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Law is integral to preservation of dignity

THE film *My Sister's Keeper* is a piece of popular philosophy for everyone. When should one person be responsible for making decisions about another? Who should make decisions for us if we are not able to make our own choices? These questions arise sometimes for children, but increasingly for adults. The law on mental incapacity in Ireland is limited to the Lunacy Regulation (Ireland) Act 1871 and Orders 65 and 67 of the Rules of the Superior Courts 1986 (Statutory Instrument No 15 of 1986).

There are further pieces of legislation concerning the circuit court dating from 1961 and 2001, but these add nothing by way of reform or modernisation. Wards of court are currently excluded from the protections of the Mental Health Act 2001. Difficult or unusual cases are considered (at great expense) by the High Court, but every day in care homes, mental health services, services for the intellectually disabled and in accident and emergency departments around the country, many

Irish society needs to revisit legislation relating to key decisions made for adults who cannot make decisions for themselves, argues Prof Harry Kennedy

decisions must be made whether minor or serious.

The European Court of Human Rights found that Britain was in breach for failing to modernise the law concerning people who were unable to make their own decisions by reason of unsoundness of mind (HL v UK 2004). In that case, a

young man with autism who could not make decisions for himself was cared for in a locked environment, though not under the Mental Health Act. This deprivation of liberty was found unlawful even though it was in his best interests, because it was not in accordance with a system of legal processes and protections.

Clearly, Ireland is now in urgent need of legislation. People with intellectual disability, people with dementia or acquired brain injury are cared for in ways that are to a varying extent restrictive or controlling. Decisions are made for them concerning where they should live, how their finances are organised and what treatments they should have.

Treatments might include everything from anti-androgens and sedatives for people with intellectual disability, to elective or emergency surgery. Welfare decisions include moving persons from their homes to care homes, locking doors or simply giving home helpers a right of access.

The Law Reform Commission has written a series of

Who makes decisions for us if we can't make our own choices? These questions are increasingly arising for adults

thoughtful explorations of this subject, and there is now a draft Heads of Bill before the Oireachtas (Mental Capacity and Guardianship Bill 2008). The discussion documents are models of scholarship and good sense. What is needed now is a detailed act that will allow the best principles of care to be

applied in a way that respects the rights and dignity of the individual person.

Ordinarily, legislators should study what currently exists, the naturalistic ways that people find their way to the care they need and the socially accepted ways for decisions to be made for the mentally incapable.

There is a risk that a process driven by legal philosophy may miss or even negate the existing informal family protections and medical or welfare pathways.

The current draft Heads of Bill defines incapacity but omits any requirement for some medically recognised mental infirmity, so that any elderly person, any eccentric or challenging decision could be found "incapacitated". There is no guidance as to the role of next of kin. There is little or no distinction between decisions about social care and medical treatments. Bizarrely, financial affairs are treated differently according to the rateable valuation of one's property.

A useful act should define mental incapacity (not merely capacity or incapacity), and it

should be able to provide for those with temporary incapacity, fluctuating incapacity and enduring incapacity. It should also allow for timely decisions in life-threatening emergencies, in non-urgent cases and in urgent cases where it is necessary to act swiftly to prevent pain and suffering and to preserve dignity.

Ireland has recently had a new Mental Health Act (2001, commenced November 2006), Disability Act (2005, not yet fully commenced) and Criminal Law (Insanity) Act (2006, commenced June 2006). This Mental Capacity and Guardianship Bill will of necessity overlap and interact with each of these, a need first identified in the Henchy Report of 1978.

Much could be done to simplify this increasingly complex area. The acts themselves are much shorter than the equivalents in other jurisdictions but this has not proved to be an advantage, with frequent recourse to the High Court and Supreme Court to help fill in the gaps and sort out the ambiguities that arise when the acts

are silent on practical issues.

A unifying principle for all such legislation should be respect for the dignity and equality of the person who is temporarily or more permanently of unsound mind and incapable of acting in their own best interests. Think, for example, of the homeless and untreated mentally disturbed people to be seen on the streets of most American cities.

Civil society should be bound together by mutual respect. It is not enough to talk of respect for rights without dignity, and the preservation of dignity in the face of mental impairment requires the legitimate intervention of family, friends and beyond that, community and society.

Irish society is cohesive and supportive of the vulnerable and impaired. It is the task of legislators, courts and government health and welfare services to facilitate this.

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