

Northern Ireland Approved Social Worker Training Programme

Submission to the Joint Ad Hoc Committee on the Mental Capacity Bill

Organisation:	Northern Ireland Approved Social Worker Training Programme
Date:	7 th July 2015

The Northern Ireland Approved Social Worker Training Programme welcomes this opportunity to provide a written submission to the Ad Hoc Joint Committee on the Mental Capacity Bill. We have addressed a number of issues/clauses/schedules of particular concern to ASWs and have proposed some amendments but would also be more than happy to also provide additional oral evidence on these or any other relevant issues to the Committee.

The Programme generally welcomes the new legislative provisions contained in the Bill for those who lack capacity to make decisions in relation to their health, welfare and finances. We welcome in particular the inclusion of the Principles including that of best interests; the requirements for support in helping people to make decisions; the introduction of the nominated person, independent advocate and Public Guardian and Lasting Power of Attorney. We also welcome the safeguards at all levels of intervention and the implicit concept of reciprocity.

We would like to acknowledge the considerable effort involved in the process of drafting the Bill and thank all those concerned. The Bill is long overdue given that legislation has not kept pace with European and indeed domestic case law, public expectations and changes in service delivery. Practitioners currently face difficult situations and dilemmas in making decisions regarding the health and social care of those people who lack capacity to make decisions with no legal framework to assist them in doing so.

The Training Programme provides training for social workers being considered for appointment as Approved Social Workers (ASWs) by their employing Health and Social Care Trust and an assessment framework to assist Trusts in their statutory duty under Article 115 of the Mental Health (Northern Ireland) Order 1986 to ensure that: “No person shall be appointed by a Trust as an approved social worker unless he/she is approved by the Trust as having appropriate competence in dealing with persons who are suffering from mental disorder”.

The training programme is comprehensive, is accredited at Master’s Level by Queen’s University, Belfast, takes place over a 12 month period and is delivered and assessed through 3 Modules:

Module 1 - Context and Concepts in Mental Health

Module 2 - Law, Ethics and Applied Law in Mental Health

Module 3 – Social Work Practice Development in Mental Health

Assessment is rigorous. Candidates are assessed through assignments, a law exam and relevant practice. This is considered essential given that ASWs are required to make important decisions which may interfere with an individual's liberty.

The Programme therefore welcomes **Clause 269** in the Bill, a provision similar to Article 115 in the Mental Health Order which requires Trusts to appoint a sufficient number of social workers for the purposes of performing functions conferred on approved social workers and to be assured that any person appointed, has appropriate competence in dealing with people who lack capacity.

However we are unclear about the meaning and purpose of **Clause 269 (5)** "Any power under this Act, to prescribe a description of person includes power to prescribe approved social workers or approved social workers of a particular description". This is one example of the lack of clarity in how a number of provisions have been drafted. This lack of clarity could result in confusion and disagreement regarding the interpretation of the provisions and potential and unnecessary legal challenges.

In our response, as part of the consultation process on the Draft Bill, we acknowledged the complexity of the task set for those who have drafted the Bill and the breadth of the issues to be addressed but also stated that we found the Bill generally difficult to navigate and the language used overly legalistic. While we understand that more clarity regarding processes to be followed in relation to serious interventions including deprivations of liberty and professional roles and responsibilities will be available in regulations and Codes of Practice, it would have helped to have these more clearly set out in the Bill as currently set out in the Mental Health (Northern Ireland) Order 1986.

We emphasised the need for legislation to be open, transparent and accessible to all and asked that the Bamford Review recommendation that legislative solutions "be clear and efficient for professional staff to operate" be considered. We also referred to the comment made in House of Lords Select Committee Report on the Mental Capacity Act 2005 which included the following recommendation in relation to that Act; "replacement legislative provisions and associated forms be drafted in clear and simple terms, to ensure they can be understood and applied effectively by professionals, individuals, families and carers".

We continue to be concerned with the complexity of the Bill. It may be that drafting a Bill that can be accessible to the majority has proved an impossible task given the complexity of fusing the need for capacity legislation to include and take account of provisions under current mental health legislation. We would urge that if it is not possible at this stage to re-draft certain clauses of the Bill that these comments be taken into consideration in the drafting of the associated regulations and Codes of Practice.

