age threshold of 16 years was selected because, in its words, it is the age at which it is accepted that young people, for the first time, can make many of the important decisions in life. I contend, however, that one could argue that a range of ages is significant in the lives of children and young people, including 10, which is the age of criminal responsibility in Northern Ireland; 13, which is the age at which a young person may hold a part-time job; and 14, which is the age at which a young person can enter a plea in respect of an indictable or summary charge.

The Department has also argued that 16 years is crucial to the operation of the Children (Northern Ireland) Order 1995, in which 16 is identified as the threshold concept in Children Order proceedings. However, those proceedings generally relate to issues such as the nature and quality of care provided to children and are rarely concerned with the evolving developmental capacity of children and young people. It is also important to note that the Children Order is not recognised as an instrument that aims to maximise autonomous decision-making by children or young people, and there are no requirements in the terms of the Order for the issue of capacity of minors to be considered in relation to issues arising. I believe that efforts should be made to enhance the opportunity for autonomous decision-making for the greater majority of children and young people who are capable of making decisions.

In relation to establishing capacity, the Bamford review recommended that there should be a rebuttal presumption of capacity for children and young people aged under 16. In other words, it should be presumed that they have capacity unless that is contested or can be proven otherwise. However, the Department has asserted that the test that will be used to establish a lack of mental capacity in adults cannot be applied to children or young people in the same way. We suggest that it may be possible to assess their capacity using a different approach. The courts frequently refer to children and young people who are identified as mature minors, and it seems reasonable to assume that that group could be assessed using the standard capacity formula.

It has been proposed that, for health-related issues, the capacity of under-16s should continue to be determined using the concept of the Gillick competence. That is a standard based on case law and used by the medical profession to decide whether a child or young person is able to consent to medical treatment without the need for parental permission for, or knowledge of, that decision. The application of Gillick means that, although under-16s may consent to medical procedures and treatment, they may not refuse same. I am concerned that that will have an adverse effect on the circumstances of mature minors who are deemed by medical professionals to have capacity, as they could be forced to accept

treatment against their will. It appears that, under the Department's legislative proposals, that position will be reinforced.

In drafting any legislative proposals pertaining to the mental health of children and young people, we believe that the Department should ensure that the legislation is fully compliant with the UNCRC. The Bamford review states:

> *"Any proposals for a comprehensive child and adolescent mental health service need to take account of all the rights contained in the UNCRC."*

Its human rights and equality of opportunity report also referenced the obligations placed on government to comply with the international standards, specifically those enshrined in the convention.

A number of UNCRC articles are particularly relevant to the proposed legislation. Article 12 provides:

> *"States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child."*

Therefore, the convention proposes that age alone cannot determine the significance of a child's views, and, furthermore, the general comment on that article states that children's levels of understanding are not uniformly linked to their biological age, and, therefore, the views of the child should be assessed on a case-by-case basis. As indicated earlier, the practice of affording rights appropriate to a young person's age and maturity is not reflected in the concept of Gillick. The continued application of Gillick, therefore, sits uneasily with the obligations contained in article 12.

The legislation proposes the introduction of a statutory right, in a limited range of circumstances, to an independent advocate for over-16s who lack capacity and for those who have no one to speak on their behalf. We believe, however, that that advocacy service should be available to any young persons under 16 who require support relating to decisions concerning their health or well-being. Article 12 of the UNCRC enshrines the right of the child to be heard in all proceedings affecting them, directly or indirectly, or through a representative or appropriate body. In some cases, children and young people who do not come within the remit of the proposed legislation may be those in greatest need of advocacy services.

In assessing the provisions and protections that will be available to those who come within the scope of the legislation, I recognise that those should provide important safeguards. However, further clarification is required on the application of the provisions and protections to a number of groups of young people, including under-16s, formally detained under the provisions of the Bill, 16- and 17-year-olds with learning disabilities and those in the criminal justice system.

