Muckamore Abbey Hospital Inquiry: Bamford and Mental Health Law in Northern Ireland – topics (d)-(g)

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Overview

- The changing international landscape
- The 1986 Mental Health (Northern Ireland) Order
- “A Comprehensive Legislative Framework” (August 2007)
- The new legislative framework: Mental Capacity Act 2016
- Comparative analysis: law in UK (outside NI) and elsewhere

Supporting materials

- Ruck Keene, A. (2023) Mental capacity and mental health legislation: overview of the status quo & reform proposals on the horizon

- Farrell, A. M., Davidson, G., Donnelly, M., Agnew, E., Forbes, T., & Frowde, R. (2022). Mental health policies and laws on the island of Ireland. Edinburgh School of Law Research Paper

- Harper, C., Davidson, G., & McClelland, R. O. Y. (2016). No longer 'anomalous, confusing and unjust': the Mental Capacity Act (Northern Ireland) 2016. *International Journal of Mental Health and Capacity Law*, (22), 57-70

- Maylea, C., Gooding, P, Eran, V. (2022) 'Literature review: protection of rights in mental health law' (report commissioned by Government of Western Australian, Mental Health Commission)

- Gooding, P., McSherry, B., Roper, C., & Grey, F. (2018). Alternatives to coercion in mental health settings: A literature review. *Melbourne: Melbourne Social Equity Institute, University of Melbourne*

The changing international landscape

- European Court of Human Rights – increasing interest in mental health matters, in particular from turn of 21st century, especially as regards:
  - **Deprivation of liberty**: *HL v UK* [2004] ECHR 471 ('Bournewood') case, *Fernandes de Olivera* [2019] ECHR 106 and *Rooman v Belgium* [2019] ECHR 105
  - **Procedural protections in relation to compulsory treatment**: *LM v Slovenia* (App. No. 32863/05, decision of 12 June 2014)
  - **Procedural protections in relation to interventions on the basis of incapacity**: *AM-V v Finland* [2017] ECHR 273

- UN Convention on the Rights of Persons with Disabilities
  - Concluded 2006, UK ratified 2009
  - Founded on the social (or human rights) model of disability
  - (Contested) interpretation by Committee on the Rights of Persons with Disabilities that compliance with CRPD requires abolition of laws based upon concepts of mental incapacity and which allow for compulsory admission/treatment in the presence of mental disorder (more later)

Mental Health (Northern Ireland) Order 1986

- Typical mid-20th century mental health legislation – primary function is the regulation of coercion in relation to admission and treatment

- Applies to all ages (with modifications introduced with effect from 2 December 2019 by 2016 Act in relation to those aged under 16: Articles 3A-3D)

- Otherwise, core provisions remained unchanged throughout period of Inquiry's timeframe, but:
  - In 2004, burden of proof changed so rests with detaining body to establish to Tribunal that criteria for detention remain satisfied (Mental Health (Amendment) (Northern Ireland) Order 2004/1272)
  - In 2018, amended to align the criteria for discharge by the Tribunal with the criteria for compulsory detention (Mental Health (Northern Ireland) (Amendment) Order 2018/1360)
  - In 2020 and 2021 temporary extensions to time-frames after which second opinion required (Mental Health (Northern Ireland) (Amendment) Order 2020/46 and Order (No 2) 2020/142; Mental Health (1986 Order) (Amendment) Order (Northern Ireland) 2021/8 and Order (No 2) 2021/101)

Mental Health Order 1986 – entry point (1)

- Not dependent on competence or capacity: entry point is mental disorder, defined (Article 3.1) as mental illness, mental handicap and any other disorder or disability of mind
  - Definition excludes personality disorder, promiscuity or other immoral conduct, sexual deviancy or dependence on alcohol or drugs

- In relation to what (in modern terms) would be called learning or intellectual disability, difference between short term assessment and longer term admission: can only be admitted on longer-term basis on the basis of 'severe mental impairment,' which has requirement for abnormally aggressive or seriously irresponsible conduct

