



## **Response to Mental Capacity Bill (Northern Ireland) 2014**

## Introduction

Children in Northern Ireland (CiNI) is the regional umbrella body for the children's sector in Northern Ireland.

CiNI represents the interests of its member organisations providing policy, information, training and participation support services to members in their direct work with and for children and young people. CiNI membership also includes colleagues in the children's statutory sector, recognising that the best outcomes for children and young people are increasingly achieved working in partnership with all those who are committed to improving the lives of children and young people in NI.

We welcome this opportunity to respond to the Mental Capacity Bill (Northern Ireland).

## International Human Rights Standards

CiNI welcomes the opportunity to respond to this consultation to strongly advocate on behalf of our wide membership base for the explicit recognition of the inclusion of children and young people within this legislation. We would suggest omission would leave children and young people even more vulnerable.

The UK Government has an obligation to ensure that all children and young people have their rights promoted and upheld through the ratification of the United Nations Convention on the Rights of the Child (UNCRC) and the United Nations Convention of the Rights of Persons with Disabilities (UNCRPD).

The principles of UNCRC are all relevant in relation to service provision and Government obligations in relation to children and young people with mental health problems in Northern Ireland. The UNCRC principles should underpin all policy and legislation, we would highlight – Article 2 ensure children and not discriminated against, Article 3 their best interests are upheld, Article 6 they develop to their maximum potential, Article 12. In addition Article 23 - State parties recognise that a mentally or physically 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. Article 24 – State parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. Article 25 – State parties recognise the right of a child who has been placed by the competent authorities for

the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.

The UN Committee also gave particular consideration to the issue of mental health and well-being of children. In 2002 the Committee called upon government to strengthen its mental health and counselling services and ensure that these are both appropriate for, and accessible to, young people. In the 2008 observations the UN Committee also noted concerns that many children with a diagnosable mental health problem do not have access to the required treatment and care and that children may still be treated in adult psychiatric wards. In relation to Northern Ireland the Committee noted that due to the legacy of the conflict the situation of children with mental health problems is 'particularly delicate'.

In fact the Committee recommended that 'additional resources and improved capacities are employed to meet the needs of children with mental health problems throughout the country with particular attention to those at greater risk, including children deprived of parental care, children affected by the conflict, children living in poverty, and those in conflict with the law.'<sup>1</sup>

### European Convention on Human Rights

It is evident there is also a clear link between access to services by children with mental ill health and Articles 2, 3, 5, 6 and 8 of the European Convention on Human Rights as incorporated by the Human Rights Act 1998. Namely the right to life, the right to live free from torture, inhuman and degrading treatment, the right to liberty, the right to a fair hearing and the right to family life and respect for privacy and correspondence. We also believe there is a potential breach of Article 14 as the decision to exclude under 16s is made purely on the basis of age, without considering other factors.

### United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)

UN Convention on the Rights of Persons with Disabilities (UNCRPD) took effect on 3<sup>rd</sup> May 2008, and ratified by some 25 countries including the United Kingdom. This international human rights instrument includes an important and specific focus on children with disabilities. We believe that the exclusion of under 16s from the Mental Capacity Bill on this

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<sup>1</sup> UN Committee on the Rights of the Child (2008) Concluding Observations: UK GB and NI CRC/C/GBR/CO/4 para 56 and 57

basis runs contrary to the obligations contained within the UNCRC, namely articles 3, 5, 7, 12, 19 and 21.

Under Article 3 of the Convention refers to respect for the evolving capacities of children with disabilities. Article 7 provides that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.

The views of children and young people must be given due weight in accordance with their age and maturity. To ensure human rights compliance and to reflect good practice, we believe this bill should include under 16s within its scope as well as providing protections and safeguards for the mature minor who lacks decision making capacity due to an impairment or disturbance in the functioning of the mind or the brain.

### Section 75 Obligations and Consultation with Children and Young People

CiNI have concerns regarding the manner in which the Departments have conducted their statutory obligations under Section 75. It appears this consultation has a number of new and amended policies added since the original EQIA was conducted.