The Programme welcomes the retention of the role of the ASW when issues of restrictions and deprivation of liberty are being considered and the new requirement for ASW involvement at each point when these are being reviewed and extended. This was recommended by Bamford and by service users and carer groups as part of that Review.

The ASW role is well established and the experience and expertise acquired in the role of applicant under the Mental Health (Northern Ireland) 1986 will be transferable, with additional training, to the duties and responsibilities set out in **Schedules 1 and 2** of the Bill. ASWs will continue to have statutory duties and responsibilities in relation to persons under 16 under amended mental health legislation so will be working under 2 statutes until a legislative solution is found in relation to meeting the needs of this vulnerable age group.

Social workers, including ASWs, by the nature of their qualifying and post-qualifying training and experience are well placed to ensure the comprehensive systems approach set out in the Bill and specifically in the provisions regarding principles, “best interests” and in **Schedules 1 and 2**. Assessment of need, care planning, service planning and delivery of services for those vulnerable individuals who lack capacity to make decisions in relation to their health, welfare and finances are core to the work of social workers.

Social work professionals and social care staff currently play a significant role in the care and protection of vulnerable people of all ages and in a variety of settings including community, hospitals and care homes. This vulnerability may be as a result of a learning and/or physical disability, physical ill health, life-limiting illness, mental ill health, substance misuse, acquired brain injury or trauma. The enactment of this legislation therefore is eagerly anticipated and will hopefully greatly assist those workers in their caring and protection roles.

We commented in the consultation regarding the draft Bill that social workers generally have a very separate though complementary professional identity to others involved in the care of the most vulnerable members of society.

We pointed out that social workers and social care workers will play key roles in the provisions of the Bill and at all the levels, from routine interventions to more serious interventions in relation to deprivation of liberty in which ASWs will be involved.

We stressed that the ASW role is a professional rather than a procedural one and that the statutory functions of the Approved Social Worker relate primarily, but not exclusively, to matters which affect the liberty of the individual. The role was first introduced in Mental Health legislation to ensure that an application for admission to hospital or reception into guardianship, though founded on a medical recommendation, would be separate and independent from that supporting medical recommendation. The reasoning of the legislators being that mental disorder alone does not render a person liable to be detained and that a person’s social situation

must also be taken into account. Assessment of these factors is, as Larry Gostin from MIND stated at that time “the Approved Social Worker’s primary claim to a professional, as distinct from a purely procedural role.”

In recognition of the separate and professional role of social workers and the role of the social care workforce we requested that all references to healthcare workers and appropriate healthcare workers in the Bill, for example **Clauses 31(2)(2a);78 (5)(6); 86(6) and Schedules 1 (4) (18) and 2 Part 2 (3) (b) and Schedule 2, 3(1)**, be amended to health and social care workers and appropriate health and social care workers to reflect this fact.

We are disappointed to find that these amendments have not been made and would urge reconsideration of this matter.

Parts 1 and 2 and Schedules 1 and 2 are of particular relevance to ASWs. We have already commented that we welcome the Principles contained in the Bill. We have already referred to **Clause 269** - a provision similar to Article 115 in the Mental Health (Northern Ireland) Order 1986.

However we are concerned that the Bill references, in addition to an approved social worker as the person who can make application for authorisations under **Schedule 1**:

“ a person of a prescribed description who is designated by the managing authority of a hospital or care home in which P is an in-patient or resident as a person who may make applications under this Schedule”. **Part 2 (5) (b)**

“a person of a prescribed description who is designated by an appropriate person (as defined by the regulations) as a person who may make applications under this Schedule”. **Part 2 (5) (c)**

Paragraph 3 (2) of Part 2 of Schedule 2 sets out the meaning of “healthcare professional” in relation to this provision to include:

- (a) An approved social worker;
- (b) “a person of a prescribed description who is designated by the managing authority of the hospital specified in the report under paragraph 2 as a person who may make reports under that paragraph”.

We again ask that “healthcare” professionals be amended to reflect the separate, non-medical professional identity of social workers.

We are also concerned that the extension of these roles to include non-ASWs appears contrary to the recommendations made in Bamford and subsequent pre-Draft Bill documents and would request that this be amended to require that only ASWs be designated to act in these roles.

