

Medical Treatment Using the Scottish Incapacity Act: Will it Work?

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[This paper was given by the author at the two day conference entitled 'Reform of Mental Health Law and Mental Incapacity' held in London on 21st and 22nd June 2002 and hosted by the Law Society and the Royal College of Psychiatrists. We are grateful to both organisations for their permission to publish this article]

INTRODUCTION

The *Adults with Incapacity (Scotland) Act 2000* was one of the first pieces of legislation passed by the Scottish Parliament. It is a major and significant Act that repeals and replaces many outdated pieces of legislation and brings the broad spectrum of incapacity issues under one single legislative framework. It is being implemented on a phased basis and can be viewed on the internet at <http://www.scotland.gov.uk/justice/incapacity>. This paper examines the major provisions of the Act, focusing on some of the difficult issues surrounding treatment and research.

HISTORY

Around 100,000 people in Scotland suffer from some degree of incapacity. It has long been recognised that the law in Scotland was fragmented and unsatisfactory and did not offer significant protection for people nor offer a framework for intervention. The Scottish Law Commission¹ reported on the unsatisfactory state of existing law in 1991 and, following a four year consultation process, issued their *Report on Incapable Adults*² in 1995. This report laid out the framework for the future Bill. It was well received by professional and voluntary agencies and led to the setting up of an alliance to promote the introduction of the Adults with Incapacity Bill. The alliance was spearheaded by ENABLE and Alzheimer's Scotland – Action on Dementia (both Scottish voluntary organisations) and won over considerable political support in Scotland. However, the Westminster Parliament was unable to find time to introduce the Bill.

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1 Scottish Law Commission (1991) *Mentally Disabled*

Adults; Legal Arrangements for Managing their Welfare and Finances. Edinburgh: SLC, 1991 (SLC Discussion Paper 94).

2 Scottish Law Commission. *Report on Incapable Adults*, Edinburgh: SLC, 1995 (SLC Report 151)

In 1999, the Scottish Parliament was established. Scottish Ministers took this area of law seriously and issued a Consultation Paper, *Making the Right Moves*³. This adopted most but not all of the recommendations of the Scottish Law Commission and formed the framework for the *Adults with Incapacity Bill*, which was introduced to the Scottish Parliament in September 1999. After a process of debate within the Scottish Parliament and consultation with interested bodies, the *Adults with Incapacity (Scotland) Act 2000*⁴ was passed by the Scottish Parliament on 29 March 2000 and received its Royal Assent in May 2000.

REPEAL OF EXISTING LAW

Many ancient (and some not so ancient) pieces of legislation are repealed by this Act. A “Curator Bonis” appointed to manage the financial affairs of an adult with incapacity is a procedure that dates from 1585 and is repealed by the 2000 Act. The Office of Tutor Dative (appointed by the Court of Session, usually to manage welfare issues) will no longer exist and Guardianship under the Mental Health (Scotland) Act 1984 is repealed. Several other Acts are significantly amended. Existing Curators, Tutors and Guardians will continue but will have titles and powers consistent with the new Act.

GENERAL PROVISIONS

The Act specifies principles and definitions and lays down the role of statutory bodies. The five key principles governing all interventions are:

1. Any intervention under the Act must benefit the adult. The Act states that “there shall be no intervention unless that intervention will benefit the adult and unless that benefit can be obtained without the intervention”.
2. The intervention must be the least restrictive in relation to the adult’s freedom. The Act reflects this in its layout.
3. In deciding on any intervention, account must be taken of the adults past and present wishes.
4. Account shall also be taken of the wishes of relevant others (including nearest relative and primary carer) where it is reasonable and practical to do so.
5. People holding certain powers under the Act e.g. attorneys and guardians must encourage the adult to use existing skills and to develop new skills.

Incapacity, in relation to this Act, is defined as being “incapable of acting or making decisions or communicating decisions or understanding decisions or retaining the memory of decisions by reason of mental disorder or inability to communicate”. The Act is very clear that assessment of capacity relates to specific decisions and is not an “all or nothing” assessment. The Codes of Practice give some guidance to people assessing capacity but the interpretation of the above definition is very much one for individual practitioners. In particular, it is not clear what “retaining the memory of decisions” means in relation to this Act. It would be unreasonably paternalistic to remove decision-making authority from people who make decisions clearly and consistently but may not necessarily be able to spontaneously recall them.

3 Scottish Executive (1999). *Making the Right Moves; Rights and Protection for Adults with Incapacity*. Edinburgh: The Stationery Office, 1999

4 *Adults with Incapacity (Scotland) Act 2000* Edinburgh: The Stationery Office, 2000

For the purposes of this Act, mental disorder is very much as defined by the Mental Health Act and is relatively broad. It excludes misuse of alcohol and drugs and provides a new exclusion that a person shall not be deemed incapable merely by “acting as no prudent person would act”! The Act also specifies that any inability to communicate must be one that cannot be overcome by translation, interpretation or mechanical means.

