

The Department of Justice, Equality and Law Reform on Scheme of Mental Capacity Bill 2008

The Psychiatric Nurses' Association (PNA) welcomes the publication of the Scheme of Mental Capacity Bill. As the professional representative body representing primarily psychiatric nurses, nurses working within intellectual disability services and general nurses working in specialist practice areas, we often submit and make representation on strategic developments which will have impact both for service users and our members. In this regard we are happy to offer our observations and general comments on the Mental Capacity Bill 2008.

The numbers of adults who are unable to make decisions for themselves is already significant and these numbers are predicted to rise steadily. The main categories of persons who are unable to make decisions for themselves are (a) the elderly (b) persons with acquired brain injuries (c) persons with mental illness and (d) persons with intellectual disabilities. Traditionally the approach to discerning whether an individual is capable of giving consent to medical intervention was one of status. Certain categories of person were automatically designated incapable of making decisions by virtue of their status as a minor or "mentally incompetent". The current laws in this matter are contained in the 1871 Lunacy Regulation Ireland Act.

Courts have gradually recognised that a status approach to an individual's decision – making capacity is unwieldy and not universally applicable and they have therefore begun to take a more discriminating and eclectic approach to the question of consent given or withheld by minors or the mentally incompetent. This approach is based not on the class of person to which the patient belongs, but rather on the individual's own personal capacity to consent.

In Ireland the current situation for individuals who cannot consent to treatment and is not mentally competent is the "Ward of Court" system. The purpose of wardship is essentially protection of the interests of the ward. An application is usually made by a family member, but it can be made by any interested party including a hospital in which the prospective ward is a patient. The application is made to the Registrar of wards of Court. The President of the High Court decides whether the order for wardship should be made.

However applying the *status* approach has always been a contentious issue for members of this union (PNA) having regard to the fact the majority of our members work with individuals who due to the nature of their difficulties, and disordered mental processes, may or may not have sufficient

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understanding of e.g. a procedure or what is being proposed and that decisions must be taken for them. It is agreed by this union (PNA) that the rights of incapacitated persons and those made Wards of Court need to be protected however there is a wide spectrum of mental disability, for example the individual diagnosed with schizophrenia may have little understanding of that particular condition but may well understand the implications of a tonsillectomy. At present the current legislation means for these individuals' that they are considered to have no capacity. Also Ward of Court proceedings are also slow and costly.

There should be a general presumption that all adults are competent. Diagnosis of mental illness is not enough to justify involuntary commitment. Involuntary commitment is not enough to overcome the presumption of competence. The test for capacity is preferable to the all or nothing *status* approach, especially when the Irish Constitution guarantees to protect, or to *vindicate* in the language of the Constitution, the rights of all citizens and given that Ireland was in the first group of signatories to sign up to the UN Convention on the Rights of Persons with Disabilities (subject to ratification) in 2007.

Council of Europe Recommendation No. R(2004)10 concerning the protection of the human rights and dignity of persons with mental disorder (Article 7(1)) outlines : 'Member States should ensure that there are mechanisms to protect vulnerable persons with mental disorders, in particular those who do not have capacity to consent or who may not be able to resist infringements on their human rights.'

The Mental Capacity Bill is welcomed as a mechanism to replace the Wards of Court system with a statutory framework governing decision making on behalf of adults who lack the capacity to do so for themselves, and a necessary step towards ratifying the UN Convention on the Rights of Persons with Disabilities and ensure compliance with Article 12 of the Convention, particularly the requirements of equal recognition before the law, regular review, adequate procedural safeguards and access to support required to exercise legal capacity. The Scheme is influenced and takes due consideration of the recommendations contained in the LRC's Report on 'Vulnerable Adults and the Law' (2006). It will allow cases to be dealt with on an issue by issue basis, and not with the blanket definition that currently exists. This approach has the added benefit of involving a proportionate, minimum incursion on an individual's decision-making autonomy as there will be cases where a person does not have the ability to make any decisions with legal consequences for themselves. The Law Reform Commission (LRC) report on "Vulnerable Adults and the Law" in 2006 also

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recommended a predominantly functional approach be taken which would involve consideration of a person's capacity in relation to the particular decision "*at the time it is to be made*" whilst also acknowledging that where an adult's lack of capacity is profound and enduring, a new functional determination may not be required in every situation in which a decision needs to be made. In this regard the PNA are also of this view and are in agreement with this recommendation.

