



Northern Ireland
Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

**Mental Capacity Bill: Departmental
Briefing**

22 March 2012

NORTHERN IRELAND ASSEMBLY

Committee for Justice

Mental Capacity Bill: Departmental Briefing

22 March 2012

Members present for all or part of the proceedings:

Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Seán Lynch
Mr Alban Maginness
Ms Jennifer McCann
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mrs Siobhán Broderick	Department of Justice
Mr Brian French	Department of Justice
Mr Gareth Johnston	Department of Justice
Mr Michael Kelly	Department of Justice

The Chairperson: The next session is the briefing on the mental capacity legislation and the justice system. I welcome to the meeting Gareth Johnston, head of criminal justice policy and legislation division in the Department of Justice (DOJ), Michael Kelly, from the civil justice policy and legislation division, Siobhán Broderick, head of civil justice policy division, and Brian French, from the criminal justice policy and legislation division. This element of the meeting will be recorded for Hansard, and a transcript will be published in due course. Gareth, I will hand over to you to outline the key issues on the mental capacity legislation, and I am sure that members will then have some points that they would like to raise with you.

Mr Gareth Johnston (Department of Justice): Thank you, Chairman, for the welcome and for affording us the opportunity to say a few words on the new Mental Capacity (Health, Welfare and Finance) Bill from a justice perspective and particularly on the overall shape of the way in which we are proposing to approach a joint Bill with the Department of Health, Social Services and Public Safety (DHSSPS). I will say something about the specific areas that we will be examining, but there will be an opportunity to come back to those when we bring a draft consultation paper to the Committee, which will hopefully be in May. You noted that I am joined by colleagues from the civil side of the directorate — the civil justice policy and legislation division — because this is a Bill that has both criminal and civil aspects. Collectively, we have been working very closely with DHSSPS colleagues on how best to create and give effect to new mental capacity law. Committee members will have seen our briefing paper, but I thought that it might be useful to set out the background to the proposed changes.

(The Deputy Chairperson [Mr McCartney] in the Chair)

The Bamford review of mental health and its report entitled 'A Comprehensive Legislative Framework' recommended a single legislative framework for the reform of the Mental Health (Northern Ireland) Order 1986. It recommended the introduction of mental capacity legislation that is broadly in line with the Mental Capacity Act 2005 across the water. One key difference between Bamford's envisaged approach and what is in place in other jurisdictions was its advocacy of the application of those mental capacity principles and safeguards to people who are subject to the criminal justice system and not just to the general population. That approach is different to what has been adopted elsewhere, which means that there is no particular blueprint or template for what we are doing.

Originally, the overall approach was that we intended to have a joint Bill that encompassed the civil and criminal justice systems. However, the priorities around the devolution of justice and the importance of delivering the first devolved Justice Bill impacted on the progress that we, as a Department, were able to make. It led to us considering with DHSSPS what we termed a trial separation, where we continued on our own tracks while keeping open the option of rejoining the provisions in a single Bill if circumstances allowed. In the meantime, DHSSPS has made good progress on the broader application of that Bill. We have recognised that the Health Committee, the Justice Committee and a wider range of stakeholders have attached considerable priority to the creation of a single piece of legislation. The Justice Committee noted that in its letter of 21 November last year. As a result of the representations that we had from the two Committees and, as I said, from broader stakeholders, the Justice Minister and the Health Minister have agreed to recombine and to work towards one single piece of legislation on mental capacity. That Bill will set out a legal framework, core principles and methods for making decisions and carrying out actions on the welfare, healthcare and financial matters of people who lack the capacity to make decisions for themselves. A number of principles that come from the Bamford review will be enshrined in the Bill. One is that any decision that is made or action that is taken on behalf of someone who lacks capacity is made in their best interests. There are also principles on autonomy and protection from harm. In addition, important safeguards need to be built in.

