

THE BAMFORD REVIEW OF MENTAL HEALTH AND LEARNING DISABILITY  
(NORTHERN IRELAND)

**HUMAN RIGHTS  
AND  
EQUALITY OF OPPORTUNITY**

October 2006

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## **FOREWORD**

Respect for human rights and promotion of equality of opportunity: these values underpin the Bamford Review of Mental Health and Learning Disability (Northern Ireland) – not only in the way in which we have conducted our work, but also in the overarching vision we have for the future strategic development of services in Northern Ireland for people with a mental health problem or learning disability.

This report is, therefore, a key product of the Review and provides the ethical foundation on which our proposals for service reform and modernisation, including legislative reform, have been based. Much of the detail of how this rights-based vision can be achieved in practical terms is given in the other reports from the Review and, in particular, the forthcoming report on Promoting Social Inclusion.

To make a reality of this vision of full citizenship for people with a mental health difficulty or a learning disability will require commitment by Government and co-ordinated action across several Northern Ireland Departments and public bodies. We look to the Department of Health, Social Services and Public Safety (DHSSPS) to give the lead in this and in ensuring that the recommendations outlined in this report are taken forward.

I thank Christine Eames and her Group for their commitment to producing this report, which I commend to you.

**Roy J McClelland (Professor)**  
**Chairman**

**October 2006**

## **OVERVIEW**

This report is the result of intensive work over a prolonged period of time. Its recommendations are the outcome of much deliberation, consultation and shared experience. Our work benefited greatly from the knowledge of others who assisted us and also from meetings with experts and stakeholders. The recommendations it presents are broad, they challenge assumptions and will require both financial and human resources to ensure proper implementation by the number of departments and agencies involved.

The report identifies and discusses issues against domestic and international standards of Human Rights and Equality, and in so doing seeks to remove barriers to the exercise of these rights: to help remove stigma and prejudice; to ensure that accessible information is provided, and shared, enabling access to services; to acknowledge the importance of the recommendations for carers and users of services, and to give protections where necessary.

The working group established to examine these issues was comprised of people from a wide range of disciplines and with a wide range of experience united in a commitment to the aims and principles of the Bamford Review. Clinicians, lawyers, practitioners, users and carers all brought their understanding of the needs under discussion to the table. It was for all of us, not just a case of making a contribution, but a learning experience.

Such a report as ours may well have been completed in other ways, especially if it were restricted to a single discipline or focus. However it was the opinion of the group that the method adopted best reflected and gave expression to the depth of experience and the diverse representation amongst us. The group was also conscious of the remit given to it by the Steering Committee of the Review, which was of fundamental importance and guided all of our work.

I would like to thank all those who responded to the consultation process in the summer of this year. This report has been improved and its recommendations strengthened as a result this and we are grateful to all those who gave such careful consideration during this important stage. I would wish to assure all those who responded that each reply received the utmost consideration against our remit.

Finally, I would like to thank all those who gave so generously of their time and their experience, and showed such immense commitment to the spirit of the Review and to our particular task within it. On behalf of all the members of the group, I want to thank Roy Keenan and Sean Ferrin of the Support Team for their unfailing help and work in making this report a reality.

**Christine Eames**  
**October 2006**



## **ABBREVIATIONS**

Throughout the report a number of abbreviations are used. These are:

ASW	- Approved Social Worker
CAMHS	- Child and Adolescent Mental Health Service
Children Order	- The Children (Northern Ireland) Order 1995
DDA	- The Disability Discrimination Act 1995
DHSSPS	- The Department of Health, Social Services and Public Safety
ECHR or the Convention	- The European Convention on Human Rights
Equality Commission	- The Equality Commission for Northern Ireland
European Court	- The European Court of Human Rights
EU	- The European Union
MHO or the Mental Health Order	- The Mental Health (Northern Ireland) Order 1986
NI	- Northern Ireland
NICCY	- Northern Ireland Commissioner for Children and Young People
Section 75	- Section 75 of the Northern Ireland Act 1998
The Review	- The Bamford Review of Mental Health and Learning Disability (Northern Ireland)
UK	- The United Kingdom
UN	- The United Nations
UNCRC	- The United Nations Convention on the Rights of the Child 1989
USA	- The United States of America



## **CHAPTER 1**

### **INTRODUCTION**

#### **THE REVIEW**

- 1.1 In October 2002, the Department of Health, Social Services and Public Safety (DHSSPS) commissioned an independent Review of law, policy and practice relating to mental health and learning disability. One of the main factors influencing this decision was to ensure that this law, policy and practice was in accordance with human rights and equality law.

#### **HUMAN RIGHTS AND EQUALITY SUB GROUP**

- 1.2 The Human Rights and Equality Sub Group, whose membership is at Annex 1, is one of two Groups within the Review's Social Justice and Citizenship Expert Working Committee. The other Sub Group has been preparing a separate report on Promoting Social Inclusion, which will be published in the near future.
- 1.3 The Human Rights and Equality Group's remit was to:
- consider relevant legislative and other requirements, particularly relating to human rights, discrimination and equality, in relation to people with a mental health need and/or a learning disability; and
  - bring forward a set of principles, proposals and recommendations.
- 1.4 In addition, the Group played a key role within the wider Review, by formulating a set of overarching human rights and equality guidelines against which each Working Committee could test their discussions and recommendations.
- 1.5 In discharging its remit, the Group recognised that there are people with special needs - for example, those with eating disorder, brain injury, Autistic Spectrum Disorder, or people with a learning disability who have complex needs - who are especially vulnerable to breaches of their human rights and to discrimination. These and other groups requiring special attention and priority have been identified in the separate reports produced by the Review.
- 1.6 There are also specific human rights and equality issues faced by vulnerable, marginalised and minority groups within Northern Ireland, who may also have a mental health difficulty or a learning disability, such as the gay/lesbian community, homeless people, asylum seekers, members of ethnic minorities, or those in contact with the criminal justice system. It was never the Sub Group's brief to consider in detail all of the issues affecting such groups, but it is important to stress at the outset that the principles outlined in Chapter 2 and many of the recommendations throughout the report apply equally to all these groups.
- 1.7 The Group initially agreed a work plan comprising a number of topics raising potential human rights and equality of opportunity questions in relation to the assessment, care and

treatment of people with a mental health problem or a learning disability. The plan took account of the comments made by a wide range of statutory, voluntary, community and other stakeholders, who responded in the autumn of 2002 to Professor Bamford's request for initial submissions to the Review on the strengths and weaknesses of current legislation, policy and service delivery for people with a mental health problem or a learning disability.

- 1.8 Papers on most of these work plan topics were provided by members for discussion and agreement. The Group also organised a consultation seminar on Advocacy for the entire Review, as part of its consideration of this subject. On the other issues identified, the Group contributed through the reports being prepared by relevant Working Committees.
- 1.9 Members of the Group also attended a Mental Health Tribunal hearing and have liaised with the Experts by Experience, Equal Lives and Carers' Reference Groups within the Review, whose contributions through their own experience of services have been invaluable.

## **STRUCTURE OF REPORT**

- 1.10 The Group considered it was essential that the papers which informed its discussions were made available and these have been placed on the Review's website, at [www.rmhdni.gov.uk](http://www.rmhdni.gov.uk). Members were also conscious that some of the issues are complex and their essence needed to be distilled into short, concise papers. These papers comprise this report and cover, for example, the key human rights and equality issues and any recommendations on the subjects considered.

## **CONTEXT OF REPORT**

- 1.11 It is important also to point out that the Group's work was essentially to examine the human rights and equality issues which may arise (or could potentially arise) from the operation of current legislation, mainly the Mental Health (Northern Ireland) Order 1986. Many of the report's recommendations reflect this, but they also signify how a future legislative framework could address these issues. In this way, therefore, this report foreshadows a substantial revision of legislation which the Review will be proposing in a separate report.
- 1.12 Similarly, many of the issues discussed overlap with and are expanded upon in the Promoting Social Inclusion report, currently subject to separate consultation. Examples of such issues are equality of access to education and employment opportunities.

## **ACCESSIBLE FORMATS**

- 1.13 Accessible versions of this report, including a young person's accessible version, have also been produced. These can be obtained from the Review's Support Team, Annexe 6, Castle Buildings, BT4 3PP (Tel No 9052 3470) and are posted on the Review's website at [www.rmhdni.gov.uk](http://www.rmhdni.gov.uk). Requests for copies in braille, audio cassette, Irish and Chinese (Mandarin) should also be sent to the Support Team at this address.

## **TERMINOLOGY**

1.14 The report's remit concerns people with a mental health problem or a learning disability, or both; and for convenience we use the phrases:

- "mental health difficulties or a learning disability";
- "a mental health problem or a learning disability"; or
- "mental ill-health or a learning disability"

as broad, generic terms, interchangeably throughout the document, unless the issue under consideration relates specifically to people with a mental health problem or to people with a learning disability.



