

Why campaign for new legislation?

There is no legal framework in England or Wales covering mental capacity – that is, about who can make decisions. The lack of clear, consistent legal guidance is eroding the rights of some people to make their own decisions.

Millions of people are affected by this issue, including those with a learning disability, physical disabilities, mental health problems, dementia, and head injuries. It also affects families and friends, who have no legal right to be involved in making decisions on important welfare and medical matters on behalf of someone who does not have capacity.

The law also fails to prevent the abuse of people whose inability to make their own decisions is due to disability, illness or injury.

The situation is different in Scotland, where new legislation on the issue was introduced in 2000. This ensured people are able to make decisions about their money, welfare and health and to plan for a future situation when they may not be able to continue making such decisions. The law in England and Wales lags behind that of Scotland and other countries around the world (see factsheet 9).

How do we know that the current legal framework is confusing and misunderstood?

In a recent poll conducted for the Making Decisions Alliance, we asked members of the public:

If someone had an accident resulting in head injuries leaving them unable to make decisions for themselves, who out of the following, if anyone, do you think would have the right to make decisions on their behalf?

92% think that their partner would be asked to make these decisions.

98% think that their partner should have the right to be involved in making these decisions.*

Would a new law help?

At the moment there is no legal definition of ‘capacity’. This means that people without capacity do not have their rights protected because the law does not fully recognise their particular status and situation. It also means that it is very difficult to decide who has capacity and

*NOP poll, October 2002

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who does not when a decision has to be made. As a result, it is hard for the law to protect those who are unable to make their own decisions or who need support in decision making. The law also fails to protect carers and professionals who may need to make decisions on behalf of someone else.

What do we want legislation to include?

The Government set out its position on adults who lack capacity to make decisions in *Making Decisions*, published in 1999. This was based on extensive debates and consultation with a range of different groups. The Government has said that it believes that a new legal framework on mental capacity is needed. The Making Decisions Alliance shares this view.

We want a new rights-based legal framework on mental capacity to:

- define what mental capacity is and clarify how a person's capacity is assessed
- enable people to make as many of their own choices as possible for as long as possible
- ensure that people have the right to access advocacy and support to help them make and communicate their decisions.
- protect those people who cannot make their own decisions in certain circumstances

- allow people to make plans for the future and to be able to choose one or more people to manage their medical, welfare and/or financial affairs under a power of attorney when they are no longer able to do so
- clarify the role of advance statements
- give legal authority to carers to make appropriate day to day decisions on behalf of a person who lacks capacity and who has not nominated someone to make decisions on their behalf
- define what it means for someone to act in another's 'best interests' and make sure that these decisions are based, as far as is possible, on what that person would have wanted
- make sure that people have access to advocates and support to help them make and communicate their decisions
- provide both statutory guidance and safeguards for professionals working with people who do not have sufficient capacity to make their own decisions.

Does the Government agree that legal reform is needed?

Yes. As stated above, the Government set out its position on the issue of adults who lack capacity to make decisions in *Making Decisions*, published in 1999. It agrees that new legislation is needed on mental capacity and that it should cover most of the points listed above.

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So why doesn't the Government introduce legislation?

The Government has said repeatedly that it wants to introduce legislation on decision making as soon as parliamentary time allows.

However, legislation in other areas may be considered to be of greater priority.

There are, in fact, two main potential obstacles to legislation on mental capacity finally being introduced.

Firstly, there is the cost of implementing new legislation. We believe, however, that the present situation is also costly – both in human terms (stress caused to people

and their families) and financially (in taking cases to court to resolve disputes). A legislative framework would be easier to plan and budget for. There needs to be more research into the potential costs and savings of introducing new legislation.

And secondly, discussion about decision making can lead to complicated ethical and moral debates. These can be controversial. But for the Making Decisions Alliance the issue is, fundamentally, clear and uncontroversial. We believe that the UN Declaration of Human Rights, which this country signed up to many years ago, enshrines the right of someone to make decisions about their own lives. The legislation that we are arguing for, if applied properly, would protect this right.

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