

Mental Capacity and T Brain Injury: A critical comparison of England and New Zealand's legislative responses

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Background

- ▶ **Research question**
- ▶ What are the similarities and differences between Mental Capacity policy and legalisation in England and New Zealand?
- ▶ The **Aims** were to compare:
 - ▶ The Ethos behind the respective policy frameworks.
 - ▶ The criteria and process for assessing mental incapacity.
 - ▶ Proactive measures for those at risk of losing their mental capacity.
 - ▶ Reactive measures for those who have lost their mental capacity
- ▶ **Objective:** To identify the practical consequences for social workers of these policies and to suggest ways they can be improved.

Methodology: Policy Map (Arkesy and O'Malley)

Determine
research
question

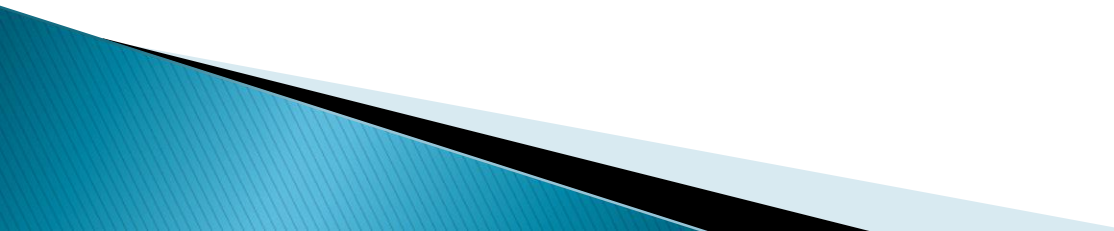
Identify
items

Select items

Charting
the data

Summary

Identifying and selecting items

- ▶ The study looked at government policy documents, legislation and guidance from the date the legislation was implemented onwards (1988 in NZ and 2005 in the England).
 - ▶ To identify current social work practice issues, social work journals were searched using ASUS and SCOPUS, from 2006 onwards.
 - ▶ The search terms used included variations for each country, due to the different terminology used.
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Charting the data

Legislation in England:

- ▶ **The Mental Capacity Act 2005**, as amended by the Mental Health Act 2007
- ▶ **The Health and Social Care Act 2008**
- ▶ **Court of Protection and case/common law.**

Legislation in NZ:

- ▶ **The Protection of Personal and Property Rights Act 1988**
 - ▶ **Case/common law**
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Government Guidance

English secondary legislation

- Mental Capacity Act 2005 Code of Practice (Dept of Con. Affairs 2007)
- Deprivation of liberty Safeguards Code of Practice Supplement (Min of Justice 2008)

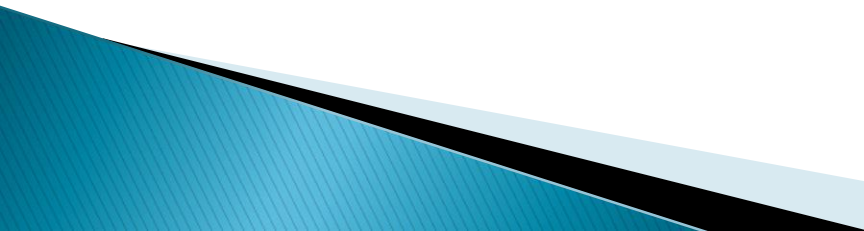
NZ secondary legislation:

- Protection of Personal and Property Rights (Enduring Powers of Attorney Forms) Regulations 2008.
- The Code of Health and Disability Consumer Rights 1996.

Other NZ guidance

- ▶ The Protection of Personal and Property Rights Act 1988 (Pamphlet) (2011)
- ▶ Example of NZ local guidance (Auckland District Health Board):
 - The Protection of Personal and Property Rights Act 1988 Staff Guide (2010)
 - Caring for Patients with Diminished Competence (2003)

Key themes from practice

1. Guiding principle/ethos behind the legislation
 2. How is capacity defined and assessed?
 3. Who is involved in assessing capacity and what are their roles?
 4. What is the process for assessing someone?
 5. What measures can a person take in the event of them losing capacity?
 6. What measures can be taken on the person's behalf if they have lost capacity?
 7. What safeguards exist for people who have lost capacity?
 8. How is the issue of a person who has capacity but is easily influenced by others managed?
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Guiding principle/ethos behind the legislation