All that presents some challenges for the criminal justice system. Our underlying policy approach is that whatever is developed for the community as a whole should also apply to people who find themselves in the criminal justice system. That underlines very much what was in the Bamford report. Offenders in the community or in custody should have the same requirements and entitlements as anyone else. However, there are particular challenges for us in the justice system. Indeed, the Bamford report recognised that a separate provision may be needed for persons with a mental disorder who, although they had a decision-making capacity, presented a significant risk to themselves or to others. Our current thinking is that, in those situations, which are quite limited, criminal justice could be set aside for the kind of circumstances in which dangerousness, mental illness and capacity crossed over. To give an example, someone in prison might have the capacity to make a decision to harm themselves significantly, but that decision might be influenced by the prison environment. In those circumstances, our duty of care should be paramount, and compulsory treatment should be available. We are talking about a small number of exceptional cases, and we clearly need to consider how safeguards would apply.

As we move forward with this project, thinking about how the Bamford approach and principles apply to the criminal justice system is critical. Where someone has issues with mental capacity, we will want to look at the powers of criminal courts and the sentencing options that are available to them. We also need to consider the plea of insanity that is available in courts and the concept of fitness to be tried. The Minister has invited the Northern Ireland Law Commission to undertake a review of those two areas. Other issues include fluctuating capacity; age limits, a particular issue that has been raised with DHSSPS; and the role of such third parties as nominated persons, advocates and court-appointed deputies. Those are all areas that we will need to consider.

We will come back to those when we return with a draft consultation paper. I hope that that will be in May. In the meantime, we have set up our project structures. We have a project steering group, on which criminal justice and health representatives are sitting, and a stakeholder reference group, which is drawn from the voluntary and community sectors and relevant professional groups. We will be considering the policy proposals as they develop and providing the groups' views and expertise as we

journey along with this. As I said, DHSSPS is represented on each of our groups, and we are working very closely with that Department.

That is what I have to say on the criminal justice side. I invite Siobhán to say something about civil justice aspects, in which the Department is very much involved.

Mrs Siobhán Broderick (Department of Justice): As Gareth said, we are dealing with the non-criminal aspects of the Bill for which the Department is responsible. Those relate primarily to the oversight arrangements for suitable decision-making or substitute decision-makers. As the Committee may be aware, the Bill will provide for those who lack mental capacity to make a decision, and provision will be made for substitute decision-makers.

The current arrangements are that if a person lacks capacity to make decisions about his or her welfare, a board or trust may appoint a person, known as a guardian, to make such decisions on behalf of that person. In practice, that tends to be a relative or the nursing home that manages the affairs of the individual concerned.

For people who are incapable of managing their property or such affairs as their financial affairs, the High Court has the power to do, or to secure the doing of, such things as appear necessary or expedient for the maintenance of their affairs. In particular, the court may appoint a controller, who is usually a family member, to manage the person's property under the court's direction. The office of care and protection (OCP) in the High Court undertakes the case management and supervisory functions in respect of controllers and attorneys, under the enduring powers of attorney. An attorney is a person who is chosen by the person who becomes incapable to deal with his or her property and affairs in the event of that person becoming mentally incapable of doing so.

The legislation in Northern Ireland also imposes a duty on the trusts to notify the OCP of cases in which the powers of the court ought to be exercised with respect to the property and affairs of a person within its area. The OCP is then required to make enquiries on foot of such a notification and, if necessary, arrange for proceedings to be brought to the court.

Our proposals are intended to address the piecemeal approach that is currently the case and to provide for substitute decision-makers and their supervision in the Bill. That will extend the High Court's jurisdiction to make a decision on behalf of an incapable person or to appoint persons known as deputies, who will replace the controllers, to make a decision, not only on the financial matters of a person who becomes incapable but on their welfare and healthcare matters. The Bill will establish a new lasting power of attorney (LPA) scheme, which replaces the enduring power of attorneys. Under those new provisions, there will be two types of lasting powers of attorney available to donors — an LPA for property and financial affairs and an LPA for health and welfare matters. Donors will be able to make either or both LPAs.

