



**Response to the Department of Health, Social Services and
Public Safety's Consultation on A Legislative Framework
for Mental Capacity and Mental Health Legislation in
Northern Ireland**

March 2009

Introduction

Include Youth promotes best practice with young people in need or at risk of social exclusion. We achieve this through the development and promotion of resources, the provision of training, information and support of practitioners and organisations. We also undertake activities aimed at influencing public policy and policy awareness – both locally and nationally.

Amongst the young people at risk with whom, and on whose behalf, Include Youth works are young people from socially disadvantaged areas, those with a learning disability, those with special needs, those who have been truanting, suspended or expelled from school, those from a care background, those who had a negative parenting experience, young people who have committed or are at risk of committing crime, misusing drugs or alcohol, undertaking unsafe sexual behaviour or other harmful activities, or of being harmed themselves.

Include Youth runs the Young Voices project, a participation project for young people who have been involved or are at risk of becoming involved in the criminal justice system, with the aim of supporting these young people to become involved in decision-making processes which impact on their lives. Young Voices runs group in custody (JJCNI – Woodlands and Hydebank Wood YOC) and in the community, particularly North Belfast. Include Youth manages the LACE (Looked After Children in Education) Project which is a multi-agency partnership with the aim of promoting better educational outcomes for children and young people in care.

The Give and Take Scheme aims to improve the employability and increase the self esteem of young people in need or at risk from across Northern Ireland. The Scheme works with approximately 150 young people from a care or criminal justice background. The Scheme aims to support young people to overcome particular barriers that prevent them from moving into mainstream training or employment and towards independent living

In addition, Include Youth runs the YOYO Practitioners Forum, which draws together professionals from a range of statutory, voluntary and community organisations working directly with young people in need or at risk, and meets on a quarterly basis.

Specific Comments

Section 75

We believe it is imperative for compliance with the Government's statutory obligations that an equality impact assessment of what the DHSSPS is proposing is carried out at this stage of the process. We are concerned that screening when carried out will identify adverse impact in relation to age, given the proposal to not extend the Mental Capacity legislation to anyone under 16. If this is the case, the Government then has an obligation to seek other ways to achieve the policy aims which will have a lesser impact on equality of opportunity.

Indeed the Human Rights and Equality of Opportunity report of the Bamford review states that:

“Section 75 is, in fact, a positive and proactive requirement, which requires public authorities to address any identified adverse impact by considering any mitigating measures, or alternative policies which might better achieve equality of opportunity.”

It makes the following recommendation with regard to section 75 of the Northern Ireland Act 1998,

“Mental health and learning disability services must reflect and be sensitive to the different religious, ethnic, racial and cultural backgrounds of people and groups in Northern Ireland. Services must comply with the equality obligations of Section 75 of the Northern Ireland Act 1998 and take account of those who experience multiple disadvantage.”

Given that the proposals flow directly from the Bamford Review we are disappointed that a full equality impact assessment was not conducted. We have many tangible examples of the varying impact of mental health on different groups of children and young people. Particularly relevant to our work at Include Youth is the severe lack of

mental health provision for under 18 year olds within the prison system (Scruton and Moore, 2004). The incidence of mental health problems in particularly vulnerable groups of children and young people is disproportionately high. Many children coming into custody have experienced trauma and mental ill health (NIHRC, 2002; NIHRC, 2006). The CJINI inspection of the Juvenile Justice Centre noted that :
“research has consistently found that young people placed in custody are likely to have complex needs and are particularly vulnerable and may have mental health problems” (CJINI, 2008).

For example, of the 30 children in the Juvenile Justice Centre on 30 November 2007: 20 had a diagnosed mental health disorder, 17 had a history of self-harm and 8 had at least one suicide attempt on record.

There is also an overrepresentation of children with learning disabilities and mental health needs within the care system. In 2005 – 2006, 15% of those aged 16 – 18 leaving care had one or more disabilities (over 80% of these young people had a learning disability and almost 10% had mental health needs) (DHSSPS, 2007).

We would urge the Department to undertake a full and comprehensive equality impact assessment in line with its section 75 statutory obligations.

In addition, we would be grateful if you would provide us with details of how you have or intend to consult directly with children and young people as one of the groups likely to be impacted upon most by the development of the new Legislative Framework for Mental Capacity and Mental Health Legislation in Northern Ireland, particularly given the high level of CAMHS need and high incidence of mental health difficulties experienced by children and young people in Northern Ireland. Such consultation is essential not only in ensuring compliance with section 75, but also in ensuring the Government’s compliance with Article 12 of the United Nations Convention on the Rights of the Child (UNCRC), one of the principles of the Convention - Respect for the views of the Child.

Children's Rights within International Human Rights Standards

We are extremely disappointed that the document makes no reference whatsoever to children's rights or to international human rights standards in relation to children. This oversight is particularly worrying given the acknowledged and accepted levels of mental health problems amongst our children and young people and the limited provision which exists to meet their needs. Expenditure on CAMHS in 2004 was less than 5% of the overall mental health budget (NICCY, 2004).