The general provisions of the Act also lay out the roles of statutory bodies. It introduces a new body, the Office of the Public Guardian, that has a duty to keep a register of various interventions under the Act and also oversee, inspect and investigate financial interventions under the Act. Local authorities and the Mental Welfare Commission for Scotland have similar powers, notably with regard to welfare issues. The Act specifies that the Sheriff Court will be the main route for legal proceedings under the Act and gives a right of appeal against a decision on incapacity.

OUTLINE OF INTERVENTIONS

Part 2.

This deals with powers of attorney. In Scots law, powers of attorney have been assumed to persist into incapacity if taken out after 1990. There was no requirement to register these powers, no mechanism for inspecting the use of a power of attorney and no clear use of welfare powers. Under the 2000 Act, powers of attorney can be continuing powers for financial matters. It is now possible to appoint a welfare power of attorney with the authority to consent to treatment and make other welfare decisions on behalf of an adult with incapacity. The grantor must be certified capable of granting the power. A doctor, lawyer or member of the Faculty of Advocates can give the certificate. The Public Guardian keeps a register of all such powers and can investigate, at the request of any party, the use of a power of attorney for financial issues. The local authority has a duty to investigate welfare powers. This part of the Act was implemented in April 2001 and approximately 5,000 new style powers of attorney were taken out during the first year.

Part 3.

This deals with accounts and funds and provides a simple mechanism for withdrawing money from the account of an adult with incapacity to pay for essential goods, services etc. This is authorised by the Public Guardian and requires a certificate of incapacity and also a counter signatory to testify to the character of the withdrawer. Only a relative or friend can do this, a professional cannot act in this capacity for one of his/her clients. This is quite a new legal procedure and, following its implementation in April 2001, the Public Guardian approved about 90 applications of this type.

Part 4.

This deals with the management of finances of residents of care homes or hospitals. It gives authority to the managers of such establishments to manage the funds of their residents within limitations as to their use and as to the amount of money they can hold on a persons behalf. The new Scottish Commission on the regulation of care will provide much of the regulatory framework for this part of the Act. Because this is a new body, the implementation of this part has been delayed until April 2003.

Part 5.

This deals with medical treatment and research. This will be covered in greater detail below. Briefly, Part 5 provides a framework for medical interventions where an adult is incapable of giving consent to treatment or research. This part of the Act proved very difficult to implement and much thought had to be given to the Code of Practice. It was implemented on 1 July 2002, roughly a year after the original scheduled implementation date.

Part 6.

This deals with intervention orders and guardianship. An intervention order is a single order covering one financial, property or welfare issue. It could be used for selling a house, signing a lease or giving up a tenancy. A guardianship order covers ongoing interventions in the areas of finance, property or welfare and, unlike Mental Health Act guardianship, the diet of powers is not laid down by law and is up to the Sheriff to decide. Any person may apply for either of these orders to the Sheriff. The application must be accompanied by two medical certificates and a report from either a social worker or, for financial issues, a suitably qualified person.

IMPLICATIONS FOR MEDICAL TREATMENT

Prior to this Act, there was no legal framework for medical treatment where an adult was not able to consent with the exception of persons detained under the Mental Health Act (but then only for treatment for mental disorder) and the appointment of a Tutor Dative by the Court of Session (a lengthy and complex procedure!). Much has been written about the issues of provision of health care to people who are incapable⁵. There was a pressing need for legislation in this area. The dilemma of autonomy of the individual versus professional duty of care is brought into sharp focus by this part of the Act.

Part 5 defines medical treatment as "any health care intervention designed to safeguard or promote the physical or mental health of the adult". This is very broad and can cover medical, dental, nursing, ophthalmic and other health care procedures. Section 47 of the Act introduces a general authority to provide reasonable treatment under a certificate of incapacity given by the medical practitioner primarily responsible for the adult's care. However, the general philosophy of the Act demands that decisions on capacity are specific to the interventions and it would be against the spirit of the Act to issue a blank certificate covering all health care interventions. The Act imposes limitations on the general authority to treat by excluding the use of force and detention except where immediately necessary and by disallowing any treatment prohibited by court order or subject to court proceedings unless authorised by law. It is not expected that this part of the Act will be used in medical emergencies.

The general authority to treat is limited by regulations. The Scottish ministers have decided that neuro-surgery for mental disorder cannot be administered to a person who is not able to consent to the procedure. Other treatments require special safeguards e.g. Court of Session authorisation for sterilisation. An independent second opinion is needed for Electroconvulsive Therapy or hormonal drugs to alter sexual drive. As a result of these regulations, it will be possible in Scotland

⁵ Not least because of the publicity generated by the well-known case of *R v Bournewood Community and Mental Health NHS Trust ex parte L* [1998] 3 AER 289

to treat a mentally ill person with Electroconvulsive Therapy when that person is not able to consent to the procedure (but presumably not resisting) using the Adults with Incapacity Act as opposed to the Mental Health Act. The Act also specifies that the general authority to treat shall not apply where there is a welfare attorney or guardian with the authority to consent to treatment or where someone holds an intervention order in relation to that treatment. Unfortunately, the Act was not specific about the need for certification of incapacity in these cases. The Code of Practice has laid down that a certificate of incapacity will be given but there may be further debate on that point.

