

Date: **Wednesday 14 July 2004**

Venue: **Committee Room 3, National Assembly for Wales**

Title: **Mental Capacity Bill**

Purpose

1. The committee is requested to note the contents of this paper which outlines the provisions of the Mental Capacity Bill.

Background

2. The Mental Capacity Bill was introduced to Parliament on the 17 of June 2004. The Bill has its basis in the Law Commission Report of February 1995 after which in 1997 the UK Government undertook a consultation exercise, "Who Decides?" before publishing the policy statement "Making Decisions" in October 1999. This statement set out proposals to reform the law by clarifying the area of decision making for people who are unable to make decisions for themselves as a result of mental incapacity. A draft Bill was published in June 2003 and this was subject to pre-legislative scrutiny by a joint committee of the Houses of Lords and Commons. The UK Government responded to the recommendations of this committee in February 2004 and this process has culminated in the current Bill before Parliament.

3. The Mental Capacity Bill aims to provide a statutory framework for the process of decision making with and for people who may lack capacity by building on established common law as well as existing good practice. It makes it clear who can take decisions in which situations and how they should go about this.

4. The Bill is divided into three parts. In the first part the Bill sets out a number of key principles applying to the Bill as a whole and makes provisions that govern decision making on behalf of and with adults lacking capacity. The second part establishes new judicial and administrative bodies and the third part includes a declaration of the scope of the Bill plus miscellaneous transitional provisions. This paper

will concentrate mainly on part 1 of the Bill.

Summary of the Bill's provisions

5. There are a set of five principles at the front of the Bill which underpin the legislation as a whole.

An assumption of capacity – every adult has the right to make their own decisions and must be assumed to have the capacity to do so unless it is proved otherwise.

Participation in decision making – a person should not be treated as being unable to make a decision unless all practicable steps to help them do so have been taken without success

Unwise decisions – A person is not to be treated as unable to make a decision just because the decision they make is unwise.

Best Interests – acts done under the Bill must be carried out in the best interests of the person who lacks capacity.

Least restrictive practice – decisions made on behalf of someone should be those which are the least restrictive of the person's basic rights and freedoms.

Decision Making mechanisms

6. The Bill adopts a best practice approach to determining capacity which is decision specific, rather than applying a broad label of incapacity on the basis of an individual's diagnosis. This means that an assessment is required as to whether an individual at a particular time is able to make a particular decision. This is sometimes referred to as a functional test and the Bill sets out a checklist of reasons as to why an individual may be unable to make a decision.

7. Everything that is done for a person adjudged to be lacking capacity has to be carried out in the best interests of that person and the Bill provides a checklist of factors that decision makers must take into consideration in coming to a decision. This includes an obligation to have regard for the person's past and present feelings or wishes and an obligation to take into account the views of family and carers.

8. The Bill provides a legal basis for a person to make decisions and carry out acts on behalf of someone else. It provides protection from liability for acts done for people who are unable to consent, provided they are done in the best interests of the person. These provisions are titled Acts in Connection with Care or Treatment.

9. In addition the Bill makes provision for having a designated decision maker in the form of new Lasting Powers of Attorney and court appointed deputies.

10. Lasting powers of Attorney will replace the current Enduring Power of Attorney, with people able to appoint a person to act on their behalf should they lose capacity. Unlike the current provision, however, the remit for decision making will be wider and will cover not only financial and property decisions but also health and welfare decisions.

11. The Bill will also replace Part 7 of the Mental Health Act 1983 which deals with the management of property and affairs of mentally disordered people. The new provision will empower the new court of protection to appoint deputies to take decisions on welfare healthcare or financial matters as determined by the court, in respect of adults who lack capacity.

