

Making Decisions

Government proposals for making decisions on behalf of 'mentally incapacitated adults'

SUMMARY

In October 1999 the Lord Chancellor's Department published *Making Decisions*, which outlines the Government's proposals to: '...reform the law in order to improve and clarify the decision-making process for those who are unable to make decisions for themselves, or cannot communicate the decisions.'

Such proposals are made in the light of responses received on the Government's consultation paper *Who Decides? Making Decisions on Behalf of Mentally Incapacitated People*. *Who Decides?* sought views on the recommendations made by the Law Commission in its report, *Mental Incapacity*, for a comprehensive reform of the current law relating to decision-making on behalf of mentally incapacitated adults.

The Government has accepted the framework suggested by the Law Commission but intends to modify some of the proposals. However, the proposals on advance statements will not be included. This paper outlines the main recommendations in *Mental Incapacity* and the areas of reform the Government intends to introduce in England and Wales. (A bill on incapacity has already been introduced in the Scottish Parliament.)

BACKGROUND

The Law Commission's report recommended that the three broad areas of decision-making - personal welfare decisions, health care decisions and financial decisions - should all be covered by one piece of legislation which would provide:

- a definition of lack of capacity;
- a duty to act in the best interests of the person without capacity;
- a 'general authority to act reasonably' in relation to personal welfare or health care decisions made on behalf of a person without capacity;
- a Continuing Power of Attorney covering personal welfare, health care and financial decisions;
- for decisions to be made by a 'manager' appointed by the court or by the court itself.

Certain personal decisions, such as consent to sexual relations, will not be covered - these can only be made by the individuals concerned.

In June 1998 the House of Lords held that people who lack capacity, but do not object to the admission, may be admitted to hospital for treatment for their mental disorder without detaining them under the Mental Health Act 1983 (the Bournewood case). This case highlighted the urgent need for safeguards for people who lack capacity to be introduced.

OVERVIEW OF THE PROPOSALS

Key features of the Government's proposals on incapacity (which generally apply to people who are 16 years or over) are summarised below.

Incapacity

- Individuals will be assumed to be able to make their own decisions unless it is proved that they are unable to do so.
- There will be a 'functional approach' to determining capacity - thus the question whether someone has capacity will depend on whether that person is able to make a particular decision at a particular time.
- A person lacks capacity if, at the time a decision needs to be taken, he or she is *"unable by reason of mental disability to make a decision on the matter in question; or unable to communicate a decision on the matter because he or she is unconscious or for any other reason"*.
- Mental disability means *"any disability or disorder of the mind or brain, whether permanent or temporary, which results in an impairment or disturbance of mental functioning"*.
- A person will be unable to make a decision by reason of mental disability if the disability is such that, at the time when the decision needs to be made, the person is *"unable to understand or retain the information relevant to the decision, or is unable to make a decision based on that information"*.
- All practicable steps must be taken to enable a person without capacity to communicate their decision.

Best Interests

Anything done for, and any decision made on behalf of, a person without capacity should be done or made in the 'best interests' of that person. In order to assist in deciding what is in a person's best interests, the following should be considered:

- the ascertainable past and present wishes and feelings of the person concerned, and the factors that person would consider if able to do so;
- the need to permit and encourage the person to participate, or to improve his or her ability to participate, as fully as possible in anything done for and any decision affecting him or her;
- the views of other people whom it is appropriate and practical to consult about the person's wishes and feelings and what would be in his or her best interests;
- whether the purpose for which any action or decision is required can be as effectively achieved in a manner less restrictive of the person's freedom of action;

- whether there is a reasonable expectation of the person recovering capacity to make the decision in the reasonably foreseeable future;
- the need to be satisfied that the wishes of the person without capacity were not the result of undue influence.

The General Authority to Act Reasonably

- Individuals may 'do anything for the personal welfare or health care of a person who is, or is reasonably believed to be, without capacity in relation to the matter in question if that is in all the circumstances reasonable for it to be done by the person doing it' if this is reasonably believed to be in the best interests of the person who lacks capacity.
- A Code of Practice will be prepared outlining carers' responsibilities under this general authority.
- Carers will be able to arrange for the provision of goods and services using money belonging to the person without capacity or use their own money and then reclaim it from the person without capacity.
- However, the general authority will not allow access to financial assets held by the person without capacity in a bank or other financial institution. Where the person has substantial assets the court should be asked to appoint a 'manager' to handle the person's affairs.
- The general authority will not allow the use or threat of force to make the people without capacity do something they do not wish to do.

Continuing Power of Attorney

- The Continuing Power of Attorney (CPA) will enable individuals to appoint the person they would wish to make decisions on their behalf in relation to welfare, financial or health care matters.
- Both the donor and the person appointed to be the CPA must be over 18 years old.
- The exercise of the CPA will be subject to specific restrictions in relation to healthcare decisions. For example an attorney will not be able to make decisions on behalf of the person without capacity about the withdrawal of artificial nutrition and hydration unless the person has specifically given authority for this in the CPA.

The new 'Court of Protection'

The Government intends to establish a single court, which will deal with all areas of decision-making for adults without capacity. In order to ensure that intervention is kept to a minimum the court will be expected to follow two key principles:

- the decision of the court is preferable to the appointment of a manager and
- the appointment of a manager should be as limited in scope and duration as possible.

The court will be able to:

- make declarations about a person's capacity;
- make decisions on behalf of those without capacity or appoint a 'manager' to make such decisions;

- give or withhold approval to particular forms of healthcare or appoint a manager to make such decisions;
- require access to healthcare records or the authorise the manager to do so;
- decide where the person should live and who can be in contact with them.

Serious healthcare decisions such as questions of treatment where the patient has made an advance directive must be decided by the court.

IMPLICATIONS

The proposals for reform set out in *Making Decisions* will have a major impact on those who lack capacity to make decisions for themselves and those who care for them. It will also affect those who currently have capacity to make decisions for themselves but wish to provide for the possibility that they may not be able to do so in the future and others may be required to make decisions on their behalf.

However there are number of concerns about the proposals. For example:

- it is not clear when these reforms are likely to be introduced;
- the scope of the general authority to act reasonably is unclear;
- The need for safeguards for those who lack capacity and who need to be treated for their 'mental disorder' has not been adequately addressed. Although the Government has suggested possible safeguards in its consultation paper on the review of the Mental Health Act 1983, no clear proposals have been made.

REFERENCES

The Law Commission, *Mental Incapacity*, Law Com 231, March 1995

The Lord Chancellor's Department, *Who Decides? Making Decisions on Behalf of Mentally Incapacitated Adults*, Cm 3803, December 1997

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The Department of Health, *Review of the Mental Health Act 1983, Proposals for Consultation*, Cm 4480 November 1999

R v Bournewood NHS Community & Mental Health Trust ex parte L (1998) 1 CCLR 390

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