England	NZ	England Practice/ethical issues	NZ Practice/ethical issues
<p>(i) Assumption of capacity unless proved otherwise.</p> <p>(ii) Enable to decide</p> <p>(iii) Capacity is not necessarily wisdom.</p> <p>(iv) Act in their best interest</p> <p>(v) Least restrictive.</p>	<p>(i) Assumption of capacity unless proved otherwise.</p> <p>(ii) Enable to develop or exercise capacity</p> <p>(iii) Orders not due to unwise decisions</p> <p>(iv) Best interest</p> <p>(v) least restrictive</p>	<p>(i) Assumption of capacity without assessment.</p> <p>(ii) Ability to enable limited by knowledge, skills and resources.</p> <p>(iii) Should Unwise decisions be treated in isolation?</p> <p>(iv) Best interest assessment often subjective</p>	<p>Jurisdiction of the court to intervene when post morbid behaviours are the same as before TBI, but level of insight and awareness has changed.</p>

Capacity and its assessment?

England	NZ	England Practice/ethical issues	NZ Practice/ethical issues
<p>2 stage test: ‘(i) The diagnostic’ test: (ii)The ‘functional’ test (Understand, weigh-up, retain and communicate test) (Bennett 2010)</p>	<p>What is the trigger? Main elements considered in Court provided format for medical report: What’s the disorder? Does person lack competence? Can they understand the nature and foresee the consequences? Is this wholly or partly?</p>	<p>Implications of the difference between intellectual awareness and insight. Abstract exercise – there is a difference between knowing something and being able to use that information in the real world.</p>	<p>Whilst TBI is a trigger for assessment due to a changing cognitive profile in inpatient context assessments occur when more immediate issue needs to be decided upon i.e. financial or welfare matter.</p>

Who is involved and what is the process?

England	NZ	England Practice/ethical issues	NZ Practice/ethical issues
<ol style="list-style-type: none">1. Individual involved decides, using above test.2. Expert opinion sought in more complex situations.3. Court of protection where disagreement.	<ol style="list-style-type: none">1. Doctor assesses, sometimes drawing on the MDT or info from others i.e. formal neuro-psychological testing.2. Court makes the decision, based on the medical evidence.	<ol style="list-style-type: none">1. Structured assessment is a compensatory strategy that may provide a false impression of functioning in the real world.2. Third party opinion can be over-ridden by the decision maker.	<ol style="list-style-type: none">1. Person may perform well on cognitive assessment but not functionally in practice.2. Post Traumatic Amnesia makes formal assessment difficult.3. MDT opinion may vary.

What measures can a person take in the event of them losing capacity?

England	NZ	England Practice/ethical issues	NZ Practice/ethical issues
<p>1. Advanced decisions to refuse treatment.</p> <p>2. Lasting Powers of Attorney:</p> <ul style="list-style-type: none">(i) Financial LPA(ii) Welfare LPA.	<p>1. Advanced directives</p> <p>2. Enduring Powers of Attorney, covers property and welfare matters.</p>	<p>1. Advanced directives risk being too broad or too narrow.</p> <p>2. Circumstances change – is LPW still the best person to act for you?</p>	<p>Confusion between Next of Kin and EPO</p>

What measures can be taken on the person's behalf if they have lost capacity?

England	NZ	England Practice/ethical issues	NZ Practice/ethical issues
<ul style="list-style-type: none"> 1.Appointeeship 2.Acts in connection with care or treatment 3.Deputy – similar to LPA, but court appointed and role set by court. 4. Directions from the Court of Protection. 5. Deprivation of Liberty Safeguards 	<ul style="list-style-type: none"> 1. Right 7(4) of Code of Rights utilised to cover treatment and placement of people as a temporary measure when consent not available. 2. Welfare or finance orders under the PPPR Act. 	<p>Acts in connection with care or treatment broad power – potential for abuse.</p> <p>Long time delay in the appointment of Deputies.</p>	<p>PPPR Act applications can be a very lengthy process.</p>

What safeguards exist for people who have lost capacity?