Independent Consultee Service

12. The Bill as drafted places the majority of duties and powers on the Lord Chancellor but it also includes some regulation making powers and duties for the Assembly. These relate to the provisions for an Independent Consultee service. These provisions are an additional safeguard for particularly vulnerable groups in specific situations where it is felt that a view, independent of the decision maker, would be advantageous. The vulnerable groups comprise adults without capacity who do not have anyone, other than those engaged in a professional capacity, to provide a view on their best interests. The specific situations are decisions about serious medical treatment and decisions about provision of, or changes in, residential or nursing care. The Assembly will be under a duty to make arrangements, as it considers reasonable, to make an Independent Consultee available. In addition the Assembly will be able to prescribe within regulations what constitutes serious medical treatment as well as the functions and appointment of the Independent Consultees.

Advance Decisions

13. The Bill makes provision to clarify and codify the current common law rules on an individual's right to make an anticipatory decision on future treatment. Individuals over 18 will be able to specify that a particular treatment should not be given and that this will apply in particular circumstances. It does not enable individuals to choose their treatment, as this is a matter for clinical judgement, but mirrors the fact that people who have capacity are able to make decisions about the kind of medical treatment that they do not wish to receive.

14. As well as confirming the legal basis for advance refusals of treatment the Bill also sets out that treatment can be withheld without liability provided that an advance refusal is valid.

Research

15. Safeguards are included in the Bill that will require a research ethics committee to agree that a project is necessary before it can be carried out. Consideration will have to be given as to whether the research is safe, could be carried out with people who have capacity and that the participants family or carer are in agreement.

Criminal Offence

16. The Bill introduces a new criminal offence of neglect or ill treatment of a person lacking capacity in an individual's care. The maximum sentence for such an offence will be set as 5 years which reflects the severity of the crime and is in line with serious assaults on individuals such as inflicting grievous bodily harm or assault occasioning actual bodily harm.

Code of Practice

17. The Bill will be supported by statutory guidance and it is the responsibility of the Lord Chancellor to produce this in the form of a Code of Practice. This Code will provide more detailed information on the operation of the legislation for individuals, families, carers, deputies and professionals alike and those making decisions on behalf of adults who lack capacity are obliged to have regard to this guidance. The Department for Constitutional Affairs proposes to have a draft of the Code available during the parliamentary process and the Bill requires that the Lord Chancellor must consult with the Assembly on this.

The Court of Protection and Public Guardian

18. Part 2 of the Bill deals with the creation of a new superior court of record, to be known as the Court of Protection and its procedures, as well as providing for a new officer to be known as the Public Guardian.

19. The Court of Protection will sit on a regional basis for England and Wales and will have jurisdiction across all areas of the Bill. It will be able to make declarations and decide on any matter regarding the capacity of an individual and their best interests.

20. The Public Guardian will be responsible for registering Lasting Powers of Attorney and deputies. The Public Guardian will also be responsible for supervising and monitoring deputies appointed by the court and for assisting the court by providing it with information as necessary.

Implications for Wales

21. The Department for Constitutional Affairs is a UK Government department that covers both England and Wales. Matters of the courts, judiciary and the new public guardian are not areas for which the Assembly has a devolved responsibility. However, the Bill will have implications for the practice of professionals in decision making in the assessment and provision of health and social care. The Bill enshrines in law best practice in decision making for people who lack capacity and emphasises the empowerment and best interests of the incapacitated person at the centre of the process. It will be important that information is widely available and that any implications for professional practice are considered carefully prior to commencement once the Bill is enacted. At this time it is anticipated that

the first year for implementation of the Bill will be 2007/08.

Financial Implications

22. Initial estimates of the costs for implementing the Bill in Wales have been made, including costs for training, costs for incorporating changes in practice and for making arrangements for Independent Consultees. These amount to initial set up costs of £0.6m in 2006/07 and then recurrent ongoing costs of £1.09 million per annum from 2007/08. These costs have been included as inescapable commitments in the 2004 Health & Social Care Budget Spending Round (BSR) bid, but funding has not yet been confirmed.

Action for Committee

23. The committee is asked to note this paper.

Jane Hutt
Minister for Health and Social Services

Contact Point: Gareth Bartley, Community, Primary Care Health Services Policy, Tel: 029 2082 3294