

Mental incapacity: implications of The Law Commission Report

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The Law Commission report on Mental Incapacity was published in 1995 and examines how decisions can be made on behalf of those who are unable to make decisions for themselves. It has far reaching implications for psychiatrists and recommends the introduction of new legislation. Research with those unable to consent, advance treatment directives, decisions about medical treatment and public law protection of vulnerable incapable people are areas covered in the document. Although there are some concerns for psychiatrists, many of the proposals can be welcomed.

This report (The Law Commission, 1995) is concerned with the way decisions can be lawfully made on behalf of those who are unable to make decisions for themselves, and the extent of powers which should be available to enable public authorities to protect adults who are at risk of abuse or neglect. It follows four consultation papers which were published in 1991 and 1993 and extensive consultation.

The basic approach recommended is the introduction of a single piece of legislation which should apply, in general, to those aged 16 and over, and in association with which the Secretary of State will prepare (and revise at times) a code of practice similar to the Mental Health Act (MHA) Code of Practice. A single court (the reconstituted and extended Court of Protection) is proposed to deal with continuing powers of attorney (CPAs) and the personal, health care and financial decisions of a person who lacks capacity.

Who is covered by the proposals?

The Law Commission recommend that people should be presumed to be capable and that questions regarding whether a person lacks capacity should be decided 'on the balance of probabilities'. They recommend that a person should be regarded as incapable if "at the material time he or she is: (1) unable by reason of mental disability to make a decision on the matter in question, or (2) unable to communicate a decision on that matter ..." (having taken steps to enable a decision to be communicated).

Mental disability is defined as "any disability or disorder of the mind or brain, whether permanent

or temporary, which results in an impairment or disturbance of mental functioning."

What factors will guide decisions made on behalf of these people?

They recommend that decisions made on behalf of those who lack capacity (or things done for them) should be made (or done) in the person's 'best interests', taking into regard:

- (1) the ascertainable past and present wishes of the person concerned and any factors the person would consider if able to do so
- (2) the need to allow and encourage the person to participate as fully as possible in any decisions affecting them
- (3) the views of other appropriate people
- (4) whether an effective less restrictive option is available.

What are the main proposals?

General authority

The Commission recommend a general authority to act reasonably but that no-one should be able to make decisions about certain matters on behalf of a person lacking capacity, including marriage, consent to sexual relations or divorce. This would regularise the position of carers who work daily with people who resist personal care. Informal action will only be justifiable where it does not conflict with formal decisions (e.g. made by an attorney) unless actions are needed to prevent the death of, or serious deterioration in the condition of, the person lacking capacity. These proposals can be regarded as a significant advance, particularly for caring relatives.

Advance statements about health care

An 'advance refusal of treatment' is proposed, i.e. the refusal by a person aged 18 years or over with capacity of any medical, surgical or dental treatment which is intended to have effect at a later time when the person may lack capacity to consent. A statutory presumption in favour of preserving life would mean that, in the absence of

any contrary indication, an advance refusal would not apply if refusal endangers the person's life or the life of a foetus where the patient is a pregnant woman. The Commission do not favour a prescribed form for advance refusals but that they should be in writing, signed and witnessed. They also recommend that the person making an advance refusal of treatment should be able to withdraw or alter it at any time if they have capacity. Basic care and relief of severe pain would not be included in an advance refusal of treatment.

Supervision of medical and research procedures

Certain specified treatments will require authorisation by the court or the consent of an attorney or manager. This would include no psychiatric treatments at present but the Secretary of State would have power to specify treatments requiring court authorisation.

Other listed treatments would require a certificate from an independent doctor who would certify that the person is without capacity and that the proposed treatment is in their best interests. The Secretary of State would determine treatments to fall in this category but the Commission recommend including treatments for mental disorder described in Section 58(1) of the Mental Health Act 1983, thereby covering all incapable patients on psychotropic medication for more than three months.

Mental Incapacity Research Committee

A Mental Incapacity Research Committee is proposed to approve non-therapeutic research procedures in relation to people without capacity and the draft Bill sets out the composition and procedures of the committee. The Commission proposes that the committee may approve research if satisfied that the knowledge of the incapacitating condition with which the person is affected may be affected, the research object cannot be achieved without involving people without capacity and risk to the individual is negligible.

Continuing powers of attorney

The Commission propose a 'continuing power of attorney' which could extend to a donor's personal welfare, health care, and property and affairs and which would require the attorney to act in the best interests of the donor.

Decision making by the Court

The Commission recommends a court-based jurisdiction (a reconstituted Court of Protection)

to resolve disputes regarding incapacity and to provide an integrated framework for making decisions regarding personal welfare, health care and finances. It could make one-off orders or appoint managers with continuing powers. The court would have power to order an incapable person to be admitted to hospital for assessment or treatment of mental disorder if the grounds for admission under Section 2 or 3 of the MHA 1983 exist and it is in the best interests of the person concerned.

Public Law Protection for vulnerable people at risk

A vulnerable person is defined as "any person aged 16 or over who (1) is or may be in need of community care services by reason of mental or other disability, age or illness and who (2) is or may be unable to take care of himself or herself, or unable to protect himself or herself against significant harm or serious exploitation." The local authority will have a duty to investigate and social services authorities will authorise certain officers to exercise new powers including the power to enter premises and interview a person believed to be at risk. A temporary protection order would allow an at risk vulnerable person to be kept in protective accommodation for up to a maximum of eight days.

Guardianship

Changes are recommended to the guardianship provisions of the MHA 1983. Only a local authority social services department could be named as guardian and the powers of the guardian would be extended to include power to convey to the place of residence specified by the guardian. The powers of the MHA Commission would be extended to those received into guardianship.

Areas of concern

Many of the proposals in this report can be welcomed. The general authority to act reasonably would be a significant advance and the proposals would clarify how to approach treatment of people who are unable to make decisions for themselves within the framework suggested.

There are wide-reaching implications for old age psychiatrists who work on a daily basis with large numbers of people who may fall within the definition of incapacity. Advance treatment refusals could limit the options available once someone becomes cognitively impaired or severely depressed, and the interface between the proposals in this report and the Mental Health Act is unclear. The mechanisms proposed for approving research could be bureaucratic and restrictive

although there has been considerable lobbying to stop all research with mentally incapable adults and some might view the proposals as supportive of continuing research. It is important that professionals working with incapable people acquaint themselves with the proposals and make their views known as they progress.

Acknowledgement

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Reference

THE LAW COMMISSION (1995) *Mental Incapacity*. London: HMSO.

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