

**DRAFT MENTAL HEALTH CAPACITY
BILL NI**



ACTION MENTAL HEALTH

CONSULTATION RESPONSE

DHSSPS and
DOJ
September
2014

1.0 BACKGROUND TO ACTION MENTAL HEALTH (AMH)

AMH is a voluntary organisation which supports people's mental health and well-being through vocational training, supported employment options, personal development and health and well-being services. It has 13 service locations in Northern Ireland from which it delivers recovery-focused projects for over 3,000 adults annually. AMH also provides a range of emotional resilience and suicide/self harm prevention services reaching over 10,880 young people and adults. The charity operates three Men's Sheds for men over 60, a learning disability project and delivers Government employment programmes.

The 9 New Horizons services funded by the ESF programme and the Health Trusts and DEL deliver a wide range of outcomes for clients with the principal activity being accredited training progressing towards employment. In the last year clients achieved 2,753 accredited training outcomes and 176 progressed to paid employment, voluntary work, further training or other government programmes. AMH is also the only organisation in Northern Ireland to deliver the Individual Placement and Support (IPS) service and this has now expanded to 3 staff in two Health Trust areas.

AMH delivers the Long Term Conditions Alliance (NI) project 'Managing the Challenge' and 25 programmes were successfully provided throughout the year with 253 people participating in the self-management programme. Also during the year our MensSana and Salus projects offered a range of mental health promotion and suicide and self-harm interventions across Northern Ireland, Cavan and Donegal; the projects had 10,884 direct beneficiaries. The 3 Mens' Sheds registered 129 older men as participants in their first full year of operation.

This year the Together For You partnership was launched, led by AMH, consisting of 8 other charity partner organisations. This unique consortium, funded by the Big Lottery Fund, is delivering a range of mental health and emotional resilience building interventions across the region for over 2 years. The Salus cross border project was also launched in partnership with National Learning Network and the HSE in Ireland and

it complements the work of Together For You. AMH continues to co-lead six other charities as part of the SES consortium delivering DEL's Work Connect and Workable employment programmes. AMH also delivers the Long Term Conditions Alliance NI's Self-Management programme on behalf of over 20 other charities and retains a close working partnership with NICVA, CO3, NICON and ACEVO and has contributed regularly to the All Party Working Group for Mental Health at Stormont. AMH Services throughout the region celebrated the 50th anniversary by holding local events to highlight client achievements. The richness and diversity of clients' talents was displayed at various exhibitions and a joint project with the Arts Council created a hugely popular book sofa in Foyle and a Basket Case project in Enniskillen, visited by HRH Prince Charles.

During the year 13-14 AMH was also delighted to be recognised as a finalist in the "Best Place to Work" category of The Irish News Awards. AMH received confirmation of iLF Gold award and Champion status as a result of a reaccreditation exercise.

2.0 General Comments

Action Mental Health (AMH) welcomes the Draft Mental Capacity Bill NI Single bill approach which presents a very real opportunity to de stigmatise mental health disorders and recognise that every citizen in our region may at some point in their life need this piece of legislation. For too long we have had one piece of legislation for those diagnosed with a mental illness and one for the rest of our population; this is unacceptable. We approve of the Bill and commend the Departments' commitment to delivering the Bamford vision¹ and potentially leading the way globally by addressing the unjustness of mental health legislation. AMH and those on whose behalf we work are concerned that whilst the Bill as Framework is an excellent start, lots of information has been left to future regulations and Code of Practice; resulting in the Bill at this point raising more questions and uncertainties within our membership instead of providing the reassuring glimpse of the future that it should. We strongly assert that future regulations and Code of Practice must be thoroughly consulted upon and preferably not during a main holiday period.

In addition to our usual methods of keeping up to date with our membership and their issues: AMH, CAUSE, Aware Defeat Depression, Mindwise and Carers NI held a consultation and information event for our members and service users on the Bill. We outline our comments and concerns and those of with whom we consulted below:

3.0 PRINCIPLES

3.1 Capacity

AMH is supportive of the Principle of assumed capacity unless it is established otherwise. We believe that this principle has the ability to fundamentally create a culture shift in our society including our clinical and legal settings by empowering individuals and reducing stigma.