The Department has indicated that under-16s detained under mental health legislation will have access to the same range of protections as over-16s subject to the same intervention. Such protections include the provision of advocacy services; a statutory recognition of the views of carers in decision-making; legal protection for a carer; and protections regarding the extent to which restraint can be used. The legislation will also create a new offence of ill-treatment or neglect of those who lack capacity. However, it does not appear that those protections will apply to under-16s who are inpatients in mental health hospitals voluntarily. I would welcome further clarification from the Department on that proposal, as we strongly believe that the maximum level of protections and provisions should be extended to all young inpatients in mental health facilities.

Furthermore, all children and young people who are inpatients should be accommodated in appropriate child and adolescent facilities and have full access to the Northern Ireland curriculum while in hospital. The Department indicated that some provisions may not be extended to 16- and 17-year-olds, including the deprivation of liberty safeguards. Those safeguards are in place for persons who may lack mental capacity and where the circumstances in which they are cared for amount to a deprivation of liberty. Previously, the Department indicated that it believed that sufficient safeguards existed under the Children Order. However, it would be helpful if it could clarify the current position on the application of

deprivation of liberty safeguards and, if it does not propose to extend those to 16- and 17-year-olds, to explain how it envisages such protections may be enacted through the Children Order.

I recognise that there are challenging issues concerning the application of the proposed Bill to individuals with learning disabilities. The Committee may wish to explore such issues further with organisations whose remit focuses on the needs of children and young people with learning disabilities, as well as with the relevant Department.

We understand that there is an intention to extend the provisions of the legislation to persons aged 16 and over in the criminal justice system and that a consultation on the policy issues will be issued in the near future. At present, the precise nature of how the protections and provisions of the legislation will apply to under-18s in the youth justice system has still to be determined. Given that the minimum age of criminal responsibility is 10, and the mental capacity legislation applies only to persons aged 16 or over, there is a need for the Department of Justice and the Department of Health, Social Services and Public Safety to examine age issues and consider how those will be managed in practice.

I have repeatedly expressed concern about the over-representation of children and young people with mental health problems in the criminal justice system and the lack of adequate treatment, funding and facilities provided to address their specific needs. It is, therefore, important that the introduction of the legislation does not have a detrimental impact on those very vulnerable groups.

The introduction of mental health capacity legislation to Northern Ireland clearly raises complex issues concerning legislation, policy development and the outworking of the Bill in practice. I have consistently stated that children and young people under 16 years should be included in the scope of the Bill and be offered the same protections provided to those aged over 16. However, I also acknowledge the legal ramifications relating to age limits and the operation of other key legislation and case law, and I believe that those matters need to be resolved. Where young people under 18 are included in the Bill, there is a need to clarify the provisions and protections that will be made available to them. As the legislation is taken forward, I urge that the Department, in collaboration with other relevant Departments and agencies, seek to provide the maximum level of protections and provisions for all children and young people, particularly, in this context, for those with mental health problems. Thank you.

The Chairperson: Thank you, Patricia. Your briefing paper is very detailed. During your presentation, you said that you were disappointed by the Department's failure to include under-16s in the Bill. I have been in this Building a while and so am well aware of where the idea of the Commissioner for Children and Young People came from and what we hope to achieve from it.

You mentioned your role and responsibilities. If the Department fails to do this, do you have a legal remit as Commissioner for Children and Young People? Will you expand on any discussions that you have had with the Department to reach an agreed way forward? You also said that there is a possibility that the legislation is not compliant with the UNCRC. What has the Department said about that?

I ask because the witnesses from the Department are behind you; they will speak to us next. I am keen to get their views so that we do not go round in circles. The Commissioner for Children and Young People and the Children's Law Centre are two big organisations that are there for the protection of children and young people, so why is the Department in one place and you are in another?

Mrs Lewsley-Mooney: Since departmental officials are next to speak, you will have to ask them why they have not included under-16s in the Bill. It is important that they explain that to you. Once the Bill has gone through all its stages and has been finalised, we will have to decide whether we need to challenge it. However, it would be unwise of me to tell you what I will do when I do not know what the outcome will be. The only point that I make is that I am disappointed that under-16s are not included.

