1

Mental capacity legislation – what's been happening elsewhere in the world

Mental capacity legislation has been the subject of debate and legislative change around the world over the past 20 years. Many countries have made changes to their laws to ensure that they deliver the necessary safeguards for citizens who lack capacity to consent. An ageing population, advances in medical technology enabling people with severe disabilities to live longer, and the move from institutionalisation to community-based living, were cited as the main reasons for reform. These are all issues that are relevant to England and Wales.

This paper examines mental capacity legislation in Scotland, Australia and Canada.

Scotland – The Adults with Incapacity (Scotland) Act 2000

In March 2000, the Scottish Parliament passed this Act, recognising that the existing law was failing to meet the needs of adults unable to make decisions for themselves. The Scottish Law Commission produced a report in 1995 on the subject and, after extensive consultation, the Adults with Incapacity Act was passed in May 2000.

Mental capacity legislation takes a functional approach to determining capacity. So, the Act makes an assumption that individuals will be able to make their own decision unless it is proved that they are unable to do so. The Act states clearly that interventions in the affairs of adults who lack capacity must be in the best interests of that adult; and that the guardian (a spouse, nearest relative, and so on) has a general authority to act reasonably on day to day decisions. The Act creates a new offence for an appointed guardian neglecting his/her duties or failing to act for the benefit of the person who lacks capacity to consent.

Under the Act, several agencies supervise those who take decisions on behalf of the adult, ensuring those decisions are in the person's best interests. These agencies include:

- the Public Guardian, which has a supervisory role and keeps registers of attorneys, people who can access an adult's funds, guardians and intervention orders
- local authorities, which can look after the welfare of adults who lack capacity in instances where no guardian can be found (other local authority roles under the Act include investigating circumstances where the personal welfare of an adult is at risk, providing information and advice to those exercising welfare powers and supervising attorneys and guardians)
- the Mental Welfare Commission, which

protects the interests of adults who lack capacity as a result of mental disorder.

Under the Act, the main ways that other people can make decisions for an adult who lacks capacity are as follows:

- **Power of attorney**
  Individuals can arrange for their welfare to be safeguarded and their affairs to be managed properly. They can do this by giving another person (who could be a relative, carer, professional person or trusted friend) power of attorney to look after some or all of their property and financial affairs and/or to make specified decisions about their personal welfare, including medical treatment.
- **Intervention and guardianship orders**
  Individuals can apply to their local sheriff court for an intervention order where a one-off decision or short-term help is required, or a guardianship order, which may be more appropriate in cases where there is a need for the continuous management of affairs or the safeguarding of welfare. Any person claiming an interest in the adult's affairs, or a local authority may make applications for intervention and guardianship orders.
- **Medical treatment and research**
  The Act allows treatment to be given to safeguard or promote the physical or mental health of an adult unable to consent. Where there is disagreement a second medical opinion can be sought. Medical practitioners have to consult close relatives before administering medical treatment. Cases can also be referred to the Court of Session in certain circumstances. The Act also permits research involving an adult incapable of giving consent, but only under strict guidelines.
- **Access to the adult's funds**
  Individuals (normally relatives or carers) can apply to the Public Guardian to gain access to the funds. Authorised housing and care services can also manage a limited amount of the funds and property of residents.

Australia

All the Australian States introduced mental capacity legislation between the late 1980s and 1990s. The principal model is the Guardianship and Administration Board Act 1986, in Victoria (recently amended in 1999). Legislation covering different states takes the functional approach to determining capacity. This paper examines Southern Australia's Guardianship and Administration Act 1993 as an example of the approach used by other states.

The Guardianship and Administration Act 1993 - Southern Australia

The Guardianship and Administration Act 1993 came into operation in 1995. This set the Guardianship Board, which is responsible for applying the new law, the task of setting out a number of orders. It is assumed that close relatives will make day to day decisions, but the Act encourages

3

those who may lack capacity in the future to appoint a guardian. However, guardians can only make welfare and medical decisions on someone's behalf. The Act creates a new offence for an appointed guardian neglecting his/her duties or failing to act for the benefit of the person who lacks capacity to consent.

Administration orders

In terms of welfare and financial affairs, the Guardianship Board may appoint an administrator to look after such affairs. The following can be appointed to act as an administrator:
- the Public Trustee
- a trustee company under the Trustee Companies Act 1988
- a relative appointed by the Board.

