

# A new legislative framework for mental capacity and mental health legislation in Northern Ireland: an analysis of the current proposals

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## Introduction

When the Bamford Review of Mental Health and Learning Disability completed its work in the autumn of 2007, it drew to a close an extensive consultation and analysis of mental health and learning disability services and the law in Northern Ireland. Its last report on *A Comprehensive Legislative Framework* made a compelling case for a major overhaul of the law that the Review team itself described as 'quite radical'.<sup>3</sup>

The Review identified the case for reform in the need to ensure that mental health law conforms to the requirements of human rights law, reflects changes to professional practice, reflects the needs of service users and their carers, and keeps pace with reform elsewhere in the UK. Alone of all the jurisdictions in the UK, Northern Ireland has been operating largely in a legislative vacuum in relation to mental capacity law. The Review's proposals for reform therefore extended to reform of mental health law and the introduction of mental capacity law.

In the autumn of 2008 the NI Executive published its response to the Bamford Review indicating that it intended to develop the law sequentially: reform of the *Mental Health (NI) Order 1986* by 2011 followed

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3 Bamford Review of Mental Health and Learning Disability (NI), August 2007, available at [www.mhldni.gov.uk](http://www.mhldni.gov.uk)

by the introduction of mental capacity law in 2014. Responses to the Executive's consultation resulted in the Department of Health Social Services and Public Safety (DHSSPS) revising its approach and it signalled its intention to bring forward mental capacity and mental health legislation together.<sup>4</sup> This created a unique opportunity in Northern Ireland for fusion of incapacity and mental health legislation. A further consultation paper was issued in January 2009, setting out the key approaches to the content of two bills. However as a result of the consultation, the Health Minister Michael McGimpsey announced in September 2009 that there would be a single bill with an overall principle of autonomy. His press statement noted: "A strong body of opinion, particularly from professional groups and lead voluntary organisations, which considered that separate mental health legislation continues to be stigmatising and recommended that mental capacity and mental health provisions should instead be encompassed into a single piece of legislation"<sup>5</sup>

This short paper provides an overview of the current direction of travel on law reform in Northern Ireland. It comments on the policy climate and arguments for a fusion of mental capacity and mental health legislation. It also highlights some of the key policy issues that will need to be further explored as the Department develops its law reform proposals and concludes with some hopes and fears for the new legislation.

## **Reflections on the model law**

When the Millan Committee reported on reform of mental health law in Scotland, it recommended that in due course the *Adults with Incapacity (Scotland) Act 2000* and the *Mental Health (Care and Treatment) (Scotland) Act 2003* should be consolidated in a single statute.<sup>6</sup> The potential interface difficulties between two pieces of closely related legislation (mental capacity and mental health legislation) that have been highlighted in England and Wales<sup>7</sup> made a strong case for the Northern Ireland administration to seize the opportunity to carefully explore the merits of a single bill for mental capacity and mental health. The value of Szmukler, Daw and Dawson's model law fusing incapacity and mental health legislation is that it shows that this can be done.

The model law of Szmukler et al, based as it is on incapacity principles, provides, in principle, a model that with suitable amendment, could be tailored to fit with the DHSSPS's policy proposal to reform mental health law on capacity principles and simultaneously introduce mental capacity law.

## **Current policy climate on key issues**

### **Fusion of incapacity and mental health legislation**

The principle of a fusing incapacity and mental health legislation is supported by a broad Mental Health and Learning Disability Alliance of user, carer, voluntary sector and professional organisations in both mental health and learning disability sectors in Northern Ireland. These include Action Mental Health,

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4 DHSSPSNI, *Legislative Framework for Mental Capacity and Mental Health Legislation in Northern Ireland, A Policy Consultation, January 2009* available at [www.mhldni.gov.uk](http://www.mhldni.gov.uk)

5 Northern Ireland Department of Health, Social Services and Public Safety press release, 10 September 2009, <http://www.northernireland.gov.uk/news/news-dhssps/news-dhssps-september-2009/news-dhssps-10092009-mcimpsey-announces-single.htm>

6 See *A Comprehensive Legislative Framework*, *supra* n.4 at para. 2.33. A review of the operation of the *Mental Health (Care and Treatment) (Scotland) Act 2003* was presented to the Scottish Government in March 2009. For details see [www.mentalhealthactreview.org.uk](http://www.mentalhealthactreview.org.uk)

