Northern Ireland Assembly

Committee for Justice

OFFICIAL REPORT (Hansard)

Mental Capacity Bill

28 June 2012

NORTHERN IRELAND ASSEMBLY

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Members present for all or part of the proceedings:
Mr Paul Givan (Chairperson)
Mr Raymond McCartney (Deputy Chairperson)
Mr Sydney Anderson
Mr Stewart Dickson
Mr Tom Elliott
Mr Seán Lynch
Mr Alban Maginness
Mr Patsy McGlone
Mr Peter Weir
Mr Jim Wells

Witnesses:

Mr Tom Haire	Department of Justice
Mr Gareth Johnston	Department of Justice
Mr Michael Kelly	Department of Justice
Mr Peter Philip	Department of Justice

The Chairperson: The Minister of Justice and the Minister of Health have agreed that the proposed Mental Capacity Bill should extend to the criminal justice system by way of a joint Bill. The joint Bill approach has considerable stakeholder support. The Department intends to consult on extending the legislation to the criminal justice system, and wishes to take the Committee's views on its consultation document before it is issued. The Department has also provided further information and options for Committee scrutiny of the joint Bill, following the recent meeting between the Chairs and Deputy Chairs of the relevant Committees and the two Ministers. I welcome Gareth Johnston, head of criminal justice policy and legislative division, Michael Kelly from the criminal justice policy and legislative division, Tom Haire, head of criminal law branch, and Peter Philip, from the criminal law branch, to the meeting. The session will be recorded and published in the Hansard report in due course. I will hand over to you.

Mr Gareth Johnston (Department of Justice): Thank you very much, Chairman, for your welcome. As you may recall, we appeared before the Committee in March, and at that time we said that we intended to issue a consultation paper on extending to the criminal justice system the principles and safeguards that were proposed for the general population under mental capacity legislation — that legislation, of course, being taken forward with the Department of Health, Social Services and Public Safety (DHSSPS) in the lead. I am pleased to say that we intend to issue our consultation proposals very shortly as a public consultation exercise. That exercise will run on until the early autumn.

We welcome this opportunity to brief the Committee and to listen to and take account of your views. I am joined today, as you said, by Tom Haire, Michael Kelly and Peter Philip, who make up our Bill team in this area. I am conscious that Members have seen the consultation paper and that the previous presentation set the initiative in context, but maybe it would be helpful if I recapped on some of the background.

The Bamford review report, entitled 'A Comprehensive Legislative Framework', recommended a single legislative framework for the reform of the Mental Health (Northern Ireland) Order 1986 and the introduction of new mental capacity legislation broadly in line with the Mental Capacity Act 2005 that applies in England and Wales. The philosophy of Professor Bamford's recommendations was really that people who have the capacity to make a decision about their treatment or their welfare should be allowed to do so. Where they do not have that capacity to make a specific decision relating to their welfare, healthcare or financial matters, the Bill will set out a legal framework for making decisions and carrying out actions.

The underlying idea is to ensure that any decision that is made or action that is taken on behalf of someone who lacks capacity is taken in their best interests. The Bill will also provide for a series of safeguards that reflect the nature and seriousness of the intervention. The more intrusive the intervention in the life of the person lacking capacity, the greater the safeguards. To put it in the health context, if electroconvulsive therapy is being considered for someone then obviously there will be a high degree of safeguards. If it is a simple decision about their everyday care, like whether somebody gets their hair cut, then the safeguards that are needed are rather less.

In short, the whole Bill and the whole approach are about looking after people who are vulnerable.

The legislation that the Bill replaces is joint legislation that covers the health system and the criminal justice system. Our intention had always been to have a joint Bill that encompasses those two sides of the coin. However, due to priorities around devolution and delivering the Justice (Northern Ireland) Act 2011, we entered into what we termed a period of "trial separation" from the DHSSPS. That meant that it progressed its work on the general civil side of the legislation, and we kept our options open on joining up again with the criminal justice side if the circumstances allowed.

Both you and the Health Committee wrote to us about that approach and, recognising the importance that the Justice and Health Committees — and indeed a range of other stakeholders — attached to the creation of a single piece of legislation on mental capacity, the Justice and Health Ministers, as you have said, Chairperson, have agreed to recombine. The Committee has a paper on that, and I will come back to it briefly at the end.

Both Departments have been working together to agree a timetable that would allow a joint Bill to be presented to the Assembly by December 2013. Our Department has established a steering group and a reference group comprising wider interests from, for example, the voluntary and community sector, to assist in informing the policy development process on the criminal justice issues. DHSSPS, which has its own reference and steering groups, is represented on each group, and we have worked closely with it in shaping our policies.

Let me say something about how all of that applies to the criminal justice system. There are challenges and safeguards needed in applying mental capacity principles to our part of the system, and it is important to recognise why we are doing so. First, the reason why we are adopting Professor Bamford's approach in the justice system is that he told us to. In the course of his independent review, he said very strongly that the same standards should apply to people in the criminal justice system, that those who are subject to the criminal justice system should have access to treatment and care that is equivalent to that available to other members of our society, and that the safeguards for those with impaired decision-making capacity must be at least as robust.