England	NZ	England Practice/ethical issues	NZ Practice/ethical issues
<p>2. Office of the Public Guardian oversees LPA's and Deputies.</p> <p>3. IMCAs.</p> <p>4. An offence to mistreat someone who lacks capacity Appoint official solicitor.</p> <p>5. Guidance on involvement in research.</p>	<p>1. Person will not be bound by a Personal Order unless party to the proceedings.</p> <p>2. Regular review and limited lengths of orders.</p> <p>3. Court appointed solicitor.</p>	<p>Research limitations means voice may go unheard.</p> <p>2. Some practitioners still defining a lack of capacity on specifically excluded criteria (such as condition, age, appearance etc).</p>	<p>1. Person's confusion often prevents them being party to the proceedings.</p> <p>2. In cases where limited finances PM not audited.</p> <p>3. Ensuring compliance with orders can be problematic.</p>

Vulnerability to the influences of others

England	NZ	England Practice/ethical issues	NZ Practice/ethical issues
<p>(i) Not covered by MCA.</p> <p>(i) Covered by Common Law as situational incapacity..</p>	<p>S25 (4) of legislation does consider the degree to which are they or could be subject to influence by others.</p>	<p>1. Lack of knowledge of case law means some practitioners are unaware of this significant.</p> <p>2. Awareness of this issue is rising due to high profile 'disability hate crimes'.</p>	<p>When in doubt seek the opinion of the court.</p>

Discussion

▶ Limitations.

- i. Hearing social workers' voices on practice.
- ii. NZ - Auckland's experience is just one example.

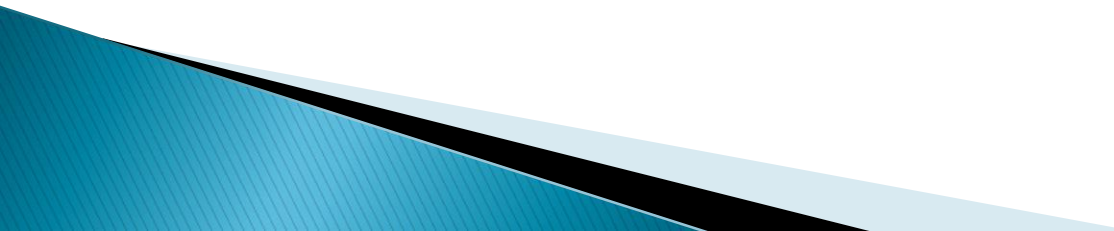
▶ Addressing the aims:

- i. Similar ethos, guiding principles assessment criteria (although NZ more nuanced) proactive and reactive responses but the processes and roles diverge.

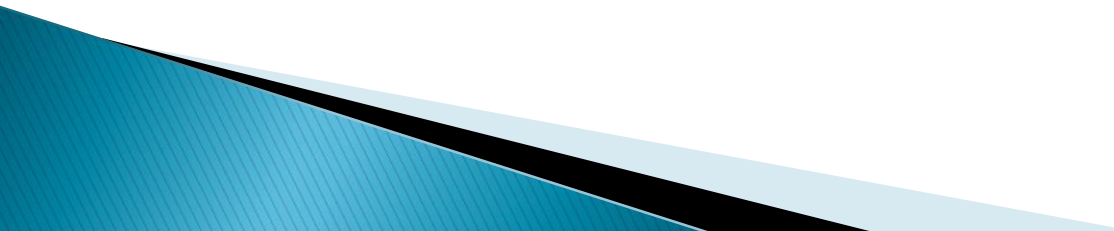
▶ Key practice issues

- i. The medical and legal professions play a much more central role in the NZ system.
- ii. NZ has a regionalised approach rather than national approach.
- iii. UK legislation focuses on individual decisions in isolation, compared to NZ's broader perspective and recognition of potential influence from others.
- iv. Both neglect the influence of other environmental factors on individual's real world decisions.
- v. A central difficulty for social workers in each countries is how to utilise structured assessments to apply abstract criteria to determine real world decision making.

Conclusion

- ▶ Both countries have a similar legal framework implemented in a different way.
 - ▶ The two approaches to determining capacity were found to have contrasting strengths.
 - ▶ ‘Real world’ assessment of capacity was problematic in both countries and is an area where Social Work can make a considerable contribution.
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Thank you for listening

- ▶ **Any questions?**
 - ▶ **Contact Andy Mantell at:**
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 - ▶ **BISWG Website :**
 - ▶ **<http://www.biswg.co.uk>**
 - ▶ **INSWABI website:**
 - ▶ **<http://www.biswg.co.uk/html/inswabi.html>**
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