

Mental Capacity

Updating New Zealand's Law and Practice

Executive Summary

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Executive Summary

Mental capacity is concerned with a person's decision-making ability. It focuses on whether the person retains that ability and, if not, who should decide on their behalf and on what basis.

The law affects a wide range of adults with impaired decision-making capacity, who are vulnerable for reasons such as dementia, learning disabilities, mental illness or acquired brain injury. The decisions in question may involve, for example, a younger adult with learning disabilities negotiating choices about their living arrangements; or, an older adult experiencing the onset of dementia who needs to work out their next steps. The increasing prevalence of dementia and Alzheimer's disease means there are now more people with impaired capacity in the community, and, there is a greater need to support them within the health system.

New Zealand's mental capacity law and practice needs updating and reform, as set out in the key findings below. This report provides a template for that reform. It tackles the challenge of how to provide a workable law that best protects and promotes the autonomy of people with impaired capacity. Specific recommendations are made for updating New Zealand's adult guardianship (or incapacity) legislation: the Protection of Personal and Property Rights Act 1988 (PPPR Act). The report also offers guidance to practitioners who are involved in assessing people's capacity, in the form of a toolkit, co-authored with a psychiatrist and an ethicist.

This report is the result of a legal research project undertaken by the writer as the 2014 recipient of the New Zealand Law Foundation International Research Fellowship. The project has involved analysis of relevant New Zealand law plus analysis of the legislative framework provided by the Mental Capacity Act 2005 (for England and Wales) and its associated Code of Practice. Key informants for this research include leading experts, academics and members of the judiciary in the United Kingdom, as well as a wide range of people working in the health and disability sector in New Zealand. A survey of doctors' educational needs was undertaken to inform the toolkit on assessing capacity.

KEY FINDINGS AND RECOMMENDATIONS

The need to modernise the law

The Protection of Personal and Property Rights Act 1988 (PPPR Act) is out of date and in need of review. The range of people to whom the legislation applies and the social environment in which it operates are now very different from when it was passed at the peak of the era of deinstitutionalisation of large psychiatric facilities. The legislation's weakness lies in its unnecessary complexity and lack of clarity about two essential concepts. These are *capacity* (or incapacity) – the legal “bright line” determining whether intervention is permitted in people's lives; and *best interests* – the standard upon which others should make decisions for people with impaired capacity, taking into account their will and preferences.

Importantly, the PPPR Act lacks an adequate mechanism for oversight of its implementation in keeping with the principles underpinning it. There has never been a public body that champions it and educates the public (and professionals working within the health and disability sector) about it. For the legal framework to have more integrity, there needs to be such a body and a clear and precise law that is accessible to all.

Supported decision-making – a legal principle taking into account tikanga Māori

New Zealand lags behind comparable jurisdictions in its commitment to implementing the United Nations Convention on the Rights of Persons with Disabilities (CRPD) within our law. This important human rights convention offers new ways of thinking about capacity, particularly in its emphasis on *supported decision-making* and recognition of universal legal capacity. New Zealand's current legal framework, as with adult guardianship law in other jurisdictions, is based on a process of *substitute decision-making*, whereby mental capacity can be tested, and when found absent another person can make a decision on the person's behalf. However, not only is it important that good judgments are made about whether or not a person has decision-making capacity, there is also an equally important question about whether there are ways in which they can be supported to make their own decisions, and the extent to which the law reflects this aim.

The CRPD provides an opportunity to enhance and improve New Zealand's adult guardianship law by giving priority to supported decision-making as a legal principle. The positive obligation in the CRPD to recognise supportive relationships has synergies with tikanga Māori, where values of individual autonomy and collective decision-making work alongside each other. There is a need for clear statutory guidance about who bears the responsibility, and when, for providing support to people whose decision-making ability is impaired, to enable them to make their own decisions whenever possible.

Defining capacity – a single test

As capacity or incapacity is the "bright line" for deciding whether the law permits intervention in people's lives, it is essential that there is a clear test for it. There are currently several tests for incapacity in the PPPR Act. At the same time there is no definition of incapacity in the Code of Health and Disability Services Consumers' Rights (HDC Code) for the purposes of deciding whether a person can give informed consent to, or refuse, healthcare.

Section 3 of the Mental Capacity Act 2005 (referred to as the English law, or MCA in this report) provides a single legal test, which defines a person as lacking capacity if they are unable to make a decision due to an inability to: understand information relevant to the decision, retain that information, use or weigh the information, or communicate the decision. This test is recommended for adoption in New Zealand.

Best interests – a standard for decision-making

The "best interests" standard recognises that where supported decision-making options have been exhausted, decisions by others need to be made. It can provide a transparent basis for decision-making when a person is unable to fully exercise their legal capacity. It is an essential complement to a supported decision-making framework. As described in English case law, "capacity is not an off-switch to a person's rights and freedoms."