## CHAPTER 2

### LAW, STANDARDS, POLICY AND PRACTICE

#### LAW AND STANDARDS

2.1 The main sources of human rights and equality law and standards relating to Northern Ireland are:

- the Human Rights Act 1998 (which made the European Convention on Human Rights (ECHR) enforceable in Northern Ireland courts);
- Section 75 of the Northern Ireland Act 1998;
- anti-discrimination legislation in place in Northern Ireland, including the Disability Discrimination Act 1995 and the Disability Discrimination (Northern Ireland) Order 2006;
- the Race Relations (Northern Ireland) Order 1997;
- the United Nations Declaration on the Rights of Disabled Persons;
- the United Nations Declaration on the Rights of Mentally Retarded Persons 1971;
- the United Nations Convention on the Rights of the Child (UNCRC) 1989;
- the United Nations Convention against Torture;
- the European Social Charter;
- the International Covenant on Civil and Political Rights;
- the International Covenant on Social, Economic and Cultural Rights;
- the Convention on the Elimination of Discrimination against Women;
- the Convention on the Elimination of Racial Discrimination;
- the Mental Health Care Principles;
- The Criminal Justice (No. 2) (Northern Ireland) Order 2004.(The “Hate Crimes” legislation); and
- legislation relevant to the care, welfare and support of children and adults with a mental health problem or a learning disability, such as the Children (Northern Ireland) Order 1995, the Chronically Sick and Disabled Persons Act 1978 and the Disabled Persons (Northern Ireland) Act 1989.

## GUIDELINES

2.2 At the outset, informed by the Review's overall Strategic Vision, which emphasises, for example, non-discrimination, equality, justice and fairness, partnership with service users and carers, reciprocity and respect for autonomy, the Group drafted a set of overarching and more specific human rights and equality guidelines. These aimed to inform the conduct of **all** the Review's Expert Working Committees and their Sub Groups, and set the context for their work.

2.3 These guidelines, which apply to everyone with mental health difficulties or a learning disability, regardless of age, and their circumstances (eg those in community or hospital settings, or in contact with the criminal justice system) are:

- The Review recognises that everyone has human rights and must be valued for his or her self-worth. States and international organisations have a duty to uphold and protect these rights.
- Putting human rights and equality principles at the centre of law, policy and delivery of services for people with a mental health problem or a learning disability is a legislative imperative because of international and domestic law.
- These principles also need to be taken into account in professional codes of conduct and practice.
- Given that people live in social settings, the human rights of any individual have to be considered in the context of relevant and often competing rights.
- Human rights, including the rights of people with a mental health problem or a learning disability, should not be arbitrarily diminished.
- There are circumstances, however, when it may be appropriate to curtail a person's human rights, but this should be limited to the minimum extent necessary, and a person whose rights have been curtailed should be entitled to appropriate services, including care, treatment and support (reciprocity of rights).
- Adequate resources must be put in place to assist recovery and to provide support for people with mental health difficulties or a learning disability.
- All public bodies must uphold these human rights and equality duties in performing their functions. Ultimately, law and decision-makers, including members of this Review, have to strike the appropriate balance in relation to the relevant rights and interests.
- However, rights of themselves are of little use unless people enjoy the protection offered by human rights in their daily lives. It is important that people know about their rights and, where these appear to have been breached, are able to enforce them.

- To enable people with a mental health problem or a learning disability to exercise the same rights as others, additional support, information and training may be required to maximise understanding and participation.
- Ensuring equality of opportunity can also mean making structural changes, tackling discrimination and addressing the assumptions and attitudes of others about mental health or learning disability.
- People with a mental health problem or a learning disability should also enjoy the implementation of their right to education, as appropriate.

## **CHILDREN AND YOUNG PEOPLE**

- 2.4 Children are a particularly important and vulnerable group. All legislation, policy, services and treatment to children and young people in both mental health and learning disability settings should be compliant with international standards (in particular, the detailed provisions of the UNCRC) and ensure that they enjoy the same rights and opportunities as other children. This will mean the provision of age-appropriate facilities.
- 2.5 The principles and provisions of the UNCRC must inform the Review's recommendations on children and young people, and the implementation of those recommendations. These principles must be read in conjunction with the Guidelines outlined at paragraph 2.3.
- 2.6 It is also important to stress that the onset of severe mental illness often occurs in early adolescence, often transforming the lives of young people previously fully engaged in education, leisure and other social and cultural activities.

## **RESOURCES**

- 2.7 Putting these principles into practice in the day-to-day delivery of services is not, therefore, an optional extra: and to do so will require additional resources.
- 2.8 The Review recognises that expenditure on mental health and learning disability services in Northern Ireland compares poorly with some other parts of the United Kingdom. Too often, these services are the "poor relations" in comparison with other programmes of care.
- 2.9 It is essential that people with mental health difficulties or a learning disability have equal access to and benefit from resources allocated by Government. Boards and Trusts must ensure that adequate resources are allocated to meet the needs of people with mental health difficulties or a learning disability in their areas. The Review acknowledges the continuing work of the Department of Health, Social Services and Public Safety on its Capitation Formula, by which the available resources are allocated among the four Boards. The Formula is also used by the Boards to inform the subsequent deployment of their resources to local areas.
- 2.10 The Review also acknowledges this Department's more recent introduction of a Strategic Resource Framework. This provides an analysis of the way in which the Boards plan to

spend the resources available to them at the start of each year. It also enables the Department and the Boards to track resource deployment by locality. In this way it can influence the funding available to local areas and ensure that they are receiving (or will receive) a fair share. However, such locality-based funding can disadvantage small, complex, geographically dispersed populations, such as those with mental health problems or a learning disability, where services are outside the areas in which they live.

- 2.11 Compliance with human rights and equality obligations is an integral part of the reform and modernisation of services for people with a mental health problem or a learning disability. To achieve this, additional resources must be made available, and must be distributed and spent in an equitable way.

## **CHAPTER 3**

### **ACCESS TO RIGHTS**

#### **BARRIERS TO EXERCISING RIGHTS**

3.1 People with mental health difficulties or a learning disability experience a range of barriers which prevent them from exercising their rights, including:

- assumptions made about their capacity;
- lack of knowledge and/or support to exercise rights;
- unequal access to services and opportunities in employment, education, transport, and access to and participation in the justice system;
- stigma and prejudice; and
- staff attitudes.

#### **Assumptions about Capacity**

3.2 Assumptions are often made by others about the capacity of people with mental health difficulties or a learning disability to participate in or contribute to the life of their community, or to make decisions. These assumptions are often due to ignorance and prejudice, arising from a lack of information and understanding about mental health or learning disability.

#### **Lack of Knowledge about Rights and Support to Exercise Rights**

3.3 Historically, people with mental health difficulties or a learning disability have been viewed as individuals in need of care and protection rather than individuals with rights. Traditionally, this care has been provided in institutions which isolated and separated those involved from the life of their local community. More recently, there has been a shift towards recognising that many of the difficulties experienced by people with disabilities arise from the structures and systems of society rather than in the person.

3.4 Most people with a learning disability need extra support to understand and to exercise their rights. The fact that information about rights is not produced in a range of formats that are accessible causes particular difficulties for them. The Review, therefore, welcomes DHSSPS' intention to address this in the next phase of its accessible formats project, as part of its work to promote equality and human rights.

#### **Unequal Access to Services and Opportunities**

3.5 Evidence shows that people with mental health difficulties or a learning disability do not have access to the same range of education, healthcare, leisure, housing or employment

services and opportunities as other people in Northern Ireland. This is due, largely, to the failure of mainstream services to take into account their specific and distinctive needs when planning or delivering services. These issues are identified in the Review's other reports, particularly that on Promoting Social Inclusion.

- 3.6 The introduction of anti-discrimination legislation, including the Disability Discrimination Act 1995 and the obligation placed on public authorities to promote equality of opportunity through Section 75 of the Northern Ireland Act 1998, has gone some way to address the exclusion and disadvantage that people with mental health difficulties or learning disability experience. 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.

### **Stigma and Prejudice**

- 3.7 Ignorance, stigma and fear around mental health and learning disability can result in discrimination and lead some to erroneously believe that people with a mental health difficulty or a learning disability do not have the same rights as others in society. Prejudice and ignorance can also mean that the participation of people with a mental health difficulty or a learning disability is not sought or welcomed, and their contributions not adequately recognised or valued. Stigma may also inhibit people with mental health difficulties and a learning disability from becoming included, and add to their isolation and exclusion.

### **Staff Attitudes**

- 3.8 Staff in all public services have a key role to play in removing the barriers faced by people with mental health difficulties or a learning disability in exercising their rights. Staff working in health and social care have a particular responsibility to ensure that the way they plan, design and deliver services empower and respect the rights of people with mental health difficulties or a learning disability.

### **CARERS**

- 3.9 The absence of services to support people with mental health difficulties or a learning disability can add to the stress and anxiety experienced by carers. It can also result in carers not having the same opportunities as others in their community to work, to rest and to access services in their own right.
- 3.10 Carers should not, as a consequence of their caring role, be discriminated against in areas such as education and employment. Carers fall under the Section 75 category of "people with dependents", whereby current and potential adverse policy impacts need to be acknowledged, and either addressed, or reason given as to why they cannot be addressed. Recognition, acknowledgement, support, information, respite, flexibility and choice are core requisites in promoting carers' rights to equality of opportunity. Carers also have their own specific personal needs which must be fully assessed and, where appropriate, met.

- 3.11 Carers are equal partners in the provision of care and should be provided with appropriate information and training for their caring role. They have the right to be involved in decisions, not only about their own situation, but also where services are being designed to support them, such as in Boards, Trusts, and other agencies involved in planning, monitoring and evaluation. These organisations should actively involve carers as well as representatives of carers' groups. Capacity should be built among carers, including providing information and training to enable them to fulfil their caring and representative roles.
- 3.12 In most situations the carer or family is the key source of information on the person needing support. Yet carers often feel that their knowledge of the person and their caring expertise are neither recognised nor valued. Care planning for the service user should be explicit about all who contribute to care, and the nature of their contribution. Creating partnerships – between carers and those professionals who provide services, both to the carers and to the person for whom they are caring - are essential to providing effective support. These partnerships must recognise the expertise of carers, ensuring that they are meaningfully involved in the planning and delivery of services.