3.2 Practicable Help

¹ A Comprehensive Legal Framework for Mental health and Learning Disability, (2007).
<http://www.dhsspsni.gov.uk/index/bamford/published-reports/cl-framework.htm>

AMH welcome the Bill's effort to include support provisions for P to enable their decision making. We would ask for clarification on what will constitute, 'practicable help'. Those we consulted with were concerned that a resource stretched environment where delivery of provision is not currently equitable across Trust areas; the phrasing 'practicable help' might in a worst case scenario mean no help at all. How do the Departments' plan to ensure; equitable, regional delivery of a suite of 'practicable help' that P can be provided with, irrespective of P's location or, the time or day of need? This needs clarification and consultation in the Code of Practice. We hold the same views on the word 'appropriate': 'appropriate provision of information' and 'appropriate explanation of the information'²; whilst we support both these actions we feel the word 'appropriate' is open to interpretation and needs clarity.

3.3 Written Statements

Written statements whilst a person has capacity carry a lot of weight. The Departments need to consider how this will be communicated to the public as it has the potential to affect each of us.

3.4 Capacity Assessment Training

It is clear that training will be needed for those undertaking capacity assessments to ensure they are conducted correctly; particularly when the consequences for the assessor are potentially very serious.

Who will devise and deliver this training? Who will resource this? Will it be done in time before the Bill goes 'live'? It is important that NI learn from the House of Lords post-legislative scrutiny of the Mental Capacity Act 2005³ pertaining to England and Wales.

This found that 'its implementation has not met the expectations that it rightly raised. The act has suffered from a lack of awareness and a lack of understanding'. To avoid a similar problem with the implementation of this Bill AMH recommend that effective and specific training and support needs to be embedded to assist effective delivery.

² Clause 4 (2) (a) & (b)

³ House of Lords, Report of Session 2013-2014, Mental Capacity Act 2005: post-legislative scrutiny published 13 March 2014 HL Paper 139

3.5 Best Interests Principle

AMH approve of the 'Best Interests Principle' and believe that it is key to validating the dignity of each individual who this Bill may be applied to. Going forward with a Code of Practice our members expressed concerns in regard to the implementation of the Best Interests Principle. If the 'relevant people' engaged in the decision making process for P are not in agreement, what happens? Who has the deciding vote? Could a situation where a decision could be contested by its very nature work against P's Best Interests as a course of action may need to be delayed or, interrupted?

3.6 Research

Research on the individual, how will this be collated? How will confidentiality be ensured?

4.0 INDEPENDENT ADVOCACY

AMH support and are favourable towards the concept of Independent Advocacy. Our concerns and questions pertain to how Independent Advocacy will work in practical terms.

4.1 How will advocacy be delivered?

It is the view of AMH that for advocacy to be truly independent it should be centralised and housed separate from the Trusts. We feel strongly that if independent advocacy is to work effectively in the manner set out in clauses 35 and 36 and clauses 88-92 then advocacy is going to need to be adequately resourced and viewed by all as having independence.

4.2 Equity

It is imperative that independent advocacy is available to those who require it at point of need. The role is so important and can carry so much weight in deciding P's best interests that the earlier the advocate is in place the more beneficial they can be to P.

and the more likely the correct decisions will be made. The access to an advocate therefore, should not be affected by: where P lives; what time of the day P needs support; which day of the week P requires an advocate; it is imperative that the Bill and its Code of Practice take account of this. AMH feel that a centralised independent centre for advocacy providing 24/7 service by trained professionals is the only way that the vision set out in the Bill will work in practical terms.

4.3 Who is best placed?

AMH and our members foresee situations whereby even the best advocate may not be best placed to advise on determinations in P's best interests. It is oftentimes family members and/or carers and those with a long term history of P who are best placed to advise on what action would be in P's best interests. Knowledge of P often sits with those closest to P. Our members were concerned that an advocate's view would hold more weighting than theirs when they feel that they know P and their wishes best? This would be particularly relevant if an independent advocate had just been appointed to P and had a short amount of time to 'obtain and evaluate relevant information' Clause 84(3). AMH would like the roll out of the Bill to build in assurances that an independent advocate will be afforded adequate time to obtain the information they require and that provision is made for effective conflict resolution should carers/family members disagree with the advocate's determination.

