

THE BAMFORD REVIEW OF MENTAL HEALTH AND
LEARNING DISABILITY (NORTHERN IRELAND)

A COMPREHENSIVE LEGISLATIVE FRAMEWORK

EXECUTIVE SUMMARY

August 2007

INTRODUCTION

The values base of the Review, as expressed in the Human Rights and Equality of Opportunity Report, has underpinned our consideration of legislative reform. We have sought to specify a comprehensive framework (hereafter referred to as the “Framework”) for future legislation which reflects the need to respect the rights of all citizens, to provide rights for those whose freedoms may need to be interfered with on healthcare grounds, where appropriate, to protect public safety and to encourage best practice.

Extensive and wide-ranging discussion over the last 4 years, together with consultation both within the Review and with several external experts, along with stakeholder contributions have all contributed to the development of the Framework proposals. There has been general support for the approach taken and for the recommendations.

The Framework proposals are not an attempt at legislative drafting, but a description and an explanation of what is considered necessary for reforming existing legislation, applying a principles-based approach.

VALUES AND PRINCIPLES

The comprehensive nature of the Review has enabled the same core values to inform all our deliberations, including on the reform of Mental Health legislation, and has ensured an integrated and co-ordinated approach to the work.

The vision underpinning the Review is a valuing of those with mental health needs or a learning disability, including their rights to full citizenship, equality of opportunity and self determination. The vision also looks to a reform and modernisation of services that will make a real and meaningful difference to the lives of people with mental health needs or a learning disability, to their carers and families. It emphasises promoting the mental health of the whole community and supporting good mental health through preventative action and acknowledges the essential role of carers.

The values base on which modern Mental Health legislation and the reform of existing provision should rest has been informed by review of developments in human rights and Mental Health law (national and international) including the Mental Health (Northern Ireland) Order 1986 (the 1986 Order).

The Review has recognised from the outset that new legislative proposals for Northern Ireland should be based on agreed principles. They should have regard to human rights and the dignity of the individual and should provide equally for all circumstances in which an individual's autonomy might be compromised on health grounds.

THE NEED FOR CHANGE

The impetus for change arises from ongoing changes in society and the professions, influenced by developments in other jurisdictions and by innovative practice at local level. Since the introduction of the Mental Health (Northern Ireland) Order 1986, new opinions have been expressed and concerns raised: by health and welfare professionals (reflecting changes in scientific knowledge); by the public (reflecting changes in views on health, illness, safety and risk); by lawyers (reflecting changes in mental health law elsewhere); and, most importantly, by users of mental health and learning disability services and their carers (reflecting their experiences with the current mental health provision). The most important drivers of the current review can be summarised as follows:

- the voice of users of services and their carers;
- changes in society and professional practice;
- human rights obligations;
- changes in Mental Health law in other jurisdictions; and
- the introduction of Capacity legislation in other jurisdictions.

THE 1986 ORDER

In formulating proposals for changes in legislation it has been essential to make a careful appraisal of the 1986 Order and its strengths and weaknesses. In doing this, account has been taken of the submissions made to the Review by users of services, carers and other stakeholders and the detailed analyses contained in the reports of committees and other commentaries relating to recent developments in Scotland, England and Wales, and in the Republic of Ireland.

While some elements of current legislation are considered to work well, it has become clear that aspects of the 1986 Order may not be human rights compliant. Neither is it in keeping with developments in good practice, which emphasise partnership between patients and professionals

and a holistic approach to care and treatment. Nor is it based on the principles which the Review has identified as essential. The 1986 Order allows the individual's autonomy to be over-ridden in the interests of his own or other's safety, and the powers focus on compulsory assessment based on a relatively narrow definition of risk, rather than ensuring appropriate treatment for those who require it.

THE IMPORTANCE OF PRINCIPLES FOR LEGISLATION

The Review's task has coincided with preparatory work by the Office of Law Reform - now the Civil Law Reform Division of the Department of Finance and Personnel - to introduce new Capacity legislation in Northern Ireland. This has provided a unique opportunity to consider the overall purpose of legislation, the guiding principles underpinning legislative reform and an opportunity to develop a comprehensive approach to protecting and respecting the dignity of people with mental health problems.

A rights-based approach is proposed as the guiding principle for reform of legislation, which should respect the decisions of all who are assumed to have capacity to make their own decisions. Grounds for interfering with a person's autonomy should be based primarily on impaired decision-making capacity. New legislative solutions are, therefore, required for issues posed by the effects of disorder of the brain or mind on an individual's decision-making capacity and which affect his/her own personal health, the need for care and treatment, safety and the welfare or the safety of others.

A principled, human rights-based approach moves from public protection as the priority towards safeguarding the rights and dignity of people with mental disorder and ensuring their access to appropriate care and treatment. It will be necessary in some situations to balance these individual rights with the rights of others who may be placed at risk through the individual's behaviour. Adequate and proportionate protections must be ensured within legislation.

