

responsibilities of local authorities, that is to say local social services departments, are discussed in the context of identifying people entitled to assistance and ascertaining those services obtainable as a right or at the discretion of the local authority. The statutory duties and powers of local authorities are helpfully set out in tabular form.

The Social Services Inspectorate guidance on the basic assessment process is set out in some detail and the article goes on to explain the provisions which give rise to a situation where more than one authority may have duties to provide adult care services and underlines the importance of the prevention of 'buck-passing' in such an event.

COMMENT

This lucid and helpful delineation by a practising solicitor of the legal framework of Care in the Community is distinctive and would usefully be read and filed by the many social gerontologists with interests in community care.

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Social Welfare Law

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David Carson, Disabling progress: the Law Commission's proposals on mentally incapacitated adults' decision-making, *Journal of Social Welfare and Family Law*, 5 (1993), 304–20.

In 1986, Age Concern England, in its important publication *The Law and Vulnerable Elderly People*, drew attention to the inadequacy of legal provisions in England and Wales surrounding the management of property and money of those older people who are unable to manage their own affairs.

The management of other people's money is fraught with legal and practical difficulties. Powers for delegating financial and other responsibilities are well established but little used. Some procedures do not appear to contain sufficient safeguards. Widely varying practices are followed by individual hospitals, residential care homes, professional advisers and families. There appears to be a gap between what is practical and practised and what is legally correct. In fact, there is often no 'correct' legal procedure.

(Age Concern England, 1986, 95)

It also drew attention to the lack of legal procedures to protect 'vulnerable' older people from various forms of abuse or neglect. During 1993, the Law Commission in England and Wales undertook

a review of these legal procedures and produced three consultation papers. In the first article for review, David Carson examines the premises and principles underpinning these papers. In the second, Robin Creyke examines the development in Australia of mechanisms for the formal legal representation of people who are mentally incompetent.

The first Law Commission consultation paper concerns private law issues, such as the powers and responsibilities of carers. It proposes the key tests, e.g. of incapacity, and criteria on which decisions should be based. It proposes new jurisdiction, without choosing between a tribunal or court, which could authorise individuals to make decisions on behalf of incapable adults about their person and their property. The second paper focuses on the authorisation of medical treatment for mentally incapacitated adults, and the third focuses on public law procedures for protecting such adults and others from abuse and neglect.

Carson's main criticism of the Law Commission's proposals is that they neither prevent incapacitation nor empower the incapacitated, indeed they threaten to disable. Carson points out that disability is not just an attribute of individuals, it is dynamic and dependent in part on the attitudes and actions of others. He suggests that there should be a general legal duty to habilitate or rehabilitate, to enable people with mental disorders or intellectual disabilities to become more competent. The Law Commission proposes that those appointed as 'personal managers' should have a positive duty to act, so that they would be liable for omissions. But what about those who have no such manager? Carers are exhorted to act in the incapacitated person's best interests but there is no proposal to sue those who fail in this. The right or duty to take away another's rights must be balanced, he suggests, by the duty to return them as soon as possible or to prevent them being removed in the first place.

Carson also argues that the presence of a mental disorder should not be made a precondition in any new law. A mentally disordered person is not necessarily incapable of making decisions; conversely, an incapacitated person is not necessarily mentally disordered. The Law Commission favours the inclusion of a mental disorder test because, without a threshold of mental disorder, too heavy a burden would be placed on the incapacity test – a test which is not easy to define or to apply. Carson argues, however, that the difficulty in assessing one thing does not justify introducing a test for another. There is a danger of it becoming a substitute for a test of incapacity. Furthermore the Law Commission sees a value in introducing suitable experts (psychiatrists and other clinicians) who could determine what kind of intervention,

if any, was most appropriate – a recipe, Carson argues, for paternalism.

The Commission also sees a mental disorder test safeguarding against the possibility of interference in the lives of merely ‘eccentric’ people or those ‘lacking inclination’. Carson’s response is that mentally disordered people may also be eccentric or lacking in inclination – do they not need safeguarding too? But the real problem of a preliminary mental disorder test is that it excludes from private legal protection those who are incapacitated but not mentally disordered. It is only on the public law front that the Law Commission proposes a new category of ‘vulnerable’ person. Such a person ‘is vulnerable if by reason of old age, infirmity or disability ... he is unable to take care of himself or to protect himself from others’ (Paper 130, para. 2.29). Carson points out, however, that whilst the Commission acknowledges that the notion of vulnerability encompasses abuse by others, it still proposes to use the client’s vulnerability as a justification for removal from home. Causes or labels, such as ‘old age’, ‘infirmity’ or ‘disability’, he suggests, do not represent a finding of vulnerability.

