

# The Bamford Vision and the Mental Capacity Bill proposals

## Introduction

1. The following comments are submitted by Roy McClelland former chairman of the Bamford Review. In submissions and presentations to the Ad Hoc Committee there have already been several references to the Bamford Review and how it has informed the present Mental Capacity Bill proposals. The purpose of this brief submission is to provide members of the Committee with a first-hand account of the purpose and goals of the Bamford vision for legislative reform, the context of Bamford's work and, critical for its success, the inclusive nature of the process of the Review.

## The Process of the Bamford Review

2. **Comprehensiveness.** An important consideration is the process that underpinned the Bamford Review. The Review has proved to be the most comprehensive of its kind in these islands and covered all of mental health and learning disability, embracing both services and legislation. It has continued to provide our community with a road map for mental health reform.
3. **Inclusiveness.** One of Professor Bamford's achievements for all of the Review was its inclusiveness – the involvement of a wide range of stakeholders and in particular the participation of service users and carers. The Bamford Review speaks with the voice of our community.
4. **Evidence based.** The Review work was also strongly evidenced based. The proposals for reform of legislation were informed by a review of developments in other countries, including the introduction in 2003 of the new Mental Health Act (Scotland). In this Act "impaired decision-making ability" now forms one of the necessary criteria for over-riding a patient's consent to detention in hospital and to treatment. It is also noteworthy that the Millian Report, which underpinned the 2003 Act in Scotland, considered the proposals as developmental and recommended consolidation of the Adults with Incapacity Act and Mental Health Act in due course.
5. **Opportunistic.** A unique opportunity was presented by the coincidence of the Review work and that of the Office of Law Reform to introduce new Capacity legislation. This provided the space to consider the overall purpose of legislation, the guiding principles underpinning legislative reform and creating an opportunity to develop a comprehensive approach to respecting and protecting the dignity of people with mental health problems or a learning disability.

## The Context of the Bamford Review - inequality

6. Since the introduction of mental health legislation in the 19<sup>th</sup> century there has been de facto a fundamental difference in the way people with mental health or a learning disability are treated under the law compared with all other health issues; particularly in relation to matters surrounding consent and the withholding of consent.<sup>1</sup>
7. Ironically among the clearest legal guidance on the grounds for consent on matters relating to *physical* health was in *Re C (Adult: Refusal of Treatment 1994)*. Ironic because it concerned a patient suffering from Schizophrenia. The High court held that "an adult has the capacity to consent (or to refuse to consent) to a medical treatment if he or she can :

understand and retain the information relevant to the decision in question  
believe that information: and  
weigh that information in the balance to arrive at a choice”.

These criteria from case law have now been enshrined in the MCA 2005 for England and Wales.

8. “Discrimination pervades mental health legislation - the justifications, criteria and processes involved in legal coercion” Mary O’Hagan (2012), international mental health leader with lived experience. The criteria “create double standards for justifying the loss of liberty – one for people diagnosed with mental illness and one for the rest of the population” General health service users have the right to refuse treatment, even with dangerous consequences to themselves, but mental health service users do not.

### **The Bamford Vision**

9. Equality goes to the heart of the Bamford Review. The Bamford vision is “a valuing of all who have mental health needs or a learning disability, including rights to full citizenship, equality of opportunity and self-determination”. The Bamford report Equality of Opportunity (2006) states “because a person has a mental health problem or a learning disability does not of itself mean that he or she is incapable of exercising his or her rights”.
10. “A principled, human rights-based approach moves from public protection as the priority towards safeguarding the rights and dignity of people with a mental disorder or a learning disability. 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 the capacity to make their own decisions. Grounds for interfering with a person’s autonomy should be based on impaired decision-making capacity.” (Bamford 2007)
11. Bamford also proposed that the provision of care and treatment for mentally disorder offenders should be under the same legislative framework.
12. Central to the Bamford proposals for legislative reform are five key demands :
  - repeal of separate and discriminating mental health legislation
  - a single legislative framework in which all health and welfare issues are considered equally
  - principles supporting the dignity of the person should be explicitly stated in the legislation
  - a presumption of decision-making capacity, with respect for decisions and provision of all necessary support to enable participation in a decision.
  - where an individual’s capacity is impaired the best interests of the person should be protected and promoted.

Together these form the litmus test for fidelity of the present legislative proposals with the Bamford Review proposals.

