The Mental Health of Children and Young People in Northern Ireland

- In Northern Ireland over 20% of children under 18 years of age suffer significant mental health problems.
- 2012/13 – 7.9% of the mental health budget was allocated to CAMHS.
- Limited inpatient adolescent facilities.
- 1 in 10 teenagers deliberately self harm.
The Mental Health of Children and Young People in the Criminal Justice System

- CJINI Report – Not a Marginal Issue: Mental Health and the Criminal Justice System:
  - 30 Children in residence @ JJC
    - 20 diagnosed mental health disorder
    - 17 history of self harming
    - 8 at least 1 suicide attempt on record
    - 8 on Child Protection Register
    - 14 had a statement of Special Educational Needs

08/08/2014
“Mental Health legislation considered from a principles base requires a comprehensive approach which recognises the overlap with capacity issues, the needs of children and of those within the Criminal Justice System, including the interfaces with relevant legislation.”

“The implications of a capacity approach to all substitute decision-making legislation would require the same basic approach to be applied for children. While most people would agree that parents be substitute decision-makers for children up to the age of 10 or 12, consideration might be given to a rebuttable presumption of capacity between 12 and 16. When a young person is deemed to lack capacity, parents would ordinarily have substitute powers until the age of 16.”
“New capacity-based legislation would allow all the protections afforded to adults in these situations, for example, if such an assessment or treatment plan involved significant restrictions or deprivation of liberty regardless of whether the child is compliant or objecting. If parents’ views are to be over-ridden, or if the child is without parents and no parental responsibility has been given, the special needs of the child must be recognised and protected in arrangements for advocacy and representation.”

“The special vulnerabilities and developmental needs of all those children and young people under the age of 18 years who may fall under the proposed approach to substitute decision-making will require special rights and protections.”
Mental Capacity Bill NI

- Released 27th May 2014
- the civil provisions of the draft Bill
- policy statement on criminal justice system
- policy statement on under 16s
  - Easy Read Version
  - Child Accessible Version
Current Proposals

- 16 and over – the Mental Capacity Bill (NI)
- Under 16s – retention of the Mental Health (NI) Order 1986
  - Some amendments to the Order
    - Possible review of the Children (NI) Order 1995

08/08/2014
Young People (people aged 16-17 years)

- Lasting Powers of Attorney
- Statutory Wills
- Age appropriate accommodation?
In-patients under 18: duties of hospital managers” states:

146(1) This section applies in relation to any person under the age of 18 who:

(a) is detained by virtue of this Act in a hospital in circumstances amounting to a deprivation of liberty; or

(b) though not falling within paragraph (a), is an in-patient in a hospital and has or appears to have mental disorder.

(2) The managing authority of the hospital must ensure that (subject to the person’s needs) the person’s environment in the hospital is suitable having regard to his or her age.

(3) For the purpose of deciding how to fulfil the duty under subsection (2), the managing authority must consult a person who appears to that authority to have knowledge or experience which makes that person suitable to be consulted.
16 and 17 year olds continued

- Review Tribunal - clause 48 – every year
- Education Provisions
  - “The Department is also considering access to education provisions.”
  - “The review emphasises the importance of recognising the right of every child and young person to have access to a practical and effective education…government policy or funding priorities should not disadvantage people with a mental health problem or a learning disability…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…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. “ – Bamford Review
Principles

- Autonomy
- Best Interests – consult with “relevant people”
  - “The act or decision must be done, or made, in the best interests of the person who lacks capacity.”
    - Autonomy
    - Justice
    - Benefit
    - Least Harm
“Principles underpinning legislation will only have effect if they are translated into clear provisions, if there are adequate services to provide good quality treatment and care to allow them to act and intended and when all those operating the legislation have adequate education and training. **The impact of the principles in the Code of Practice for the 1986 Order was reduced because of delay in publication and a failure to deliver an associated training programme.** Principles must be incorporated into the new law and elaborated upon in Codes of practice. The new legislation, the Codes of Practice and related training programmes must be introduced at the same time.” Bamford Review
Lacks Capacity

2.(1) For the purposes of this Act, a person lacks capacity in relation to a matter if, at the material time, the person is unable to make a decision for himself or herself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.

(2) It does not matter

(a) whether the impairment or disturbance is permanent or temporary;

(b) what the cause of the impairment or disturbance is.

(3) In particular, it does not matter whether the impairment or disturbance is caused by a disorder or disability or otherwise than by a disorder or disability.
Unable to make a decision

- “unable to make a decision” - the person is unable to make the decision if they are unable to understand the information required to make the decision, unable to retain the information long enough to make the decision, unable to appreciate the relevance of the information and use or weigh the information in order to make the decision, or unable to communicate the decision.

