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A 'gold standard' for capacity

In an ageing society with increasingly prevalent issues of mental capacity, Helen Bradford-Swire asks if this should lead to a global LPA to meet the needs of international clients

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According to recent statistics from the World Health Organization (WHO), more than 55 million people worldwide have dementia.^[1] WHO describes the disease as ‘one of the major causes of disability and dependency among older people globally’.

However, loss of mental capacity can strike individuals in many ways, at any age, and can severely complicate asset management and succession planning. For trust and estate practitioners, issues raised by vulnerable clients can lead to contentious litigation pre- and post-death. In a world where clients are increasingly globally mobile or have assets located in numerous jurisdictions, matters of mental capacity are further complicated.

‘An increasing number of autonomous individuals are residents in multiple jurisdictions and may own assets and properties across numerous jurisdictions,’ notes Yue-En Chong TEP,^[2] Chair of the STEP Mental Capacity Special Interest Group (SIG) Steering Committee. ‘Moreover, a common misconception is that a person only requires their donee to act for them when they are completely unable to make any decisions for themselves. For many conditions of the mind where the loss of mental capacity is incremental, or where people have limited ability to make decisions because of brain damage, an autonomous individual could nevertheless retain decision-making powers over many aspects of their lives. However, they may be unable to make decisions over complex issues such as investments.’

A complex question

The intricacies of the situation have prompted STEP to examine if it is possible to harmonise lasting power of attorney (LPA) legislation around the world to create a ‘standard’ or, at the very least, support governments without any such legislation to create laws that would protect vulnerable clients.

‘With 10 million people in the world developing dementia every year and increasingly ageing populations, with increasing healthcare needs and decisions to take, the question is whether it is within a government’s policy objectives that the responsibility of making advance plans over assets and welfare should be assumed by the individual or the government,’ says Chong. ‘If the individual is responsible for their own advance planning, then it is critical that countries have legislation with provisions such as those under the England and Wales *Mental Capacity Act 2005*. Such legislation would provide for the making of an LPA, or similar, allowing advance selection of a donee over personal welfare, health and property and finance.’

It is easier said than done: variations on similar types of legislation are currently in place in many countries around the world. Just as England and Wales has LPA legislation, Australia and Hong Kong have enduring powers of attorney (EPAs), which the Cayman Islands is also seeking to put in place. In the US there is legislation for durable powers of attorney (DPAs) and Malaysia has powers of attorney (PoAs) that continue, despite the donor’s mental incapacity, if certain criteria have been met.

But in many jurisdictions, even those with existing legislation, gaps remain. No country has yet implemented what could be considered a 'gold standard', with portability of powers and cross-border recognition remaining a common shortcoming for most.

'The PoA legislation in the Cayman Islands does not currently include LPAs or EPAs,' comments Anthony Partridge TEP,^[3] Chair of STEP Cayman Islands. 'This means that when an individual loses capacity to make financial decisions, any general PoA that has previously been made is invalid. It has always left a large hole that creates both legal and social problems, particularly with an ageing population.'

Setting a 'gold standard'

So is a global standard possible? And if so, how can the parameters be defined?

'The key factor will be to facilitate a defined process that supports all citizens,' explains Martin Haanen TEP,^[4] a member of the Mental Capacity SIG Steering Committee. 'It would recognise a client's appointee, be able to operate internationally and enable the efficient and free flow of financial administration.'

Immediate obstacles to such a cross-border process include the terminology, with names for instruments of advance planning varying vastly from jurisdiction to jurisdiction, and the nuanced inconsistencies between said instruments, e.g., LPAs and EPAs. For some jurisdictions, the legislation applies to property and financial affairs, for others it applies to health and welfare, and some jurisdictions combine the two.

The challenges grow exponentially: from cultural differences including religion, approaches to the older generation and concepts of patriarchy and matriarchy, to significant legislative differences between common-law and civil-law jurisdictions.

Moreover, were jurisdictions to unilaterally adopt LPA legislation, there would be further questions to answer about the formalities of creation and the framework behind the legislation. This is especially prescient in a post-COVID-19 world where there is international variation on the digitalisation of documents and the validity of virtual creation and witnessing.

'Many questions need to be answered around the "gold standard" of safeguards to prevent LPA abuse,' warns Chong. 'We need to consider issues around witnessing, registration, certification and digitalisation of LPAs. For the activation, who is a qualified professional to certify a loss of capacity? And would the professional assessment of a person in one country be recognised in another country? If a global standard applies to the whole framework we also need to examine timelines for registration and appropriate sanctions for abuse.'

Cross-border cooperation

There is a huge amount of ground to cover as the discussion evolves: inevitably one question leads to myriad further considerations.

But, says Haanen, creating a standard is not impossible, even if it takes a generation to bring it into force. 'The groundwork is to identify jurisdictions with similar culminating purposes and common affinities,' he observes. 'Certain countries have common ground in this area: Singapore and Malaysia; Australia, Canada, New Zealand, the UK and, of course, EU Member States.'

A move in the direction of all countries having some form of legislation in place would prove invaluable to practitioners working cross-jurisdictionally, as well as families with assets spread around the world. Speaking from the Cayman Islands' perspective, Partridge says, 'The implementation of EPAs through amendments to the *Powers of Attorney Act* will protect the rights of vulnerable clients whoever those individuals may be. Importantly, it will also create greater flexibility for the private wealth industry on a global scale.'

'Achieving a standard would definitely help in cases involving cross-border litigation,' agrees Chong. 'If a donee could represent an individual in multiple jurisdictions around the world, having a global LPA would mean that time would not have to be spent getting the authorities in each jurisdiction to recognise the "foreign power LPA" before the donor can be represented in the foreign court. This is necessary when the person without mental capacity has to make appearances in multiple courts around the world or pursue claims in various jurisdictions.'

Although it may not be a near-term solution, STEP sees such a standard as a part of the future of estate planning and asset management. Already there are steps in the right direction: the European Commission has recently proposed new cross-border rules to protect people who have lost mental capacity, following 12 years of advocacy from STEP.[\[5\]](#)

'We believe that a "gold standard" can definitely be achieved through analysing the best practices currently in every jurisdiction and finding the perfect recipe of factors,' Chong says. 'It might take quite a number of years of discussion or implementation but, once done, it would serve the needs of the mobile, global citizen.'

[\[1\] bit.ly/475cNrQ](https://bit.ly/475cNrQ)

[\[2\]](#) Yue-En Chong TEP is Managing Director at Bethel Chambers, Singapore.

[\[3\]](#) Anthony Partridge TEP is Partner at Ogier.

[\[4\]](#) Martin Haanen TEP is Director and Trustee at Castle Trustees, New Zealand.

[5] www.step.org/press-office/12-years-step-advocacy-pays-european-commission-proposes-new-rules-protect-people-who

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