### **Recommendations**

- 1. The Government and the Commissioners for Human Rights, Children and Equality must actively promote the rights of people with mental health difficulties and people with a learning disability, and provide accessible information about these rights to them.**
- 2. Public, voluntary and independent sector staff, including front line staff and policy makers, must receive training on human rights and equality issues in relation to people with a mental health problem or a learning disability. This requirement must be reflected in contractual arrangements.**
- 3. 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.**
- 4. Government and public bodies must ensure that people with mental health difficulties or learning disability have equal access to the same range of services and opportunities as other people in Northern Ireland.**
- 5. Government and public bodies must actively address issues of stigma and prejudice and implement action plans for this purpose.**
- 6. Government and public bodies must address the inequalities experienced by carers and uphold their right to have their needs recognised and met. Carers must have their expertise recognised and respected and be fully involved as equal partners in the planning and delivery of services.**



## **CHAPTER 4**

### **THE RIGHT TO VOTE, TO FOUND A FAMILY AND TO LIFE**

#### **CHANGING PERCEPTIONS AND NEEDS**

- 4.1 Over the last 20 years or so, there has been a shift away from perceiving people with disabilities as the recipients of care, protection and treatment, towards recognising them as individuals who have rights, but who may not fully enjoy these rights.
- 4.2 Linked to this has been an increasing emphasis on acknowledging the inherent value of disabled people, of empowering them, maximising their autonomy and self-determination and tackling the barriers that stop them enjoying the same rights as others.
- 4.3 There has also been a growing recognition that some groups of disabled people - such as children, women, older people and people from different ethnic backgrounds - experience particular difficulties.
- 4.4 The interdependence of civil, political, economic, social and cultural rights is particularly relevant for disabled people, since many will rely on additional supports to exercise their rights.

#### **EXERCISING RIGHTS**

- 4.5 Because a person has a mental health difficulty or a learning disability does not of itself mean that he or she is not capable of exercising his or her rights. Assumptions about capacity can, of course, interfere with a person's right to make decisions about all aspects of his or her life. The issues in each instance are whether:
  - the individual has the competence to understand the nature and purpose of the activity or decision in question; and
  - systemic barriers exist which prevent the individual from taking advantage of the rights they are afforded.
- 4.6 The Sub Group concentrated on these issues in relation to three particular rights:
  - entitlement to vote;
  - marriage, sexual relations and the right to found a family; and
  - the right to life.

## **ENTITLEMENT TO VOTE**

### **Eligibility to Vote**

4.7 Eligibility to vote in elections in Northern Ireland is restricted by criteria relating to age, citizenship and residency. To vote, a person must also be listed on the relevant Northern Ireland register of electors for a particular election.

### **Common Law**

4.8 There are no references to people with mental health difficulties or a learning disability in current electoral law. The only reference is in common law, which uses outdated terminology and states that "idiots" cannot vote and that "lunatics" can only vote in lucid intervals.

4.9 The Electoral Commission, which is responsible for encouraging public confidence and participation in the electoral process, recognises that the terms "idiots" and "lunatics" are "anachronistic" and "give no guidance to the Electoral Registration Officer".

4.10 The Commission adds, however, that common law incapacity cannot be disregarded and that it would be wrong to register a person if there were grounds to believe that he or she lacked the capacity to vote because of mental incapacity.

4.11 The guidance produced by the Commission states that the general assumption should be to register people with mental health difficulties or a learning disability.

4.12 The Commission goes on to suggest that a person who is registered as an elector or entered in the list of proxies, cannot be refused a ballot paper or be excluded from voting on the grounds of mental incapacity.

### **Legal Incapacity to Vote**

4.13 There are two factors which determine whether a person with a mental health difficulty or a learning disability can vote:

- whether he or she has a legal capacity to vote; and
- whether he or she has a place of residence for voting purposes.

4.14 Legal incapacity to vote has been defined as "some quality inherent in a person which...either at common law or by statute deprives him of the status of a Parliamentary elector".

4.15 If a person with a mental health difficulty is in hospital on an informal basis or is subject to guardianship, that fact in itself does not place him or her under a legal incapacity to vote. His or her competency is still a question of fact.

## **Place of Residence**

- 4.16 Previously the legislation distinguished between detained and voluntary patients in hospital. In addition, detained patients were not able to treat the hospital where they were detained as their place of residence for the purposes of electoral registration, and whether they could register as resident at a place outside the hospital was a question of fact to be determined by the Electoral Officer.
- 4.17 A person who had been detained, therefore, for more than six months was likely to experience difficulties in registering as resident at their former address.
- 4.18 The Representation of the People Act 2000 enacted provisions which are designed to enable persons in psychiatric hospitals to register to vote whether they are detained or voluntary patients (unless they are detained as a result of criminal activity in which case they are disfranchised).
- 4.19 Under the Act, a mental hospital is defined as meaning any establishment maintained wholly or partly for the reception or treatment of persons suffering from any form of mental disorder as defined by the Mental Health (Northern Ireland) Order 1986.
- 4.20 A new concept introduced by the 2000 Act is the “declaration of local connection”. This enables patients in a hospital to register by treating them as resident at the address which they have declared, which may be an address where they would be living if they were not a patient, or an address in the UK where they have lived at any time.

## **The Electoral Fraud Act (NI) 2002**

- 4.21 Research carried out by the Electoral Commission into the first year of operation of the Electoral Fraud (Northern Ireland) Act 2002, highlighted concerns about the impact of the new registration process on people with a learning disability.
- 4.22 Provision had been made in the legislation for the registration form to be completed and signed by another person on behalf of the individual wishing to register. The person completing the form was asked to state the reason why the person wishing to register had not signed it. Where learning disability or mental health was given as the reason, a letter was sent from the Electoral Office, which is responsible for the management of elections in Northern Ireland, asking the person to confirm that the individual wishing to register had the mental capacity to vote.
- 4.23 The Electoral Commission concluded that "the individual registration process may have inadvertently impacted on people with learning disabilities, thus effectively disenfranchising hundreds of people who in the past may have voted".

## **Accessibility of Electoral Process**

- 4.24 For many people with a learning disability the electoral rules and legislation are not the only barriers to taking part in the electoral process. Difficulties in getting to and gaining

access to polling stations, the absence of information provided in a range of accessible formats, as well as the assumptions made by others about their capacity or interest in voting has militated against people with a learning disability exercising their right to vote.

- 4.25 The Review, therefore, welcomes the Government's proposals to review the law in the Electoral Administration Act 2006.

## **MARRIAGE**

### **Capacity to Enter into a Marriage**

- 4.26 In considering whether a marriage is invalid on the ground that one of the parties was suffering from a mental disorder at the time it was entered into, the test to be applied is whether he or she is capable of understanding the nature of the contract of marriage.
- 4.27 To understand the contract of marriage, a person must be capable of appreciating that it involves the duties and responsibilities normally attaching to marriage. Only a broad understanding of the nature of marriage is necessary. A mere understanding of the promise exchanged is not sufficient if the nature of the contract is not understood. The presumption is in favour of marriage and the burden of proof is on the party attempting to show lack of consent.
- 4.28 The right of a person with a mental disorder to marry - even if detained under the mental health legislation - is the same as that of any other person. The person must understand the nature and purpose of the marriage contract, must be capable of giving consent and must not be under duress.

### **Voidance of a Marriage by Reason of Mental Disorder**

- 4.29 Under the Matrimonial Causes (Northern Ireland) Order 1978, a marriage is voidable if at the time of marriage either party, although capable of giving valid consent, was suffering (whether continuously or intermittently) from mental disorder within the meaning of the Mental Health (Northern Ireland) Order 1986, of such a kind or an extent as to be unfitted for marriage. In order to succeed, a petitioner must establish mental disorder which rendered the person incapable of living in a married state and of carrying out the duties and obligations of marriage.

### **Civil Partnerships**

- 4.30 Individuals with mental health difficulties or a learning disability have the same rights as others in relation to civil partnerships.

### **The Right to Found a Family**

- 4.31 Article 12 of the ECHR guarantees to men and women of marriageable age the right to marry and to found a family. The European Commission on Human Rights has considered two cases which raise the question of how far the rights guaranteed by Article 12 can apply

to prisoners. The Commission's opinion was that the right to marry was in essence a right to form a legally binding association between a man and a woman and that this right could not be denied on the grounds that, as one of the partners was detained, the couple would not be able to live together.

- 4.32 The Government, in enacting the Marriage Act 1983, considered that these principles applied also to persons with a mental illness detained for substantial periods. Prior to the 1983 Act, detained persons did not have ready access to authorised places of marriage. The marriage of a detained person can be solemnised at the place where that person usually resides. A further liberalisation has been effected by the Marriage Act 1994.
- 4.33 Recent research studies, as well as the Review's Equal Lives report, have drawn attention to the growing numbers of parents with a learning disability. Traditionally, these parents were more likely than other parents to have had their children removed from them because of assumptions made about their ability to care, the lack of support available, as well as concerns about the welfare and protection of the children. The competing rights of parents and children to enjoy family life together, and the rights of children to be protected, present real and profound challenges to services (to ensure the welfare of children and to support adults with a learning disability) as well as the legal profession involved in family court proceedings. While the welfare of the child must be paramount, every effort must be made to provide adequate resources to support parents with a mental health difficulty or a learning disability.