We have detailed the rigorous training and assessment requirements for ASWs to ensure their competence to act under the Mental Health (Northern Ireland) Order 1986 and the similar requirements anticipated under **Clause 269**. We are therefore concerned that there is no reference to similar provisions in relation to the issue of the competence of those appointed as the additional “healthcare professionals” who will make an application or report or indeed to others tasked to assess capacity throughout the Bill.

Reference is made to regulations that will prescribe a description of the person who may make an application or report. Given that assurance of the competence of ASWs is required before that person can be appointed in the role we would strongly urge that if non-ASWs are to be designated similar requirements are required in statute in relation to non-ASWs if the role is to be extended.

We note that when a person, ASW and non - ASW, is considering / makes a report under **Schedule 2, 2 (6)** and P’s nominated person objects an ASW must be consulted even if the person is an ASW. However it is not clear whether the ASW will have the power to veto the proposed detention. We recommend that this matter be addressed and clarified.

We were puzzled initially by the references to “managing board of the hospital or care home” as we understand that hospitals in Northern Ireland are managed by a Health and Social Care Trust rather than a “board of a hospital”. However we then noted that the definition of “managing board of the hospital or care home” (**Clause 293**) has been drafted to include not only HSCTs but other independent non-statutory health and social care organizations.

We are concerned by the potential for lack of standardization in all processes and in particular in relation to deprivation of liberty situations and other very serious interventions under **Schedules 1 and 2** where it appears that “an appropriate person” or the managing board of a hospital or care home will have the power to designate persons to make applications or reports.

We are also concerned that these non-statutory bodies will not have the status of “public authorities” under the Human Rights Act 1998 with positive obligation to respect the rights enshrined in the ECHR thus depriving clients/ patients/ residents of rights under the convention.

We note the provisions in relation to Warrants, **Clauses 278 to 281** under the Bill. Reference is made in these Clauses to a “justice of the peace”. It is our understanding that this office was replaced in April 2005 by the office of the Lay Magistrate. Do these references then need to be amended?

The provisions in relation to warrants include many but not all of the provisions contained in Article 129 of the Mental Health (Northern Ireland) Order 1986. In

contrast to these provisions the Bill's warrants are concerned only with those who are already subject to the processes of deprivation in the Bill or Mental Health Act 1983 or Mental Health (Care and Treatment) Act 2003 (Consequential Provisions) Order 2005.

We would point out that currently the most frequently used warrant is under Article 129(1). However there appears to be no similar provision in the Bill. We would request that the following provision be included:

If it appears to a magistrate / lay magistrate, on complaint on oath made by an officer of an HSC trust or a constable –

There is reasonable cause to believe that a person believed to be lack capacity in relation to decisions about their health and welfare

- *“has been, or is being, ill-treated, neglected or kept otherwise or*
- *“unable to attend to their health and welfare, is living alone”*

Is to be found on any premises:

a) That admission to the premises has been refused or that a refusal of such admission is apprehended; and

b) That it is reasonable in the circumstances to issue a warrant

“any constable, accompanied by a medical practitioner and approved social worker to enter, if need be by force, any premises specified in the warrant in which that person is believed to be, and, if thought fit, remove the person to a place of safety with a view to the making of an application under Schedules 1 or 2 in respect of the person, or of other arrangements for care or treatment”

We note the offence of ill-treatment or neglect see **Clause 256** but this does not fully encompass this issue.

More clarity is needed in relation to restraint that may be required in the process of conveying P to hospital following an application under **Schedule 1** or report under **Schedule 2**. Article 131 of The Mental Health (Northern Ireland) 1986 refers to provision as to custody, conveyance and detention. The Draft Bill should include similar and more detailed provision in relation to this matter so that roles and responsibilities are clear particularly in relation to provisions to support the person making application or report under **Schedules 1 and 2**.

We note that an ASW is not mentioned in any of the warrants. Indeed we are alarmed that **Clauses 280 and 281** appear to refer to situations as identified in **Part 9 and 10** of the Bill only and not in relation to a situation where an ASW and medical practitioner are carrying out an emergency assessment with a view to deprivation of

liberty (**see Schedule 2**) and or where an ASW may need to arrange for P to be conveyed to hospital.

The experience of ASWs and medical practitioners currently is that while in the majority of situations the assistance of police in the process of assessment in the community and subsequent conveyance to hospital is not required, there are other situations where, as a result of a person's severe mental ill-health, they pose a substantial risk of harm not only to themselves and others. In these situations ASWs and medical practitioners need to be assured that support will be forthcoming from the PSNI when this is necessary. We request that this provision is placed in statute.

