ACTAPS Newsletter

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CHAIRMAN'S REVIEW

Welcome to Issue 51 of the Newsletter.

This contains Master Denzil Lush's talk on the Mental Incapacity Bill together with his Submission on the draft Bill to the Scrutiny Committee. Also, we have a very interesting article from Nicholas Beetham of Title Research, a Genealogist.

Henry Frydenson
Chairman, ACTAPS

The Mental Incapacity Bill

by Denzil Lush, Master of the Court of Protection

On Friday 27 June 2003, the Department for Constitutional Affairs (which until 13 June 2003 was known as the Lord Chancellor's Department) published a draft Mental Incapacity Bill.

The bill and explanatory notes can be found on the department's website, www.dca.gov.uk and on www.parliament.uk/parliamentary_committees/jcmb.cfm

Hard copies can be obtained from The Stationery Office, price £23.50.

A joint committee of the Commons and Lords has been appointed to give pre-legislative scrutiny to the bill. There are 16 members – 8 from each House.[1]

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[1] Lord Carter (Labour) (Chair), Baroness Barker (Liberal Democrat), Baroness Fookes (Conservative), Baroness Knight of Collingtree (Conservative), Baroness McIntosh of Hudnall (Labour), Lord Pearson of Rannoch (Conservative), Lord Rix (Crossbencher), Baroness Wilkins (Labour), John Bercow MP (Conservative, Buckingham), Angela Browning MP

The committee's timetable is as follows:

- the first meeting took place on Tuesday 15 July, when it elected Lord Carter as chair.
- written evidence was invited from interested organisations and individuals, and should have been submitted by Monday 1 September to Scrutiny Unit, Room G10, house of Commons, London SW1P 3JA;
- oral evidence is being taken during September; and
- the committee will report to both Houses of Parliament by the end of November.

It is unlikely, therefore, that the bill will be included in the Queen's Speech in November.

The main features of the draft bill are as follows:

(1) One piece of legislation

A similar draft Mental Incapacity Bill originally appeared as Appendix A to The Law Commission's Report No. 231, *Mental Incapacity*, published by the HMSO on 1 March 1995, price £21.85. The report was the culmination of a project that originally began in 1989 under the then Family Law commissioner, Brenda Hoggett (now Lady Justice Hale). There was extensive consultation, with no fewer than four consultation papers being published:

- *An Overview* (1991)
- *A New Jurisdiction* (1993)
- *Medical Treatment and Research* (1993); and
- *Public Law Protection* (1993).

In its final report the Law Commission recommended an integrated new scheme for decision-making on behalf of persons who lack capacity to make their own decisions, the *Mental Incapacity Act.* This would involve repealing Part VII of the Mental Health Act 1983, and the Enduring Powers of Attorney Act 1985, and placing on a statutory footing the declaratory jurisdiction of the High Court in respect of health care and personal welfare decisions.

(Conservative, Tiverton and Honiton), Paul Burstow MP (Liberal Democrat, Sutton and Cheam), Jim Dowd MP (Labour, Lewisham West), Stephen Hesford MP (Labour, Wirral West), Joan Humble MP (Labour, Blackpool North and Fleetwood), Huw Irranca-Davies MP (Labour, Ogmore), Laura Moffatt MP (Labour Crawley).

The Law Commission's draft Bill contained a number of sections on public law protection, largely replicating the provisions of the Children Act 1989. The government announced in its own report following consultation, *Making Decisions* (1999), that it would not be proceeding with this aspect of the draft.

(2) Two fundamental principles

The proposed legislation is underpinned by two fundamental principles:

1. The definition of *incapacity*. "A person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of or a disturbance in the functioning of the mind or brain. It does not matter whether the impairment or disturbance is permanent or temporary."(Clause 1).

   "A person is unable to make a decision for himself if-

   (a) he is unable to understand the information relevant to the decision,

   (b) he is unable to retain the information relevant to the decision,

   (c) he is unable to use the information relevant to the decision as part of the process of making the decision, or

   (d) he is unable to communicate the decision (whether by talking, using sign language or any other means." (Clause 2(1)).

2. "Where under this Act any act is done for, or any decision is made on behalf of, a person who lacks capacity, the act must be done or the decision made in his *best interests*" (Clause 4(1)).