In 2008, the UN Committee on the Rights of the Child recommended that:

“additional resources and improved capacities are employed to meet the needs of children with mental health problems ... with particular attention to those at risk, including children deprived of parental care, children affected by the conflict, those living in poverty and those in conflict with the law.”

The Committee also raised concerns about the rise in the incidence of youth suicides.

Early intervention is vital and through our direct work with young people we have seen the implications of not detecting and treating mental health problems – the consequences for individuals are significant.

Given the potential impact of mental ill health and access to appropriate and adequate mental health services on a child's right to life, survival and development we would have expected to see a much greater emphasis in this policy consultation document on children's rights.

To ensure the DHSSPS's compliance with its human rights obligations it is essential that the UNCRC underpins all policies which relate to access to services for children and young people with mental health needs and is fully considered in the way that policies which relate to mental health services for children and young people are taken forward.

The principles of the UNCRC are extremely relevant with regard to the Government's obligations to meet the mental health needs of children and young people. The

UNCRC principles require the Government to ensure that children are not discriminated against - Article 2, their best interests are upheld - Article 3, they develop to their maximum potential - Article 6 and they are able to meaningfully participate in all aspects of their lives - Article 12. Given the fact that the legislation will not apply to under 16 year olds, we believe there could be a breach of Article 2. Article 24 of the UNCRC requires States to ensure that all children have the right to the highest standard of health and medical care attainable and to strive to ensure that no child is deprived of their right of access to such health care services. Article 19 requires States to ensure that children have the highest standard of health and medical care attainable and to place special emphasis on the provision of primary and preventative health care and public health education. Article 23 of the UNCRC specifically refers to the rights of mentally disabled children and strongly promotes integration and participation in education. State parties are required to recognise that a mentally disabled child should enjoy a full and decent life, in conditions, which ensure dignity, promote self-reliance, and facilitate the child's active participation in the community.

The Bamford Report "A Vision of a Comprehensive Child and Adolescent Mental Health Service" stated that:

"Developments in the past 2 years have not significantly altered the situation noted by O'Rawe that despite 25% of the Northern Ireland population being younger than 18, expenditure on CAMHS represents less than 5% of the total NI mental health budget. Her assertion remains pertinent that failure to address the inequity of this situation will,

"...potentially violate the (European Convention on Human Rights) and the statutory equality duty toward the most vulnerable mentally ill children and young people"

The 2006 Bamford Review of mental health and learning disability in Northern Ireland stated that prevalence of mental health problems and disorders in children and young people are likely to be greater in Northern Ireland than in other parts of the UK, citing the Chief Medical Officer's estimate that more than 20% of young people are suffering 'significant mental health problems' by their 18th birthday. The Review described child and adolescent services as "wholly inadequate" and "characterised by overwhelming need and chronic underinvestment".

The existing legislative framework for mental health, *The Mental Health (Northern Ireland) Order 1986*, makes no provision for the rights and best interests of children. For example, it does not incorporate the 'best interests' principle or provide a statutory right to independent advocacy. Legislation also fails to require age-appropriate in-patient facilities to be provided for children. Consequently, 14-17 year olds falling into the gap between child and adult services are often placed in adult mental health units - in 2003-2004, children occupied 2,386 bed days in adult psychiatric wards (DHSSPS, 2005). The number of beds available in secure care is limited, and applications for some children are only successful following a period in custody (McKeaveney, 2005). An inspection of the Juvenile Justice Centre in November 2007 raised concerns about custody being used as a form of 'quasi-care':

“Research suggested that the gatekeeping process for secure care could actually lead to children being placed in the JJC if they did not meet the strict care criteria; and trivial offences provided the opportunity to use custody as quasi-care. However, that was not the JJC’s purpose and it could be of no benefit for marginalised children to experience custody for insufficient reason.”

As a result of insufficient psychiatric provision in Northern Ireland, young people with complex mental health disorders or eating disorders may be sent to facilities in England – when a review was conducted in 2004, 17 children and young people were receiving 'out of area specialist placements' (DHSSPS, 2004).

The UNCRC Committee’s 2008 concluding observations noted limited access to required treatment and care for the 1 in 10 children in the UK with diagnosable mental health problems, and concern about the fact that children may still be treated in adult psychiatric wards. It also raised concern “that in Northern Ireland – due to the legacy of the conflict – the situation of children in this respect is particularly delicate.”

There is an urgent need for investment in mental health services for children and young people. Following the comprehensive spending review additional funding of £19.75 million in 2008/09, rising to £23.6 million in 2009/10 and £44 million in

2010/11 will be made available for mental health and learning disability services. The Executive pointed out in its Response to the Bamford Review that this represents a 12% increase over the mental health services spend in 2007/08. It is not clear whether any of this additional funding was of direct benefit to children and young people within CAMH services.

