

# WRITTEN MINISTERIAL STATEMENT

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Health, Social Services and Public Safety

Justice

## MENTAL CAPACITY LEGISLATION FOR NORTHERN IRELAND

*Published at 12.00 noon on Tuesday 27 May 2014*

**Mr Poots (The Minister of Health, Social Services and Public Safety) and Mr Ford (The Minister of Justice):** We are today launching a public consultation exercise on the preparation of new mental capacity legislation for Northern Ireland.

The consultation document includes the draft clauses of a new Mental Capacity Bill which apply to the civil population, alongside policy proposals relating to those subject to the criminal justice system.

### **Background**

At present, there is no specific legislation governing mental capacity in Northern Ireland. Instead, the common law continues to be the main source of law governing mental capacity issues in relation to health and welfare interventions. New capacity legislation is needed to clarify the law but also to introduce additional protections for what are some of the most vulnerable people in our society.

Currently, separate legal authority is provided under the Mental Health (NI) Order 1986, to detain persons for the assessment and/or treatment of mental disorder provided certain criteria are met, regardless of whether or not they have capacity. This, the *Bamford Review of Mental Health and Learning Disability* concluded, has a stigmatising effect on persons with a mental disorder.

A key recommendation of the *Bamford Review*, therefore, was the development of a single legislative framework for the reform of mental health legislation and the introduction of capacity legislation in Northern Ireland. It is precisely this that the new draft Mental Capacity Bill sets out to achieve. It will introduce, for the first time anywhere, a single statutory framework governing all situations where a decision needs to be made in relation to the care, treatment (for a physical or mental illness) or personal welfare, of a person aged 16 or over, who lacks capacity to make the decision for themselves.

The current Mental Health (NI) Order 1986 will therefore no longer apply to persons aged 16 or over. In terms of scope, this new framework will have a very wide application, covering routine matters such as helping to wash and dress a person, right up to the most serious things, like depriving a person of their liberty for their care or treatment.

This is an innovative approach. No other jurisdiction has taken this major step towards equal treatment for people with mental disorder, giving them the same rights as anyone else in society. The proposals published by the Department of Justice will take us even further, by extending the framework to those subject to the criminal justice system.

## **Draft Civil Provisions**

The key civil aspects of the proposed new framework include:

- The enshrining in statute, of what is referred to as the common law presumption of capacity. This is the general rule that all persons, aged 16 or over, are presumed to have capacity to make decisions for themselves, unless it is established otherwise.
- Promoting the need to help and support people to exercise their capacity to make their own decisions where they can.
- Enabling people who have capacity to put in place future decision making arrangements (such as a new Lasting Power of Attorney) to make not only financial decisions on their behalf, but also health and welfare decisions, should they lack capacity to do so themselves at some point in the future.
- Putting on a statutory footing the common law doctrine of necessity which applies where a decision needs to be made about the care, treatment or personal welfare of a person lacking capacity and no alternative decision making arrangements have been put in place by the person. This provision will provide those carrying out health and welfare interventions with protection against civil and criminal liability provided they have properly established that the person concerned lacks capacity, they act in the person's best interests, and other applicable safeguards are met.
- Requiring significant additional safeguards to be put in place where the intervention proposed is serious. These safeguards are designed to protect the person who lacks capacity and go beyond the best interests test currently provided for under common law. Extra safeguards must also be put in place for 16 and 17 year olds in recognition of the fact that they are considered a "child" under international law and the Children Order (which will continue to apply).

## **Department of Justice proposals**

Department of Justice proposals are for the three key stages of the criminal justice system to be brought into line with the capacity-based approach. They are designed to ensure a consistency in approach between the health, civil and criminal justice systems.

The three key stages covered in the proposals are:

- The police's ability to remove persons from a public place who are in need of care or control to a place of safety;
- Courts' ability to deal with those either unfit to plead or in need of particular healthcare based disposals; and
- Prisons' ability to transfer prisoners in need of in-patient treatment to and from hospital along with the responsibility for them when they are in hospital.

These are the key means by which persons are either diverted from a criminal justice pathway or more properly located in a healthcare or treatment environment where that is the most appropriate way forward.