### **Sexual Relations**

- 4.34 While the law enables persons with a mental illness to be married provided they understand the marriage contract, it is silent as to whether married couples have a right to have a private place for sexual intercourse while detained in hospital, although such a right may be claimed under Articles 12 or 8 of the ECHR. The term "founding a family" in Article 12 has not been interpreted as referring to the consummation of marriage or having children.
- 4.35 Article 8 provides persons with the right to respect for their private and family life. This also applies to sexual life. The Department of Health advises that "given there is probably nothing in law to prevent a marriage from taking place, the hospital then has to consider whether facilities should be made available for consummation of the marriage, a matter raising questions about human rights. The decision whether to allow unsupervised visits should be based upon the following criteria:
- any risk one spouse may present to the other;
  - overall security within the hospital;
  - the social consequences of making available to certain patients privileges not available to others; and
  - the availability of suitable facilities."

- 4.36 Current mental health legislation does place limits on the capacity of certain groups to engage in sexual activity. Whilst the aim of the legislation is to protect people with mental disorder from exploitation and abuse, it can also interfere with the freedom of some people with a mental disorder from developing relationships, engaging in sexual activity and marrying.

## **RIGHT TO LIFE**

- 4.37 The Review's report on learning disability, *Equal Lives*, drew attention to research which indicates that people with a learning disability have higher mortality rates than people in the general population. The Disability Rights Commission, which operates in Great Britain, highlighted, too, in an evidence paper produced as part of its health inequalities investigation, the increased risk of early death for people with a learning disability and the higher levels of mortality rates for people with schizophrenia or manic depression.
- 4.38 The fundamental human right to life imposes on the Government an obligation to protect every person's right to life. This is linked to the provision of appropriate services, for example, the prevention of suicide and self-harm, as well as raising issues such as the provision of help and support after release from institutional care. The Review's report "Mental Health Improvement and Well-Being - A Personal, Public and Political Issue" deals with issues around suicide prevention.
- 4.39 The decision to impose or withdraw medical care or treatment raises complex ethical, legal and moral issues. Recent medical advances mean that many people of all ages are able to survive because of medical intervention and treatment. Doctors and other health care professionals are required to take into account the effects that a treatment might have on a person's "quality of life", even though the treatment itself might prolong an individual's life.
- 4.40 This already difficult decision is made more complicated in cases where a person has a severe or profound learning disability and where a person may be unable to express an opinion or make a decision.
- 4.41 The Review acknowledges the Department of Health, Social Services and Public Safety's "Good Practice in Consent" Guidelines, which it issued in 2003, and its objective that the process of consent is properly focused on the rights of the individuals concerned and their relatives.

## **Recommendations**

- 7. Legislation dealing with capacity should be based on the presumption of an individual's ability to make a decision. Responsibility should be placed on those challenging or questioning a person's decision-making capacity to provide evidence of incapacity.**
- 8. The continued use of common law in current electoral practice should be reviewed as a matter of urgency.**
- 9. Government and public bodies should provide training and information to their staff to enable them to comply with the positive duty to protect everyone's right to life.**

## CHAPTER 5

### EDUCATION RIGHTS

- 5.1 The right to education is a fundamental right under the UNCRC and ECHR, as incorporated by the Human Rights Act 1998.
- 5.2 The Review emphasises the importance of recognising the right of every child and young person to have access to a practical and effective education. It is of fundamental importance to any analysis of human rights and equality issues and should be explicitly reflected and recognised in any new legislative framework.
- 5.3 A practical and effective education includes the need for a fully accessible curriculum and examinations or qualifications process.
- 5.4 Government policy or funding priorities should not disadvantage people with a mental health problem or a learning disability by, for example, prioritising academic or vocational courses for funding student support, or by setting timescales for completion of certain qualifications. Particular attention needs to be paid to ensuring that children and young people with mental health difficulties or a learning disability, who present challenges to educational services because of the severity or complexity of their disability, enjoy equal access to education. Young people with mental health difficulties or a learning disability preparing to leave school should have access to continuing and stimulating opportunities to learn and develop their potential.
- 5.5 There should also be some redress to recognise the fact that children and young people with severe learning difficulties only received the right to education in 1986, which means that most adults with a learning disability did not enjoy the same rights as others in the community.
- 5.6 Similarly, people who have missed out on educational chances because of previous mental ill-health should be able to avail of “catch-up” programmes. (These social inclusion issues will be picked up in the Review’s separate report on Promoting Social Inclusion.)
- 5.7 Careful attention must be paid to the educational provision for any child or young person who is deprived of liberty, as this engages the child’s rights under Article 5 of the ECHR. The right to education in this context extends beyond school leaving age and applies to all children and young people. Moreover, the European Court’s definition of education is broader than simply classroom teaching. All provision should be detailed carefully in individualised education/treatment plans and reviews.
- 5.8 Children and young people with a mental health difficulty or a learning disability have the right to an effective and practical education without discrimination under Protocol 1, Article 2 and Article 14 of the ECHR, as incorporated by the Human Rights Act 1998. These rights should be read in conjunction with those provided specifically for children and young people by Articles 2, 3, 12, 23, 28, 29 and 42 of the UNCRC.

- 5.9 The inappropriate placing of children and young people in adult hospital wards is a serious human rights and equality issue. In relation to the education rights of such inappropriately placed children and young people, the Review believes that these have been particularly adversely affected.
- 5.10 Article 14 of the ECHR, in conjunction with Protocol 1, Article 2 ECHR and Article 2 of the UNCRC require educational provision for children with a mental health problem or a learning disability to be provided on a non-discriminatory basis. It should promote equality. This is re-enforced by the new provisions introduced by the Special Educational Needs and Disability (Northern Ireland) Order 2005.

### **Recommendations**

- 10. The right of every child and young person with a mental health problem or a learning disability to education should be explicitly recognised and reflected in any new legislative framework.**
- 11. The Government must ensure that people with mental health difficulties or a learning disability have equal access to lifelong learning opportunities. This includes the funding and development of specific programmes and additional support, where needed.**

## **CHAPTER 6**

### **CAPACITY, INCAPACITY AND HUMAN RIGHTS**

- 6.1 This chapter deals with the law in relation to capacity in Northern Ireland governing:
- (a) the management of patients' property and affairs; and
  - (b) medical treatment and welfare provision.

#### **LAW GOVERNING THE MANAGEMENT OF PATIENTS' PROPERTY AND AFFAIRS**

- 6.2 While there is a legal presumption of capacity, two categories of persons are considered to lack capacity for legal purposes (and are regarded as persons under a disability):
- children; and
  - adults without capacity e.g. "patients" i.e. persons, who by reason of mental disorder (as defined in Part VIII of the Mental Health Order) are incapable of managing or administering their property and affairs, which includes engaging in the legal process.

#### **Persons Without Capacity and Representation in Court**

- 6.3 The Official Solicitor to the Supreme Court of Northern Ireland looks after the interests of and represents certain "persons under a disability" as defined by the legislation. Generally speaking, "persons under a disability" must engage in the legal process by bringing proceedings by a next friend, or defending proceedings against them by a Guardian ad Litem.
- 6.4 The Official Solicitor only acts as next friend or Guardian ad Litem of last resort in that such intervention only occurs if there is no one else suitable, willing or able to act.

#### **LAW GOVERNING MEDICAL TREATMENT AND WELFARE PROVISION**

- 6.5 Article 69 of the Mental Health Order enables non-consensual treatment of detained patients, subject to Article 62 (2). Special protection operates in relation to certain forms of treatment:
- (a) surgical operations which destroy brain tissue or the functioning of brain tissue (and operations for the surgical implantation of hormones for the purpose of reducing the male sex drive), which require a patient's consent except in cases of urgent treatment;

- (b) electro-convulsive therapy (ECT) and the administration of medicine by any means once three months has elapsed from the first time the patient was given medicine for his or her mental disorder, which require either consent (from a person certified as capable of consenting) or a second opinion.

## **THE ISSUES**

- 6.6 One of the main issues in mental health law is the question of capacity, which in this context relates to a person's ability to understand, to make decisions and to manage his or her affairs. It is closely related to mental disorder, including mental illness and learning disability.
- 6.7 Assumptions made about the capacity or incapacity of an individual can impact on people with a mental health difficulty or a learning disability and interfere in their right to make decisions in all aspects of their lives. This can include making decisions about, for example, what to do during the day, opening a bank account, entering into personal relationships, getting married or voting (as discussed in Chapter 4).
- 6.8 This fundamental aspect of a person's "human rights" is known as autonomy. Formal or informal perceptions of incapacity can result in the removal of autonomy. Consequently the issue of capacity is central to a person's human rights.
- 6.9 From a human rights perspective, it does not inevitably follow that a person, including a child or a young person under 18, lacks capacity simply because he or she has some form of mental disorder. Moreover, the position is complicated by the fact that a person's "capacity" can vary according to the nature of the decision in question. Also, it should be remembered that a person's mental capacity will not necessarily remain static - this is known as intermittent capacity.
- 6.10 Under the ECHR, Articles 3, 5, 8 and 11 provide protection for a person's autonomy. Article 3 protects against inhuman or degrading treatment; Article 5 protects against arbitrary detention; Article 8 protects a person's private life, including his or her physical or mental integrity; and Article 10 enshrines a modified freedom of expression. Article 14 seeks to guarantee equal treatment and proscribes discrimination in relation to any of the above mentioned rights.

## **POTENTIAL CONCERNS**

- 6.11 The potential human rights concerns in this area focus on the inappropriate removal of a person's autonomy, both in relation to a person with capacity and a person without capacity. In broad terms, the issue to be addressed concerns the circumstances where a substitute decision-maker can validly make a decision on a person's behalf.
- 6.12 Substitute decision-making can potentially be contrary to human rights law in the following circumstances:

- (a) in relation to a person who is acknowledged to have capacity;
- (b) in relation to a person who is deemed incapable, but who actually has capacity; and
- (c) inappropriate substitute decision-making in relation to a person who does not have capacity.