- clause 4 - person must also be supported to make the decision in question.
Advance Decisions

- Mental Capacity Act 2005 - codified the common law
- An effective advance decision to refuse treatment must be complied with if it is valid and applicable under the common law - clause 10
- Excludes 16 and 17 year olds
Protection from Liability and Safeguards

- Clause 8 - codification of the common law doctrine of necessity.
- Part 2 - applies to all acts in connection with a person’s care, treatment and personal welfare
- Excludes negligent acts
Clause 11 - the use of restraint - anything done by an intervener which restricts a person’s liberty of movement whether they resist or not or, the use or threat of force done with the intention of securing the doing of another act, which the person resists then the intervener must ensure that the act of restraint is a proportionate response to the likelihood of the harm that will be suffered by the person and proportionate to the seriousness of the harm concerned.

If the restraint amounts to a deprivation of liberty then clauses 22 and 23 of the Draft Bill apply.

Harm = any harm whether physical or non physical and includes harm to the person who lacks capacity resulting from that person’s harming others
Additional Safeguards for Serious Interventions

- Clauses 17 – 34 - certain acts must be authorised by Trust panels
- Schedule 1 - if an application for an authorisation is made a Trust must constitute a panel to consider the application. The application must be accompanied by medical report and a care plan.
- An application for an authorisation may seek authorisation for more than one “measure” depending on the circumstances of the case. Who makes the application will also depend on the circumstances and the “measure” for which authorisation is being sought.
- Trust panels made up of 3 persons with “relevant expertise”.
- The panel will be able to grant the authorisation, refuse it or to grant an interim authorisation.
Deprivation of Liberty Safeguards

- clauses 22 – 27 - the process for applying a deprivation of liberty to a person who lacks decision making capacity
- The types of deprivation of liberty which may be authorised are:
  - The detention of a person in circumstances amounting to a deprivation of liberty in a hospital or care home in which care or treatment is available for that person;
  - The detention of a person in circumstances amounting to a deprivation of liberty while being taken, transferred or returned to a hospital or care home for the purposes of the provision to that person of care or treatment; or
  - The detention of a person in circumstances amounting to a deprivation of liberty in pursuance of a condition imposed during a permitted period of absence from a hospital or care home.
DOLS Continued

- Schedule 1 – sets out the criteria
- “prevention of serious harm condition”- clause 23
- Challenge to a DOL-
- House of Lords Select Committee - “hugely complex, voluminous, overly bureaucratic, difficult to understand yet providing mentally incapacitated people with minimum safeguards.”
- “poor understanding of capacity assessments and best interests decision making applies in relation to the DoLS safeguards as much as it does in relation to any other best interests decision”. It was further suggested that the safeguards were often seen as “a need for authorities to set up paperwork processes to make restrictions on a person ‘legal’, rather than … actual and real safeguards for people”. Significant criticisms were made of the failure to apply the ‘less restrictive option’ principle in relation to the safeguards.”
Other Panel Authorisations

- Attendance Requirements
- Community Residence Requirement
- Compulsory Treatment with Serious Consequences
Independent Advocate

- “this is not a legal advocate but a person who can speak on behalf of the person who lacks capacity and who will have knowledge of the procedures involved in relation to the proposed intervention and of the persons rights under the Bill.”

- Clause 35(2)(b) - a duty on the person who wishes to carry out the intervention to consult with and take into account the views of the independent advocate

- Clause 83 – HSCTs obliged to make an independent advocate available in circumstances where the Bill requires them to do so
Clause 87 - P has the Right to declare that no independent advocate is to be instructed

Clause 89 provides that a person has the right to discontinue their involvement with the independent advocate.

Appointment for a single matter
Rights of Review

- Clauses 44 – 52 - provides for the renaming of the Mental Health Review Tribunal to the Review Tribunal, details of the rights of individuals to apply to the tribunal, and states which persons may refer a case to the Tribunal, places duties on Health and Social Care Trusts to refer cases to the Tribunal and set out the Tribunals Powers in relation to the authorisation of certain interventions.
Other Decision Making Mechanisms

- High Court
- Court Appointed Deputies
- Office of Public Guardian
Offences

- Ill-treatment or neglect
  - 133(1) A person (“X”) who
    - (a) ill-treats, or
    - (b) wilfully neglects, another person (“P”) where this section applies commits an offence.
  - (2) This section applies where
    - (a) X has the care of P, and P lacks capacity in relation to all or any matters concerning his or her care or is believed by X to lack capacity in relation to all or any such matters; or
    - (b) X is an attorney under a lasting power of attorney granted by P; or
    - (c) X is a deputy appointed for P by the court.
  - (3) A person guilty of an offence under this section is liable
    - (a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;
    - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.
Under 16s

- Retention of the Mental Health (NI) Order 1986
  - Temporary measure?
  - “it is now proposed that a separate project should be undertaken to consider that framework in light of the draft Bill. Such a project would be a substantial undertaking in its own right and, given the Department’s current focus on the draft Bill it is likely to be a commitment for the next Assembly mandate.”
Best Interests Principle

- the child’s views must be taken into account;
- the child must be provided, in an appropriate way, with information and advice about the matter in question;
- where practicable and appropriate persons with parental responsibility and carers must be consulted; and
- the child must be helped and encouraged to participate as fully as possible in the determination of what is in his/her best interests as far as it is practicable and appropriate to do so.
Under 16s continued

- Duty to Consult with Independent Advocate
- Extension of the Disregard Provision
- Consent AND a Second Opinion for electro-convulsive therapy
Amendment of Nearest Relative Provisions

- *JT vs UK [2000]*
  - “patient” right to apply to displace NR
  - *County Court application*
  - new ground of “unsuitability”
  - Including the patient in the list of persons who may apply to the court for an acting nearest relative to be discharged or varied
age appropriate accommodation (akin to clause 146).

