

Practitioners Experience and implications for Capacity Legislation in the North and South of Ireland- additional notes, Paula Scully

This document does not contain slides of my presentation- see separate handout - but contains comments on the Assisted Decision Making (Capacity) Bill (ADMCB) and the Northern Ireland Mental Capacity Bill (NIMCAB) which could not be included in the presentation due to time pressures.

Systems for implementation of ADMC

No matter how aspirational the Bill is, it is recognised that the Government operates within tight budgetary constraints. Therefore, the author offers some insights from her experience of running the first Hong Kong Guardianship Board (tribunal), as an Australian Public Guardian and also as a solicitor in England for the last seven years in the Mental Capacity and Mental Health Act systems.

Numbers relevant to ROI

- Dail report 2012 - 41,000 with dementia, 10,000 with acquired brain injury and 7,000 with stroke
- 2003- 25,557 with intellectual disability
- Courts Report 2013 -2404 wardship cases, 410 cases with the General Solicitor for Wards and Minors
- 542 EPOAs registered in 2013
- Therefore, family/professionals are making informal decisions on behalf of the relevant person rather than using formalistic structures.

Current functions of Office of Wards of Court (similar to NI Office of Care & Protection

- is responsible for the supervision of the affairs of persons taken into wardship
- provides support to the President of the High Court, the judge responsible for wardship
- supervises the activities of persons (“committees”) given responsibility for the day to day management of a ward's affairs; and
- registers enduring powers of attorney.

Current role of the General Solicitor

- The General Solicitor is accountable to the High Court for all monies / assets under his/her control; also acts as committee of **the person**/property of the ward.

Queries on future roles of Wards Office, General Solicitor and linkage with OPG

- Government should release transitional proposals as to what it plans to do about the current Wards of Court Office and the Office of General Solicitor and how it is proposed that they will be linked with Office of Public Guardian (OPG).
- Will the Office of the General Solicitor for Minors and Wards be kept independent from OPG or be merged into OPG to assist transition to full implementation of ADMC Bill?
- Will the Office of Wards of Court be merged into OPG or kept separate until all wards reviewed?
- Will the Bill be further amended to clarify the linkages between the three offices and whose role it is to prioritise the transitional arrangements for wards and to prepare them for review by the Court?
- When wardship review provisions are in force, the Legal Aid Board should prioritise acting for wards that meet means test and represent them in Court for review.
- Which group of lawyers will represent detained wards at detention reviews under Part 9 – mental health lawyers linked with MHC or LAB lawyers?

Wardship in transition ROI

- Should wardship review provisions become operational before the rest of the Bill to allow for preparation for reviews to commence? Could the Courts Service commence review of the decision making abilities of wards of court just before implementation?
- HSE could allocate social workers to commence capacity assessments on the ward's scope for decision making. Or Should OPG set up panels of trained capacity assessors e.g. if non treatment issues, then HSE social worker to assess personal welfare and financial capacity.
- Appoint Independent Decision Making Advocates (IDMA) to investigate the ward's circumstances, family relationships, and advocate for least restrictive alternative. IDMA also to make recommendations on suitable supporters, co decision makers or representatives from family or friends if ward is incapable of choosing or declines to do so, or there is family conflict as to who that would be.
- Independent psychiatrist to review ward's mental health and whether MHA or ADMC Bill is more relevant; if MHA, then automatic review by MH Tribunal; if not, then review of circumstances, capacity, mental health and IDMA etc to furnish reports to the Court.
- If Circuit Court lists prioritised for review of wards of court, this will assist specialist Judges getting up to speed quickly with the new law rather than be

inundated with new applications under the Bill and then the wards stay under the old regime for a longer period.

- S35 - ward or someone with sufficient interest may apply to review order or Court shall initiate review of capacity of ward within 3 years- too long a period. All wards should be automatically sent to Circuit Court for review –not reliant on someone on ward's behalf to initiate review though triaging system will be necessary due to the number of wards.
- Ward is only discharged from wardship if the ward has capacity for all matters. This is not a proportionate response and not in keeping with the spirit of the Bill. If the ward is then totally under the supervision of the provider and there is no one to make decisions except informally pending the appointment of an independent Decision Making Representative, the ward may be deprived of their liberty under A5 ECHR.
- S36 - Court can transfer supervision of ward to PG including minors - not appropriate unless ward has such a severe disability that will require DMR at 18 or shortly before then. What is the extent of the proposed "supervision" – only of financial affairs or also of personal welfare? Or is this with an assumption that the wards will require decision making representatives for all areas as they will be so institutionalised under the current system that they will be unable to make any decisions without a co decision maker or representative being appointed?