In terms of accepting or rejecting treatment at each of these stages, it is proposed that where a person can make such a decision, that decision will be recognised. Where the person lacks the capacity to make such a decision, the principles of the Bill will be applied. The rights of those lacking capacity will be protected in the same way as they would for a person in the community.

The Bill's proposals are about capacity to make decisions about care, treatment or personal welfare – not around capacity to choose, for example, arrest, imprisonment or another court disposal. Persons who have carried out an offence are not in a position to determine whether or not they ought to be detained for the offence itself. That is a matter for the courts and detention for offences carried out can still be imposed regardless of capacity.

The criminal justice system will therefore retain its over-arching statutory powers and independence around the detention of people who have carried out offences. Risk and public protection will remain a key feature of the criminal justice proposals alongside our duty of care to vulnerable people within the justice system.

The draft Bill also contains a number of important civil justice proposals which flow from the Bamford Review. These include an enlarged jurisdiction of the High Court in relation to the welfare and healthcare of persons lacking capacity. The Bill will also create a new Office of the Public Guardian, which will supervise court-appointed deputies; register Lasting Powers of Attorney; and deal with representations about how deputies and attorneys exercise their powers. The Bill will also make some changes to the functions of the current Mental Health Review Tribunal. The Tribunal will, for example, be able to hear applications about the appointment of a nominated person in certain cases. It will also have a wider scope than at present, beyond applications in relation to the detention of persons with mental disorder.

### **Children under 16 years of age**

The consultation paper also contains a section dealing with issues relating to children under 16 years of age (to whom the draft Bill does not apply). We acknowledge concerns raised by some stakeholders to date, including some members of the Health Committee who, while generally supportive of the need to progress this legislation, question whether children under the age of 16 will be adequately protected.

We wish to make it clear, that the Mental Health Order will be retained, as a temporary measure, for children under the age of 16 who need to be detained for the assessment and/or treatment of mental disorder. That Order will be amended to strengthen the important protections it already contains, drawing where appropriate on those available in the draft Bill for those aged 16 and over subject to the same intervention while making them more child-focused. Work on these additional protections is currently ongoing and stakeholders have been fully engaged in that work.

It is right to acknowledge that emerging capacity in children should be given careful consideration but we hope the Assembly will appreciate that the position in relation to children is even more complex and indeed, deserving of particularly careful consideration. That is why it is proposed that a separate project to consider the wider legislative framework relating to children in light of the Bill should be taken forward in the next Assembly mandate.

That said, the principles of the Children Order as they currently stand should not be underplayed. They made very significant changes to developments in child welfare practice and are still as relevant today as they were in 1995. Indeed, the provisions and protections of this existing framework which, not least, require a child's welfare to be given paramount consideration, will remain in place when the draft Bill is enacted.

We would like to assure the Assembly of our commitment to consider any proposal brought forward by stakeholder groups during this consultation that would better protect children pending the outcome of the proposed separate project.

### **Conclusion**

It would be remiss of us not to acknowledge that getting to this point has been a collaborative effort involving many people and organisations. We are very grateful for the significant contribution made so far by those in the community and voluntary sector, other government Departments and the wider health and social care and criminal justice families. We are confident that the benefits of having adopted such an inclusive approach will be evident for all to see in the draft legislation.

This is a once in a generation opportunity to reform this important area of law and we would encourage everyone with an interest, to contribute any ideas and views through this consultation process that will strengthen the draft Bill in any way, prior to its introduction into the Assembly. It is important that we get as many views as possible to make it a sound and operable piece of legislation in Northern Ireland for generations to come.

This consultation exercise will run for a period of 14 weeks and will close on 2 September 2014. During this time there will be a number of public consultation events held across Northern Ireland, the details of which will be published in due course. Thereafter, we hope to introduce the Bill in the Assembly in early 2015, and for it to have completed its Assembly stages by the end of the current mandate. We encourage all those with an interest or role to play to engage with us to meet this important deadline, in order to provide additional protections for vulnerable members of our society.

The consultation document is available on both the DHSSPS and DoJ websites at the following links:

[http://www.dhsspsni.gov.uk/index/consultations/current\\_consultations.htm](http://www.dhsspsni.gov.uk/index/consultations/current_consultations.htm)

[www.dojni.gov.uk/current-consultations](http://www.dojni.gov.uk/current-consultations)