Carson acknowledges that defining mental incapacity is extremely difficult. But he criticises the Law Commission for not making use of some American research which is developing competence measures. He concludes that the proposals do not match needs or emergent service philosophies and should be reconsidered. Of course the Law Commission cannot make proposals that would involve any significant public expenditure with any real hope of implementation but, suggests Carson, it could at least elucidate alternatives, ‘leaving it to Government and the public... to decide which if any are worth buying’.

COMMENT

The present Law Commission proposals should be an important concern of anyone with an interest in welfare and older people. As Carson himself points out, this is an area of law which is rarely reviewed and which, once reformed, may provide frameworks for decades to come. The underlying philosophies and consequences of such reforms will affect public perceptions of mentally incapacitated and vulnerable older people. A main thrust of Carson’s arguments is that concepts such as disability, incapacity or vulnerability are dynamic, involving the attitudes and actions of others. This presents two problems. First, how should the law determine incapacity or vulnerability? Second, how can the law be formulated in a way which doesn’t empower carers at the expense of those they care for?

Robin Creyke, Focusing on individual needs: developing the law's mechanisms for mentally disabled and elderly people, *International Social Security Review*, 46 (1993), 79–96.

Creyke argues that since the International Year of the Disabled in 1981, legal mechanisms for proxy decision-making in Australia have moved from a paternalistic medical model to one which, in general, takes as their reference point the interests and lifestyle of the individual concerned. Three mechanisms; (1) guardianship and property management, (2) substitute payees for government pensions, and (3) enduring power of attorney; and legal protections for older people living in institutions are reviewed by the author and in this abstract.

Guardianship and property management orders

Proxy decision-makers can be appointed for persons who are deemed mentally incompetent. Today there is equal emphasis on protecting property, supporting personal decision making about where and with whom a person should live, and about medical treatment. Over the last decade or more, jurisdiction has moved from courts to tribunals, which with an inquisitorial rather than adversarial style are less expensive and more informal, although they may still be dominated by lawyers and the legal culture. The 'least restrictive' principle operates, that a proxy decision-maker should only be appointed as a last resort and the deprivation of rights minimized. The weakness of a principle is that its breach attracts no sanction. Creyke cites a recent report from New South Wales that superintendents of institutions have been applying for *en bloc* guardianship orders for their older residents with and without dementia.

A further development is that 'substituted judgement' has replaced the 'best interests' principle. This means that instead of decisions being made in the best interests of the incompetent person, as judged by the guardian, they are guided by the guardian's understanding of what they would decide, even if idiosyncratic. This is akin to the advocacy principle. Creyke reports a tenfold increase in the number of people applying for guardianship and management of property orders since jurisdiction was virtually removed from the courts. Less formal arrangements, such as substitute payees schemes and enduring powers of attorney, nevertheless remain far more prevalent.

Substitute payees for government pensions

There are two schemes which permit the payment of a pension to

someone on behalf of a mentally incompetent pensioner: (1) the Australian Department of Social Security's (DSS) nominee scheme, and (2) the Department of Veterans' Affairs trustee scheme. Statutory safeguards against abuse are minimal, especially in the nominee scheme. Creyke regards the reform of both these substitute payees systems as essential. Because the DSS scheme is designed to enable 'competent' pensioners to make alternative arrangements, e.g. while they are away, as well as to provide a substitute arrangement for 'incompetent' pensioners, *de minimis* principles apply. The trustworthiness of the nominee is not checked, nor is the nominee required to produce accounts for inspection. Furthermore, although there is a statutory maximum amount (87.5%) of money that can be deducted from pensions for board and lodging for those in Commonwealth-funded nursing homes, there is no way of ensuring that the remainder is expended on the individual. Prosecutions of staff at Arandale Hospital, Victoria have begun in part for the misappropriation of residents' funds. Creyke suggests that abuse will continue until a separate scheme for incompetent persons is created with appropriate statutory safeguards.

