

Parliamentary Brief



The Law Society

Mental Capacity Bill

House of Commons - Second Reading

11 October 2004

The Law Society warmly endorses the Mental Capacity Bill. We believe that this much-needed legislation will help to protect the rights of one of the most vulnerable groups in society, those who lack mental capacity. This includes people born with disabilities that affect their capacity to make decisions and those who at some point in their lives lose their ability to make decisions through illness, injury or disability.

The Bill also establishes for the first time a statutory framework for decision-making and provides vital legal guidance and protection for professionals, carers and family members.

However, the recent judgement in *HL v UK* raises serious human rights issues in relation to the Bill and we call on the Government to clarify its response at the earliest possible opportunity.

We particularly support the inclusion of a statement of principles at the outset of the Bill, which makes explicit:

- the legal presumption of capacity
- the need to take all practical steps to support a person to make a decision
- the right to make unwise decisions
- that decisions must be made in the incapacitated person's best interest
- that decisions made must be the least restrictive of basic rights and freedoms

These principles promote a real shift in attitude towards empowering vulnerable people to make as many of their own decisions as possible. In a similar way to s1 of the Children Act 1989, they will also provide useful guidance for the courts, lawyers, doctors, health professionals and informal carers faced with making difficult decisions on a daily basis.

The Definition of Incapacity

The Law Society supports the Bill's core definition of incapacity, which focuses on the particular time a decision has to be made and reflects the important principle that capacity is 'function specific' and must be assessed in relation to the particular decision or activity. The definition also recognises that impairment may be permanent or temporary and that capacity may fluctuate, for example a person with dementia may experience lucid intervals.

Best Interests

We fully support the Bill's key principle of 'best interests', which must guide all actions and decisions made on behalf of someone lacking capacity. This principle has become well established in the common law and gives priority to the needs of the person lacking capacity and what s/he would have wanted. The Bill sets out a checklist that decision-makers must work through in deciding what is in the best interests of the incapacitated person. This will provide a common standard to ensure consistency in how substitute decisions are made.

Acts in connection with care or treatment

The Bill provides professional and informal carers with an express defence against civil liability and criminal prosecution for certain acts. The carer will not incur any liability if reasonable steps are taken to establish whether the person lacks capacity and the action taken is in the person's best interests. The Law Society believes it is important to provide protection for formal and informal carers making day-to-day decisions for people who lack capacity, such as washing, dressing and arranging services.

However, we are concerned that the scope of this power is unclear and may be too wide in light of the *HL v UK* ruling. The Law Society would support clear limits on the types of actions permitted. We would also welcome the Government's view on providing fixed procedural rules governing the admission and detention where an incapacitated person is deprived of their liberty within the meaning of article 5 of the ECHR (right to liberty and security).

Lasting Powers of Attorney

The Society welcomes, in principle, the new Lasting Power of Attorney (LPA), enabling any person with capacity to authorise someone else to take decisions in relation to their property, financial affairs and personal welfare, should they lose capacity in the future. For example, someone in the early stages of Alzheimer's disease could authorise a family member to make decisions in the future about their day-to-day care, including diet and personal appearance.

Safeguards against abuse are provided, such as giving the Public Guardian powers to deal with complaints about the way in which donees of LPAs operate and to order direct visits.

We support the requirement that all LPAs must be registered with the Public Guardian before they can be used. We also believe there should be a duty to notify the Public Guardian and to have that notification endorsed on the instrument when the person loses capacity, in line with the current Enduring Powers of Attorney. Otherwise, the LPA could not provide a guarantee for a third party, such as a bank, that the person has lost capacity and where the LPA is conditional on this, then the third party would require further medical evidence before they could accept the LPA as valid. This would clearly engage article 8 of the ECHR (respect for private and family life).

Advance Decisions to refuse treatment

The Law Society supports the inclusion of advance decisions or 'living wills' in the Bill, allowing adults with capacity to refuse specific medical treatments if they lose capacity in the future. This enables the exercise of a right of choice and control over one's own life and body. For example, someone with motor neurone disease could refuse artificial nutrition and hydration in the later stages of their illness when they are close to death. This codifies and clarifies the current common law rules, integrating them into the broader scheme of the Bill. The purpose of the Bill is to empower people to take individual decisions in the event of future incapacity, if they wish to do so, and nothing in this Bill would permit any form of euthanasia.

Independent Consultee

The Society supports the introduction of independent consultees but believes that this does not go far enough. The NHS body or local authority will be under a duty to seek advice from the consultee about what is in the person's best interests when a serious decision needs to be taken about an incapacitated person's medical treatment or moving into a residential/care home. This will only be provided where there are no close relatives or friends to consult.

In our view it is important for the independent consultee to protect the interests of an incapacitated person even if the individual does have relatives. For example, where there is a dispute between the family and the clinical team about proposed medical treatment. We believe that the right to an independent consultee should be extended to any incapacitated person, who is undergoing assessment under s47 of the NHS and Community Care Act 1990.

Protection of Vulnerable People

We support the creation of a new criminal offence against anyone found guilty of ill treatment or wilful neglect of a person lacking capacity, punishable by a term of imprisonment of up to 5 years. This will provide a vital deterrent against abuse. But we believe that the Bill should go further and include a public duty on local authorities to investigate cases of suspected abuse or neglect, in a similar way to s47 of the Children Act 1989.

Court of Protection

The Bill establishes a new Court of Protection, which will be a superior court of record and able to sit anywhere in England and Wales. Whereas the existing Court of Protection only has jurisdiction over property and financial affairs, the new Court will also have jurisdiction to consider healthcare and personal welfare. For example, it could rule on whether a person has capacity to consent where an irreversible treatment such as sterilisation is proposed. This will remove the need for applicants to resort to the inherent jurisdiction of the High Court.

These reforms will provide easier access to justice across the country rather than through a single office in Archway. However, it is vital that the considerable expertise that currently exists at the Court of Protection is not diluted. Sufficient public funds must be made available to ensure the new Court is sufficiently accessible for those with limited assets.

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