This part of the Act also lays down procedures for challenging medical decisions. Where there is not a proxy decision-maker as outlined above (i.e. a welfare attorney or guardian), the medical practitioner will obey the general principles of the Act in deciding on treatment. This treatment will then proceed unless any person claiming an interest in the adult's welfare appeals that treatment to the Sheriff and the Sheriff grants an interdict preventing the treatment. If a proxy exists, the medical practitioner will consult the proxy where it is reasonable and practical to do so and may only proceed with the proxy's agreement. If the proxy disagrees, the medical practitioner will seek an independent opinion given by a nominated medical practitioner. This person will be appointed by the Mental Welfare Commission for Scotland and will be a practitioner skilled in the procedure being suggested but independent of the prescribing doctor. The nominated practitioner will examine the adult, consult with the parties involved and make a decision. Following this decision, treatment will proceed unless appealed to the Court of Session. The timescale involved has provoked some anxiety and the Act specifies that, in the meantime, the practitioner has a duty to provide treatment to save life or prevent a serious deterioration in the adult's condition.

Perhaps the most difficult area highlighted by this change in the law is decision making for people with major degrees of incapacity and a need for complex, multiple and not easily foreseen health care interventions. An adult could have multiple certificates of incapacity ranging from basic feeding through the whole range of health care interventions to major surgery. The Code of Practice introduced the idea of a treatment plan to deal with this situation. A treatment plan would include a broad "catch all" category of fundamental health care procedures for basic nutrition, hydration, skin care etc and a list, in broad terms, of the areas of intervention the adult requires. The treatment plan will not include single special procedures such as invasive surgery or investigations. These will need separate consultation and certification. The medical practitioner will make a decision on capacity in relation to each area of intervention and agree a whole package with interested parties including relatives and other professionals. Because a certificate of incapacity can only last for a year, this treatment plan would be subject to an annual review. This would reinforce good practice in continuing hospital and nursing home care.

It is too early to say whether this part of the Act will be a success in achieving its objectives of providing a workable legal framework for medical decision making for adults with incapacity. Unlike other parts of the Act, it is not subject to registration and inspection although the Mental Welfare Commission will take a keen interest in the use of the Act.

RESEARCH

Research is also covered by *Part 5* of the Act and is implemented on 1 July 2002. The Act specifies that research can be undertaken where an adult is incapable of giving consent but that the outcome of the research must provide real and direct benefit to the adult. This might appear to misunderstand the nature of research but it is consistent with the general principles of the Act. However, a further clause states that, if the adult will not benefit directly from the research, then the outcome must be likely to provide real and direct benefit to others with the same incapacity through greater scientific understanding of the condition. Research can only be undertaken into the incapacity for which the adult suffers and must involve no or minimal foreseeable risk or discomfort. Consent is obtained from a welfare attorney or guardian or, if no such person exists, from the nearest relative. A special ethics committee will consider all such research for ethical approval.

OMISSIONS FROM THE ACT

Two areas relating to medical treatment proposed by the Scottish Law Commission were omitted from the Bill and subsequently the Act.

Withdrawing and withholding medical treatment.

The Scottish Law Commission proposed a framework for making decisions to withdraw or withhold life-sustaining treatment. This gave rise to anxieties about “euthanasia” although the Commission’s proposals were very much in line with good practice guidance from the British Medical Association⁶ and reflect what doctors are doing at present. This area is, to some extent, covered by the general principles of the Act. The Act prohibits any intervention that will not benefit the adult and this could be taken to include a futile attempt to prolong life where the adult has no hope of recovery.

Advanced Statements.

Again, the Scottish Law Commission recommended that the status of advanced statements should be solidified in Scots Law. This is not an explicit part of the Act but, again, the general principles insist that the past wishes of the adult must be taken into account in determining any intervention. Guidance from the British Medical Association⁷ states that practitioners should regard an advance refusal of treatment as being as valid as a contemporaneous refusal of treatment. It is perhaps unfortunate that this “common law” stance has not been solidified by the Act.

IMPLEMENTATION.

A national steering group oversees the phased implementation of this Act and advises the Scottish Executive on any difficulties that occur. Early data suggests that the Act is working well but the potentially major impact of the changes to the law on medical treatment have yet to be assessed. Time will tell whether this Act provides a sound protective legal framework for adults with incapacity and for those trying to provide healthcare without being restrictively cumbersome and bureaucratic.

6 *Withdrawing and Withholding Life Prolonging Medical Treatment; Guidance for Decision Making (Second Edition)* British Medical Association 2001

7 *Advanced Statements about Medical Treatment* The British Medical Association 1995