Such safeguards should include an interview with both parties to the arrangement, to determine whether the pensioner is actually incapable and whether or not they have been pressured into requesting a substitute appointment. Furthermore, arrangements should be regularly reviewed to ensure that the money is being spent solely on the pensioner and that adequate accounts are being kept.

Enduring powers of attorney (EPA)

Creyke finds this the most satisfactory mechanism for proxy-decision making. As with the British equivalent, a person while mentally competent can choose a proxy to act in the event of incapacity. Its advantages are informality, cheapness and privacy – there is no public determination of incapacity. Its safeguards are that the person must sign a declaration indicating comprehension at the time of its execution; it must be witnessed; there is a right to review by anyone who can establish a proper interest; and the agent may have to lodge regular accounts. Creyke sees the way EPA has developed in the Australian Capital Territory (ACT) as a model for the rest of Australia. Here EPA has been extended to cover property and financial management as well as decision making over personal affairs including authority to consent to or refuse medical treatment. In the ACT, therefore, EPA has become a substitute for property management and guardianship orders. In

addition, ACT legislation requires agents to adopt the substituted judgement principle.

As Creyke points out, however, two of the advantages of the EPA – its informality and its private nature – are also its Achilles heel. It can be used by the unscrupulous to manipulate a person into making an EPA in their favour. Such instances have been reported in the Australian press and to advocacy groups. More careful monitoring and public education is required.

Finally, Creyke reviews legal protections for people in ‘aged care accommodation’. Following some damning reports in the 1980s, Commonwealth-funded nursing homes have introduced changed practices. These include:

- an agreement or formal contract between residents and owners setting out responsibilities and obligations for each;
- a charter of rights and responsibilities to enhance the basic principles of individuality, autonomy and privacy;
- a programme of staff training;
- national outcome standards focusing on quality of care and quality of life;
- standards monitoring teams to achieve compliance with national outcome standards;
- a community visitors scheme to enable complaints to be made;
- departmentally funded advocacy schemes, complaints units or information officers.

There have been difficulties in implementing these changes. Proprietors and residents, for example, have sometimes refused to sign the agreement which is central to these changes. The former have claimed it poses onerous new burdens and is too time consuming; the latter have claimed it unnecessary or as unwanted government interference. Furthermore, some parts of the agreement are more exhortations to good practice than enforceable contractual obligations. There are difficulties in assessing the degree of compliance with outcome standards and to date few nursing homes have been denied funding for breach of these standards. The agreement, at worst, may not survive a full scale challenge; at best, it may be interpreted in ways which will disappoint those who had high hopes for it.

COMMENT

Those who are familiar with legal procedures in England and Wales will notice many similarities with Australia. However, Australia is clearly further along the road to reform. It is important to learn more

about, for example, how the principle of ‘substituted judgement’ and the ‘inquisitorial’ mode of hearing are working out in practice. Creyke’s concern about the substitute payee schemes in Australia echo the problems of those operating in England and Wales. The Law Commission have proposed reforms to the appointee scheme. Given the many thousands of people in Britain who are dependent upon someone else to handle their pension, such reform is long overdue.

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Costs of Care

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Kavanagh, S., Schneider, J., Knapp, M., Beecham, J. and Netten, A., Elderly people with cognitive impairment: costing possible changes in the balance of care, *Health and Social Care in the Community*, 1 (1993), 69–80.

The 1990 National Health Service (NHS) and Community Care Act, and subsequent government guidance documents, have set out the direction for change in the provision of health and social care for elderly people in the United Kingdom. Included amongst the goals of these changes are: a reduction in the use of long-stay hospital accommodation, delayed admission to residential care from private households, and better support for carers. This paper considers a number of policy options for changing the pattern of services for elderly people with advanced cognitive impairment, and attempts to estimate the cost of providing such packages of care in England as a whole.

Potential service changes are evaluated against a baseline option, which is simply to continue offering the same packages of care which are available now. Using data from the Office of Population Censuses and Surveys’ Disability Survey, they consider the number of people with advanced cognitive impairment and then estimate the cost of these current packages of care. The options considered were: living alone in a private household; living with others in a private household; a local authority residential home; a private or voluntary residential home; a private or voluntary nursing home; and a long-stay hospital. The results demonstrated that, for example, the estimated average weekly cost of living alone in a private household was £206.76, compared to £729.44 for those in long-stay accommodation. These