4.4 Professionalisation of Advocacy

AMH view the role of independent advocate with such importance that we recommend that it is professionalised as a career, with appropriate training and certification. This is a process that should be beginning as soon as the Bill goes through the Assembly. Our members wanted to know if there would potentially be different categories of advocates with different specialisms depending on the needs and requirements of P.

The role of Independent Advocate has the potential to be hugely beneficial to all those engaged in the determination of the best course of action for P; however it is a role with huge responsibility. The independent advocate must therefore: receive adequate training and professional development together with; professional support structures.

AMH argue that the professionalisation of independent advocacy as a career would go some way towards ensuring that clinicians, judiciary and family members/carers engaged in P's interventions take adequate account of the independent advocate acting on behalf of P.

4.5 Privacy

AMH believe it is important to highlight in the Code of Practice how the advocate can effectively research and build an accurate picture of P to aid decision making whilst still ensuring P's privacy. Our members had a quite a lot of question about how this would work in reality and how it would differ from how information is shared now with those who have interest in P's welfare.

4.6 Awareness-Raising

If an advocate's representation on behalf of P supersedes that of P's nominated person this will need awareness-raising. The general public; Carers'; family members of those who may currently or, in the future need support due to diminished or diminishing capacity need to know about this Bill in general and particularly the role, purpose and weighting of the independent advocate. This will be a culture shift for many which rarely happens with immediacy. How do the Departments' intend to build in conflict management?

5.0 SAFEGUARDING & INTERVENTIONS

AMH welcomes the Draft Bill's considerations of safeguards, particularly in relation to the wider implications as outlined in Part 2 which should make for much more fair and just outcomes for those experiencing lack of capacity as a result of mental health issues.

5.1 Additional Safeguards

AMH support the requirement of additional safeguards to be put in place where intervention is serious.

5.2 Act of Restraint

AMH believes that restraint to P in sub-clause 4(a) should be limited to when failure to do the act would create a risk of physical harm to P, not to 'harm' which could include psychological or, emotional harm. We are not convinced that circumstances could arise where physical constraint would be necessary to prevent psychological/emotional harm and those circumstances not also constitute an 'emergency' as defined by the Bill.

Sub clauses (5) and (6) provide a welcome differentiation between an act of restraint and an act which is a deprivation of liberty. This should reduce the likelihood of confusion between the two for D and what conditions must be met in order to be legally carrying out the act. We look forward to more detail on this within the Code of Practice.

5.3 Nominated Person

AMH are concerned that in clause 13 D in this case is only required to engage with the nominated person once a determination has been made that P lacks capacity. Given the Principles of the Bill and support for decision making, it follows that D should ensure that the nominated person conditions are in place when a formal capacity assessment.

5.4 Deprivation of Liberty

AMH welcome the concept of a single gateway process for the deprivation of liberty whether in the context of admission to hospital due to physical or mental health condition or to a placement in a care setting. This removes the legislative stigma associated with having special procedures for, those requiring mental health treatments and not for others.

5.5 Training

AMH believe that accredited training needs to be provided in order to enable as wide a range of health and social care professionals as possible to carry out formal capacity assessments based upon clearly established possession of the requisite skills and understanding of the requirements of the law and the liability for adhering to it correctly.

5.6 Default Nominated Person

AMH supports the recognition of P's carer as the primary default nominated person; this is an important statutory recognition of the critical role of carers'.

We are unsure why the default nominated person has to ordinarily be resident in the jurisdictions mentioned in clause 75(4)(b). Globalisation of communication and travel should mean that it is possible for an individual who is ordinarily resident outside of those jurisdictions to fulfil the role of the nominated person.

We are broadly supportive of the criteria for carer in clause 76. We recommend however that consideration as to how subsection (2) relates to the potential default nominated person who is employed by P as a personal assistant through direct payment. This may be an exceptional circumstance that may be written into this clause.

