

## **Mental Capacity Act April 2005**

The Mental Capacity Bill completed its parliamentary stages yesterday evening (Tuesday 5<sup>th</sup> April) and will soon be an Act. The DRC is very pleased to have secured some excellent improvements to the Bill whilst it went through parliament. We have worked closely with officials, the Government, MPs and peers of all parties (and crossbenchers), and other disability and advocacy organisations – most notably those in the ‘I Decide’ and ‘Making Decisions Alliance’ coalitions. We have been pleased to note the Government’s willingness to consult and work with stakeholders to produce amendments that have strengthened this Bill considerably and resulted in DRC support for a Bill that we originally held several reservations about.

The DRC only welcomed the Mental Capacity Bill when it was first introduced. Whilst the DRC recognised that 15 years of campaigners’ efforts had finally led to the Bill, we held several reservations about the provisions of it. During the Bill’s progress, almost all of our reservations were addressed – through close co-operation with the Government leading to the Government placing many of its own amendments in the Lords stages.

The DRC supports the enactment of the Bill and is pleased it will reach the statute book and will not be lost due to the general election. This means the benefits and security it will provide for many disabled people will not be delayed further. We expect to see our two remaining issues with the Bill resolved through engaging with the Government in further consultation on its Code and implementation.

Outlined below are some of the substantial benefits the Mental Capacity Act will introduce and the most important changes that we have worked with the Government to achieve since the Bill was introduced. We also outline our two remaining areas of concern that we hope to see resolved through consultation on the Bill’s Code and implementation. The DRC did not believe that these issues warranted the delay or demise of the Bill in its final Commons day and encouraged all MPs to support its swift passage.

### **Advocacy**

The DRC was concerned that when the Mental Capacity Bill was first introduced, it offered no provisions for advocacy to support decision making. Instead, it introduced an ‘Independent Consultee’ (IC) service for people who lacked capacity and had no friends/family to consult on their best interests –

people the Government called 'unbefriended'. The Government believed that this was advocacy but the DRC saw the IC role as more of an insurance liability mechanism for the service provider than as a genuine advocacy service.

The IC did not reflect an advocacy service as the authority/service provider only had to 'seek advice' from the IC (and not act on it), nor was there any reference to the IC 'supporting' the person lacking capacity. The DRC lobbied against the proposed role of the IC – and against the Government's desire to call it an Independent Advocate service. The DRC called for the title to reflect the specific nature of the job and supported the Government's amendments to alter 'Independent Consultee' to our suggestion: Independent Mental Capacity Advocate (IMCA).

The Government's amendments during Lords stages should ensure that the role of an IMCA will more closely reflect a form of advocacy. The IMCA will be 'instructed' by service providers to 'support' and 'represent' the person lacking capacity. If the advice of an IMCA is not followed, the decision-maker will have to record the reason(s). The DRC believes that these specific amendments put 'unbefriended' people lacking capacity in a far stronger position than when the Bill was first introduced.

The DRC believes access to this service is too limited (ie for just those with no friends or family), but we are pleased that the Government has been willing to consult and listen to stakeholders and has taken a step in the right direction in introducing a form of advocacy. The Government has also provided a regulation making power to allow for the extension of this service in the future. The DRC will be engaging further with the Government on the implementation and expansion of this service.

We are pleased that this Bill will secure a form of advocacy for some disabled people. However, looking outside the scope of just the Mental Capacity Bill we believe there is a broader need to ensure disabled people have rights to independent advocacy. The Strategy Unit's recent report 'Improving the Life Chances of Disabled People' sets out a blueprint for building capacity amongst a national network of disabled people's organisations to deliver general advocacy services and the DRC looks forward to seeing progress made on realising this.

### **Advance statements**

The Government has, after extensive lobbying, included advance written statements on the face of the Bill. This means that anyone with capacity that has recorded in advance any request to be treated if lacking capacity will have to have their request considered under the Best Interests provisions of the Bill. The DRC would have liked a more specific reference to advance

requests for treatment, but we are pleased that written statements will be on the face of the Act and are pleased that the Government has committed to an explicit reference in the Code. The DRC has consistently called for legal recognition of advance requests and fully supports this move – we believe it to be the logical step following the Burke judgement of 2003. We are also pleased that the Government has committed to including in the Code that when advance requests for treatment are not followed, the reason(s) must be recorded.

