



## Belfast City Council

<b>Report to:</b>	Strategic Policy & Resources Committee
<b>Subject:</b>	<b>CONSULTATION – Legislative Framework For Mental Capacity And Mental Health Legislation In Northern Ireland</b>
<b>Date:</b>	Friday 20 <sup>th</sup> February 2009
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### Relevant Background Information

#### Purpose

To bring to the attention of Members, a consultation by the by the Department of Health Social Services and Public Safety (the Department) on its proposals to amend the existing mental health legislation and to introduce a new mental capacity bill in line with recommendations made in the Bamford Review of Mental Health. A draft high level response is also attached for consideration.

#### Background

Members have previously received consultation reports in relation to the Bamford Review – an independent review of the law, policy and service provision affecting people with a mental health problem or a learning disability. Last summer the Northern Ireland Executive issued its response to the review, "*Delivering the Bamford Vision*", which outlined the government's long term vision and proposals for improving services for people with a mental health problem or a learning disability, and which also included a commitment to legislative reform. This consultation document now sets out the Department's proposals for the legislative reform, and in particular, proposals to amend the existing Mental Health (Northern Ireland) Order 1986 (the 1986 Order) and to introduce new mental capacity legislation.

### Key Issues - Summary of the Consultation

The consultation provides an opportunity to provide comments in advance of formal draft legislation. The document sets out:

- (i) the underlying principles upon which the legislation will be based;
- (ii) the key elements of the proposed mental capacity legislation; and,
- (iii) the key elements of and proposed amendments to the existing mental health legislation.

### Legislative Timeframe

In response to feedback to *Delivering the Bamford Vision*, which indicated that respondents were unhappy with the proposed sequential approach to developing the legislation and the target date of 2014; the Department is now proposing a new harmonised "twin track" approach whereby a new Mental Capacity Bill and either a modernised 1986 Order or a new Bill, if more appropriate, would be enacted in the same time-frame. The Department is hoping to consult on the detailed content of the Bills, accompanied by explanatory notes and a regulatory impact assessment including an analysis of the implementation costs, in late 2009. Subject to Assembly approval (2010) and additional resources being made available from 2011 onwards, it is anticipated that both Bills will be enacted into law by April 2011, with commencement thereafter.

### Guiding Principles

The Department has accepted the broad principles developed by the Bamford Review and is proposing that they be embedded in both the mental capacity and mental health legislation. The central thrust of the principles is to safeguard the dignity and human rights of mental health service users. In summary the principles are:

- **Autonomy** – the right of the individual to decide and act on his or her own decisions (primary principle)

- **Justice** – applying the law fairly and equally;
- **Benefit** – promoting the health, welfare and safety of the person, whilst having regard to the safety of others; and
- **Least harm** – acting in a way that minimises the likelihood of harm to the person.

### **Mental Capacity Bill**

Whilst the Mental Capacity Bill will promote the concept of autonomy, in circumstances where an individual does not have the mental capacity to make decisions for themselves, this legislation will provide legal protections for them and those acting on their behalf. The Bill will contain a definition of impaired decision-making, how this is to be assessed and by whom. It will also provide detail on what “substitute decision-makers” will need to take account of when acting on behalf of an individual with impaired capacity. The proposed legislation will apply to those aged 16 and over and make provision for an assessment of capacity in relation to a specific decision only. (It must not be assumed that because a person lacks capacity to make one decision that they also lack capacity to make other decisions)

The proposed Bill will also include provision for:

- *Advance decision-making* – enables people with capacity to make a valid advance decision concerning their future treatment, including refusal, with appropriate safeguards in place.
- *A lasting power of attorney* – empowers people to make a decision on who will make decisions in respect of their financial affairs and welfare (including healthcare) if in the future they should lose capacity (replacing and extending the existing enduring power of attorney which deals only with financial affairs).
- *A High Court appointed deputy* – who can be given the authority to make financial decisions on behalf of someone who lacks capacity and who has not applied a lasting power of attorney. Decisions concerning healthcare will be referred to the High Court.
- *A new Office of Public Guardian* – to ensure that both court appointed deputies and those appointed as lasting powers of attorney act in the best interest of the incapacitated person.
- *Statutory recognition of the views of carers* – to be taken into account when decisions are made.
- *Legal protection* to a person who is providing care or treatment for someone who lacks capacity, subject to reasonable safeguards and standards of care.
- Create a *new offence of ill-treatment or neglect* of those who lack capacity.
- *Enhanced advocacy services* for those who have no one to speak on their behalf.
- An ethical framework for research involving people who lack mental capacity. Where unauthorised research has been undertaken, this will be a criminal offence.

The Department also intends to take account of the European Court of Human Rights judgement (HL v United Kingdom 2004, the Bournemouth case) to ensure that additional safeguards are in place regarding the deprivation of liberty of an individual who lacks the capacity to consent to care where it is in their own best interests, and will include details of when and how deprivation of liberty may be authorised. This will be necessary to ensure compliance with Article 5 of the European Convention of Human Rights.

### **Mental Health Legislation**

The Department proposes to modernise the Mental Health (NI) Order 1986 in order to:

- embed the Bamford principles into mental health legislation;
- ensure that the law is fit for purpose so that people with a mental disorder receive effective assessment, treatment and care in accordance with modern clinical and social care practice;
- harmonise with mental capacity legislation to form a coherent framework; and
- put additional protections in place for people who have a mental disorder requiring assessment and/or treatment.