However the PNA is also cogniscent of existing law recognising incapacity and guardianship in other jurisdictions such as Australia's New South Wales: In this instance the NSW Guardianship Tribunal consists of two separate groups of people. The first group, the tribunal staff, are full time and manage the day to day administration of the tribunal. The second group, the tribunal members conduct the hearings and make the determinations. They are appointed on the basis of their significant professional and personal experience with people who have disabilities or on the basis of their legal skills and experience. This enables the tribunal to take a holistic approach to its decision making. It is the view of this union PNA that the establishment of a Guardianship Board / Tribunal made up a member of the judiciary and two other allied health professionals such as a medical doctor or psychiatric nurse who have the experience and training to assess functional capacity would be a preferable approach which may sit at any place, on any day at any time. This multi disciplinary approach would allow for greater flexibility in enabling an assessment based on the functional approach to capacity to be carried out depending on the needs of each individual case. Such a body would have the potential for greater speed in hearing cases and determinations which would be more appropriate rather than having an application listed in the court and awaiting for it to be set down thus reflecting the assessment of capacity based on a functional approach, i.e. time specific and issue specific. Equally the PNA are submitting that this process would be less inquisitorial and formal than a court and a more suitable approach for a vulnerable person whose capacity is being assessed.

Definition of Capacity and Decision Making

Section 7(1) of the Bill brings clarity on the definition of capacity. Capacity is defined as 'the ability to understand the nature and consequences of a decision in the context of available choices at the time the decision is to be made'.

A person lacks the capacity to make a decision if he is unable to:

(a) Understand the information relevant to the decision;

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- (b) Retain that information;
- (c) Use or weigh that information as part of the process of making the decision; or
- (d) Communicate his decision.

Any question as to whether a person has capacity is to be decided on the balance of probabilities. Some members of this union (PNA) are in agreement that this legislation should provide some form of guiding principles which assist determining an adult's capacity to make a particular decision. A core consideration in examining the merits of a particular model for determining capacity is the impact that its application is likely to have on the right of an adult to self-determination. Capacity legislation should seek to achieve an appropriate balance between autonomy and protection and to have appropriate structures in place to deal with the consequences of a finding of lack of capacity.

The Bill also provides that a person is entitled to supported decision-making. The person must, so far as is reasonably practicable, be permitted to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him. Where it is not possible to support a person in this way, the court or a court appointed personal guardian will act as the substitute decision-maker. The PNA welcomes the setting out of the Guiding Principles in legislation which must be adhered to by all persons in giving effect to the purposes of the Mental Capacity Act (i.e. both the court and persons making a decision on behalf of an adult who lacks capacity).

Head 4: Guiding Principles

- (a) It will be presumed that a person has capacity;
- (b) No intervention is to take place unless it is necessary, having regard to the needs and individual circumstances of the person, including whether the person is likely to increase or regain capacity;
- (c) A person will not be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success;
- (d) A person is not to be treated as unable to make a decision merely because he makes an unwise decision;
- (e) Any act done or decision made under this Bill must be done or made in the way which is least restrictive of the person's rights and freedom of action;

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(f) Due regard must be given to the need to respect the right of a person to his dignity, bodily integrity, privacy and autonomy;

(g) Account must be taken of a person's past and present wishes, where ascertainable;

(h) Account must be taken of the views of any person with an interest in the welfare of a person who lacks capacity, where these views have been made known; The Bill does not specify a hierarchy of authority in this regard and therefore, it would appear that a doctor would need to take into account the views of all of these people when considering treatment to be provided. However, a doctor's overriding duty is still to act in the patients' best interests.

(i) Any act which is done or any decision made under this Bill for or on behalf of a person who lacks capacity must be done or made in his best interests.