The DRC has often stressed the importance of a balance in the rights of refusing and requesting treatment. We believed the Government was incorrect to attempt to put on statute the right to allow people to only express treatments they do not wish to receive if lacking capacity – advance directives (sometimes referred to as ‘living wills’). The DRC believes it is equally important for patients’ autonomy to have the right to request treatments along the same lines.

The DRC does not believe the Mental Capacity Act will introduce euthanasia. The DRC opposes euthanasia/assisted dying at the current time. Although the Bill puts advance directives to refuse treatment on the statute book, they have been legally binding for more than ten years. The Bill contains specific provisions and safeguards to clarify their use, prevent their misuse, and offer greater protection to people that create them and subsequently change their mind. There is also a new criminal offence in the legislation and the original Bill was amended to ensure that when decisions are being made about Best Interests and life-sustaining treatment, they are not motivated by a desire to bring about the death of someone lacking capacity and are not a result of prejudiced assumptions about someone’s perceived quality of life.

The DRC believed that concerns the Bill introduced euthanasia were misplaced and urged MPs to recognise the clear potential the legislation had to heighten the decision-making ability of disabled people and offer much needed clarity in what is an extremely complex area of law.

### **The Mental Capacity Bill and Mental Health Act 1983**

The DRC held concerns that there was insufficient clarity on the relationship between the compulsory powers under the Mental Health Act 1983 (MHA) and the authority to make decisions on behalf of people who lack capacity under the Mental Capacity Bill (the Bill). Given the potential for the legislation to overlap where the person who lacks capacity to make certain decisions has a “mental disorder” (as defined in the MHA); the DRC considered that the Bill must make clear when the provisions of the MHA take precedence. The DRC welcomed Government amendments which made clear that under the Bill using ‘restraint’ does not mean you can deprive someone of their

liberty. The DRC was also pleased to note that the Government will be consulting further on additional safeguards for people informally detained and also committed to making sure there is clear cross reference to mental health legislation in the codes of practice.

### **Non-discrimination**

The DRC persuaded the Government to amend the Bill to make clear that assessments of someone's decision-making capacity, and decisions being made for someone lacking capacity, should not be based on prejudiced or discriminatory assumptions. We welcomed the addition of anti-discrimination principles to the Bill, which the DRC assisted in creating. Many disabled people experience discriminatory assumptions about their abilities and these amendments will assist the culture change and empower disabled people in this specific area.

## **Issues we aim to influence the Code and implementation over:**

### **Communication support**

The DRC is very pleased with the presumption of capacity on the face of this legislation. We are also pleased that the Government believes it is important to ensure disabled people are not prevented from making decisions due to a lack of communication support. Government amendments to the Bill included making clearer that disabled people should be offered a proper explanation about a decision that needs to be made, and that this explanation should be given in a way that meets individual communication requirements. The DRC welcomed this, but we remain concerned about how the commitment to meet the requirements of all disabled people will be met in practice – and how effectively it will be monitored. Without proper resources, communication needs may not be met, and without effective monitoring there will be no opportunity to resolve problems. The DRC will be working with the Government to try and secure commitments in this area during consultations on the Code and implementation.

### **Informal/closed relationships**

The DRC remains concerned about how effective the 'reach' of the code of practice will be to people in informal or closed relationships (ie individuals with little or no contact with service providers). It will be important that the code assists all carers in their role – not just formal/paid ones – and offers greater protection to all people unable to make decisions for themselves and people with limited capacity (or who experience temporary lapses of it) including those in closed relationships and those living at home and being cared for by (a) family member(s).

While it has not been possible to find an effective mechanism for addressing this on the face of the Bill, the Government has listened to our concerns and

indicated that it will address the issue in the code and during implementation. The DRC will be working with the Government to this effect.

### **Conclusion**

The DRC was concerned that the Mental Capacity Bill was at risk due to the general election and may have been dropped to get other legislation through parliament in time. The legislation has taken 15 years to create, has been vastly improved in its parliamentary progress, and there are still opportunities to improve it further through work on the code and implementation. It deals with an extremely complex area and offers clarity and guidance that are needed as soon as possible. The DRC believed it was important for the Mental Capacity Bill to reach the statute book and is pleased that this has been made possible.

### **Contact**

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