Mental Health legislation considered from a principles base also requires a comprehensive approach which recognises the overlap with capacity issues, the needs of children and of those within the Criminal Justice System, including the interfaces with other relevant statutes.

A PROPOSED COMPREHENSIVE FRAMEWORK FOR SUBSTITUTE DECISION-MAKING

The key proposal for statutory reform is that Government should adopt a coherent and co-ordinated approach to legislative provision. There should be a single, comprehensive legislative framework for the reform of Mental Health legislation and for the introduction of Capacity legislation. This should be through the introduction of provisions for all people who require substitute decision-making. A Framework is proposed for interventions in all aspects of the needs of people requiring substitute decision-making, including mental health, physical health, welfare or financial needs.

One possible model application of the Framework has been developed in some detail and is presented in chapter 7 of the main report. This model allows for three discrete levels of intervention, representing increasingly formal measures of both scrutiny and authorisation on the one hand, and protections and recourse to appeals on the other, as the seriousness, intrusiveness and/or risk presented by the issues involved increase.

RECOMMENDATIONS

The Review makes the following recommendations for reform of legislation.

Overarching Recommendations

1. There should be a single, comprehensive legislative framework for the reform of Mental Health legislation and for the introduction of Capacity legislation in Northern Ireland. This should be through the introduction of provisions for all persons who require substitute decision-making. A framework is proposed for interventions in all aspects of the needs of persons who require substitute decision-making, including mental health, physical health, welfare or financial needs.
2. The framework should be based on agreed principles, explicitly stated in legislation and supplemented, if necessary, in supporting Codes of Practice.
3. The principles underpinning new legislation should support the dignity of the person and have regard to:

Autonomy: respecting the person's capacity to decide and act on his own and his right not to be subject to restraint by others.

- There should be an assumption of capacity and provision of care and treatment should be on a partnership and consensual basis, as far as possible. Respect for capacitous decisions should extend to those decisions made legally in advance and where the person grants specific decision-making powers to another on his behalf, for the time when he loses capacity himself.
- Participation - users of services should be fully involved to the extent permitted by the person's capacity, in all aspects of their care, support or treatment. Users of services should be provided with all the information and support necessary to enable them to participate. This may include the involvement of advocates and/or carers. Account should be taken of past and present wishes in so far as these may be ascertained.

Justice: applying the law fairly and equally.

- Non-discrimination - persons with a mental disorder or a learning disability should retain the same rights and entitlements as other members of society.
- Equality and respect for diversity - persons should receive treatment, care and support in a way that accords respect for, and is sensitive to their individual abilities, qualities and cultural backgrounds. The legislation should not discriminate on grounds of age, gender, sexual orientation, ethnic group, disability, social class, culture or religion.
- Reciprocity - the loss of a person's rights by detention or by compulsion to treatment and care should be matched by an obligation to provide adequate treatment and care for that person.
- Partnership - services should develop effective partnerships to ensure continuity of care across age and service boundaries.
- Fairness and transparency - there should be fairness and transparency in decision-making, and the right to representation for challenge of due process. Proceedings should be timely.

- The specific rights of children, including the right to education, should be protected.

Benefit: promoting the health, welfare and safety of the person, while having regard to the safety of others.

- Where interference is necessary and permissible, the best interests of the person should be protected and promoted, including protection from abuse and exploitation.
- Interventions should only be undertaken using the legislation to achieve benefits which cannot be achieved otherwise. Benefit to the person should include, but not be limited to, reduction of risk of harm to self or others.

Least Harm: acting in a way that minimises the likelihood of harm to the person.

- The person should be provided with the necessary care, treatment and support in the least invasive manner and in the least restrictive environment compatible with the delivery of safe and effective care. The perception of the restriction by the person himself should be taken into account.
- There should be clear guidance on the use of restrictive practices such as restraint, seclusion and time out for both adults and children, and these should be monitored and subject to evaluative research.
- There should be clear guidance on how and when research may be carried out with persons who have impaired decision-making capacity and this should be monitored.

4. These principles should apply in a non-discriminatory and balanced way to all healthcare decisions, as well as to welfare and financial needs.
5. Grounds for interfering with a person's autonomy should be based on his or her impaired decision-making capacity.
6. The definition used in the Mental Capacity Act 2005 should be adopted in Northern Ireland, specifically that:

“a person lacks capacity if in relation to a matter at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance

in the functioning of, the mind or brain. It does not matter whether the impairment or disturbance is permanent or temporary.”

Impairment of, or disturbance in the functioning of, the mind or brain includes mental disorder, as defined in the Mental Health (Northern Ireland) Order 1986, which subsumes “mental illness, mental handicap and any other disorder or disability of mind”. It includes disorders due to injury or disease such as stroke. The test of capacity should include all those aspects of mental functioning which affect decision-making capacity (not just cognitive impairment).