We are also deeply concerned that as the mental capacity legislation will not apply to children under the age of 16, that there will be a potential breach of Article 14 of the European Convention on Human Rights as incorporated when read with Article 8 as this decision appears to be made purely on the basis of age, taking no other factors into consideration.

General Comments

We welcome the fact that the Department has taken on the recommendation of the Bamford Review to bring in both pieces of legislation at the same time.

We welcome the intention to develop person- centred services which will draw heavily on the views of users and carers. However, we are concerned that there is not more detail on the development of child centred services.

We remain deeply concerned by the Executive's response to the Bamford recommendations on age appropriate services. The Review recommended that CAMHS should ordinarily cover children and young people up to their 18th birthday and that at all times children should be held in age appropriate settings. The Executive has stated that there should be flexibility when deciding whether young people should be admitted to an adolescent ward. Both the current provisions where children can be detained with adults in non-age appropriate facilities and the Executive's proposal that this could continue is entirely unsatisfactory and runs contrary to the best interests of children. It is our opinion that in all incidences children and young people under the age of 18 should be treated in age appropriate settings.

We find that the treatment of children in adult wards totally unacceptable. This results in children being treated by staff with minimal or no training in paediatrics or child

and adolescent mental health, and not subject to child protection vetting procedures. This raises huge questions with regard to the quality of provision and child protection. We therefore welcome the proposal that a provision will be included to ensure that under 18 year olds will be provided with accommodation suitable to their needs. We would welcome more detail on what this accommodation will be.

We are concerned that the document does not make reference to the need to be provide education to children and young people in in-patient care or detention. We would welcome a commitment to this within the legislation.

A New Mental Health Bill

The existing legislation, the Mental Health (NI) Order 1986, makes no provision for the rights and best interest of children. The drafting of a New Mental Health Bill offers an opportunity to provide age appropriate assessment and facilities for children and young people. The consultation document as it stands is extremely adult focussed and we are concerned that it does not reflect the need to develop distinct services for children. As a result there are proposals within the document which are wholly inappropriate for children. For example, it is suggested that the authorised detention period be extended from 14 to 28 days with access to the Mental Health Tribunal being available from the 14th day. We are extremely concerned about legislating for children and young people to be detained for a 28 day period in any facility. The current tribunal system would also mean that although an application can be made to the tribunal after the 14th day it may be several weeks before access to a tribunal would be available.

There are no specific proposals aimed at the provision or improvement of services for children and young people in the Department's proposed Mental Health Bill. There is also a need to clarify how the proposed legislation will interface with the Children (NI) Order 1995.

We welcome the provision of additional safeguards but are concerned that as the legislation is not relevant to under 16 year olds, they will not avail of these safeguards.

We do not understand how the role of the new chosen nominated person who supports the service user when they have capacity to do so and who replaces the existing role of the nearest relative will apply to children and young people since children under 16 will not be deemed to have capacity under the new capacity legislation.

The proposed framework for capacity legislation set out in the “*Comprehensive Legislative Framework*” report of the Bamford Review included special protections for children and young people under the age of 18. The consultation document makes no reference to the special protection measures for children. We welcome some explanation as to why this is not included.

Mental Capacity

We are very concerned that the new capacity legislation will not apply to under 16 year olds. This runs contrary to the Bamford review recommendation that there be a rebuttable presumption of capacity in children under 16. We object strongly to the view that children under the age of 16 lack the capacity to take decisions about their care. If the Capacity Bill proceeds as proposed by the Department the situation for persons aged under 16 in Northern Ireland will be that whilst they are in a position to consent to surgical, medical or dental procedures and treatment they will never be in a position to refuse such treatment. This will inevitably lead to cases where a mature child, who is regarded by medical professionals as competent and having capacity, could be forced to have a particular type of treatment against his / her will.

There are a number of safeguards proposed in the Mental Capacity Bill which will provide assistance for those persons who are deemed to lack mental capacity. As it is proposed that the new Mental Capacity legislation should not apply to under 16's it would therefore appear that these protections will not be available to this very vulnerable group of young people. It is essential, both in terms of compliance with human and child rights standards, that the same protections that are available to adults who lack capacity are also and equally available for children and young people who are deemed to lack capacity.

We welcome the intention to take into account the views of carers. We would urge the Department to ensure that this will include the views of young carers.

We would welcome more detail on whether the proposed advanced advocacy services will be made available to children and young people.

The Department also intends to create a new offence of ill-treatment or neglect of those who lack capacity. As it is proposed that this legislation will not apply to under sixteen's, it is likely that the method used to report offences under the new legislation will be based on adult protection procedures. It would be of great importance for this legislation to apply to offences committed against children and young persons under the age of 16 as well as to adults.

Conclusions

Include Youth welcomes the opportunity to comment on the proposed legislative framework and wishes to be kept informed of any further developments.

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