A Road to fused legislation - History and Development of the MCA (NI) 2016

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It is always a pleasure to hear Professor Szmukler present the case for fused legislation. Unsurprisingly he was an important source of encouragement on our journey to a new MCA.

Beginnings and context

The starting point for the NI journey of reform can be traced back to 90's of the last century. Most of *you* were probably still at school! To appreciate just why and how we ended up with 'fusion legislation' the context of our work is rather important. And looking back serendipity has probably been in the mix!

Those of us who made this journey had their own starting points, sources of inspiration, whatever. For me it was participation in a **European study of consent in mental health legislation** across the different member states. In all of the countries we examined non-voluntary admission to hospital, detention and compulsory treatment, for people with a mental illness, was provided for in statute law.

By contrast outside mental health we noted the high status of consent including respect for withholding of consent in matters relating to physical health.

Here in the UK the contrast had become just as stark. In 1993 the Court of Appeal in Re T (Adult: Refusal of Treatment) affirmed the right of an adult patient to make a free choice including the refusal of treatment. Lord Justice Butler-Sloss confirmed:

"A man or woman of full age and sound understanding may choose to reject medical advice....A decision to refuse medical treatment by a patient capable of making the decision does not have to be sensible, rational or well considered."

Ironically among the clearest statements concerning the grounds for consent on matters relating to physical health was in Re C (Adult: Refusal of Treatment) in 1994. The irony was that C was a patient who was suffering from Schizophrenia.

But the health issue at the time was his gangrenous leg, for which he was reluctant to have surgery.
The High court ruled that an adult has the capacity to consent, or to refuse to consent, to a medical treatment if he or she can :

Understand and retain the information relevant to the decision in question
Believe that information: and
Weigh that information in the balance to arrive at a choice

For many in mental health these and similar case judgements were game changers.

Before proceeding with our local journey of reform I should acknowledge the support we received with our work. In addition to medical colleagues including Professor Szmukler, we were also fortunate in having several law experts on board with our work.

First is Professor Genevra Richardson. **Her review of the Mental Health Act 1983** provided an early stimulus for *our* work.
The report endorsed **two key principles**: ***non-discrimination against those with a mental illness*** and ***respect for patients' autonomy.*** They form a thread which runs through much of *our* work.

During the Bill stages, Professor Richardson was a great source of encouragement and sound advice.

Another law expert who assisted us greatly was *Hilary Patrick*, member of the Scottish Mental Welfare Commission and a former member of the Millan Committee of which more later. Third was *Professor Phil Fennell*, Cardiff Law School.

NI RCPsych Recommendations on Legislative Reform
Beginning in 2000 the NI Division of the Royal College of Psychiatrists carried out a review of our Mental Health Order.

I should acknowledge at the outset that “fusion” legislation was not in our minds in 2000.

That said inequalities flowing from the earlier case law decisions had not been lost on us. In our report to the Department of Health in 2001 recommending reform of legislation we set down two ethical priorities:

First: "Principles, well established within healthcare, provide an essential backdrop to any review of mental health law:….. This includes respect for a person's autonomy".

Second: "In any review of mental health law -capacity/incapacity considerations must occupy a central place in any proposed treatment intervention."

The Bamford Review

The Department of Health responded positively in 2002 by establishing a comprehensive review of Mental Health and Learning Disability, subsequently called the Bamford Review in memory of Prof David Bamford, with whom I co-chaired the Review until David's untimely death in 2005. The Review included a review of mental health legislation.

For to-day's consideration two points are relevant:

First the inclusivity of the Bamford Review, one of David Bamford's great achievements, helped insure that the voices of the most important drivers for reform were given priority - the voices of users of services and their carers. This in turn gave us the moral high ground throughout our work and, at significant points, the ear of Ministers. It is worth noting that throughout the 16 year journey to the present Act we had no less than 7 Health Ministers to deal with, including 2 direct rule ministers!

Second at heart of the Bamford Review was a commitment to equality. Its vision statement was:-
"a valuing of all who have mental health needs or a learning disability, including rights to full citizenship, equality of opportunity and self-determination".

However as service user Rachel Perkins, Chair of Equality 2025, has commented: ***"equal citizenship requires equality under the law": and in her view "repeal of laws that apply to only one group of people".***

Our work on legislative reform sought to address these equality issues:

- We reviewed the research evidence, including evidence around the decision-making capacity of people detained under a MHA.

- We considered the issues around risk and public protection. Issues around definition of capacity including fluctuating capacity….

- We consulted widely including with legal and medical experts.

Context and timing

Colleagues in Medical Ethics at VU University Amsterdam suggested that the context and timing of our work gave us a unique opportunity – specifically the absence of any MC legislation – we had a clean slate to work on.

Second, was a little bit of Serendipity! In 2004 our Office of Law Reform were tasked with consulting on new Capacity legislation for NI. However, with the Bamford work well under way, they and Department of Health agreed to our suggestion that the Bamford Review should lead on joined up work on reform of mental health legislation *and* on the development of Capacity legislation.

With hindsight this situation was probably pivotal for the final outcome. It provided the opportunity and the space:
- to develop a comprehensive approach.
- to consider the overall purpose of legislation
- and to formulate the guiding principles which should underpin legislative reform

A comprehensive legislative framework

In our development work we were most impressed with the Millan Report on reform of Scotland's mental health legislation. We even considered Scotland's

MHA introduced in the course of our work in 2003. However by mid-2004 we resolved that our goal would no longer be a kind of Mental Health (Scotland) Act, with bells and whistles.