6.13 The Review's forthcoming report on proposed legislative reform deals extensively with these issues.

### **THE MENTAL CAPACITY ACT 2005**

6.14 Mental health legislation has been undergoing reform throughout the United Kingdom. In April 2005, the Mental Capacity Act 2005 was enacted in England and Wales. The provisions of this legislation provide much greater protection for persons with mental disorder than the prevailing legislation in Northern Ireland. Moreover, the Act has adopted a number of principles established in common law and human rights law, which provide greater protection for persons with mental disorder.

### **HUMAN RIGHTS COMPLIANT LEGISLATION FOR NORTHERN IRELAND**

6.15 Domestic legislation for children, young people and adults must be compliant with the Human Rights Act 1998 and in particular European Convention jurisprudence. The Review is addressing this issue in its work to develop a new legal framework.

### **Recommendation**

- 12. Any new legal framework must include appropriate rules and procedures to govern:**
- (a) the determination of capacity or incapacity;**
  - (b) the circumstances when substitute decision-making can be lawful in relation to someone who is capable;**
  - (c) how to deal with persons with intermittent capacity; and**
  - (d) the appropriate mechanisms for dealing with persons who do not have capacity, including putting in place sufficient safeguards to protect such persons.**



## CHAPTER 7

### INVOLUNTARY DETENTION

#### THE ISSUES

- 7.1 The compulsory admission and detention of individuals in hospital constitutes an interference with their autonomy and liberty, and carries with it a risk of unlawful interference with their human rights. Considering whether to intervene in a person's life and involuntarily subject him or her to detention is often a complex and difficult task for the relevant authorities, which are charged with providing care and treatment, where appropriate. Moreover, the State has a duty to protect people from harm, including the person in question as well as others.
- 7.2 Liberty is a fundamental human right and the law safeguards individual autonomy. Involuntary detention raises a range of human rights concerns, including:
- when a person's mental state does not warrant detention;
  - when a person's behaviour does not warrant detention;
  - failure to observe procedural requirements and due process;
  - continued detention when the legal criteria are no longer fulfilled;
  - the need for adequate inpatient provision for children and young people and provision for the education of detained children and young persons; and
  - the statutory role of relatives.
- 7.3 Decision-making in this area involves an assessment of the health of the person concerned and consideration of his or her rights and interests, as well as the interests of the wider community. There are a range of factors which must be taken into account when considering whether or not to intervene in a given situation. In every case, the State must be careful to act within the law, both prevailing domestic law and European Convention law.

#### DOMESTIC LAW

##### The Statutory Framework

- 7.4 The main statutory framework for the compulsory detention of individuals is Part II of the Mental Health (Northern Ireland) Order 1986 (MHO). Compulsory detention under this Order (sometimes called formal detention) comprises two stages:
- admission for assessment; and
  - detention for treatment.

- 7.5 A person with a “mental disorder” can be compulsorily admitted to hospital for assessment. If he or she is living in the community, this process can be initiated by an approved social worker (ASW) or by the nearest relative on the recommendation of a medical practitioner. Part II of the Order also covers the detention of patients already receiving treatment voluntarily in a hospital.
- 7.6 A person can be admitted for assessment only if he or she is:
- suffering from mental disorder of a nature or degree which warrants his or her detention in a hospital for assessment (or for assessment followed by medical treatment); and
  - failing to so detain him or her would create a substantial likelihood of serious physical harm to him or herself, or to other persons.
- 7.7 The Review, however, considers that the legislation is too narrow, in that, for example, the use of compulsory powers is entirely risk-based, with narrower criteria than elsewhere in the UK, thereby excluding some people with severely deteriorating conditions from care by disregarding psychological harm to others.
- 7.8 A nearest relative or, more often, an approved social worker, can make an application for a person to be admitted to hospital. The ASW is required by law to make an application for assessment in respect of a patient for whom he or she has responsibility, where he or she:
- is satisfied that such an application ought to be made; and
  - is of the opinion, having regard to any wishes expressed by relatives of the patient or any other relevant circumstances, that it is necessary or proper for the application to be made.
- 7.9 The nearest relative can require the responsible authority to direct the responsible ASW to exercise this duty. If in these circumstances, the ASW decides against making an application for assessment, he or she must inform the nearest relative of the reasons in writing.
- 7.10 The Review also has concerns that those with a personality disorder are excluded and recognises the importance that they receive treatment. A new legislative framework is required to ensure that people with a personality disorder are not excluded from accessing adequate treatment.

### **Application for Admission to Hospital by the Approved Social Worker**

- 7.11 An application for assessment by an ASW will only be valid if he or she “has personally seen” the patient not more than two days before the date of the application. The ASW must consult with “the person appearing to be the nearest relative” before making an application, “unless it appears to the approved social worker that in the circumstances such consultation

is not reasonably practicable or would involve unreasonable delay”. If a patient is admitted to hospital following an ASW’s application without such consultation, “it shall be the duty of that social worker to inform the nearest relative of the patient [of said admission] as soon as may be practicable”.

### **Admission of Children and Young People**

7.12 Children and young people can be detained under the MHO. The Code of Practice provides guidance to assist practitioners involved in this. Whenever admission of a child or young person to hospital is a possibility, the Code highlights three issues which should always be considered:

- (a) what parent or guardian is legally responsible for the child, if any?
- (b) is the child capable of making his or her own decision? and
- (c) is the child subject to any court or other legal order?

### **Detention for Treatment**

7.13 A patient may be detained for longer than 14 days only if his or her condition falls within the criteria contained in Article 12 (1) of the MHO, namely:

- (a) the patient is suffering from a mental illness or severe mental impairment of a nature or degree which warrants his or her detention in hospital for medical treatment; and
- (b) failure to detain the patient would create a substantial likelihood of serious physical harm to him or herself or to other persons.

7.14 A person can be initially detained for treatment for up to six months and can be further detained for a second period of up to six months. Thereafter, a patient can be detained for periods of up to one year. However, the MHO requires that once a person has been detained for a year, the authorisation of further detention must be made by two psychiatrists, of whom one must be “a person who is not on the staff of the hospital in which the patient is detained and who has not given either the medical recommendation on which the application for assessment in relation to the patient was founded or any medical report in relation to the patient under Article 9 or 12 (1)”.

### **The Children (Northern Ireland) Order 1995**

7.15 Provision is made under the Children (Northern Ireland) Order 1995 for interventions concerning children who require psychiatric care and treatment. A Supervision Order can be imposed where a child requires care which his or her parents are unable to provide. A court can authorise the psychiatric examination of a child subject to a Supervision Order if it is satisfied, on the evidence of a medical practitioner, that the child may be suffering from a mental condition that requires treatment and that is medically treatable. A court can also

authorise the medical treatment of a child where appropriate. The child's consent is required under the Children Order.

### **Detention under the Health and Personal Social Services (Northern Ireland) Order 1972**

7.16 The Health and Personal Social Services (Northern Ireland) Order 1972 makes provision for State intervention concerning persons who:

- (a) suffer from grave chronic disease or, being aged, infirm or physically incapacitated, are living in insanitary conditions; and
- (b) are unable to devote themselves, or to receive from persons with whom they reside, or from persons living nearby, proper care and attention.

Such intervention can include the non-consensual removal of such persons to other accommodation, where necessary, and subject to the safeguards prescribed, including having to apply to a Magistrate's Court for a removal Order.

7.17 A social worker (who may or may not be an ASW) may initiate proceedings to remove a person from his or her place of residence if he or she reasonably believes that removal is necessary in the interests of the person concerned, or to prevent serious nuisance or injury to a third party. The social worker must initially consult with both the person's general medical practitioner and a medical officer designated by the Health and Social Services Trust. He or she may make a removal application based on the medical certification of the Trust's designated medical officer that this is necessary.

7.18 Thereafter, the Trust may apply to the magistrates court within the jurisdiction where the person resides for an order to remove him or her to a suitable hospital or other place, and be detained there for up to three months. The Trust must give the person's nearest relative three days' notice of its intention to apply to the court for a removal order, and it must inform the person managing the accommodation which is to receive the person that a removal hearing is to take place. At the hearing, the Trust must lead evidence to substantiate its application. The court also may hear evidence from the person concerned and/or his or her nearest known relative. The person concerned has the right to be legally represented at such a hearing.

### **Non-Statutory Detention**

7.19 Many people with mental health problems receive care and treatment outside the statutory framework, particularly elderly people cared for in hospital, nursing or residential care homes. Informal extra-statutory, non-consensual intervention (including deprivation of liberty) in the lives of such persons has traditionally been justified under the common law principle of necessity. Since the decision of the European Court in the Bournemouth case (outlined below), however, such extra-statutory, informal interventions involving a deprivation of liberty may be unlawful.

## **RELEVANT HUMAN RIGHTS LAW: AN OVERVIEW**

### **The Human Rights Act 1998**

7.20 The Human Rights Act 1998 provides a mechanism whereby individuals who are aggrieved about a perceived breach of their rights under the European Convention on Human Rights may challenge the actions of the relevant public authority. This challenge can be by way of civil proceedings, a judicial review application, or by introducing the argument into other ongoing court or Tribunal proceedings. The Act has three important effects:

- (a) courts must construe primary and secondary legislation in accordance with the Convention;
- (b) public authorities have a duty to comply with the rights outlined in the Convention. A “victim” of a breach of that duty can challenge this in the courts; and
- (c) the superior courts can make a finding that domestic law is incompatible with the Convention and can make a “declaration of incompatibility”.