Office of Public Guardian

- Rename Office of Public Guardian as Office of Public Advocate and give OPA an additional role of making recommendations to Government about empowering people with decision making incapacity and also protecting them when they have no one else to do so. Further, Government could explore whether to grant OPA roles of, for example, the OPA in Victoria, Australia:
 - *To protect and promote the rights of people with a disability and to make enquiries on behalf of people with disabilities when there are concerns about their safety or interests.*
 - *To provide individual and systemic advocacy responses that advance, promote and protect the inclusion, rights and wellbeing of people with disabilities*
 - *To promote the development of the ability and capacity of persons with a disability to act independently*
 - *To ensure improved responses to the violence, abuse, neglect and exploitation that harms people with disability.*

- Australian Public Advocates who also had the role of PGs found that the public and interest groups such as carers were more supportive of the Office when the PG role was balanced by systemic and individual advocacy.
- OPG will be managed by Courts Service unlike England where it is an executive agency of the Ministry of Justice. Proposed OPG would preferably be independent of Courts and Government.
- Risk of PG being ordered by Court to take on functions akin to the English Official Solicitor and Public Trustee. Firstly clarify how the Office of the General Solicitor for Wards (some similarities to English Official Solicitor) will link in with OPG.
- For those who are wards of Court as minors because of their money, then Court Funds Office should manage their money rather than arranging for the OPG to have jurisdiction over minors. This implies that the Office of General Solicitor will be merged into OPG, as the General Solicitor currently has some jurisdiction over minors.
- OPG not suitable to manage ward's money, only to monitor person with legal responsibility for managing money. Create a Public Trustee or allocate clearer powers to manage and invest money to the PG.
- If court orders PG to manage ex ward's property, a role performed by Public Trustee in Canada & Australia, who will supervise PG acting as PT?
- OPG is to have a regulatory role and therefore should not have a decision making role about money. English Official Solicitor acts as trustee for child estates or as financial deputy for adults lacking capacity but will be supervised by OPG when acting as deputy. Official Solicitor acts as Litigation Friend when no one else available in welfare/ deprivation of liberty disputes also.
- English OPG has a pilot mediation scheme- grant power to OPG to establish an alternative dispute resolution scheme and to train mediators in specific needs of people under the Bill

Court structure ADMC Bill

- Former County Registrars were appointed as Circuit Court Judges – MOJ intended them to have jurisdiction under ADMC Bill - Should it not be the new Family Court that deals with the Bill?
- The Bill's jurisdiction should be integrated into new Family Court system; hearings must be held in private but with media allowed access but with no reporting of names. Family dynamics cause similar conflicts when RP lacks capacity as other family conflicts so best placed in a Family Court system.
- No experts should be appointed by anyone except with Court's permission.

- Court must be inquisitorial not adversarial

Court Friend – S60 ROI

- Court friend must be appointed by PG to assist RP where the RP has not instructed a legal practitioner and there is no decision-making assistant etc to assist the RP in the course of a hearing
- Court friend may not examine or take copies of any health record unless s/he is a Doctor. It is unfair not to allow them access to all records to support RP.
- Unclear if court friend can secure legal aid for RP
- Unclear if Court friend is an advocate or akin to the Official Solicitor. What is their standing in court?

Structures for tackling Abuse

- ADMC Bill does not mention abuse or neglect of people with disabilities or give power to the PG to investigate abuse. Was it intended that HSE social workers would deal with abuse against PWDs and elderly? Need to ensure that the legislation clearly sets out powers to investigate abuse by attorneys and other decision makers under the Bill.