7. Children and young people under the age of 18 who are affected by the proposed approach to substitute decision-making should be afforded special protections.
8. A comprehensive legislative framework must take account of the particular needs and protections necessary for vulnerable adults, including those compliant persons with impaired decision-making capacity who are deprived of their liberty (“Bournewood” situations).
9. Persons who are subject to the Criminal Justice System should have access to assessment, treatment and care which is equivalent to that available to all other people.
10. Legislation must provide appropriate public and individual protection to the community against harm from persons whose decision-making capacity is impaired and who present a risk to others. On the other hand, legislation must not discriminate unjustifiably against persons who suffer from a mental health problem or learning disability.

Specific Recommendations

11. Specific key provisions of the Mental Capacity Act 2005 should be introduced for the proposed legislative framework, with minimal amendment. These include:
 - the definitions of decision-making capacity and persons with impaired decision-making capacity;
 - a requirement that any decision or action undertaken on behalf of a person with impaired decision-making capacity must be in his/her best interests and must have regard for the least restrictive option available;

- legal protection for the performance of everyday acts carried out in connection with a person's care or treatment;
 - provision for attorneys, acting under Lasting Powers of Attorney (LPAs), to deal with welfare (including healthcare) in addition to property and finance;
 - an enlarged jurisdiction of the Court in relation to welfare, healthcare and financial matters;
 - powers of the Court to make declarations and orders and to appoint deputies;
 - the recognition of advance decisions to refuse treatment and, in addition, advance statements about preferred treatment;
 - safeguards in relation to research involving persons with impaired decision-making capacity;
 - independent advocates;
 - Codes of Practice;
 - a new offence of ill-treatment or neglect;
 - the appointment of a Public Guardian; and
 - ratification of the Convention on the International Protection of Adults.
12. The following provisions, which are not within the Mental Capacity Act 2005, although some of which are currently defined in Mental Health law, should be included within the proposed legislative framework:
- compulsory admission to an approved facility for assessment;
 - compulsory detention in hospital for treatment;
 - supervised intervention in the community;

- a system for the management of risk;
- provision for prolonged and particularly serious interventions;
- an enhancement of the role and functions of the Mental Health Commission, which will transfer to the Regulation and Quality Improvement Authority;
- a development of the role and functions of the Mental Health Review Tribunal;
- the introduction of a nominated person as a replacement for the “nearest relative”, with a re-definition of the corresponding role;
- an enhancement of the role and recognition of the rights of carers (such as family or friends);
- an extension of certain professional boundaries and functions, with the creation of two new professional posts, the Approved Clinician and the Responsible Clinician; and
- ratification of the Convention on the Rights of Persons with Disabilities.

Recommendations on Implementation

13. The proposed application of a capacity approach to interventions should be the focus for early local evaluation. The training needs and practicalities surrounding capacity assessment in clinical and other settings should be evaluated in advance of any proposed introduction of legislation.
14. The general public, users of services and carers must be kept fully informed at all stages of the introduction and operation of new legislation.
15. Training programmes on the proposed new legislation are essential for those persons who will be required to operate it and for users of services and their carers. The legislation, Codes of Practice and related training programmes must be introduced together.
16. Adequate resources must be made available to operate the procedures and bodies prescribed by the new legislation.

17. The Criminal Justice System should take the lead in developing an inter-agency risk assessment and management approach. This should co-ordinate with the proposed legislative framework. It should apply to all offenders who pose a prescribed level of risk, irrespective of whether or not these persons suffer from a mental health problem or learning disability.
18. The proposed comprehensive legislative framework should be taken forward through a joint initiative involving the DHSSPS, the Civil Law Reform Division of the Department of Finance and Personnel, the Northern Ireland Court Service and the Northern Ireland Office. This group should be responsible for translating the proposals into new provision for Northern Ireland. Users of services and carer representatives must participate in the development of the legislative framework.

NEXT STEPS

The inter-departmental approach to the process of implementing the Bamford Review reports will be central to the successful development of legislative reform, which must be given a high priority by Government. It will be essential to have co-ordination between DHSSPS and other Departments, for example on risk management, on the particular needs of children and young people and on the need for a joint approach to effective monitoring and evaluation of the agreed framework. Given the day-to-day reality of individual mobility between the countries of the United Kingdom and the Republic of Ireland, consideration must be given to the inter-jurisdictional compatibility and utility of legislative provision.

The Review considers that the successful introduction of new legislation will depend critically on the effective implementation of the recommendations of all the reports of the Bamford Review on policy and services. Indeed, consideration must be given to a phased introduction of aspects of legislation in tandem with appropriate service development.

In order to ensure that legislative change translates into meaningful improvements in the lives of those it is there to support, a well-resourced strategy for education and training will be essential, including the simultaneous introduction of Codes of Practice. An information programme for the general public, service users, carers and professionals must be provided.