### **Article 5 (1)**

7.21 The issue of detention of mentally disordered persons raises the prospect of a possible challenge to a public authority on the basis of a breach of Article 5 of the Convention (the right to liberty and security of person).

### **The Scope of the Right to Liberty**

7.22 This right to liberty and security of the person is a qualified rather than an absolute right, and can be abrogated where liberty is restricted “in accordance with law” or where the circumstances outlined in sub-paragraphs (a) to (f) apply. Detention, therefore, which is carried out in accordance with the Mental Health (Northern Ireland) Order will prima facie not be in breach of Article 5. However, there is still considerable scope for a breach of Article 5 in the application of the legislation and, in some areas, aspects of the legislation may be incompatible with the Convention itself.

7.23 It is generally agreed that the core requirements of this Article are that a detention must take place in accordance with a procedure prescribed by law and that the detention must not be “arbitrary”. This Article is also the central provision in relation to the penal detention of mentally disordered adults, and for those detained under “civil” powers.

### **Detention**

7.24 The structure of the Article 5 protections for the liberty and security of the person are contingent on there having been “detention”. If there is no detention, then the safeguards of Article 5 do not apply. Detention has been determined by factors such as duration, effect and the mode of restraint used.

## **On What Basis?**

- 7.25 A pivotal factor in determining the legitimacy of a detention in the mental health context is a reliable finding of some mental disorder. The requirement outlined in Article 5 is a finding of “unsoundness of mind”. No detailed interpretation of this concept has been developed by the European Court. This is consistent with that court’s pragmatic approach to interpreting the Convention as a living instrument. The European Court has, however, held that Article 5 will not permit the detention of a person simply because his or her apparently irrational views or behaviour deviates from the norm in society.
- 7.26 The question of detention on the basis of ‘severe mental impairment’ was recently considered in a judicial review application by North and West Belfast Trust. The Mental Health Review Tribunal had held that the patient in question should be conditionally discharged as she was not suffering from “severe mental impairment” or “mental illness”. Although this case raises issues relating to Article 5, these arguments were not examined by the Court, which ruled that “severe impairment of intelligence and social functioning” was a disjunctive test which required both proof of severe impairment of intelligence and proof of severe impairment of social functioning.
- 7.27 The European Court has previously addressed the issue of detention in *Winterwerp v The Netherlands*, where three minimum conditions were outlined for the detention of mentally disordered persons:
- (a) there must be objective medical evidence such as to establish a true mental disorder;
  - (b) the mental disorder must be of a kind or degree warranting compulsory confinement; and
  - (c) the mental disorder must persist throughout the period of detention.

The Court acknowledged that different considerations might apply in “emergency” cases.

## **Bournewood and Informal “Admission”**

- 7.28 The *Bournewood* case concerned the informal detention of persons without capacity to consent to detention. A 48 year old autistic man was admitted to hospital following a minor incident at a day care centre. He was compliant and made no attempt to leave. The House of Lords held that he was not detained and reversed a decision of the Court of Appeal, which had held that such patients could not be admitted informally.
- 7.29 The European Court found that the detention was a 'deprivation of liberty' pursuant to of Article 5 of the Convention. It also found that the detention was arbitrary and in contravention of Article 5 (1) because of the absence of procedural safeguards. The Court further found that there was a breach of Article 5 (4) in that there was not an available appropriate mechanism (such as a Mental Health Review Tribunal) to challenge the lawfulness of the detention: judicial review did not constitute an appropriate mechanism.

## **The Role of the Nearest Relative**

- 7.30 Under the Mental Health Order, the nearest relative is afforded certain powers and rights in relation to the admission and detention of a patient. These powers raise issues under Article 5 and also Article 8 (the right to respect for private and family life) and were considered by the European Commission on Human Rights in *JT v United Kingdom*.
- 7.31 In that application, the detained person complained that the legislation did not include any formal mechanism whereby she could alter the identity of her nearest relative. The applicant complained that she did not want the nominated person to be her “nearest relative” and objected to this person being given confidential medical information. This case was settled on the basis that legislation would be introduced to permit reasonable objections to the nearest relative.
- 7.32 The Review agrees with the recommendation in the Human Rights Commission’s report, “Connecting Mental Health and Human Rights” that the role of the nearest relative in relation to the compulsory detention of individuals should be discontinued.

## **Provision of Treatment**

- 7.33 In *Aerts v Belgium*, the European Court held that where the applicant had not been provided with any treatment for the condition which had given rise to his detention then there was a breach of Article 5 (1) (e). The applicant was detained in a psychiatric prison wing rather than a social protection centre. The Court held that as he had not been convicted of any criminal offence his detention could not be justified under Article 5 (1) (a). The only possible justification for his continued incarceration was Article 5 (1) (e).
- 7.34 The Court found that there must be some relationship between the ground of permitted detention and the location and conditions of that detention and, in principle, Article 5 (1) (e) detention could only be justified if the patient was held in an appropriately therapeutic setting.

## **Lack of Adequate Resources**

- 7.35 The European Court has considered the Article 5 implications of continued detention in circumstances where an individual would be released, but for a lack of adequate treatment resources. In *Johnson v United Kingdom*, it found that where lack of placement facilities resulted in indefinite detention, this could constitute a breach of Article 5 (1) (e). The applicant had been found not to be suffering from any mental disorder and his conditional discharge was deferred pending the provision of suitable hostel accommodation.

## **Article 5 (4)**

- 7.36 This Article introduces due process mechanisms which provide procedural support for the substantive Article 5 right to liberty. It is important to note that the protections of Article 6 may also be applicable in relation to detention in the mental health sphere. This article raises four discrete issues:

- (a) a review of the lawfulness of detention;
- (b) by a court;
- (c) in a reasonably prompt manner; and
- (d) with the power to release persons who are unlawfully detained.

7.37 Review in the mental health context must be periodic, because the lawfulness of the detention is contingent on the persistence of the illness. Excessive delay in the conduct of periodic review will be in breach of Article 5 (4).

### **Recall of Patients Conditionally Discharged**

7.38 The Secretary of State has the power under Article 48 of the MHO to recall a person who has been discharged subject to a Restriction Order. There is no requirement for a further medical assessment prior to the exercise of this power. Some commentators have noted in relation to the English legislation, that “it is difficult to see how this power is compatible with the Convention”. Where a restricted patient is re-admitted for assessment or treatment, there is no mechanism for application to the Mental Health Review Tribunal unless the formal power under Article 48 (3) has been used. This anomaly is also likely to be in breach of Article 5 (4) of the ECHR.

### **Minors and Detention: Article 5 (1) (d)**

7.39 The Review considered the human rights and equality issues concerning children and young people who are detained in the context of mental ill-health. Recommendations on this issue in the Review’s report on child and adolescent mental health services are informed by human rights and equality principles.

7.40 The European Convention envisages that detention of a minor will be lawful where it is done for the purposes of educational supervision. There is a clear tension between the terms of Article 5 (1) (d) and the use of accommodation orders under the Children (Secure Accommodation) Regulations 1995.

7.41 The European Court has taken a relatively broad view of the term ‘educational supervision’. In *Koniarska v United Kingdom*, the Court found that “the words ‘educational supervision’ must not be equated rigidly with notions of classroom teaching. In particular, in the present context of a young person in local authority care, education supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned.”

7.42 In *DG v Ireland*, the European Court found that educational supervision could apply beyond the statutory school leaving age. The applicant was a 17 year old who displayed indications of a serious personality disorder. There was no secure unit available for his assessment in the jurisdiction and he was consequently detained in a penal facility. The

Court found that the absence of any instruction, education or recreational facilities at the penal institution constituted a breach of Article 5 (1) (d).

7.43 It would appear, therefore, that detention in inappropriate facilities can constitute a breach of Article 5. Given the absence of appropriate facilities for mentally disordered young people in Northern Ireland, this is likely to be a continuing problem in relation to the detention and treatment of minors here. (Chapter 5 summarises the Review's conclusions on deprivation of liberty and the right to education.)

## CONCLUSIONS

7.44 The following constitute the Review's conclusions on these issues:

- a new definition of mental disorder is needed;
- the criteria for detention should include the protection of other persons from significant risk of serious harm, and there should be adequate safeguards put in place to prevent misuse and abuse of such a power. At the same time, the Review recognises the concerns that broadening the definition may affect a person's right to liberty. To ensure that appropriate safeguards are put in place, there should be detailed guidance in a Code of Practice in relation to such an amendment;
- there is concern over the role of the nearest relative: the Review considers this
- current role in relation to compulsory detention should end;
- statutory authorities should provide information to and consult with the patient's "named" or nominated person rather than the nearest relative;
- proper safeguards must be included to ensure that patient needs are properly accommodated: in particular, to properly protect children;
- there is concern over the adequacy of resource allocation to meet the needs, including the educational needs, of compulsorily detained children;
- if children are to be subject to detention, suitable and adequate resources should be available to protect their rights and best interests, including their educational needs and rights;
- there should be appropriate provision so that the disparate needs of diverse individuals and groups are adequately accommodated;
- potentially the anti-stigmatisation provision at Article 10 of the MHO should be strengthened to protect assessed and detained persons from post-detention discrimination; and
- the needs of people with severe personality disorder in relation to compulsory detention must be fully addressed.