Visitors/ Capacity Assessors

- Section 59 provides that a special visitor must be a registered doctor or be a person that possesses other relevant qualifications and have particular knowledge, expertise and experience, as respects the capacity of persons.
- There is a risk that doctors will try to insist that they only are qualified as capacity assessors. It is essential to include psychologists and social workers as assessors. Social workers need more recognition in the Bill as they support a social model of disability which is more holistic than the medical model.

Court appointment of DM Representative

- RP should have the right to seek means tested legal aid if application to appoint DMR.
- If DMR to be given power to consent to restraint of the person, even though DMR not authorised to deprive RP of liberty, should free legal aid be granted as may raise an A5 issue?

Northern Ireland

Office of Care and Protection

The Office of Care and Protection is similar to the ROI Wards of Court office but it is part of the Family Division of the High Court. Family are appointed controllers of

finances where someone unable to manage affairs. If no family then the Official Solicitor is appointed, similar to the General Solicitor of the High Court in ROI.

The Northern Irish Law Society expressed concerns at an Office of Public Guardian being introduced as it may take funding from the OCP. The OCP does not have any power to decide where a Patient should live or any decisions relating to medical care.

NI Official Solicitor

The Office of the Official Solicitor's principal purpose is to represent the interests of persons who are under a legal disability (i.e. "patients") where no one else is suitable, willing or able to. The Official Solicitor and her Office have therefore a close working relationship with the Master (Care & Protection) and OCP Patients Office. The Official Solicitor currently acts as Controller for approximately 350 Patients.

Aside from acting as a Controller, the Official Solicitor's work also includes:

- providing legal assistance to the OCP in connection with the estates of Patients where someone other than the Official Solicitor is appointed as Controller.
- representing the interests of persons under a legal disability in family or other civil proceedings
- taking responsibility for other miscellaneous matters (such as consent to medical treatment cases) where the court feels that the assistance of the Official Solicitor would be an advantage.

NI Consultation - In effect, the OPG will take over the current case management functions of the OCP. Clause 119 of the Bill places a duty on the HSC Board and Trusts along with the RQIA to report to the OPG cases where there is concern about a person who lacks capacity and where the powers of the court may be exercised.

Scottish Report on Adults with Incapacity (SLC 240; 1.10.2014)

The new DOL authorisation process seeks to identify the care regimes with the most restrictions and to provide a level of scrutiny to ensure that all measures are necessary for their wellbeing and are the least restrictive care regime possible.

- the Law Commission recommends a procedure for challenging an Authorisation to prevent an adult with incapacity requiring physical treatment leaving hospital; Doctor issues Certificate with right of appeal to Sheriff.
- Power to impose "**significant restriction of liberty**" in care homes or adult community placements when:
 - Adult not allowed to leave unaccompanied
 - Adult's actions controlled by force, restraint or medication; 2 or more restrictions amount to a significant restrictions
 - Exemption for house rules if applicable to all!

- Placement Manager prepares Statement of Significant Restrictions
- Doctor certifies incapacity - interim authorisation for 28 days pending full assessments;
- Also require Mental Health Officer's (Mental Health qualified social worker) report
- Welfare attorney or guardian can grant authorisation- 1 year but if none, then the Court grants authorisation
- Right to appeal against attorney/guardian authorisation, periodic review, right to vary restrictions
- Mental Health Commission notified.
- Court power to cease unlawful detention.

Ref: <http://www.scotlawcom.gov.uk/law-reform-projects/adults-with-incapacity/>

Comments on Scottish proposals

The language of "significant restriction" is more likeable to families and providers than using "DOL" or DOLs where the value of the DOL Safeguards has been lost by the perception of removing liberty rights.

Concerns about allowing individuals that are most likely to be family to authorise provider's requests for significant restrictions where family may feel less powerful to challenge providers, compared to having Local Authority Supervisory Body deciding authorisation or preferably the Panel suggested by NIMCB.

Conveyance power

England has no express power to convey someone from their own home/ or care home/hospital to another place unless under the MHA. Police are reluctant to return people whether under a DOLS authorisation or not as there is no statutory power. Two judgments have decided that there is an implied power to convey when a person is under a DOLs authorisation. Human rights lawyers are unhappy with this interpretation. There should be an express statutory power in an emergency to convey someone lacking decision making capacity from A to B.