The Chairperson: That is fair enough. In your briefing paper you suggest that the Committee may wish to do a, b or c. Indeed, on page 2 you state:

"the Committee may wish to seek further clarification from the Department with regard to the specificity of these legal complexities".

Will you expand on that?

Ms Colette McIlvanna (Office of the Northern Ireland Commissioner for Children and Young People): I understand that the Children (Northern Ireland) Order 1995 has been held out by the Department as a threshold concept. As a result of that order, when children and young people reach the age of 16, except in exceptional circumstances, the courts will not make article 8 orders, which deal with contact and residence. That is where the Department is coming from when it says that the age of 16 is a threshold concept.

Since it comes from case law, Gillick competence is slightly different. It has been in place since 1985, but all case law can be overturned. The issue in Gillick was about whether children and young people can consent to treatment. I am not sure whether you are aware of the Gillick case, but it related to the provision of family planning treatment to a minor. Under Gillick, if a child has sufficient maturity and understanding they can consent to treatment. However, the flip side is that children and young people cannot necessarily refuse treatment. Patricia referred to the concept of a mature minor, and you could have a very mature 15-year-old who, under Gillick, would be entitled to opt in to treatment. However, if their view is that they should not have treatment, that capacity would be over-ridden. That is where the difficulty lies. It compounds the difficulty of a child who is already in a very difficult situation.

The Chairperson: OK. That is fair enough. I am trying to tease out the details. Do you believe that the proposed legislation is not complaint with the UNCRC?

Mrs Lewsley-Mooney: I do not think that it is. To go back to my original point, the office of the Commissioner for Children and Young People — you have highlighted this — is about:

"effectiveness of law, practice and services relating to the rights and best interests of children and young people by relevant authorities."

The Chairperson: If you believe that the Bill does not comply with the UNCRC, then, technically — these are my words; you are the experts, so advise me — is the Department failing to implement legislation around children and young people?

Mrs Lewsley-Mooney: Yes, obviously, if it is not UNCRC compliant.

Ms McIlvanna: Particularly in relation to article 12.

The Chairperson: OK, that is fair enough. I am conscious that we are in a public forum, so I do not want to ask you what you are going to do, as you do not want to give your strategy away.

Mr McDevitt: Is your assertion that, as it stands, the proposed legislation risks not being compliant with the UNCRC on the basis of the reliance on the Gillick test principally? Is that your main area of concern?

Mrs Lewsley-Mooney: Yes.

Mr McDevitt: It was suggested to us earlier that Gillick is high risk, because it is case law that can be trumped by another piece of case law. It was further suggested that Scotland has legislated to deal with the issues around Gillick, and that the number of challenges in Scotland has been very small, whereas England and Wales continue to rely on Gillick and case law for that type of issue, and the number of challenges in the courts in England and Wales has been very high. Why do you think the Department wants to rely on case law when it could easily legislate for the matter at this stage?

Ms McIlvanna: That is a question for the Department.

Mr McDevitt: Can you give me a good reason why it would want to do that?

Ms McIlvanna: Where Gillick sits in relation to the broader structure of children as they are in developing capacity is the issue. I refer to the mature minor. We understand the Department's difficulty; Patricia acknowledges it in her paper. It is really an issue where you see the mature minor who, under Gillick, can consent but who cannot refuse. That is only compounded by the current proposals.

Mr McDevitt: Therefore you cannot see a good reason?

Ms McIlvanna: I cannot.

Mr McDevitt: OK. On the change in the Bamford recommendations on the capacity test — the same question — can you give me a good reason why the Department might want to change that? What has changed since Bamford that would make you think now that it should do it differently?