## **Recommendations**

- 13. The definition of mental disorder should be reviewed.**
- 14. The criteria for detention should be broadened to include the protection of others from significant risk of serious harm, with appropriate safeguards put in place to prevent misuse or abuse of this power.**
- 15. The role of the nearest relative as applicant in the compulsory detention of patients should end.**
- 16. There should be appropriate safeguards defined in legislation for “Bournewood detentions”, in accordance with the European Court’s ruling.**
- 17. Proper safeguards should be put in place to ensure that patient needs are properly accommodated, particularly as regards children and young people, in accordance with the principle of reciprocity of rights.**
- 18. Given the previous under-funding of services for children and young people, there must be adequate resources made available, including the provision of age-appropriate services and facilities, to protect the rights, needs and best interests of compulsorily detained children and young people, including their educational needs and rights.**
- 19. The anti-stigmatisation provisions in the present legislation must be built upon to protect assessed and detained persons from post-detention discrimination.**

## CHAPTER 8

### REPRESENTATION AT MENTAL HEALTH REVIEW TRIBUNALS

#### THE ISSUES

- 8.1 One important human rights issue is the extent to which the law currently safeguards a patient's right to have his or her case properly aired before a Tribunal, a crucial dimension of a person's access to justice.
- 8.2 In cases before courts and tribunals, parties commonly retain lawyers and provide them with instructions as to their situation. On the basis of these instructions, the lawyer then presents the client's case to the court or Tribunal.
- 8.3 Persons with mental health difficulties or a learning disability may be potentially disadvantaged by reason of a reduced ability to make appropriate decisions in relation to representation, and/or by a reduced ability to provide coherent, rational and comprehensible instructions. In such circumstances, the human rights and equality issues for consideration are, what provision:
  - (a) does the law make to alleviate/prevent disadvantage and prejudice to the person concerned?
  - (b) should the law make to alleviate/prevent disadvantage and prejudice to the person concerned?

#### THE LEGAL BACKDROP

- 8.4 In the case of *Megyeri v Germany* (1993), Mr Megyeri was convicted of a number of criminal offences. The European Court ordered that he be detained in a psychiatric hospital. Although his detention was reviewed periodically, in two sets of review proceedings he did not ask for representation and the review body did not appoint a lawyer to assist him. He claimed that this failure to appoint a lawyer contravened Article 5 (4) of the ECHR.
- 8.5 The European Court found that the absence of representation in his case constituted a breach of Article 5 (4): that the national authorities should have ensured that he was legally represented at all hearings.
- 8.6 European Convention Law does not appear to guarantee a right to legal representation in every case. However, the implications of the *Megyeri* decision appear to be that:

*"even if a right to representation funded by the State is not (yet) a general right, a court which reviews detention must always consider whether a particular person is capable of acting for himself, for example, whether he is able to marshal arguments and points in his favour, and understand any legal issues arising. If not, then legal representation must be provided and must be paid for by the State."*

- 8.7 In Northern Ireland, the Mental Health Review Tribunal (Northern Ireland) Rules 1986 do not guarantee a patient legal representation. Rule 10 (1) permits a patient to authorise any person to act for him or her as long as the nominee is not "*a person liable to be detained or subject to guardianship under the Order or a person receiving treatment for mental disorder at the same hospital as the patient*".
- 8.8 Where the patient does not want to conduct his or her own case and has not authorised a representative to act for him or her, the Tribunal may appoint a representative to act (Rule 10 (3)). This apparently was originally intended by the legislator to be a discretionary power. Notwithstanding, pursuant to the Human Rights Act 1998, the Mental Health Review Tribunal should interpret and apply the Mental Health Review Tribunal (Northern Ireland) Rules 1986 in light of the *Megyeri* decision.

### **PREVALENT CONCERNS**

- 8.9 A number of concerns in relation to compulsorily detained mentally ill patients and their access to justice (and, in particular, liberty) can be identified. Specifically, how many such patients are able to organise their thoughts sufficiently coherently to enable them to "marshal arguments and points in [their] favour and understand any legal issues arising"? More specifically, how many patients are able to make considered decisions in relation to representational issues, such as:
- the arguments they want to put forward;
  - whether they ought to appear in person or obtain representation; and
  - whether it is in their interests to obtain legal representation?

### **POTENTIAL PROBLEMS IN RELATION TO PATIENT REPRESENTATION**

- 8.10 Mental Health Review Tribunal hearings focus on a patient's "right" to liberty and, in particular, the statutory criteria governing compulsory detention. The subject matter of these hearings ranks high in legal terms given the importance attached by the law to individual liberty. Such hearings are often contentious by reason of the conflicting views of the Health and Social Services Trust and the patient. It is fundamental to both a patient's health and welfare and his or her human rights that he or she is properly represented at these Tribunals.
- 8.11 From a patient perspective, there are arguably a number of shortcomings in the current system of representation at Mental Health Review Tribunals, creating obstacles which can serve to abrogate his or her human rights (eg. the right to liberty and/or a fair hearing) including:
- no automatic access to legal advice and assistance. Often decisions in relation to representation are left in the hands of the patient, who is not always fully capable of acting in his/her best interests, by reason of, inter alia, the medical condition and/or medication;

- some patients seek legal assistance and obtain non-expert assistance. For example, junior barristers and junior and/or generalist solicitors are often involved in representation notwithstanding their lack of the requisite knowledge, skill, experience and/or expertise; and
- some patients refuse legal assistance and represent themselves or obtain non-legal representation. This can detrimentally affect their prospects of having their arguments and submissions properly presented and fully aired.

8.12 Such factors undermine a patient's right to have his or her case properly presented to a Tribunal, which, in turn, can abrogate a patient's human rights, including the important right to liberty.

### **COMPETING RIGHTS, INTERESTS AND OBLIGATIONS**

8.13 All of the above issues concern the interplay between a patient's interests, a patient's rights and the responsibility of the State. Two of the main underlying ethical issues are:

- in what circumstances should a patient's rights outweigh his or her perceived best interests? (eg, if the patient refuses to nominate a representative or instruct a representative who has been appointed to act on his behalf, should the patient be entitled to dispense with representation and, if so, when?); and
- what policies, procedures and practices should the State put into place to ensure a patient's access to justice and the patient's right to have his or her case properly aired? (eg, should the State ensure that every patient receives legal representation, or that legal representation is always provided in specified circumstances?).

### **CONCLUSIONS**

8.14 The Review reached the following conclusions:

- a patient should have an entitlement to expert legal representation at a Mental Health Review Tribunal;
- such representation should be provided by experienced lawyers with an expertise in the area of mental health and compulsory detention. There are different models of specialist legal provision, including a publicly-funded specialist who might operate out of a law centre, and a specialist and accredited panel of practising lawyers;
- such provision should be available to all, irrespective of a person's income or savings;
- there may be situations where it would also be useful for a patient advocate to play a role in assisting the patient;

- as a general rule, a patient should be able to represent him or herself, or appoint a representative of his or her choice to represent him or her;
- there may be circumstances where the requirements of justice (including the patient's right to a fair hearing) demand that a suitable lawyer is appointed to act on the patient's behalf, whether or not the patient consents to such a course; and
- in relation to children, dual or tandem representation should be considered, wherein a lawyer and a Guardian ad Litem would be appointed to act for the child. Such a tandem approach will ensure that proper representations are made to the decision-making body on both the child's rights and best interests.

### **Recommendations**

- 20. A patient, irrespective of his or her income or savings, should have an entitlement to expert legal representation at an independent Tribunal, provided by experienced lawyers with expertise in mental health and compulsory detention.**
- 21. A patient should be able represent him or herself and/or appoint a representative of his or her choice for this purpose. Where appropriate, a patient advocate may play a role in assisting the patient.**
- 22. Where the requirements of justice demand it (including the patient's rights to a fair hearing), a suitable lawyer should be appointed to act on the patient's behalf, whether or not the patient consents to such a course.**
- 23. In relation to children, dual or tandem representation should be considered, whereby a lawyer and a Guardian ad Litem would be appointed to act for the child.**

## **CHAPTER 9**

### **ADVOCACY**

#### **INTRODUCTION**

- 9.1 People with a mental health problem or a learning disability are particularly vulnerable to human rights violation. Their rights and interests must be identified specifically under the legislation and within regional policy mandates. For human rights to be a reality, they must be accompanied by accessible and effective enforcement mechanisms.
- 9.2 Advocacy seeks to support individuals to express and have their views heard. It aims to redress any imbalance of power between the individual and professional. It is concerned with empowerment, autonomy and self-determination, the safeguarding of citizenship rights and the inclusion of otherwise marginalised people.
- 9.3 There are a range of different approaches to providing advocacy, including:
- identifying someone to represent the interests of another individual, or to support an individual to represent him or herself;
  - the provision of independent information and advice about rights and services; or
  - supporting people to come together as a group to have a greater say in the issues which concern them and to bring about change.

#### **RELEVANT HUMAN RIGHTS AND EQUALITY LAWS AND STANDARDS**

- 9.4 The main human rights and equality laws and standards applicable to advocacy are:
- the European Convention on Human Rights 1950;
  - the Disability Discrimination Act 1995;
  - the Northern Ireland Act 1998 (Section 75);
  - the Race Relations (Northern Ireland) Order 1997;
  - the Children (Northern Ireland) Order 1995;
  - the Mental Health (Northern Ireland) Order 1986;
  - the UN Convention on the Rights of the Child 1989;
  - the UN Declaration of the Rights of Mentally Retarded Persons 1971; and
  - Standard Rules on the Equalisation of Opportunities of Persons with Disabilities.

