

Number 13

## Government's Response to the Report on the Draft Mental Incapacity Bill

A previous briefing<sup>1</sup> has reported on the draft Mental Incapacity Bill. This bill has been subject to scrutiny by a Parliamentary Committee and the Government have now commented on their report.

The proposed bill will reform the law to improve and clarify the decision making process for individuals who are 16 and over who are unable to make decisions for themselves. It will also offer to people who have capacity, the opportunity to decide how they are to be cared for in the future when they might lose capacity.

Over 2,000 adults in England and Wales lack capacity and the bill therefore has significant potential impact. With an increasing aged population, these numbers are likely to increase.

### Summary of the Government's Response to the Comments on the Bill

The Government has welcomed the report of the Scrutiny Committee and it is plain that it is proposed to enact this bill. The Government and the Committee are both of a view that the draft legislation broadly follows the correct approach.

Comment has been made on the following specific areas:

- **General Authority**

The Bill proposes a "general authority" which reflects the existing common law doctrine of necessity. Concern has been expressed that this term suggests too wide an interference in people's lives and the government have confirmed that this is not intended – it is therefore to be anticipated that this term will not appear in the final legislation.

- **Decision Making Mechanisms**

The bill proposes to replace existing Enduring Powers of Attorney with Lasting Powers of Attorney. LPAs would have to be registered with the Public Guardian and subject to the powers of the Court of Protection who would be able to appoint deputies to take decisions on behalf of those who lack capacity. The government accepts that those deputies will need clear standards of conduct and limitations on their autonomy. In addition to the proposed Act, there will be a Code of Practice to clarify this.

- **Advance Directions regarding Medical Treatment**

The government accepts that advance directions are appropriate. Guidance on the operation of them is to be provided. However, nothing in this proposed legislation is to permit euthanasia.

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<sup>1</sup> See Care Home Briefing no 7

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- **Links with Mental Health Legislation**

The government are still working on a new Mental Health Act and acknowledge that the Mental Incapacity Bill and that Act will need to compliment each other.

- **Code of Practice**

The government have accepted that the Mental Incapacity Bill will require a Code of Practice to supplement the statutory provisions.

- **Protecting Vulnerable People from Abuse**

Although the Scrutiny Committee suggested that the Bill could cover this area, the government have made it plain that their "No Secrets" guidance is attended to address this, rather than the Mental Incapacity Bill.

- **Medical Research**

Some commentators on the bill have resisted allowing any medical research on those who lack capacity. However, the government's view is that this performs an important public function.

- **Advocacy**

The Government has acknowledged that advocacy plays an important role in the rights of those without capacity and has acknowledged that the Bill will include a requirement to consult with everyone involved in the welfare of the person concerned.

Whilst the Bill has not as yet been enacted, it is clear that the government intends to pursue this proposed legislation when parliamentary time allows. It is likely to be of great assistance in the management of the affairs of people lacking capacity.

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March 2004

## Buying or selling a care home?

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For more information on Care Home Law contact Andrew Parsons at RadcliffesLeBasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.

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