

Scottish Mental Health Law Review

Notes from second Capacity and Supported decision making working group 3 August 2020

Present: Jill Stavert, John Scott, Marianne Morritt, Joanna Dymock, Pearse McCusker, Sandra McDonald, Paul Hutton, Becky Todd.
Kirsty McGrath, Sophie Ryder, Nicola Paterson (Secretariat)

Apologies: Simon Bradstreet

1. Notes from previous meeting

The notes from the previous meeting were agreed.

2. Discussion and agreement on glossary of terms.

- The group discussed and agreed the glossary of terms. A revised version will be circulated following the meeting to also take into account concepts such as 'human rights assessments', 'risk' and 'insight'.

3. Consider:

- a. Sandra McDonald's Report on capacity assessment**
- b. Literature review to date**

- The group explored what it would like to achieve, including what it would look like to have, or not have, a capacity threshold under mental health, what a supported decision making model would include and what how the law/practice would need to change to get there.
- The differences between 'Significantly Impaired Decision Making' (SIDMA) and 'capacity' were clarified.
- The group discussed the current use of capacity assessments and how this sits with the social model of disability.
- Sandra's report on capacity assessment was discussed. From a broad perspective the findings indicated that most people felt that there needed to be a point at which people can intervene in other's lives but there was a concern that, in the case of persons with 'mental disorder', the desired outcomes tend to be decided by those who intervene and capacity assessments are part of this.. The group explored how this might be avoided.
- It was agreed that there was a need to turn discussions around and focus on building and maximising people's capacity in relation to specific decisions or choices rather than limiting interventions.

- It was acknowledged that there was a huge disparity between theory and practice.
- It was agreed that there was a need to develop a workable model, and for professionals to provide more detail as to why somebody lacks capacity.
- It was agreed that it would be beneficial to investigate further with the Mental Health Tribunal for Scotland how the criteria of SIDMA is approached at tribunals.
- There was a general consensus around the need to be cautious about abandoning capacity assessments based on what happens in practice rather than how the law dictates they should be carried out. It was acknowledged that there can be a disparity in this regard.
- It was highlighted that the law can be a weak lever for cultural change, for example, this does not have much bearing on whether people engage in supported decision making.
- It was highlighted that the concept of 'assessment' seems to be less of a problem. It is when it is a capacity assessment that issues arise. The possibility of a team approach to capacity assessment was proposed which would involve sharing the assessment amongst different practitioners, risk assessors and others.
- The meeting ended with discussion around the perception that capacity is measurable, like blood pressure and can be assessed objectively, divorced from the values of society, law, medical practice and the individual. We need to be clear about the rationale that underpins the judgements made around capacity.

4. Next steps

- Discussion then turned to what additional information the group would need to take forward its objectives.
 - It was agreed that the group would seek advice from the Learning Disability and Autism review into the evidence and sources used to move away from capacity assessments towards human rights assessments.
 - It was also suggested that the group seek evidence from colleagues in Northern Ireland to understand how it is envisaged their Mental Capacity Act (Northern Ireland) 2016 will work in practice.
 - It was agreed that the group would not formally consult any further at present, acknowledging that there was enough information accessible on the subject matter to produce recommendations that could be consulted on at a later date.

Jill will produce a further 'literature review' paper on supported decision-making with links to other documents for consideration by the group.

- **5. Next meeting**

The next meeting will be held on 10th September. An agenda will be circulated prior to the meeting.

Secretariat to Scottish Mental Health Law Review
6 August 2020