7 See for example, Richardson, G. 'Problems at the Interface: Lessons from England and Wales', paper to Law Centre (NI) Seminar, *Mental Health and Capacity Law in Northern Ireland*, February 2009

Alzheimer Society (NI), Aware (Defeat Depression), the British Association of Social Workers (NI), the British Medical Association (NI), Bryson Charitable Group, CAUSE, Children's Law Centre, the College of Occupational Therapists, Disability Action, Equality Commission Northern Ireland, Federation of Experts by Experience, Law Centre (NI), Mencap, Mindwise, Participation and Practice of Rights and the Royal College of Psychiatrists.

### The capacity approach

The Minister, in his foreword to the Departmental proposals, sets out his intention that "where a person has the mental capacity to make a decision, including a decision about treatment of their mental disorder, they will be allowed to do so".<sup>8</sup>

"The Department's aim is stated to be 'to produce a legislative framework, encompassing both mental capacity and mental health legislation, which places the right of individuals to make decisions about their own treatment, care, welfare and /or financial affairs at the centre of legislative reform.'<sup>9</sup>

The current position is that the capacity test proposed for treatment would be one of 'significantly impaired decision making ability'. However consultation responses have suggested a capacity test based on the wording in section 2 and 3 of the *Mental Capacity Act 2005* for England and Wales.

### Forensic provisions

Unlike the proposals put forward by Szmukler et al, the proposals for new legislation do not explain the interface between the new law and the criminal justice system and so it is difficult to anticipate the likely policy position on offenders who retain decision making capacity but who would benefit from mental health treatment. The Bamford review had advocated a common approach to all who require treatment.<sup>10</sup>

### Deprivation of liberty safeguards

The Department will take this legislative opportunity to address the need for safeguards for those who lack the capacity to consent to care in a hospital or care home and who are deprived of their liberty in their best interests. At present, the detailed proposals have not been developed.

The Mental Health and Learning Disability Alliance has recommended a single system of safeguards to apply in a unified bill to those who lack capacity and are subject to compulsory interventions. It notes that the complexity of two separate systems of safeguards which apply under mental health and mental capacity legislation elsewhere in the UK need not be replicated in Northern Ireland.<sup>11</sup> They argue that legislation should ensure that all those who lack capacity enjoy equal protection of the law by being subject to one system of safeguards.<sup>12</sup> These safeguards should reflect the vulnerability of those subject to the legislation and should be commensurate with the gravity of the intervention.

8 *Legislative Framework for Mental Capacity and Mental Health Legislation in Northern Ireland – A Policy Consultation Document, January 2009, DHSSPSNI at p.3.*

9 *ibid at p.4, para.1.1*

10 *See A Comprehensive Legislative Framework, supra n. 4 at para. 5.55*

11 *New deprivation of liberty safeguards came into force in England and Wales in April 2009.*

12 *See Article 14(2) UN Convention on the Rights of Persons with Disabilities – 'state parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are on an equal basis with others, entitled to guarantees in accordance with international human rights law...'*

## **Key Issues to Address**

Other issues, all of which are considered in the model law, that need to be explored further in the proposals for law reform in Northern Ireland are compulsory treatment in the community, safeguards, advance directives, and advocacy. Each of these is briefly discussed below.

### **Community Treatment Orders**

Reform of mental health law envisages that compulsory treatment in the community may be authorised for an initial period of six months with provision for extension for a further six months and thereafter for twelve months at a time. The basis for the introduction of community treatment order is not well articulated in the Department's policy proposals and detail of the scope of community treatment orders, their application to children, and how community treatment orders will be regulated is as yet unclear. Questions arise as to whether there will be limits to the number of community treatment orders that may be applied to an individual, and how fluctuating capacity will be assessed where a person is subject to a long-term community treatment order. The introduction of community treatment orders for those with a mental health disorder who lack capacity to consent to treatment also raises questions about the system of safeguards that should be in place to protect those who fall within the ambit of the legislation.