We also have concerns at the lack of consultation with children and young people who are likely to be impacted by these proposals. We would highlight the Ask First principles which have been endorsed by Government departments. The principles are underpinned and informed by the UNCRC and Section 75 of the Northern Ireland Act (1998). Ask First principles are the Northern Ireland standards for children and young people's participation in public decision making. The standards were developed by the Participation Network to assist public authorities to establish effective direct engagement with children and young people. The standards set out the various elements, which together, ensure that the involvement of children and young people in public decision making is both meaningful for them, and effective for the public authority with whom they are engaged. We would welcome further information on how DHSSPS and DOJ have engaged with children and young people.

Furthermore, we do not believe there has been proper application of Section 75 of the Northern Ireland Act 1998. Children in Northern Ireland firmly believe that the legislating of Section 75 of the Northern Ireland Act 1998 allows for the promotion of equality of opportunity for all children and young people. We are therefore extremely concerned for all vulnerable groups of children and young people that they will not be protected unless there is a child friendly version of the above consultations and that the Department consults with children and young people directly.

Children and young people comprise 27% of the population in Northern Ireland and are service users. Given the likely impact that the actions within these policies will have on the lives of children and young people, direct consultation with this group will be central to ensuring these children and young people are consulted in respect of the policies and producing child friendly versions will enhance their experience and participation.

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 UNCRC, one of the principles of the UNCRC - Respect for the views of the Child. In examining the government's compliance with Article 12, the UNCRC Committee recommended that the government,

*"...take further steps to promote, facilitate and monitor systematic, meaningful and effective participation of all groups of children in society."*<sup>2</sup>

Also, the Equality Commission's, *"Guidance for Implementing Section 75 of the Northern Ireland Act 1998"* states that consultation should take place in accordance with its stated Guiding Principles on Consultation,

*"...specific consideration is given to how best to communicate information to children and young people..."*<sup>3]</sup>

We would like further information as to why a child friendly version and consultation with children and young people have not been included within the scope of this consultation. We do not believe cost nor is time a satisfactory reason for not complying with the Department's legal obligations.

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<sup>2</sup> Para 30 CRC/C/15/Add.188

## Bamford Review of Mental Health and Learning Disability (NI)

Children in Northern Ireland have consistently called for the full implementation of all recommendations contained within the Bamford Review. The Bamford Review highlighted *'Mental Health legislation considered from a principles base required a comprehensive approach which recognises the overlap with capacity issues, the needs of children and of those within the Criminal Justice System.'*<sup>3</sup>

We believe children and young people under 16 should be contained within the scope of this bill. We are concerned that their exclusion means they do not have the same access to the safeguards and protections for those over 16. Indeed the Bamford report noted: *'The implications of a capacity approach to all substitute decision-making legislation would require the same basic approach to be applied for children. While most people would agree that parents be substitute decision-makers for children up to the age of 10 or 12, consideration might be given to a rebuttable presumption of capacity between 12 and 16. When a young person is deemed to lack capacity, parents would ordinarily have substitute powers until the age of 16. However if the child's best interests are considered to be at significant risk then treatment may have to be authorised.'*<sup>4</sup>

## Mental Health (Northern Ireland) Order 1986

Section 3 of the consultation proposes to exclude those under the age of 16 from this Mental Capacity Bill, instead retaining the Mental Health (Northern Ireland) Order 1986 with some amendment as an interim measure pending a review of the Children (Northern Ireland) Order 1995.

CiNI have concerns over the approach to keep the Mental health (Northern Ireland) Order 1986 for those under 16. To quote Bamford: *'While some elements of the current legislation are considered to work well, it has become clear that much of the 1986 Order is not human rights compliant. Neither is it in keeping with developments in good practice, which emphasise partnership between patients and professionals and an holistic approach to care and treatment. Nor is it based on the principles which the Review has identified as essential.'*<sup>5</sup>

We would very much welcome a review of the Children (NI) Order 1995 however a timescale for this process has not been mentioned in the consultation document. Evidence suggests this is a huge

<sup>3</sup> The Bamford Review of Mental Health and Learning Disability (NI) A Comprehensive Legislative Framework  
Para 4.6

<sup>4</sup> Ibid, Para 5.45 and 5.46

<sup>5</sup> Ibid, Para 4.2

task for the Department and may take some time to complete as has been noted by officials to the DHSSPS Committee evidence session on 22<sup>nd</sup> January 2014.<sup>6</sup>

The retention of the Mental Health (NI) Order 1986 for under 16s was also stated at that session as a 'temporary measure'. Again there is no detail within the consultation document as to what 'temporary' means within this context.