We obviously need to care for and protect vulnerable people who find themselves in the criminal justice system. However, as the Committee will also be aware, the Department has been moving towards the normalisation of prison healthcare generally. For example, prison healthcare services are now being provided by the South Eastern Trust. We take the view that it is important that the same quality and framework of healthcare enjoyed by the general population is extended to those in the criminal justice setting, not least because the treatment and management of those conditions may help to prevent offending or antisocial behaviour in the future.

We also recognise — and this is another reason why we think the capacity approach is important — that mature and responsible individuals should, subject to preventing people from doing harm to

themselves or to others, be free to make their own decisions and be helped to do so and to take ownership of their decisions and actions. That approach chimes very much with what we see in the criminal justice system as our approach to reducing offending. People must be seen as responsible for their own decisions, where they have the capacity to take them.

What we have set out in the consultation paper is intended to be part of a very open process. We have begun engagement with stakeholders through our reference group and in other ways, and we want to continue that open approach to our policy development. These are by no means final ideas, but we want to hear people's opinions. At a general level, we are clear that, by and large, what is proposed generally for the population should apply in the criminal justice setting. Someone who is on probation or bail or who is living in the community on post-release licence will have the same requirements and entitlements as any other person under the legislation. In broad terms, that should be the same also for people who are detained in custody. The intention is that, if a detained person has a mental capacity issue in relation to their health, welfare or finances, it will be assessed in the same way; decisions will be taken in the same way and treatment will be provided on the same basis. The key provisions of the Bill in terms of principles and safeguards will be applied.

However, there are some areas where this desire to give people responsibility for their own decisions, where they have the capacity to take them, rubs up against our duty of care and our duties for public protection. Let us say that someone in prison decides to harm themselves and has capacity to make that decision, which could happen in a small number of instances. Prison is a challenging environment, and being in prison may influence the person in the decision that they make. The consultation paper proposes that, in those circumstances, we should have special arrangements that would allow for compulsory treatment. That would be in situations where there is a material risk of significant harm to the person themselves or to others.

As the Committee is well aware, courts have powers to order compulsory detention and treatment in hospital. The Department has powers about transfer from hospital to prison. Our paper invites suggestions as to how those should operate in the capacity-based approach but takes the view that courts should retain those powers. One option is to continue to give the courts complete discretion in relation to those orders, but in anticipation that the expert advice on which they rely would inevitably be infused with a Bamford and a capacity approach.

Aside from that, the Bill also covers the range of options that the courts have available when someone before them has a mental illness, learning difficulties or a personality disorder. We consider whether there would be merit in making alternative disposal methods available, such as a community-based compulsion order, which would be similar in effect to a community treatment order. It might bridge the gap that has been flagged in the past between the hospital order, which only a small number of people would qualify for, and the supervision and treatment order, which has been used in a wider range of cases.

Youth justice is a concern for the voluntary and community sector. The specific arrangements that I have referred to for the criminal justice system would allow us to ensure treatment for the very small number of under-16s in the criminal justice system who need compulsory hospital treatment.

Alongside our work, another important area that informed the 1986 Order was the area of unfitness to plead and unfitness to be tried. We had asked the Law Commission whether it would carry out a review of that area of law. It is an important and complex area, and we are grateful to the commission for taking that on. It intends to issue a consultation paper at about the same time as ours. The intention is that its work and ours could join up in time to meet this joint Bill.

The Chairperson: Gareth, we just want to move on. I am conscious that you are here to get agreement for a consultation to be issued. Obviously, there will be responses, and we will have to go through the legislation, so there is no point in continuing to outline in detail all that is going to be in the Bill. Members will have questions.

Mr McGlone: I see that, in the foreword, the Minister says that a core value, as he would probably see it, is:

> *"It is my strong view that what is being developed for the general population in terms of principles and safeguards in terms of mental capacity should also be applied in the criminal justice field."*

That is fine. I do not think there is anybody in the room who would disagree with that, or outside the room either. But why do you put that principle or core value out for consultation and ask people whether they agree with it, if it is, or should be, a fundamental? In other words, it appears that you move from a fundamental to a dilution of a fundamental.

Mr Johnston: The Department's intention, as evidenced by what the Minister said, is that that should apply. We do ask people if they agree, because we think that, even on the fundamentals, it is good to ask people. I am very hopeful that there will be strong support for what the Minister is saying — that the same standards should apply. We are not trying to dilute it but just to give the people the opportunity to express their opinions.

Mr Wells: On the mechanics of this, Bamford was initiated in 2002, and the equivalent legislation in England and Wales was in 2005. Here we are in 2012 being told that the first opportunity to see the Bill will be December 2013. That strikes me as painfully slow. If there is any potential slippage in that, will we get a Bill through before the end of this mandate?