The court, which is the High Court, will therefore exercise a number of functions; namely, to adjudicate on whether a person has the mental capacity to make a particular decision and to make declarations and decisions on behalf of a person whom it judges not to have sufficient capacity to do that. It can also appoint deputies, decide whether lasting powers of attorney are valid and remove attorneys or deputies who are failing to carry out their duties.

There will be a new office, called the office of public guardian (OPG), which will replace a number of the functions that are currently carried out by the OCP. The new office will be established to undertake functions such as the supervision of deputies and the registration of the lasting powers of attorney that will replace the current arrangements for enduring powers of attorney. It will also, as necessary, deal with and investigate representations on how deputies and attorneys exercise their powers.

I mentioned the duty to notify the OCP of any cases in which the courts' intervention may be required. That duty will be retained in the Bill and amended to reflect the new structures. Engagement in consultation with relevant stakeholders and DHSSPS continues for judicial oversight arrangements in a number of discrete areas.

Planning for the establishment of the new office of public guardian remains at an early stage. However, we envisage an office of around 20 staff, who will deal with around 1,000 applications for the registration of lasting powers of attorney, around 500 deputyships and 100 investigations. We envisage the running costs of the office to be around £1.25 million. Thank you.

Mr Johnston: Chairman, the Department is interested in two bits of the legislation. The first of those, as Siobhán said, is the role that the court and the court offices will play when people become incapable — all those really important protections for, say, those who develop dementia. Secondly, we are interested in the law for those with mental health issues, learning difficulties and personality disorders who become incapable in the justice system, and what criminal law says about those people. Those are the two big areas for the Department of Justice working alongside DHSSPS.

It is envisaged that the joint Bill will be brought to the Assembly no later than December 2013. However, in the run-up to that, we will have an interest in discussing how best to handle things. As Committee members will be aware from some of the correspondence, a meeting has been arranged between the two Chairpersons, the two Deputy Chairpersons and the two Ministers to think about how best we handle things, and whether there may be some opportunity for a joint approach to be taken, even in the run-up to the legislation being introduced. I am aware that December 2013 is some way off, but the Committee will be hearing quite a bit about the Bill's policy development over the coming months. We wanted to assure you that we are now joined up and working with DHSSPS on one Bill. We also wanted to set out the general direction of travel and give a taster for what will come down the line.

The Deputy Chairperson: Thank you for your presentation. I apologise for missing the beginning of it and for the Chairperson having to leave to attend to a bit of business. You may have covered this while I was out of the room, but do you propose to take views on the laws of unfitness to stand trial as part of the consultation exercise?

Mr Johnston: Yes, that will form part of the exercise. However, we have asked the Northern Ireland Law Commission to look at that particular bit. It proposes to do that to the same timetable as us when we look at the other bits of the law. It will be looked at, but the consultation paper on that will come from the Law Commission, which is an independent body.

The Deputy Chairperson: Will that run alongside the other consultation?

Mr Johnston: It will be done at roughly the same time.

Mr McCartney: Will you be looking at improved options for community-based supervision?

Mr Johnston: Yes. The disposals that are available to the court will be part of the consultation, and one area that we want to look at is the community. There are some interesting models; for example, in Scotland, where they have more flexible community orders than are available to us through supervision and treatment orders. We will look at those, and they will form part of the Department's consultation paper.

The Deputy Chairperson: Are there any budgetary concerns or implications in the legislation?

Mr Johnston: Siobhán might be best to talk about that on the civil side, where the more major issues will be.

Mrs Broderick: One of the major issues for the budget will be in the establishment of the office of public guardian, as it will have set-up and running costs. Currently, we envisage the set-up costs to be around £1.25 million and annual recurring costs for the running of that office of £1.25 million.

Mr Johnston: On the criminal side, there will be implications for capacity assessments, and so on, but our current assumption is that those implications will be dealt with within existing resources.

The Deputy Chairperson: No members have indicated that they wish to speak. There is plenty of time between now and December 2013. Thank you for your presentation this afternoon.