### **Safeguards**

Szmukler *et al* make the argument for comprehensive review and accountability mechanisms to apply in a 'fused' statute. As noted above, the Mental Health and Learning Disability Alliance has recommended a unitary system of safeguards to apply to all those who lack decision-making capacity about their care and treatment and who are subject to compulsory intervention. Outstanding issues to explore in the development of new law for Northern Ireland are whether there should be an independent *authorisation* mechanism for all compulsory interventions as well as the avenues for seeking a review of an initial authorisation of compulsory intervention and the frequency of review. The Bamford Review had recommended a role for the Regulation and Quality Improvement Authority to approve intervention plans.<sup>13</sup> The Department's policy proposals envisage 'an extended role for the Mental Health Review Tribunal'. The Scottish model of independent approval of interventions, care plans and compulsory treatment by the Scottish Mental Health Tribunal has much to recommend to Northern Ireland.<sup>14</sup> So too does Szmukler *et al*'s proposals for a Mental Capacity Tribunal with responsibility for authorising care plans, hearing applications for assessment orders and approving compulsory treatment orders and with an appeal jurisdiction.

### **Advance Directives**

The Department proposes that the new bill will make provision for advance decision-making in relation to refusal of future treatment. It is important that the law makes provision to ensure that individuals may be supported in making an advance directive. It is not clear as yet how issues such as who may make an advance directive, the validity of an advance directive, and the burden of proof required to be shown to override an advance directive, will be addressed in the new legislation.

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<sup>13</sup> The RQIA is responsible for monitoring and inspecting the availability and quality of health and social care services in Northern Ireland. From 1 April 2009, the functions of the Mental Health Commission for Northern Ireland have transferred to the RQIA.

<sup>14</sup> For a recent analysis of the work of the Scottish Mental Health Tribunal see Dobbie *et al*, *An Exploration of the Early Operation of the Mental Health Tribunal for Scotland*, Scottish Government Social Research (2009)

## Advocacy

The Bamford Review gave particular emphasis to the role of advocacy. The Department envisage that enhanced advocacy services will be available to those falling within the ambit of the mental capacity and mental health legislation. There is strong support amongst mental health and learning disability groups in Northern Ireland for enhanced advocacy services. Since different groups of people falling under the reach of the legislation have distinct requirements from advocacy according to their needs and circumstances e.g. peer advocacy; self-advocacy; advocacy for carers etc, it is important that the law develops advocacy provisions according to the guiding principles that is independent, freely available and appropriate to the needs of the individual. The Mental Health and Learning Disability Alliance has recommended that the law should enshrine a right to appropriate and independent advocacy, and a corresponding duty on the relevant authorities to provide such advocacy services, including at assessment stage. Szmukler *et al's* model of an 'independent mental capacity advocate' may be sufficiently broad as to encompass a range of advocacy models that could apply under new law in Northern Ireland.

## Hopes and fears for the new legislation

Continued consultation by the Department with stakeholders as it develops its policy direction will hopefully help to ensure that the new law enjoys a sense of widespread 'ownership' when it emerges. The Department now does not envisage the bill being ready for introduction to the Assembly until 2011.<sup>15</sup> Care will need to be taken to ensure that the reform timetable does not slip so far as to jeopardise progress that has been made to date. The law reform project will carry forward to a new administration (with the possibility of a new minister) and this introduces new uncertainties into the policy process.

All three expert reports on mental health law reform in the UK (Richardson, Millan and Bamford) have stressed the importance of service development alongside law reform.. Much of what may ultimately be included in the new legislation will require an investment in services and the training to support its implementation. It is hoped that the new legislation will be matched by corresponding commitment to an investment programme.

## Conclusion

The reform project in Northern Ireland presents an opportunity to develop an ethically consistent framework for the treatment and care of all those who lack the capacity to consent to such treatment. It has been said many times already in this process that there is before us a once-in-a-generation opportunity to craft new legislation that could transform how we as a society address the care and treatment needs of those with impaired decision-making capacity. No other jurisdiction in the UK in recent years has seized the opportunity to develop new mental health and mental capacity legislation at the same time. The opportunity currently before us in Northern Ireland, calls for policy innovation and political determination to deliver the transformational approach to mental health and mental capacity law that will serve as a lasting legacy of the local administration.

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15 See DHSSPS press release, *supra* n. 5 and DHSSPSNI, *Delivering the Bamford Vision: The Response of Northern Ireland Executive to the Bamford Review of Mental Health & Learning Disability – Action Plan 2009 – 2011*, October 2009 at para. 6.3