Mr Johnston: The timetable is certainly challenging, but we believe that it is achievable. In many ways, that leads on to the second of the papers that the Committee has, which is starting to raise that question. It is a question for the Assembly, but we are offering a few thoughts on how the process might best be managed. Would it be best managed by two Committees looking separately at the legislation, or by an ad hoc Committee, so that there is one Committee that looks at the joint Bill? If so, how could that Committee be involved in the run-up to the legislation, looking at the policy so that we hit the ground running?

Yes, it has been a long time since the Bamford report. I know that health colleagues would say that, on their side, it has been a very complicated bit of legislation to get to the stage that they are now at, which is working with the draftsperson. They also thought that it was important to do it in a very engaging way with stakeholders. Although I think that has been very useful, it has taken some time. I know that Professor McClelland and others have made the point that their overriding concern is to get the legislation right. They do not want it to be delayed any longer than it needs to be, but we need to make sure that what gets put into legislation is something that can stay there and be valid for the next period of years.

Mr Wells: I happened to be around the last time, for the 1986 legislation, so it shows you that the Department cannot be accused of going at breakneck speed. *[Laughter.]* I do not intend to be around the next time the legislation is upgraded, I assure you.

Mr McGlone: Bus pass time.

Mr Wells: How does the rest of the United Kingdom — England, Wales and Scotland — deal with the issue of a joint legislative framework for the ordinary man on the street and those who are criminals? Have they tried to unite the legislation at any stage?

Mr Johnston: They have not. It would be a unique approach in Northern Ireland. England, Wales and Scotland have adopted the mental capacity principles in terms of the general population. Professor Bamford felt that it could, and should, be done with the criminal justice population. We feel that it can be done, but that there are certain safeguards and special arrangements that we need in particular cases so as to assure that our duties of care are respected and that public protection is respected.

Mr Wells: Finally, is it the case that the Department of Health is basically ready to run, but the Department of Justice is holding the process back?

Mr Johnston: The Department of Health is still dealing with a number of issues, certainly in terms of drafting. It is now at the stage of drafting the Bill. There are a number of issues that it is grappling with at the moment, not least the issue of young people. So we have agreed a joint timetable that we believe we both can meet, and, in the next year or so, if there is any scope to pull that forward, we will take advantage of it.

The Chairperson: Sorry, Mr McGlone, you had one last point.

Mr McGlone: I think it has been answered in response to Mr Wells. It was around the timetabling issue and delivery.

The Chairperson: Great minds think alike.

Mr Wells: There is another line to that phrase, but I will not say it.

Mr Weir: Thank you, gentlemen, for your evidence. I hope that, in your trial separation with the Department of Health, no inappropriate relations were formed with any other Department. I will probe on a couple of issues. I do not have the same depth of knowledge and mental capacity as Mr Wells, who seems to be very clued in, stretching back 26 years. In terms of what is being put forward for consultation, obviously you have talked about following Bamford. Is it a pure and simple "Bamfordisation" of the Criminal Justice Bill? Are there any areas where you have deviated from Bamford, either because you feel that it is inappropriate or because the length of time post-Bamford has meant that events have overtaken it and it is not now applicable?

Mr Johnston: Bamford recognised that special consideration would need to be given about how exactly the arrangements applied in the criminal justice system. We propose special arrangements for the small number of people where the duty of care and mental capacity rub up against each other. Those are not arrangements that were set out specifically in Bamford; those are arrangements that we are developing because of what we feel is a conflict of duties. On the one hand is the duty to respect someone's decisions, and on the other is the duty to step in where there is a duty of care.

Mr Weir: In the briefing paper, you say that the Department welcomes views on particular arrangements in a small number of cases where there is a severe mental illness but there is still capacity. You give the example of severe personality disorder. Are you seeking a list of options on those particular arrangements, or is it a more open-ended question? Are you simply seeking views on how that issue should be dealt with?

Mr Johnston: We have put out what we propose as an option. That is that, in circumstances where there is a material risk of significant harm to the person themselves or to others, there would be a power to step aside from the capacity and make compulsory arrangements for someone's treatment. We are asking for views both on that and how it would be translated into legislation, and also on the practicalities. When those people transfer into hospital, how exactly is their treatment managed when they are there alongside people who may be being treated on a different basis? Those are, essentially, the questions that we would like views on.

The Chairperson: Thank you very much. I have one point before you finish. When the Bill comes, will there be specific sections that relate to the criminal justice system? Will specific clauses be targeted solely at the criminal justice system?

Mr Johnston: That is certainly the intention. There will be general principles that will apply both to civil and criminal, but then there will be a section that deals with all of the criminal justice issues, the special arrangement that I have just been talking about, the powers of courts and the different orders that are available to courts.

The Chairperson: Is there an approximate percentage of how much of the Bill will relate to criminal justice?

Mr Johnston: About 30%? There or thereabouts. The difficulty is that even our part, which will be specific, is very much based on the principles of the Bill overall. That is why we propose that the Committee might give serious consideration to some form of joint approach.

The Chairperson: Thank you very much.