A new definition of mental disorder will be developed to better reflect developments in mental health and to align Northern Ireland legislation with the rest of the UK (which will also facilitate the transfer of service users between jurisdictions). It will no longer exclude those suffering solely from a personality disorder.

#### *Intervention*

Whilst the legislation aims to protect the rights of individuals with mental health problems, it recognises that there may be occasions when appropriate intervention may be required, for example when there is increased risk to the individual and occasionally to society. In such circumstances, it is proposed that there will be two kinds of intervention:

- short-term stay in hospital for an **authorised assessment** for up to 28 days. This extends the previous 14 days to enable a full assessment to be made and will put Northern Ireland in line with other UK jurisdictions. Those being assessed will have a right of access to the Mental Health Review Tribunal after 14 days to have the intervention for assessment reviewed; and
- **medical treatment** in a hospital or in the community. This authority could last up to 6 months initially and be extended for a further 6 months and for 12 months at a time thereafter.

There will be set criteria authorising intervention and safeguards to protect individual service users. The proposed criteria for an authorised assessment are that there is a likelihood that:

- (i) the person has a mental disorder;
- (ii) there is significant risk to health, safety or welfare of the person or to the safety others; and
- (iii) because of the mental disorder the person has significantly impaired decision-making ability in relation to treatment.

The proposed criteria for intervention for medical treatment either in hospital or in the community are that:

- (i) the person has a mental disorder;
- (ii) medical treatment is available to the service user which could treat the condition or help prevent it deteriorating;
- (iii) if medical treatment was not provided, there would be a significant risk to the health, safety or welfare of the person or to the safety of others;
- (iv) because of the mental disorder, the person has significantly impaired decision-making ability in relation to treatment; and
- (v) intervention is necessary.

The intervention response must be proportionate to the risk posed and, where possible, interventions should be agreed with the individual. The offence of ill-treatment or neglect, already included in the current 1986 Order, will be reviewed and aligned with a similar offence which will be contained within the Mental Capacity Bill. Additional safeguards, in addition to the protections contained within the Mental Capacity Act and in present mental health legislation, will also be put in place to protect the rights of mental health service users.

#### **Consultation Questions**

The Department is seeking feedback on:

- the guiding Principles and whether they should be embedded the proposed legislation;
- whether the proposed Powers and Protections are appropriate and compressive;
- whether there is a need to undertake a full Equality Impact Assessment; and,
- general comments on the proposals.

The full consultation document can be accessed at: <http://www.dhsspsni.gov.uk/legislative-framework-for-mental-capacity.pdf> The closing date for responses is 31<sup>st</sup> March 2009.

#### **Resource Implications**

n/a

#### **Recommendations**

The Strategic Policy & Resources Committee is asked to note the content of the report and to approve the attached response to the consultation document and to approve its submission to the Department.

<b>Key to Abbreviations</b>
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N/a
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<b>Documents Attached</b>
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APPENDIX 1: Draft Response Letter
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## **APPENDIX A – PROPOSED COUNCIL RESPONSE TO THE CONSULTATION**

### **DEPARTMENT OF HEALTH SOCIAL SERVICES & PUBLIC SAFETY CONSULTATION: “Legislative Framework for Mental Capacity and Mental Health Legislation in Northern Ireland”**

#### **BELFAST CITY COUNCIL RESPONSE**

Belfast City Council welcomes the opportunity to comment on the above DHSSPS consultation which sets out the principles and key proposals for legislative reform in relation to mental capacity and mental health.

The Council has previously responded to consultations resulting from the Bamford Review and is committed to working in partnership to improve the quality of life and well-being of all people living in Belfast. We are therefore supportive of initiatives, and in this case legislative reform, that will contribute to improved mental health and well-being and which will help promote equality of opportunity for all people and particularly those most at risk.

As a city with high levels of deprivation, Belfast also experiences higher than average levels of mental ill health and learning disability (the Equal Lives report stated that there is a link between poverty, levels of deprivation and learning disability). Our Elected Members have expressed interest in the provision of services for people with mental health problems or a learning disability and are keen to ensure that these services are responsive and fit for purpose.

It is crucial that the guiding legislation, which in effect will become the overarching policy position, provides a solid basis on which to build a caring, equitable and appropriate approach to mental health within Northern Ireland. We are therefore supportive of the principles based approach as outlined in the consultation document, and agree that the proposed principles provide a fair, safe and balanced approach with which to underpin mental health and mental capacity legislation.

As an organisation, however, we do not have the specialist knowledge or professional expertise to comment in detail on the impact which the proposed legislation would have on service users and their carers or whether the proposed powers and protections are appropriate and adequate. We would therefore stress the importance of consulting and listening to those individuals or organisations that have first hand experience of this issue. In particular we stress the need to engage with individuals or organisations that can represent young people and articulate their needs and experiences.

The Council is keen to work in partnership with Government, communities and other sectors to improve wellbeing and quality of life. We therefore welcome future opportunities to provide our views and where appropriate to work with the DHSSPS in this area.

Thank you for your interest in Belfast City Council’s position on this subject