We also note that no similar provision to that in Article 129 (4) of the Mental Health (Northern Ireland) Order 1986 where the applicant who having made the application for a person to be admitted to hospital for assessment but is unable to convey the person to that hospital can request that a warrant be issued authorising any constable...accompanied by a medical practitioner, to enter, if need be by force, the premises and to take and convey the patient to the hospital specified in the application.

The issue of conveyance to hospital of a person whose detention is sought remains one of the most challenging factors in the assessment and detention process but is barely mentioned in the Bill except in relation to protection from liability. In contrast, Article 8 of the Mental Health (Northern) Order 1986 (Effect of application for assessment) and Article 131 (Provisions as to custody, conveyance and detention) in the Mental Health (Northern Ireland) Order 1986 address the issue of safe and legal conveyance of the patient and support for the applicant in this task. Article 8(b) refers to responsibility of the Board in cases of difficulty. This has been amended to include HSCTs who do not have responsibility for the use of ambulances whereas this was a responsibility for Boards at that time.

In recognition of the serious adverse incidents that have occurred because of a lack of clarity and agreement re roles and responsibilities in the conveyance process we recommend that provisions in relation to this issue be set out in the Bill with more comprehensive guidance to follow in Regulations and Code of Practice.

Article 127 of the Mental Health (Northern Ireland) Order 1986 addresses issues in relation to rights of persons to treatment in hospital on a voluntary basis. A similar provision does not appear to be included in the Bill.

Article 112 addresses the role of the Regional Health and Social Care Board and the Regional Agency for Public Health and Social Well-being in the promotion of mental health; secure the prevention of mental disorder and promotion of treatment, welfare and care of persons suffering from mental disorder. Again a similar provision does not appear to be included in the Bill.

We welcome the new provisions contained in the Bill in relation to ill-treatment and neglect which extend the protections already available to those with a mental disorder in the Mental Health (Northern Ireland) Order 1998 to all those who lack capacity to make decisions. However we note that the particular provisions in relation to sexual offences as contained in the Order and amended by the Sexual Offences (Northern Ireland) Order 2008 do not appear to have been included nor are they referred to.

While emphasis on safeguards is to be welcomed, we are concerned that the pronounced focus on protection from liability rather than positive obligation and professional duty and responsibility to act is concerning and has the potential to lead to defensive practice.

We agree generally with the safeguards in relation to an act of restraint.

More clarification is needed in relation to what constitutes harm as used throughout the Bill. It should be noted that the current Mental Health legislation makes reference to serious physical harm rather than harm when considering deprivations of liberty and considers substantial risk of harm – see Article 2(4).

We feel that that more information and guidance is also required in the Bill in relation to how the provisions relating to Attendance and Community Residence requirements, specifically in relation to how these will be enforced, the supports available to those required to impose these and the options available if P is not compliant.

We broadly endorse with the provisions for authorisations set out in **Schedule 1 and 2** but again find these lack sufficient detail to comment on more fully.

We note that the word examination is used in **Schedule 2** rather than assessment. We recommend that “examination” be replaced with “assessment” to truly reflect the purpose of this intervention and multi-disciplinary nature.

We note the word “prescribed” throughout the Bill and hope that this indicates the intention of the Department / legislators to prescribe who can and cannot be appointed and the level of competence required in relation to all interventions. We feel this should be included in statute rather than in a Code of Practice.

We agree with legislative proposals in relation to the Review Tribunal. However we would strongly recommend that membership reflects consideration of the measures to be reviewed and the full range of professionals with expertise in working with people who lack capacity in relation to health, welfare and finance, including social work professionals. The present Mental Health Review Tribunal has members drawn from the medical and legal professions, the “third” or lay member is rarely if ever from a social work, nursing, psychology or other non-legal/medical background.

Transfer between Jurisdictions - We strongly recommend that consideration be given to matters relating to transfers between Northern Ireland and the Republic of Ireland and others relevant matters. Such measures should be acknowledged and addressed in the Bill to reflect current practice in relation to mental and physical health matters.

We trust that the Supplementary legislation, Regulations and Code of Practice will be available for consultation at the earliest opportunity.

In conclusion the successful implementation of this legislation will be dependent on a number of factors not least adequate funding and training.