   In deciding what is in a person's best interests regard shall be had to:

   (a) whether he is likely to have capacity in relation to the matter in question in the future;
   (b) the need to permit and encourage him to participate, or to improve his ability to participate in the decision-making process;
   (c) his past and present wishes and feelings and the factors he would consider if he were able to do so;
   (d) if it is practicable and appropriate to consult them, the views of others (in this context 'others' might include, for example, family members, anyone engaged in caring for the person concerned, and anyone who has an interest in his or her welfare)
   (e) whether the purpose for which any act or decision is needed can be as effectively achieved in a manner way restrictive of his freedom of action. (Clause 4(2)).

(3) Three areas of decision-making

The proposed legislation covers decision-making on:

1. *personal welfare matters* including: (a) where the person is to live; (b) what contact, if any, he is to have with specified persons; (c) the exercise of the rights conferred on him by or under any enactment to obtain information; and (d) obtaining the benefits and services to which he is entitled, or which are available to him, by virtue of any enactment.

2. *health care matters*, such as (a) approving or refusing approval for the giving, withholding or cessation of particular forms of health care; (b) requiring the person responsible for the health care of the person concerned to allow a different person to take over that responsibility; and (c) obtaining access to the health records of the person concerned.

3. *property and affairs* include:

   (a) the control and management of his property;

   (b) the sale, exchange, charging, gift or other disposition of his property;

   (c) the acquisition of property in his name or on his behalf;

   (d) the carrying on on his behalf of any profession, trade or business

   (e) the dissolution of a partnership of which he is a member;

   (f) the carrying out of any contract entered into by him;

   (g) the discharge of his debts and any of his obligations, whether legally enforceable or not;

   (h) the settlement of any of his property, whether for his own benefit or for the benefit of others;

   (i) the execution for him of a will;

   (j) the exercise of any power (including a power to consent) vested in him whether beneficially or as a trustee or otherwise;

   (k) the conduct of legal proceedings in his name or on his behalf. (Clause 18).

(4) Four levels of decision-making

Decisions will be made at four levels:

1. The *Court of Protection*. The existing court will be abolished, but will retain a central registry. Nominated District, Circuit and High Court Judges will comprise the new Court of Protection and they will be able to sit at any place in England and Wales appointed by the Lord Chancellor: (Clauses 34 and 35). In addition to its existing powers the Court of Protection will have power to:
   (a) make declarations on the capacity of a person to make a particular decision and on the lawfulness or otherwise of an act, omission or course of conduct in relation to that person (Clause 15);
   (b) make one-off decisions on behalf of a person without capacity (Clause 16(2)(a));
   (c) appoint a deputy to make decisions (Clause 16(2)(b)); and
   (d) give directions in respect of lasting powers of attorney (Clauses 21 and 22).

2. An attorney acting under a *lasting power of attorney*. The Enduring Powers of Attorney Act 1985 will be repealed and replaced by provisions for the creation of LPAs which will extend to all or any specified matters relating to the donor's personal welfare, health care, property or affairs - including the conduct of legal proceedings: (Clauses 8-13). The general requirements for the creation and registration of LPAs are dealt with in Schedule 1, and there are transitional provisions, which will apply to existing enduring powers of attorney (Schedule 3).

3. A *deputy* appointed by the Court of Protection. "In exercising its powers the court shall have regard to the principle that a decision by the court is to be preferred to the appointment of a manager to make a decision and that the powers conferred on a manager should be as limited in scope and duration as possible": (Clause 24).

4. A person acting under the *general authority to act*. "It is lawful for any person to do an act when providing any form of care for another person if that person lacks, or is reasonably believed to lack, capacity in relation to the matter in question, and in all the circumstances it is reasonable to do the act": (Clause 6(1)). A person acting under this informal general authority has no power to overrule the authority of the donee of a lasting power of attorney or a deputy appointed by the court: (Clause 7(2)).

Submission of 8 August 2003 on the Mental Incapacity Bill by Master Denzil Lush to the Scrutiny Committee

Autonomy and protection

1. I support the broad thrust of the Bill, but I think it's weak in terms of protection. This can be remedied fairly simply with little need for extra resources. Principally, what is required is a change in emphasis in the introductory clauses, and to extend the offences of ill-treatment and neglect to cover financial abuse.