- NB recent confirmation from Northern Ireland Court of Appeal that Mental Health Order and Mental Health Act 1983 are substantively different and cannot read across from one to the other: *RM's Application for Judicial Review* [2022] NICA 35 (appeal to SC outstanding)

Mental Health 1986 – entry point (2)

- Focus is on concept of ‘serious physical harm’ to the person or to others (Article 2)

- Where the risk is to the person, focus on actual, attempted or threatened harm **OR** judgment so affected person is or would soon be unable to protect themselves against harm

- Where risk is to others, focus on violent behaviour **OR** other persons having been placed in reasonable fear of serious physical harm

Mental Health Order – principles

- No statutory principles, but contained in Code of Practice (dating from 1992), that people with mental health problems should:
  - be treated and cared for in such a way as to maintain their dignity;
  - receive respect for and consideration of their individual qualities and background – social, cultural, and religious;
  - have their needs taken fully into account notwithstanding the fact that within available resources it may not always be practical to meet them;
  - receive any necessary treatment or care with the least degree of control and segregation consistent with their safety and the safety of others;
  - be discharged from any form of constraint or control to which they are subject under the Order immediately this is no longer necessary;
  - be treated or cared for in such a way as to promote their self-determination and encourage personal responsibility to the greatest possible degree consistent with their needs, wishes and abilities

Mental Health Order: civil patients (1)

- Admission to mental health hospital for assessment and then treatment
  - Article 127 envisages voluntary admission (but feasibility post the *Bournewood* and *Cheshire West* [2014] UKSC 14 decisions?)
  - Admission for assessment (short term: differing periods, but maximum 14 days) to be made by Approved Social Worker or the patient's nearest relative with a medical recommendation, followed by further medical examination by different doctor immediately upon arrival at hospital (Articles 4 and 9)
  - Admission from hospital if already present (Articles 7 and 9)
  - Admission for treatment, following on admission for assessment, requires medical opinion from approved doctor (first period up to 6 months, then 6 months, then yearly) (Article 12)

Mental Health Order: civil patients (2)

- No specific provision for treatment in the community but:
  - Article 15 allows patient to be placed on leave by responsible medical officer
  - Guardianship (Article 18) provides more limited framework as alternative to hospital admission – with no authority to deprive a person of their liberty (*A Health & Social Care Trust v Mr X & Ors*) [2019] NIFam 9

- Discharge (in most cases) by responsible medical officer, nearest relative (but can be barred), or upon successful appeal to Tribunal (ASW can discharge from guardianship as well)
  - Note that Tribunal hearings take place in private and no public judgments – understanding of their practice?

Mental Health Order: civil patients (3)

- Treatment: Part IV of the Order provides a framework for:
  - Compulsory treatment, even in the face of the patient's capacitous refusal
  - Treatment where the person cannot consent
  - Second opinions from Second Opinion Appointed Doctors after a defined period of time where the patient cannot or does not consent (except in an emergency)
  - ECT treatment, neurosurgery and male sex drive reducing hormones
  - Emergency treatment

Mental Health Order: the nearest relative

- Role of nearest relative (Articles 32 and 36)
  - Statutory list
  - Can apply for admission
  - Cannot block admission but objection has to be noted
  - Can bring about discharge (subject to barring by RMO)
  - Acting nearest relative can be substituted by County Court on application – including (post *Re HM's Application for Judicial Review* [2014] NIQB 43, by patient themselves)

Mental Health Order: forensic patients (Part III)

- Those diverted from criminal justice system by the courts, either before or after sentencing

- Those transferred across from prison where their mental health has deteriorated

- Main differences to civil patients:
  - Different – longer – periods of detention in many cases
  - (Limited) variations in relation to treatment framework reflecting the different lengths of the period of detention
  - Restrictions in some cases upon leave / discharge, requiring consent of Secretary of State unless patient obtains absolute discharge from MHRT
  - Significant issue in relation to ability of Tribunal to discharge into conditions of deprivation of liberty in the community: *A Health and Social Care Trust v Mr O and Mr R* [2020] NIFam 23 (both Muckamore Abbey Hospital patients)

