

MENTAL CAPACITY BILL - SUMMARY

Introduction

The Mental Capacity Bill provides a statutory framework to empower and protect vulnerable people who may not be able to make their own decisions. It makes it clear who can take decisions in which situations and how they should go about this. It enables people to plan ahead for a time when they may lose capacity.

A draft Mental Incapacity Bill was published in June 2003 and was subject to pre-Legislative Scrutiny by a Joint Parliamentary Committee. The Committee published its report in November 2003 and the Government published its response in February 2004.

The whole Bill is underpinned by a set of five key principles stated at the front of the Bill. These are.....

- **A presumption of capacity** - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
- **The right for individuals to be supported to make their own decisions** - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
- That individuals must retain the **right to make what might be seen as eccentric or unwise decisions**;
- **Best interests** – anything done for or on behalf of people without capacity must be in their best interests; and
- Least restrictive intervention – anything done for or on behalf of people without capacity should be the **least restrictive of their basic rights and freedoms**.

What does the Bill do?

The Bill enshrines in statute current best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf. It reforms and updates current statutory schemes for enduring powers of attorney and Court of Protection receivers.

The Bill deals with the assessment of a person's capacity and acts by carers of those who lack capacity.....

- **Assessing lack of capacity** – The Bill sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is a “decision-specific” test. No one can be labelled ‘incapable’ as a result of a particular medical condition or diagnosis. Most people who have a learning disability or early-stage dementia can make many of their own decisions, even if they may lack capacity in relation to some complex issues.
- **Best Interests** – Everything that is done for a person who lacks capacity must be in that person's best interests. The Bill provides a checklist of factors that decision-makers must

work through in deciding what is in a person's best interests. The person themselves – their wishes and feelings – and their participation are key. Also, carers and family members gain a right to be consulted.

- **Acts in connection with care or treatment** – The Bill clarifies where a person is providing care or treatment for someone who lacks capacity then the person can provide the care without incurring legal liability. The key will be proper assessment of capacity and best interests. This will cover actions that would otherwise result in a civil wrong or crime if someone has to interfere with the person's body or property in the ordinary course of caring. For example, by giving an injection or by driving the person's car.

The Bill deals with two situations where a designated decision-maker can act on behalf of someone who lacks capacity.....

- **Lasting powers of attorney (LPAs)** – The Bill provides for people to appoint an attorney to act on their behalf if they should lose capacity in the future. This is like the current Enduring Power of Attorney (EPA), but the Bill also allows people to choose an attorney to make health and welfare decisions.
- **Court appointed deputies** – The Bill provides for a system of court appointed deputies to replace and extend the current system of receivership in the Court of Protection. Deputies will be able to take decisions on welfare, healthcare and financial matters as determined by the Court. They will only be appointed if the Court cannot make a one-off decision to resolve the issues.

The Bill creates two new public bodies to support the statutory framework, both of which will be designed around the needs of those who lack capacity.....

- **A new Court of Protection** – The new Court will have jurisdiction over the whole Bill and will be the final arbiter for capacity matters. It will have special procedures and judges.
- **A new Public Guardian** – The Public Guardian and his/her staff will be the registering authority for LPAs and deputies. They will supervise deputies appointed by the Court and provide information to help the Court make decisions. They will also work together with other agencies, such as the police and social services, to respond to any concerns raised about the way in which an attorney or deputy is operating.

The Bill also includes three further key provisions to protect vulnerable people.....

- **Independent consultee** – an independent consultee will be provided for a person lacking capacity who has no one who to speak for them. This would apply in relation to serious medical treatment and long-term residential care. It is also intended that independent consultees would also be involved in annual care reviews for these people. A regulation making power will allow the Secretary of State to extend the provision of an independent consultee.
- **Advance decisions to refuse treatment – Statutory rules with clear safeguards** confirm that people may make a decision in advance to refuse treatment if they should lose capacity in the future. The Bill sets out the circumstances in which advance decisions may be followed by doctors.

- **A criminal offence** - The Bill introduces a new criminal offence of ill treatment or neglect of a person who lacks capacity. A person found guilty of such an offence may be liable to a term of up to five years imprisonment

The Bill also sets out clear parameters for research into mental incapacity.....

- Research on incapacitated people will only be carried out if a research ethics committee agrees that the project is necessary, safe and cannot be done on people who have mental capacity; if the person is content to participate; and if a family member or carer advises that the person would not decline to take part.

More detailed guidance will be available to families, professionals and carers on the new statutory framework. Codes of Practice will be prepared for that purpose, and a draft of the Codes will be published when the Bill is at Committee Stage of its consideration by Parliament.