For Millan had also suggested that Scotland's 2003 Act should be seen as developmental, with the possibility of consolidation of their Incapacity and Mental Health Acts at a later date. In mid-2004 we resolved to do just that - to go for a single legislative framework.

The last report of the Bamford Review **"A Comprehensive Legislative Framework"** was issued in 2007.

The report concluded:
"Having one law for decisions about physical illness and another for mental illness is anomalous, confusing and unjust."

Slide. ***"Northern Ireland should avoid the discrimination, confusion and gaps created by separately devising two statutory approaches but should rather look to creating a comprehensive legislative framework."***

Slide. ***"A rights based approach is proposed as the guiding principle for reform of legislation, which should respect the decisions of all who are assumed to have the capacity to make their own decisions."***
This signalled a clear shift
"from public protection as the priority towards safeguarding the rights and dignity of people with a mental disorder or a learning disability." 4.5

We also proposed that the provision of care and treatment for mentally disordered offenders should be under the same legislative framework.

Central to our proposals for legislative reform were:
- repeal of separate and discriminating mental health legislation and
-the introduction of a single legislative framework in which all health and welfare issues are considered equally
In which***:***

-principles supporting the dignity of the person should be explicitly stated in the legislation
With two key principles being:
- a presumption of decision-making capacity, with respect for decisions and provision of all necessary support to enable participation in a decision.
- where an individual's capacity is impaired the best interests of the person should be protected and promoted

From the perspective of Capacity legislation such principles are hardly exceptional. From a mental illness perspective, they break new ground.

DH and DJ responses to Bamford

The Department of Health and the Department of Justice responded to these proposals. I journeyed with the two Bill teams over the next eight years.

Initially there was a lot of ambivalence among senior officials at DoH. They were quite outside their comfort zone.

As the Department's consultation on their MCB in 2014 acknowledged…***the overwhelming response to its initial consultation in 2009 was…. ….to develop the single, comprehensive framework envisaged by the Bamford Review!*** by now we had effective community engagement and support.
Slide Consequently***….. it was decided in September 2009, that the Department would fuse together mental capacity and mental health law into a single Bill.***
This, so far as I am aware, is the first mention of "fusion" to describe our legislation.

In 2010 it was serendipity's turn again! Justice powers were finally devolved to our local assembly. Had we been dealing with the Ministry of Justice I expect the outcome would have been rather different! Ironically David Ford who was appointed local Justice Minister was a social worker by profession. He was quickly on message and his Justice Bill team soon followed suit.

Over the next few years the Bill teams of DH and DJ did good work crafting a MCB to address the needs of both civil society and criminal justice. Input from

colleagues form the Bamford Review including Professor Davidson, who will be speaking to you shortly was invaluable in keeping the drafting work on message with Bamford.

UNCRPD Compliance
It will not surprise you that we met a number of challenges during the Bill stages. Before finishing, one is worth noting - the **UN Committee's General Comment** on Art. 12 of the Convention on the Rights of People with Disabilities, issued in 2014. As you know the General Comment on Art. 12 has led to questioning of the compliance of the MCA's in each jurisdiction with the Convention.

By 2014 the Bill proposals, now a fusion of MC and MH provisions, were at an advanced stage of gestation. One particular concern was the Committee's statement: **"compliance with Article 12 requires that States Parties abolish all substitute decision-making regimes",** in favour of supported decision making.

All our Mental Health Acts are grounded on substitute decision-making, for those at the sharp end of present mental health legislation and for whom we were seeking to provide for under a Mental Capacity framework. Legislative change will not change the reality of these serious health situations. In our minds the imperative was to place the over-riding of a person's decision, including refusal of treatment, on the right footing – impaired decision-making capacity. However where this condition is met substitute decision-making, in that person's best interest, is typically necessary and may be life-saving.

Help came from several quarters, including the **EAP 2014 report** for the Department of Justice- on the MCA 2005 compliance. Based on careful review and analysis of the arguments….. two important conclusions were, first……**the MCA is not fully compliant…,**
Slide. But second **"the UN Committee on CRPD is not correct in its claim that compliance with the Convention requires the abolition of substitute decision making."**

In addition the Bill team, did some creative redrafting of the Bill. The rest as they say is history. **The Bill finally received Royal assent on 16 May 2016.**
I believe we now have a 'good enough' piece of legislation, fit for the 21st century.

That said it has its imperfections and its limits.

Children and Young People

One area not provided for is children. Bamford gave careful consideration to the rights and needs of children and young people and asked the Departments to do likewise. Having walked the walk with the Bill team I know they did give detailed consideration to these issues. They concluded that the MC Bill was not the vehicle for addressing these important matters. My journey with them has persuaded me likewise.

There is however a priority to revisit the legislative provision for the rights and needs of our young people. And a small group is presently giving this matter careful consideration.

The MCA(NI) 2016

While we still have important steps to achieve full implementation, the fundamental rights to decision-making equality are now enshrined in legislation**.**

At the very least this new Act is an important social experiment. Its provisions will have ramifications for the people of NI citizens and potentially ramifications beyond its shores.

Thank you for your forbearance.

Roy McClelland January 2021