Mental Health Order: Misc

- Monitoring of mental health patients by (now) RQIA
- Offences e.g. in relation to ill-treatment of mental health patients
- (Entirely separately) provision for the management of property and affairs by those incapable of doing so

A Comprehensive Legislative Framework (August 2007)

- Context:
  - *Bournewood*
  - Adults with Incapacity Act 2000 and Mental Health (Care and Treatment) Act 2003 (Scotland)
  - Mental Capacity Act 2005 (E&W)
  - CRPD only just coming into view (one mention in the report)

- Final report of Bamford Review

A Comprehensive Legislative Framework (August 2007)

- Principles based
  - Autonomy
  - Justice
  - Benefit
  - Least harm

- Not drafting legislation, but setting direction of travel for a comprehensive legal framework

- (Near complete) fusion between mental health and mental capacity law from age zero upwards

Mental Capacity Act (Northern Ireland) 2016

- A long journey from Bamford in 2007 (with the CRPD coming into focus)

- 16 plus, intended ultimately to be overarching framework for all acts of care and treatment, almost entirely capacity based

- Overarching matters:
  - Principles (ss. 1 and 2)
  - Capacity (ss. 3-6)
  - Best interests (ss. 7-8)

- Key provisions:
  - Graduated safeguards (Part 2)
  - The role of the nominated person (Part 3)
  - Advocacy (Part 4)
  - Lasting powers of attorney (Part 5)
  - The role of the court (Part 6)
  - Forensic diversion (Part 11) (capacity based for treatment, not for detention)

Mental Capacity Act (Northern Ireland) 2016: principles (s.1)

Capacity

- Presumption of capacity
- Requirement that determination of capacity can only take into account statutory factors, and not to be determined merely on the basis of any condition that the person has, or any other characteristic of the person, which might lead others to make unjustified assumptions about his or her ability to make a decision.
- That a person is not to be treated as unable to make a decision for himself or herself about the matter unless all practicable help and support to enable the person to make a decision about the matter have been given without success
- The person is not to be treated as unable to make a decision for himself or herself about the matter merely because the person makes an unwise decision.

Best interests

- Acts done / decisions made for / on behalf of person must be done in their best interests

2016 Act: capacity - the three questions

- Section 3

  (1) Is the person unable to make their own decision in relation to the matter? If so:

  (2) Is there an impairment or disturbance in the functioning of the person's mind or brain? If so:

  (3) Is the person's inability to make the decision because of the identified impairment or disturbance?

- (*A Local Authority v JB* [2021] UKSC 52 confirmed order under materially identical provisions of MCA 2005 in E&W)

2016 Act: best interests

- Section 7 – statutory checklist
  - 'Special regard' to the person's past and present wishes and feelings, their beliefs and values and other factors they would be likely to consider if they were able to do so

- Extensive caselaw from E&W, including at Supreme Court level, likely to be applicable in NI (and drawn upon in statutory NI DoLS Code of Practice, but no post-implementation confirmation)
  - *"The purpose of the best interests test is to consider matters from the patient's point of view"* *Aintree v James* [2013] UKSC 67
  - Can include harm to others where it 'blows back' on the person*: DY v A City Council & Anor* [2022] EWCOP 51 (see also NI DoLS Code of Practice paras 6.32-6.34)

Nominated persons

- Choice where appointer (16+) has capacity to do so, or default (set out in ss. 73-76)

- Will have substantial role in due course but at present role in relation to deprivation of liberty is:

  - To be consulted in relation to application for detention authorisations (Sch 1 para 6(d); long-term; Sch 2 para 2(4)(c)) – short-term)

  - To bring applications to the Review Tribunal (only with consent of P where P has capacity to decide whether an application should be brought) (s.45)

- NB, no equivalent power to nearest relative under 1986 Order to discharge

2016 Act: deprivation of liberty (1)

- Entry into force of deprivation of liberty provisions in December 2019 a recognition that deprivation of liberty requires formality (also money & valuables and research)