### **Mental Capacity Bill (Northern Ireland)**

13. The Department of Health and Social Services and the Department of Justice have responded to the challenge. Having journeyed with the Bill teams over the last seven years I can testify to the high of fidelity of their work with the Bamford vision. Fidelity

in how they have gone about their work, in particular their accessibility, inclusivity and openness. Also fidelity in what they now present for our consideration. The fundamental rights to equality and dignity for all our citizens are now enshrined in draft legislation.

14. I invite you to think “mental health” in relation to what is being articulated within the new proposals:
  - The Bill is to provide equally for all circumstances and for all aspects of a person’s need- financial, welfare, health -including mental health.
  - Principles. The Mental Capacity Bill is principles-based. The principles are set out at the start and underpin the entire Bill.
  - The First Principle: A person is assumed to have capacity unless it is established otherwise- -nobody should be deemed to lack capacity unless all practicable help and support has been given to help an individual to make a decision for him/herself without success;
    - making an unwise decision does not mean a person lacks capacity.
  - The second principle: establishing and acting in a person’s ‘best interests’. The person intervening in someone’s life must take into account the person’s past and present wishes and feelings, his/her beliefs and values and any other factors likely to influence the person’s decision if he/she had capacity.

The foregoing are core to the Bill’s proposals and fundamental the Bamford vision.

15. In addition, under the best interests principle the person making the determination must, in relation to any act or decision that is being considered, have regard to whether the same purpose can be achieved in a way that is less restrictive of the person’s rights and freedom of action.
16. That person must also have regard to whether failure to intervene is likely to result in harm to other persons with resulting harm to the person. That is under these arrangements preventing harm to others is provided for and nested within the “best interests” principle.

### **Children and Young People**

17. Bamford gave careful consideration to the rights and needs of children and young people and asked the Departments to do likewise. Having walked the walk with the Bill teams over the last seven years I know they have given thoughtful and detailed consideration to these issues. They have concluded that this Bill is not the vehicle for addressing these important matters. My journey with them has persuaded me likewise. The generally accepted key principle underpinning the rights and needs of children is each child’s best interests. The key principle underpinning the rights of adults is respect for autonomy. In my humble opinion they form separate foundations.
18. There must now be a priority in revisiting the legislative provision for the rights and needs of our young people, presently vested in the Children’s Oder.

## **Substitute decision making**

19. In light of recent interpretations of the UN Convention on the Rights of People with Disabilities, including views around the need or otherwise for substitute decision-making, consideration needs to be given to those at the sharp end of present mental health legislation.
20. Under current mental health legislation an essential criterion for compulsory admission is: “a substantial likelihood of serious physical harm”. Those who suffer from episodes of serious mental disorder are about 10 times more likely to die by suicide than those who do not.
21. At the time of admission with an episode of illness, these days often quite brief, a sufferer will often be in a psychotic state, perplexed by delusions – that is fixed and unshakable false beliefs about themselves or their situation; often morbidly depressed or manic in their mood. Insight into being ill, at such times, is typically lacking. Legislative change will not change the reality of these serious health situations.
22. The moral imperative is to end the discrimination inherent in our response to such health need. Interfering in a person’s life can only be justified where a person’s decision-making capacity is impaired. However where this condition is met substitute decision-making, in that person’s best interest, is often necessary and may be life-saving.

## **In Conclusion**

23. The Mental Capacity Bill proposals sign-post an end to discriminatory mental health legislation - to detention and the over-riding of any person’s refusal of treatment, if they have the capacity to refuse. These decision-making rights will be on a par with the rights that individuals presently enjoy in common law regarding physical health treatment.
24. However legislation is only one part of the picture of reform. Appropriate resources must be allocated to enable effective implementation of any new legislation.
25. A detailed Code of Practice is required to provide clarity on many aspects of the legislative proposals. It must be consulted upon, agreed and introduced in phase with new legislation to ensure its effectiveness.
26. Extensive training will be needed for a wide range of professionals. A comprehensive information programme must be provided for service users, carers and attorneys.
27. The Bamford Review completed four years work on legislative proposals in 2007. It handed the baton to the Bill teams of the two Departments. That baton has now been handed to you. On behalf of Bamford I commend the present proposals in the round and greatly appreciate your endeavours in making the Bamford Review a reality for the citizens of Northern Ireland.

Roy McClelland OBE July 2015

1. McClelland R, Szmukler G (2000) Capacity and Consent in Psychiatric Practice Revisited. *European J Health Law* 7, 47-55