Ms McIlvanna: We do not come from a medical background. I am sure that there is medical opinion as to how you can test capacity in children and young people. The vision of Bamford was that the presumption would not be absolute but would be rebuttable, so it would be on a case-by-case basis and you would have to look at the age and stage of the young person. I can see no reason for diverging from that, unless there are sound medical reasons that we are not aware of.

Mr McDevitt: However, if you look at it from a rights perspective —

Ms McIlvanna: Yes, it should be envisaged that there is some child-friendly or child rights-compliant way to assess a child's capacity.

Mr McCarthy: Thank you very much for your presentation. On page 3 you mention:

> *"the evolving developmental capacity of children and young people."*

Will you give us a bit more detail on that? Moreover, paragraph 3.1 states:

> *"efforts should be made to enhance the opportunity for autonomous decision-making for the greater majority of children and young people who are capable of making decisions."*

How should that issue be brought forward?

Mrs Lewsley-Mooney: By complying with article 12 of the UNCRC and giving children the right to have a voice in any decision-making process.

Mr McCarthy: It is as simple as that? OK. That is fair enough.

Ms McIlvanna: It is also important to note that the Children Order and the UNCRC do not say that the child's voice should be absolutely determinative; it is a weighing of the competing rights, needs and best interests. However, it is important that the child have the right to have his or her voice not only heard but taken into account and weighed in the balance. For example, at the lower end of the scale, the question of whether a child should have an un-invasive medical procedure would be very different from a life-or-death situation.

The Chairperson: No other member has indicated that they want to ask a question — except Gordon.

Mr Dunne: I must admit that I have not studied the background of the issue. Are there not risks with engaging directly with under-16s? Do you not see that there are risks? It could be detrimental to their interests.

Mrs Lewsley-Mooney: As Colette said, it is about taking their best interests into play. The important thing is that a young person has a say and that that say is given some weight. Of course, their age and maturity are taken into consideration.

Mr Dunne: Are you advocating for all or in some cases?

Mrs Lewsley-Mooney: In all cases. As we said, it is case by case.

Mr Dunne: Surely there is a risk. Do you not perceive there to be a risk?

Mrs Lewsley-Mooney: In what way?

Mr Dunne: It could swing against them. Surely any decisions that that they make are subject to advice. Do you think that an under-16 can make a decision that could influence the rest of their life?

Ms McIlvanna: It would be an under-16 who has had the necessary supports; that is where we talk about the lack of advocacy services for under-16s. It would not be that the under-16 would make a snapshot decision; we would hope that that child would have adequate support, knowledge and information to assist them in making a decision. I see a greater risk in excluding an under-16 from the decision-making process. If the child or young person feels that the adults around them have made the decisions, it could be harder for the child to be compliant in the process. The child's buying into and being involved in the process can only help globally. When we deal with children and young people with mental health difficulties, they are already quite troubled and may feel disjointed from the system. For them to be able to reclaim and reassert some power — contingent on their age and stage of maturity — can only benefit them in the process.

Mrs Lewsley-Mooney: We already know that the legislation will give that help and support to over-18s with advocacy services. Why can the same not be given to under-18s?

Ms McIlvanna: It could be argued that the under-16s who will be involved in such decision making are the most vulnerable and require the most support and the most access to advocacy services.

Mr Brady: Thank you for your presentation. Surely Gordon's fears would be dealt with by the Bamford recommendation about a rebuttable presumption. It is assumed that the child has capacity, but if it is felt that they have not, they may be tested. That will not affect children who do not have capacity; capacity is presumed as a starting point, and then, presumably, it will be worked out from that.

Ms McIlvanna: Yes; it is almost worked backwards from the position of capacity and —

Mr Brady: That is the point that I am trying to make: vulnerable children would not be left exposed.

The Chairperson: You said earlier that the outcome of the process will determine where you sit on this, but have you informed the Office of the First Minister and deputy First Minister (OFMDFM) of your concerns about the Bill?

Mrs Lewsley-Mooney: Not yet.

The Chairperson: OK. You are welcome to listen to what the departmental officials have to say. Thank you very much for the paper and your presentation.