- Deprivation of liberty:
  - No statutory definition, but guidance in the statutory DoLS Code, based upon English case-law, especially *Cheshire West* [2014] UKSC 14
  - Short term detention in hospital on basis of report of appropriate healthcare professional (Sch 2)
  - Longer-term detention in place where appropriate care and treatment available on basis of HSC Trust panel authorisation (Sch 1) – not just hospital
  - Authorisation solely relating to deprivation of liberty, not acts of care and treatment

2016 Act: deprivation of liberty (2)

- Route of challenge to expanded Mental Health Review Tribunal
  - Application by P or nominated person (with consent where P has capacity)
  - Power of referral by AG/Department of Health/Master (Care and Protection) acting on the direction on the court (s.47)
  - NB duty on HSC Trust to notify AG where DOL authorisation for 1 year and person lacks capacity in relation to whether to bring an application at 6 months (s.50)

- Duty on HSC Trust to refer where extended for second or subsequent time and Tribunal has not considered case for 1 year (in case of 16-17) or 2 years (18+) (s.48)

The 2016 Act and the 1986 Mental Health Order

- Mental Health Order remains on the statute books
- Sole statutory framework for under 16s
- Statutory precedence over DoLS framework in 2016 Act: Article 3 of the commencement order makes clear that if a person can be detained under the 1986 Order, then the 1986 Order framework must be applied

Law elsewhere: England & Wales

- Mental Health Act 1983
  - Strong resemblance to 1986 Order, key differences being MHA 1983 has: (1) less restrictive definition of mental disorder; (2) ? less restrictive criteria for admission; (3) ability to detain to treatment immediately; (4) community treatment orders; and (5) aftercare provision
  - Last amended 2007
  - Review 2018, leading to draft Mental Health Bill 2022
  - No suggestion of following NI lead just yet, but seeing NI as testbed for fusion

- Mental Capacity Act 2005
  - Strong resemblance to the 'capacity' parts of the MCA 2016, but less developed set of graduated safeguards
  - Framework for administrative authorisation of deprivation of liberty added 2009, widely recognised not to be working, legislation to replace it currently in limbo

Law elsewhere: Scotland (1)

- Mental Health (Care and Treatment) Act 2003
  - Principles based, emphasis on earlier role of Tribunal approving compulsory treatment order (whether in hospital or community)
  - Based on both capacity ('significantly impaired decision-making') and mental disorder

- Adults with Incapacity Act 2000
  - Capacity and 'benefit' based
  - More reliance on formal authority (treatment certificates/guardianship) than MCA 2005
  - No equivalent to DoLS

- Adult Support and Protection Act 2007
  - Framework for intervention where adult at risk

Law elsewhere: Scotland (2)

- Scott review reported summer 2022
- Strongly CRPD-influenced, and attempt to incorporate positive rights
- Cf Bamford Review – not legislating, but direction of travel
- Attempt to move away from the idea of capacity to 'autonomous decision-making'
- Not fusion
- Scottish Government response awaited

Law elsewhere: Republic of Ireland

- Mental Health Act 2001
  - Mental disorder, impaired judgment and best interests as touchstones
  - Early automatic reviews by Mental Health Tribunal
  - Reform process underway to reform 2001 Act

- Assisted Decision-Making (Capacity) Act 2015
  - Strongly CRPD-influenced: much emphasis on supported and co-decision-making to avoid the need for substitute decisions
  - Capacity, will and preferences as touchstones
  - Implementation due on 26 April 2023
  - No equivalent to DoLs, and separate legislation anticipated

Law elsewhere: more broadly

- Continuing debate about whether CRPD compliance requires abolition of (even capacity-based) legislation providing for involuntary care and treatment

- But reforms influenced by CRPD – see e.g. Norway: move to capacity-based mental health legislation in 2017 and law reforms in different states / territories of Australia

- And increased recognition of need for (and tools to support) reducing coercion