2. Mental health legislation in England and Wales has traditionally oscillated between patient autonomy and self-determination, on the one hand, and benign paternalism and protection, on the other (*qv.* Clive Unsworth, *The Politics of Mental Health Legislation*, Oxford University Press, 1987). Striking the right balance is about as achievable as discovering the philosopher's stone or the holy grail.

3. The Law Commission's draft bill, which was published in 1995 and forms the basis of the present Mental Incapacity Bill, was something of a high-water mark in terms of autonomy. Since then, the pendulum has swung the other way, towards greater protection and the individual's right not to be abused.

4. I don't believe that, when it published its report on *Mental Incapacity* in 1995, the Law Commission was fully aware of the extent of financial exploitation, particularly affecting the elderly mentally infirm. Certainly, the more important surveys on abuse have postdated that report. But, even if it was aware, it failed to address the problem by providing adequate, private law safeguards.

5. Although its private law protection was weak, the Law Commission's public law proposals were quite robust. These largely replicated the Children Act 1989, though it has to be said that, unlike mentally incapacitated adults, children are rarely the victims of financial abuse. In any event, the public law proposals were jettisoned by the government in *Making Decisions* (1999), because, I assume, they

were too expensive. So, the current draft Bill, so far as it has inherited the Law Commission's recommendations, has already been stripped of the safeguards that would have gone some way towards striking a more even balance between protection and autonomy.

6. The offences of ill-treatment and neglect, described in clause 31 of the draft Bill, seem to relate solely to physical ill-treatment. If the legislation is to have any teeth, the government needs to make it clear that the financial abuse of people who lack capacity is also an area of zero tolerance. Some would argue that the existing criminal law is sufficient in this respect. I'm not sure I agree.

7. There are a number of well-intentioned statements in the first few clauses of the bill that should be included in a code of practice, rather than be enshrined in statute and thereby given greater status than they deserve.

8. For example, clause 2(2) provides that, "a person is not to be treated as unable to make a decision merely because he makes an unwise decision." There is nothing new about this statement. It has been part of English common law since at least 1850, when the then Vice-Chancellor came up with an almost identical formula. I agree with it in principle, but, if someone makes a continuous series of unwise decisions, should he or she be denied the protection the law provides for people who lack capacity?

9. Similarly, clause 3 restates the common-law principle that "a person must be assumed to have capacity unless it is established that he lacks capacity," but it over-simplifies the matter, and potentially favours abusers by not allowing the burden of proof to shift in appropriate cases.

10. For example, if an 85 year old woman with vascular dementia gives a door-to-door salesman, whom she has never met before, a cheque for £5,000, the onus should shift to him to prove that she had the capacity to understand the nature and effect of her actions when making a gift of that size, rather than there be an automatic presumption that she was capable of making the gift.

11. In *Re W (Enduring Power of Attorney)* [2001] 2 WLR 957 it was held that Mr Justice Hoffmann had inadvertently shifted the burden of proof in his important decision in *Re K, Re F* [1988] 1 All ER

358, where he set out the degree of understanding an individual needs in order to execute a valid enduring power of attorney. I understand that in the last month or so, in *Williams v Williams*, the judge intimated that *Re W* had also been wrong on the burden of proof. As you can imagine, if judges of the calibre of Lord Hoffmann can get it wrong, this is a complicated, controversial area, which needs to be considered very carefully.

Best interests

12. I believe that anyone who acts for an incapacitated person (whether as an attorney, a deputy, or under the general authority to act) should be bound by various general obligations and, depending on the nature and formality of their appointment, a number of more specific duties.

13. By general obligations I mean, for example:

- to act reasonably
- to act diligently
- to act honestly and in good faith
- to act within the scope of his or her authority
- to limit interference in the life of the person without capacity to the greatest extent possible
- to protect him or her from abuse, neglect, and exploitation
- to respect and advance his or her civil liberties and human rights
- to provide such assistance and support as is needed
- where appropriate, actively to help him or her resume or assume independent or interdependent living
- to involve him or her in all decision-making processes to the greatest possible extent
- to encourage such participation and to help him or her to act independently in the areas where he or she is able
- to encourage him or her to exercise whatever skills he or she has, and wherever possible to

develop new skills

- to exercise substituted judgment by respecting and following his or her wishes, values and beliefs to the greatest possible extent, so far as these are known or can be ascertained, and will not result in harm or be contrary to his or her best interests.