*The Department is also considering access to education provisions.*
Under 16s

- Retention of Mental Health (NI) Order 1986
  - Language
  - Personality disorder
  - Psychological harm
  - The role of the Nearest relative
  - Assessment period
Under 16s – Retention of the Mental Health (NI) Order 1986

- Issues regarding criminal proceedings
- The view of the Bamford Review of Mental Health and Learning Disability
Rationale for the Exclusion of Under 16s from the Mental Capacity (Health, Welfare and Finance) Bill

- The Application of the Capacity Test
- Interface with the Children (Northern Ireland) Order 1995
- The Importance of the Age of 16
- Separate project to consider the recognition of emerging capacities in children under the age of 16
- Gillick - uncertainty
Criminal Justice Proposals

- The DoJ summary of responses received document January 2013 proposals for the criminal justice system included:
  - The procedures, principles, safeguards and protections being developed for a mental capacity legislative base would be applied.
  - This would include applying the new decision-making framework where this was compatible with existing duties and powers.
  - The retention of a statutory powers base within the criminal law in terms of police, court and prisons law
  - Police to retain their ability to take people to a place of safety
  - Courts would retain their independence in sentencing and capacity would be taken into account – though would not of itself be determinative
  - Courts would also have additional and alternative community based sentences available
  - Prisons would retain their ability to transfer prisoners to and from hospital in appropriate circumstances
  - For such transfers, the capacity-based approach would be fully reflected, where there was a lack of capacity, the protections and safeguards requirements from the capacity model would be reflected, where there was capacity the person’s consent to treatment would be required.
The main elements of the DoJ proposals:

- A capacity based approach to care, treatment and personal welfare
- The removal of the term mental disorder from criminal justice legislation
Criminal powers after the passage of the Bill

- The courts, the PSNI and the prison service will retain their over-arching statutory powers around detention.
- Capacity coupled with best interests will form the core principles in relation to treatment.
Where the PSNI, the courts or the prison service intend to intervene under the Mental Capacity Bill they must establish the following:

- The person has a medical condition that requires intervention
- Examination or treatment is required
- Hospital is the most suitable place for providing treatment
- Failure to examine or treat the person poses a risk of harm to themselves or others, and either
  - a) That the person has the capacity to consent to examination or treatment and so consents; or
  - b) The person lacks capacity and the examination or treatment is in the best interests of the person.
Places of Safety

- It is proposed that the PSNI will be able to bring a person to a place of safety if:
  - the person is in a public place and it appears to the PSNI that they are in immediate need of care or control
  - the person is unable to make a decision because of an impairment or disturbance in the mind or brain as to whether they need to go to a place of safety
  - it is necessary to remove the person to a place of safety to prevent serious harm to the person or serious physical harm to other persons
  - removal to a place of safety would be in the person’s best interests.
The Powers of the Criminal Courts

- Remand Powers
  - It is proposed that if a court is considering remanding a person into hospital for examination or treatment that:
    - the person has a medical condition and examination or treatment is required
    - examination or treatment is available and a hospital is the most suitable place to provide that examination or treatment
    - failure to examine or treat the person would result in harm to themselves or others; and either
      - a) the person has the capacity to consent to examination or treatment and so consents, or
      - b) the person lacks capacity and the examination or treatment is in the person’s best interests.
Sentencing

- In-patient treatment order
- A restriction order
- In-patient direction order
- Community residence order
Unfitness to Plead

- The Northern Ireland Law Commission (NILC) carried out a review and consultation on unfitness to plead in 2013.
- The NILC considered that elements of a mental capacity approach could enhance the test for determining unfitness to plead and recommended that, in order to be unfit to plead, the accused must be shown to be unable to make a decision for himself in relation to a matter because of an impairment or disturbance in the functioning of the mind or brain to be unable to:
  - a) understand the charges brought against them
  - b) follow the course of proceedings and
  - c) make certain decisions that they are required to make in relation to the trial.
Transfer of Prisoners

It is proposed that transfer criteria will be:

- the person has a medical condition and examination or treatment is required
- examination or treatment is available and a hospital is the most suitable venue for providing that examination or treatment
- failure to examine or treat the individual would result in harm to themselves or others; and either
  - a) the person has capacity to consent to the examination or treatment and so consents, or
  - b) the person lacks capacity and the examination or treatment is in the best interests of the person.
- The Review Tribunal
- Review Tribunal Powers
- Recall

Under 16s???
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