The PNA is in agreement with the Law Society's view that:

The powers of the Court as specified in Head 5 be specifically subject to the guiding principles in Head 1 and the best interest principle in Head 3.

Decision making

Before a medical practitioner performs any act in connection with the personal care, health care or treatment of another person whose decision-making capacity is in doubt, he must have regard to the general principles and comply with the following requirements:

1. Before doing the act, take reasonable steps to establish whether the person lacks capacity in relation to the matter in question;
2. When doing the act, reasonably believe that the other person lacks capacity in relation to the matter in question, and it is in the other person's best interests that the act be done.

The Bill gives medical practitioners immunity from liability if they follow the steps above when treating patients

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Guardianship Matters

Where a person has been found to lack capacity, a personal guardian can be appointed by the High Court or the Circuit Court to make decisions concerning his personal welfare or property and affairs. Decisions on certain matters such as non-therapeutic sterilisation, withdrawal of artificial life-sustaining treatment or organ donation will only be made in the High Court,

Office of Public Guardian

The Scheme will create a new administrative structure, the Office of Public Guardian, established to manage the guardians entrusted to people who lack capacity. The Office of Public Guardian will supervise court appointed personal guardians and donees of enduring powers of attorney and provide a forum for complaints to be made against personal guardians and donees and provide information and Codes of Practise for personal guardians and others. In situations where there is no person willing or able to act as a personal guardian, the Office will act as a guardian of last resort.

Please refer to previous paragraph re make up of Guardianship Board / Tribunal

Mental Health Act 2001

It has been submitted to this organisation (PNA) in the absence of capacity legislation there is a difficulty with the 2001 Mental Health Act with regard to the criteria for mental disorder both in terms of capacity to voluntary admission and capacity to consent to treatment. Some people do not have the capacity to consent to voluntary admission but do not fulfil the criteria for involuntary admission under the Act .This limits the scope for clinicians with regard to safeguarding the patient's welfare as in "the best interests of the patient "section 4 (1) they may be left with little alternative but to admit the individual involuntary. Therefore the Scheme of Mental Capacity bill does not deal with the glaring gap that currently exists i.e. the issue of people who are involuntary detained within the terms of the Mental Health Act 2001 and lack capacity. If an application is made by such a person to a tribunal under the Mental Health Act 2001 and the tribunal determines that that person should not be involuntarily detained then a further application to another court is necessary for consent for "voluntary" treatment under the Mental Health Act. Legislation is required to deal with persons who need treatment for mental illness but because of their lack of capacity are unable to consent to being admitted as a voluntary patient.

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Conclusion

The PNA welcomes the opportunity to make comments and observations on the Scheme of the Mental Capacity Bill. This is an opportunity to bring structure and a modern framework governing decision making on behalf of persons who lack capacity. Having regard to Head 27 (2) of the Bill, the PNA wishes to make comment on - The Minister for Health and Children may appoint a *“working Group on Capacity to Make healthcare Decisions” comprising of representatives of professional bodies in the healthcare sector, health care professionals and lay persons”*.

It is the position of this union (PNA) and our members that we submit a representative onto this working group. Mental health nursing is the largest group of professionals within the mental health workforce and the shift of mental health provision from large institutions into the community require multiple skills and a multi-disciplined workforce. Psychiatric – mental health nurses focus their clinical activities on different populations (Child & adolescent, older adults, families); on specific mental health problems (violence, substance abuse, severe and persistent mental illness); on targeted patient outcomes (clinical, functional, perceptual). Psychiatric nurses provide individualised care, focusing on the whole person, the family, or the community. Because of their broad background in biological, pharmacological, sociological, and psychological sciences, psychiatric – mental health nurses are a rich resource as providers of psychiatric mental health services and patient care partners for the consumers of those services. They are uniquely poised to provide the type of collaborative, integrative and multi - level clinical care service and therefore could provide a tremendous contribution to any debate / collaboration surrounding the detail of the Mental Capacity Bill and publications / codes of practice pertaining to the Office of the Public Guardian.