14. This list is by no means exhaustive, and one could add a number of other fiduciary duties - such as not profiting from one's position, keeping the incapacitated person's funds separate from your own, avoiding conflicts of interests, and the duty of confidentiality. A person acting for someone who lacks capacity also owes him or her a duty of care, which varies according to whether the attorney, deputy or other agent is acting gratuitously, or professionally for remuneration.

15. More specific duties would depend on the nature of the appointment or the form of intervention ordered by the court. They include, for example, making an inventory, giving security, filing annual accounts and reports, etc.

16. Clause 4 of the Mental Incapacity Bill provides, in subsection (1), that any act done for or any decision made on behalf of a person who lacks capacity must be done or made in the person's best interests. Subsection (2) then goes on to provide a 'statutory checklist', which sets out various criteria for establishing whether an act or decision is in someone's best interests.

17. This 'statutory checklist' attempts to define the elusive concept of 'best interests', but it only covers a limited range of the considerations I described above as general obligations, and I have doubts as to its overall adequacy and efficacy.

18. I am also concerned about the prominence 'best interests' is given in the entire scheme of things, and the fact that it is too prescriptive. Everything seems to hang on it. For example, one of the few grounds on which an attorney can be removed is if he has acted, is acting, or proposes to act in a way that is not in the best interests of the person who lacks capacity (clause 21).

19. I realise there is a danger that presenting prospective substitute decision-makers with a list of

obligations could deter them from acting, but, if they are not willing to adhere to a basic code of conduct governing acceptable behaviour, then perhaps it would be better if they didn't act. The Law Commission considered this in an earlier report, *The Incapacitated Principal* (1983), which led to the Enduring Powers of Attorney Act 1985. At paragraph 4.69 it said:

> Accordingly we do not recommend that the attorney should be subject to a statutory duty to act. The problems that such a duty would solve would, we feel, be heavily outweighed by those it would create. And we are well aware of the risks of discouraging the acceptance of EPA attorneyships. In our view, the prospects of a donor's affairs being well run after his incapacity are dependent not so much upon duties and sanctions but rather upon his choice of attorney at the outset.

20. I am not convinced that the Law Commission's stance is still tenable. In *Acting as Agent under a Financial Durable Power of Attorney: An Unscripted Role* (Nebraska Law Review 75, 575 (1996)), the author (Carolyn L Dessin) suggested:

> Recently, however, concerns have been voiced that perhaps we have created an instrument of abuse rather than a useful tool. Sometimes the problems are as clear as wrongful misappropriation of the principal's property by the agent. Often, however, problems arise because the standards governing the behaviour of agents under durable powers of attorney have never been clearly defined. In many instances, those standards have not even been considered. Legislatures, courts, and commentators have often simply assumed the application of various bodies of law without careful reflection.

21. The term 'best interests' doesn't feature in the Adults with Incapacity (Scotland) Act 2000. Instead, the Scottish Law Commission preferred to state various fundamental general principles, which now appear in section 1 of that Act. These principles, however, go little further towards creating a comprehensive code of conduct for substitute decision-makers along the lines I have described above.

22. In summary, therefore, I believe that, instead of imposing a duty to act in a person's best interests, there should be a comprehensive statement of the standard of conduct required of everyone who acts or makes decisions on behalf of persons without capacity, and if their behaviour falls below those standards it should be possible for the court to remove them as attorneys or deputies, or as the case may be, and if their conduct is criminal, they should face the prospect and consequences of prosecution.

Conclusion

23. I shall conclude my submission here for the time being, because, apart from considering whether there is a need for this legislation in the first place, the main issue for the committee to decide is whether the draft Bill has struck the right balance between autonomy and protection, and I wouldn't wish my comments on this fundamental issue to be weighed down by technical arguments on other less important aspects of the Bill.

DENZIL LUSH

Master of the Court of Protection

8 August 2003