Again we reiterate that this is contrary to what was outlined within the Bamford Recommendations particularly in relation to special protections for children and young people: *'The special vulnerabilities and developmental needs of all those children and young people under the age of 18 years may fall under the proposed approach to substitute decision-making will require special rights and protections.'*<sup>7</sup>

We would request further information in respect of the amendments being proposed within the Mental Health (NI) Order 1986, without which we are unable to make a detailed response. It is our view that without seeing the draft clauses suggested for change within the Mental Health (NI) Order 1986 the current consultation process is incomplete. It is necessary therefore for both Departments to publish and seek consultation on the amendments to the Mental Health (NI) Order 1986 at the same time as issuing detail of how professionals will operate a dual system for those under 16 and those over 16, particularly for those children and young people who are vulnerable such as those within the criminal justice system.

## Principles

We welcome the inclusion of the two main principles within the document for those aged 16 and over of 'Autonomy' and 'Best Interests'. Having said that, we are concerned that the Department has moved away from the four principles recommended in the Bamford Review of:

- Autonomy – respecting the individual's capacity to decide and act on his/her own right and his/her right not to be subject to restraint by others
- Justice – applying the law fairly and equally
- Benefit – acting in the individual's best interests

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<sup>6</sup> [http://www.niassembly.gov.uk/Documents/Official-Reports/Health/2013-2014/140122\\_MentalCapacityBill%28DHSSPSbriefing%29.pdf](http://www.niassembly.gov.uk/Documents/Official-Reports/Health/2013-2014/140122_MentalCapacityBill%28DHSSPSbriefing%29.pdf)

<sup>7</sup> Ibid, Para 5.48

- Least Harm – acting in a way that does not harm the individual<sup>8</sup>

This departure is concerning as Bamford suggested these were the sound ethical base for any legislation and the cornerstone around which new legislation should be based. We would very much welcome further information pertaining to the reasons from moving away from the Bamford principles.

## Codes of Practice

The fact that detailed information is not known at this time is worrying. The Bamford review highlighted similar circumstances in relation to delays in new laws, Code of Practice and education programmes:

*‘Principles underpinning legislation will only have effect if they are translated into clear provisions, if there are adequate services to provide good quality treatment and care to allow them to act as intended and when all those operating the legislation have adequate education and training. The impact of the principles in the Code of Practice for the 1986 Order was reduced because of delay in publication and a failure to deliver an associated training programme. Principles must be incorporated into the new law and elaborated on in the Code of Practice. The new legislation, the Code of Practice and related training programmes must be introduced at the same time.’<sup>9</sup>*

We would very much welcome further information on the timescale for the Codes of Practice and detail of how these will be consulted upon. Without which we are unable to make a fully informed response.

## Department of Justice Proposals

It appears the Department of Justice will only be applying this Bill to those young people aged 16 and over, meaning that other children and young people (aged 10 – 15) who become involved in the criminal justice system will be subject to the Mental Health (NI) Order 1986.

We are unable to comment on the specific clauses in relation to those children and young people in the criminal justice system that are under 16 because the amendments to the Mental Health (NI) Order 1998 simply do not appear within this consultation. This is a

<sup>8</sup> The Bamford Review of Mental Health and Learning Disability (NI) A Comprehensive Legislative Framework Para 1.8 Pg 5

<sup>9</sup> Ibid, Para 1.12

worrying development as this legislation is at such an advanced stage. We feel this consultation is incomplete without such clauses being made available.

We would very much welcome further information from the Department of Justice on the draft justice clauses of this Bill and the proposed amendments to the Mental Health (NI) Order 1986.

## Conclusion

We very much welcome the opportunity to respond to this consultation. We are however, concerned at the lack of detail and information on issues such as the Codes of Practice and the criminal justice provisions within the Bill. We look forward to receiving information on these outstanding issues as highlighted throughout this consultation response.

Children in Northern Ireland support the response made by the Children's Law Centre, particularly their evidence base which has been derived from their work with and on behalf of children.

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