In New Zealand the phrase "best interests" is found in both the PPPR Act and in Right 7(4) of the HDC Code, but it cannot be regarded as a specified legal standard for decision-making of the kind codified in the MCA. Section 4 of the MCA provides a checklist setting out a series of matters that must be considered

when best interests decisions are made on behalf of a person by a substitute decision-maker. These include: the person with impaired capacity participating as much as possible in the process of determining their best interests; their present and past wishes and feelings (or will and preferences) being recognised; and, taking into account beliefs and values that would likely have influenced their decisions if they had capacity.

Major gaps in current New Zealand law

There are major gaps in New Zealand legislation that need urgent attention and English law provides models which New Zealand could adapt. The most significant development in English law that New Zealand can learn from has been the realisation that the doctrine of *necessity* under the common law – the principle that necessary treatment and care can be provided to a person who lacks capacity in their best interests – which is expressed in New Zealand through Right 7(4) of the HDC Code, provides inadequate legal safeguards for people who lack capacity and who are unable to consent or object to decisions about their healthcare and living arrangements, or to their participation in research.

This report provides a solution to filling these gaps. It recommends establishing a set of “liberty safeguards” where people lacking capacity appear to be detained, and specific legislation concerning research involving people who lack capacity.

Liberty safeguards

Liberty and freedom of movement are values of fundamental importance in our society, yet currently in New Zealand there is no legal process governing loss of liberty for some people who lack capacity. In a broad range of settings, people who lack capacity are detained, under the continuous supervision and control of those caring for them. Yet, in many cases no process is automatically triggered to review the lawfulness or appropriateness of their detention. This is the case, for instance, when people are not under the authority of the Mental Health (Compulsory Treatment and Assessment) Act 1992, or an order made under the PPPR Act, but are detained. Moreover, in most cases, the PPPR Act does not provide an ongoing process for reviewing the detention of people who lack capacity where their detention has been authorised by a person holding an enduring power of attorney (EPOA).

This is the so-called “Bournewood gap” that has led to major, ongoing developments in English law under the MCA and in the European Court of Human Rights, including the establishment of “deprivation of liberty safeguards” (DoLS), to fill the gap.

Revised legislation should therefore provide what might be called “liberty safeguards” to cover the situation of such persons. These safeguards should include: a process to identify, authorise and monitor deprivations of liberty; a code of practice to guide providers and facilities when the safeguards apply; a clear and speedy authorisation process; and the powers and procedures of an independent monitoring body.

Research on people who lack capacity

There is also currently no facility in the law to allow participation in research by adults incapable of giving informed consent. This report argues that ethics committees should be permitted to allow ethically sound research that will secure benefits, provided it adequately protects the interests of the research participants. Here too, the MCA provides a useful legal model for the development of New Zealand's own statutory protections to guide ethics committees where none currently exist.

Sections 30–34 of the MCA provide lawful authority to carry out research on participants who lack capacity where approved by a research ethics committee, as long as various safeguards are complied with. These safeguards relate both to the characteristics of the research and the participation of individuals in it. Among the numerous protections, the MCA provides that the research must have the potential to benefit the patient without imposing a burden that is disproportionate to that benefit, or be of wider benefit for persons affected by the same or a similar condition, and must impose no more than negligible risk to the patient.

A Code of Practice

The MCA Code of Practice has been pivotal in making the English law accessible. The English experience shows it is vital that the professionals involved with an individual, as well as their informal carers, know what the law is and how to implement it. New Zealand should establish a Code of Practice concurrently with reform of the legislation.

The Toolkit for Assessing Capacity, annexed to this report, is a first step towards providing a consistent and systematic approach to assessing capacity within the New Zealand healthcare setting. It is intended to contribute to such a Code of Practice.

A checklist for reform

The report also identifies other useful aspects of the MCA that could form part of a wider review of New Zealand law. A key factor promoting the success of the English mental capacity legislation has been a national register of lasting powers of attorney (LPAs), which are like enduring powers of attorney (EPOA) in New Zealand. The national register is supported by a public agency – the Office of the Public Guardian – which ensures more effective supervision of attorneys. This report recommends that an electronic register of EPOAs and advance directives should be established in New Zealand.

These measures are now recognised in the United Kingdom as instruments of support and safeguards against abuse that are compliant with article 12 of the CRPD. Another measure is supporting effective access to independent advocates for people with impaired decision-making capacity.

The legal landscape of mental capacity law in New Zealand is fragmented. Reform of the law is urgently needed. It will require a coordinated approach across the social, health and legal sectors. This is likely to get full support from those working within the health and disability sector who want to make positive changes that will benefit people with impaired capacity for decision-making.