## **THE NEED FOR ADVOCACY**

- 9.5 The ECHR is intended to guarantee not rights that are theoretical and illusory, but rights that are practical and effective.
- 9.6 Article 6 guarantees everyone the right to a fair hearing. Article 5 guarantees everyone the right to liberty and security of a person and Article 8 guarantees everyone the right to family and private life.
- 9.7 Articles 1 and 14 provide a duty to guarantee effective rights to everyone without discrimination. Strasbourg jurisprudence has been highly influential in the development of both the substantive and the procedural aspects of the rights of those subject to compulsion. The European Court's emphasis on procedural aspects of Convention rights has extended its scope and is of great practical significance in the field of compulsion under mental health law. In the case of children, it acknowledges the requirement for special consideration for young people in detention and supports the need to have the lawfulness of detention reviewed in compliance with Article 37 (b) of the UNCRC.
- 9.8 Different types of advocacy may be needed by different people at different times of their lives and to respond to different circumstances. Children, older people, people from diverse ethnic communities, individuals with complex, profound and multiple disabilities and people involved with forensic services are likely to need additional, specific support to address their needs.
- 9.9 Advocacy services are unevenly and poorly developed in Northern Ireland. The recently articulated and increasing demand for advocacy support is an indication of the need to promote and support the rights of people with a mental health problem or with a learning disability. A range of different models of advocacy has developed in response to accepted needs in the rest of Europe and internationally.
- 9.10 Health and social care staff and relatives often act as advocates for individuals with mental health problems or a learning disability. However, the possibility of conflict of interest has increased the demand for independent advocacy services to ensure that the voice and interests of the individual are heard.
- 9.11 Carers, too, may need separate advocacy services, to support them in accessing independent information and in expressing their views about their own distinct needs. Advocacy services can also support carers in their role as advocates for the person they care for.
- 9.12 It is important that people with mental health problems or a learning disability can choose if they want to use an advocacy service, and be able to choose the model of advocacy support that best suits their preferences and needs. Carers should also be offered choice in advocacy support.

9.13 Particular consideration must be given to the principles, procedures and models of advocacy available to individuals who may not be able to exercise this choice, to ensure that they enjoy equality of opportunity and are not disadvantaged.

## **ISSUES EXAMINED**

9.14 The particular issues examined were:

- the need for advocacy;
- the human rights principles involved;
- models of advocacy;
- advocacy in other jurisdictions;
- advocacy support for:
  - people with mental health problems;
  - people with a learning disability;
  - people with a learning disability who have experienced mental health problems; and
  - the distinct needs of vulnerable groups including children, older people, people from diverse ethnic communities, individuals with profound and multiple disabilities and people involved with the criminal justice system.

9.15 In addition to the papers and presentations made at meetings, a seminar on advocacy was held for the Review members.

## **CONCLUSIONS**

9.16 The consensus was that there should be clear provisions within a legislative and policy framework to enable people with mental health problems or a learning disability:

- to understand the proceedings in which they are involved; and
- to participate in their ongoing care and the accompanying decision-making process, to the greatest extent possible.

9.17 The objective should be to have in place:

- a range of independent advocacy support services delivered by a range of providers;

- support for people with mental health difficulties or a learning disability in exercising their rights;
- services which are compliant with all legal requirements in Northern Ireland;
- a coherent, co-ordinated, regional strategic framework which will provide people with mental health difficulties or a learning disability with access to advocacy support;
- an advocacy support service which is available both in hospital and in community settings;
- advocacy support services that will extend to those undergoing assessment and treatment voluntarily and involuntarily and which will reflect the diverse needs of people with mental health difficulties or a learning disability;
- advocacy support services which will pay particular attention to the circumstances where the autonomy and self-determination of individuals may be restricted or denied.

9.18 A strategy to achieve these objectives should be developed with the involvement of all stakeholders, including users, carers and families and should:

- set explicit deadlines and targets for implementation;
- ensure the development of agreed quality standards and consistent monitoring of advocacy support; and
- work in tandem with other current and forthcoming strategies such as the children and young people's strategy and the carers' strategy.

## **Recommendations**

- 24. There should be a statutory right to independent advocacy support, embracing a range of different models.**
- 25. There should be a regional strategy for the development and funding of independent advocacy support in Northern Ireland. This will involve a number of Northern Ireland Departments and should be co-ordinated by the Department of Health, Social Services and Public Safety.**

## **CHAPTER 10**

### **CONCLUSION**

From its outset, the Bamford Review placed respect for human rights and equality of opportunity at the heart of its work and its vision for the reform and modernisation of services. As this report stresses, this is not an optional extra, it is a legislative imperative.

This report has considered a number of situations where actual or potential human rights and/or equality issues arise in relation to people with a mental health problem or a learning disability; and has made recommendations to address these scenarios. We recognise that there may well be others which we have not examined.

Implementing these recommendations is the responsibility of the Government and public bodies, and to achieve the Review's person-centred and rights-based vision for services and opportunities will require co-ordinated action across Government and by these public bodies, responding to the particular needs of different groups. Importantly, also, it will require additional resources, which should be allocated and spent in accordance with equality and human rights principles.

This is not only the challenge of this report, but of the entire Bamford Review.



## ANNEXES



**MEMBERSHIP OF THE HUMAN RIGHTS AND EQUALITY SUB GROUP**

Lady Christine Eames (Chair)	Human Rights Commission
Ms Tara Caul	Children's Law Centre
Miss Brenda Donnelly	Royal Courts of Justice
Mr Bill Halliday	Equality Commission; now Praxis Care Group
Dr Raman Kapur	Threshold
Dr Caroline Marriott	North and West Belfast Trust
Ms Patricia Monaghan	LAMP
Dr May McCann	CAUSE (and a Carer)
Miss Jane McConnell	Royal Courts of Justice
Miss Joanne McDonald	Strule Buzz Group
Professor Tony McGleenan	University of Ulster
Mr Paddy McGowan	Irish Advocacy Network
Dr Paschal McKeown	Mencap and LEAD (the Northern Ireland Coalition on Learning Disability)
Dr Angela O'Rawe	Queen's University
Mr Michael Potter	Royal Courts of Justice
Mr Sean Ferrin ) Mr Roy Keenan )	Secretariat

## **Annex 2**

### **RECOMMENDATIONS**

#### **Access to Rights**

1. The Government and the Commissioners for Human Rights, Children and Equality must actively promote the rights of people with mental health difficulties and people with a learning disability and provide accessible information about these rights to them.
2. Public, voluntary and independent sector staff, including front line staff and policy makers, must receive training on human rights and equality issues in relation to people with a mental health problem or a learning disability. This requirement must be reflected in contractual arrangements.
3. 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.
4. Government and public bodies must ensure that people with mental health difficulties or learning disability have equal access to the same range of services and opportunities as other people in Northern Ireland.
5. Government and public bodies must actively address issues of stigma and prejudice and implement action plans for this purpose.
6. Government and public bodies must address the inequalities experienced by carers and uphold their right to have their needs recognised and met. Carers must have their expertise recognised and respected and be fully involved as equal partners in the planning and delivery of services.

#### **Right to Vote, to Found a Family and to Life**

7. Legislation dealing with capacity should be based on the presumption of an individual's ability to make a decision. Responsibility should be placed on those challenging or questioning a person's decision-making capacity to provide evidence of incapacity.
8. The continued use of common law in current electoral practice should be reviewed as a matter of urgency.
9. Government and public bodies should provide training and information to their staff to enable them to comply with the positive duty to protect everyone's right to life.

## **Education Rights**

10. The right of every child and young person with a mental health problem or a learning disability to education should be explicitly recognised and reflected in any new legislative framework.
11. The Government must ensure that people with mental health difficulties or a learning disability have equal access to lifelong learning opportunities. This includes the funding and development of specific programmes and additional support, where needed.

## **Capacity, Incapacity and Human Rights**

12. Any new legal framework must include appropriate rules and procedures to govern:
  - (a) the determination of capacity or incapacity;
  - (b) the circumstances when substitute decision-making can be lawful in relation to someone who is capable;
  - (c) how to deal with persons with intermittent capacity; and
  - (d) the appropriate mechanisms for dealing with persons who do not have capacity, including putting in place sufficient safeguards to protect such persons.

## **Involuntary Detention**

13. The definition of mental disorder should be reviewed.
14. The criteria for detention should be broadened to include the protection of others from significant risk of serious harm, with appropriate safeguards put in place to prevent misuse or abuse of this power.
15. The role of the nearest relative as applicant in the compulsory detention of patients should end.
16. There should be appropriate safeguards defined in legislation for “Bournewood detentions,” in accordance with the European Court’s ruling.
17. Proper safeguards should be put in place to ensure that patient needs are properly accommodated, particularly as regards children and young people, in accordance with the principle of reciprocity of rights.
18. Given the previous under-funding of services for children and young people, there must be adequate resources made available, including the provision of age-appropriate services and facilities, to protect the rights, needs and best interests of compulsorily detained children and young people, including their educational needs and rights.

19. The anti-stigmatisation provisions in the present legislation must be built upon to protect assessed and detained persons from post-detention discrimination.

### **Representation at Mental Health Review Tribunals**

20. A patient, irrespective of his or her income or savings, should have an entitlement to expert legal representation at an independent Tribunal, provided by experienced lawyers with expertise in mental health and compulsory detention.
21. A patient should be able to represent him or herself and/or appoint a representative of his or her choice for this purpose. Where appropriate, a patient advocate may play a role in assisting the patient.
22. Where the requirements of justice demand it (including the patient's rights to a fair hearing), a suitable lawyer should be appointed to act on the patient's behalf, whether or not the patient consents to such a course.
23. In relation to children, dual or tandem representation should be considered, whereby a lawyer and a Guardian ad Litem would be appointed to act for the child.

### **Advocacy**

24. There should be a statutory right to independent advocacy support, embracing a range of different models.
25. There should be a regional strategy for the development and funding of independent advocacy support in Northern Ireland. This will involve a number of Northern Ireland Departments and should be co-ordinated by the Department of Health, Social Services and Public Safety.