5.7 Resources

AMH acknowledges that we are operating in a testing financial climate; particularly in relation to the health sector. That said, AMH would like assurances that safeguards outlined in the Draft Bill are not resource dependent or; dependent on where P lives or time of the day/day of the week P requires safeguards.

6.0 FUTURE PLANNING

6.1 Advance Decisions

AMH support the draft Bill's requirement for an effective advance decision to refuse treatment to be complied with as this clearly supports the autonomy of P. AMH and our members seek clarity on what will constitute an 'effective' advance decision'? How will it be ensured that P was not under undue influence or duress when making the advance decision? How will it be ensured that P had mental capacity at the time of the advance decision? Will P be formally reminded to review their advance decision regularly to provide them with the opportunity to evaluate their current views in case they change over time?

6.2 Lasting Power of Attorney

AMH acknowledge and support the principle of LPA in permitting P to self determine and plan for a future where they may have diminished capacity. We do have the following questions and concerns:

- 6.2.1** How much will it cost an individual to register LPA with the new Office of the Public Guardian? It is imperative that this cost is not prohibitive for the most vulnerable in our society who have potentially the most to gain from having an LPA.
- 6.2.2** How long will an LPA be valid for? As raised under 6.1 (above) in relation to Advance Decisions those we spoke with were concerned that a person may change their mind; their relationship with their LPA may alter; the LPA may no longer wish to have responsibility for some or all of the decisions they initially agreed to; in relation to potential diminishing capacity related to age the LPA may experience diminished capacity themselves over time etc Who will be responsible for ensuring the LPA is up to date and correlates with P's current views and circumstances? We strongly advocate that the new Office of the Public Guardian undertake this role to annually request that P and the LPA reconfirm their agreement.
- 6.2.3** What is the liability for the Lasting Power of Attorney? How will the potential gravity of this role in future decision making for P be communicated to both P and the LPA.

6.3 Finances

Finances are an emotive and private matter for most individuals. AMH acknowledge that a main difference in LPA system from the EPA system is that a person now can give someone else the authority to make decisions on their behalf in relation to their health as well as their finances. We seek clarity as to whether an individual may have an LPA for health matters only and whether they could have two different LPAs'; one for financial decisions and another for health and welfare matters. Those we spoke with favoured the two areas being treated separately as some people may avoid registering an LPA because they don't wish anyone else to have knowledge or care of their

finances thereby foregoing their opportunity to plan for their future health and welfare which they be very comfortable doing. Similarly someone may feel that the person placed to take care of their financial future should they lack capacity may not be the same person they would select to make decisions pertaining to their future health and welfare should they need to.

6.4 Awareness Raising

It is critical that if the Bill comes into effect that all citizens in the region are aware and understand the role of LPA. Those we spoke with about the Draft Bill had difficulty comprehending where the line was for decision making between: nominated person, independent advocate and Lasting power of Attorney. It is essential that these are distinguished for and this depends upon effective communication.

7.0 CONCLUDING REMARKS

Action Mental Health believes the Draft Bill provides a very real opportunity for NI to lead the way with this unique single Bill approach to this legislation. The Draft Bill presents clearly a vision for the future that is largely in line with Bamford and this again is to be commended. Where we have raised concerns is around the practical realisation of the Bill. We look forward to a thorough consultation on the Code of Practice and recommend that key stakeholders, including ourselves, are consulted in the drafting of the code in preparation for consultation. We feel that for the Draft Bill to be a beacon globally for others to follow and for the citizens of NI citizens to be empowered by this legislation; the Code of Practice needs to be embedded from the beginning and the training for those who need to apply the Code of Practice needs to be in place from the start. This should avoid the problems faced by England and Wales. We want to see a communication plan in place before the Bill goes 'live', not just for practitioners in the health and judicial systems but for the general public, so they may understand how the Bill may affect them in real terms and what they can do to ensure their own views are recorded when they have capacity. Action Mental Health would like to work with the Departments' on this communication plan. We have a long history of working collaboratively within our sector regionally and with statutory agencies and

Departments' and it is our view that everyone needs to be delivering the same message if the public are to be made aware of the Bill and its potential implications for them and those they care for.