Medical decisions

There are two laws that deal with the issue of who has the legal authority to consent to medical and dental treatment:
- Consent to Medical Treatment and Palliative Care Act 1995
- Guardianship and Administration Act 1993.

If a person has not appointed a 'medical agent', or has not made an 'anticipatory direction' (a living will) under the Consent to Medical Treatment and Palliative Care Act 1995, and mental capacity is lost, then consent to medical or dental treatment for a person with a mental incapacity must be sought from the following:
- the guardian appointed by a person, prior to mental incapacity, to make medical decisions
- the guardian appointed by the Guardianship Board under a Guardianship Order. The written order will specify the areas in which the guardian is empowered to make decisions.
- where there is no guardian or enduring guardian, specified relatives can give consent, including a spouse, a parent a sister or brother aged 18 years or older, a daughter or son of aged 18 years or older.

In terms of prescribed treatment such as an operation, where a person is unable to give their consent, the Guardianship Board is the only authority that can give consent. The Guardianship Board is governed by a set of criteria when making decisions about such a treatment or procedure.

The Office of the Public Advocate has also been set up, as a 'watchdog' with the responsibility of educating the public on issues relating to disability and promoting the interests of people who lack capacity to consent, and in some instances, their carers.

Canada – Adult guardianship legislation

The situation in Canada is similar to Australia's in the way that each province has its own legislation. Until recently, mental capacity legislation varied considerably from province to province. There were two main

approaches adopted. The traditional system regarded incompetence as absolute (e.g. Ontario's Mental Incompetence Act 1980). This means that legal rights, possessions and decision-making power of the person lacking capacity to consent are transferred to another once the court makes a decision that the person lacks the capacity to consent.

This approach was heavily criticised by disability organisations as being paternalistic and open to abuse. Major reform took place in the early 1990's (see Ontario case study below).

The second approach, adopted in Alberta (the Dependent Adults Act 1976), was one of the earliest attempts in the world to adopt a more functional approach to mental capacity.

Ontario – towards reform

In 1992, Ontario abolished its mental incompetence guardianship regime and enacted three new legislations: the Consent to Treatment Act 1992, the Advocacy Act 1992 and the Substitute Decision Act 1992. This legal reform promoted the autonomy of those who lack capacity to consent, and prevented unnecessary legal intervention in their lives. The Act states clearly that interventions in the affairs of adults who lack capacity must be in their best interests. People will be presumed to be able to make their own decisions, unless it is proved otherwise. In all the areas of decision making, the Act makes clear the need to encourage the individual to participate as fully as possible in any decision affecting him/her. The appointed guardian has a general authority to act reasonably. As with the legislation in Scotland and Australia described above, the Act creates a new offence for an appointed guardian neglecting his/her duties or failing to act for the benefit of the person who lacks capacity to consent.

Individuals can arrange for their welfare to be safeguarded and their affairs to be managed properly, by giving another person (who could be a relative, carer, professional person or trusted friend) power of attorney. These include decisions about their property and financial affairs and/or to make specified decisions about their personal welfare, including medical treatment.

Finally, the Health Care Consent Act has created a simple procedure that recognises the social position of family members as natural substitute decision makers. It provides the legal framework for carers to appeal against medical decisions. It should be noted, however, that if the patient has granted the power of attorney for personal care or if a guardian has been appointed, then the attorney becomes the substitute decision-maker and other family members lose their automatic status.

Ontario's legislation has also established the Office of the Public Guardian and Trustee to provide a number of services. Some of these include:

- **Property Guardianship**
  This service manages the financial affairs of individuals who lack capacity to consent, when there is no one else who is able, willing and appropriate to provide this service for them. The office may be appointed as guardian of property by a doctor in a psychiatric facility, a designated capacity assessor, or the court.
- **Personal Care Guardianship**
  The Personal Care Guardianship is occasionally appointed as guardian of the person to make personal care decisions for a mentally incapable adult, if this is necessary to protect the person from serious personal harm. Only a court can make these appointments. As guardian of the person, it is the office's responsibility to make decisions about things like custody, safety and housing.
- **Decisions about treatment and admission to long-term care**
  This service is responsible for making decisions about medical treatment and admission to long-term care for those who are mentally incapable of doing so when there is no one else, such as a family member, willing and able to provide this service.

All of these countries have mental capacity legislation which protect people who are unable to make decisions for themselves.

Please see *Why campaign for legislation* in factsheet 5 for further information.