

The long journey to reforming the law on mental capacity

A very thorough and extensive consultation has taken place to review the legal framework on mental capacity. Despite the lengthy consultation process – set in train by the Law Commission in 1989 – resulting in a draft Bill and, more recently, publication of *Who Decides* and *Making Decisions* by the Lord Chancellor's Department, no legislation has been forthcoming.

| Date | Mental capacity consultations and public statements |
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| 1989 | <p>Consultation papers</p> <ul style="list-style-type: none"> • The Law Commission begins a six-year consultation period on mental capacity. There was extensive public consultation on all aspects of mental capacity. This culminated in a Mental Incapacity Law Commission Report and a draft Bill. • Mentally Incapacitated Adults and Decision-Making: An Overview • Mentally Incapacitated Adults and Decision-Making: A New Jurisdiction • Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research • Mentally Incapacitated and Other Vulnerable Adults: Public Law Protection |
| 1995 | <p><i>'...the fact that many people who previously lived in an institutional setting are now living in the community where greatly increased opportunities for substitute decision-making arise; how advances in medical science now enable people to live longer than was previously the case often with their mental capacity impaired. These demographic, social and medical changes have taken place at the same time as a recognition by the courts that there is now no person or court in England and Wales who can lawfully take personal welfare or medical decisions on behalf of adults who lack capacity to take decisions for themselves. The Commission's study has made it abundantly clear that there is a pressing need for reform.'</i> Mental Incapacity Law Commission Report, March 1995</p> |
| 1997 | <p>Consultation paper <i>Who Decides?</i> - Making decisions on behalf of mentally incapacitated adults</p> <p>A Green paper issued by the Lord Chancellor's Department for further</p> |

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| | <p>consultation on a possible legal framework to manage the welfare, medical decisions and financial affairs of adults who lack capacity to consent.</p> <p><i>'The Government believes there is a clear need for reform of the law in order to improve and clarify the decision making process for those who are unable to make decisions for themselves, or those who cannot communicate their decisions. These are some of the most vulnerable people in our society. The law in this area has developed in piecemeal fashion, and does not always offer sufficient protection either for mentally incapacitated adults, or for those who look after them...'</i> Who Decides? – Making decisions on behalf of mentally incapacitated adults, December 1997</p> <p><i>'...As it currently stands, the law affords little protection either to mentally incapacitated adults, or to those who care for them. The law is confusing and fragmented.... The current law lacks coherence because it has developed piecemeal. It is unsystematic and full of glaring gaps....The Government is determined to make progress in an area in which those who lack mental capacity, and those who care for them, are not adequately protected under the law today. It is equally determined that any reform should command the widest possible public support.'</i> Lord Irvine of Lairg, The Lord Chancellor, House of Lords, December 1997</p> |
| <p>1999</p> | <p>Command paper Making Decisions – the Government’s proposals for making decisions on behalf of mentally incapacitated adults. The report was issued in the light of responses to the consultation paper <i>Who Decides?</i> (this was a policy statement rather than a White Paper)</p> <p><i>'This policy statement sets out the Government’s proposals to reform the law in order to improve and clarify the decision making process for those who are unable to make decisions for themselves, or who cannot communicate their decisions.... These proposals would apply to people without capacity aged 16 or over, except where otherwise indicated. Clearly, legislative changes can only be made when parliamentary time allows.'</i> Making Decisions, October 1999</p> <p><i>'...The Government is committed to clarifying and improving the legal position for incapacitated people and their carers as soon as we can...That is the Government's aim too, consistent and commensurate with our</i></p> |

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| | <p><i>responsibility and duty of care both to individuals and to the wider society...'</i> Keith Vaz MP, then Parliamentary Secretary at the Lord Chancellor's Department, in a speech to Mencap in July 1999</p> <p><i>'...Mentally incapacitated people are among the most vulnerable in our society. They must often rely on others to be their champions.... We have decided to legislate, when parliamentary time allows, to provide a range of key principles to give clear guidelines to those making decisions about the care and welfare of the incapacitated.'</i> Lord Irvine of Lairg, The Lord Chancellor, in a speech to the Law Society Conference on Mental Incapacity, November 1999</p> |
| <p>2000</p> | <p><i>'...we wish to empower mentally incapacitated adults as much as we can, by allowing them, if it is possible, if it is appropriate and if it is in the public interest, to make provision for the care they want before they lose capacity, and we want to ensure that when decisions are made about the care and welfare of mentally incapacitated adults, that those decisions contain adequate safeguards and protection, they are made consistently and they are made in line with each adult's own particular best interests...'</i> Jane Kennedy MP, then Parliamentary Secretary at the Lord Chancellor's Department, in a speech on Mental Incapacity to the Central Law Training Conference in April 2000</p> <p><i>'What guides us in this scrutiny is, first and foremost, concern for the most vulnerable in our community... We propose to reform the law in order to improve and clarify the decision-making process for those who are unable to make decisions for themselves. We will legislate, when parliamentary time allows, to provide a range of key principles to give clear guidelines to those making decisions about the care and welfare of a person without capacity.'</i> Jane Kennedy MP, then Parliamentary Secretary at the Lord Chancellor's Department, in a speech to the Second European Congress on Family Law in May 2000</p> |
| <p>2001</p> | <p><i>'The Government recognise the need for a fundamental reform of mental incapacity law and will therefore introduce legislation to implement the proposals in Making Decisions when parliamentary time allows.'</i> Rosie Winterton MP, Parliamentary Secretary at the Lord Chancellor's Department, in a House of Commons parliamentary question in July 2001</p> |

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| 2002 | <p><i>Making Decisions: Helping people who have difficulty deciding for themselves</i> This is a consultation paper on six guidance leaflets to provide help and guidance to adults who, due to mental incapacity, need support to make decisions. The paper is also aimed at helping carers.</p> <p>The Government has accepted the need for changes in the law to improve and clarify the decision making process for people unable to make decisions for themselves because of problems of mental capacity. <i>Making Decisions</i> (published in October 1999) sets out the Government’s proposals for law reform. But new legislation takes time.’ <i>Making Decisions: Helping People who have Difficulty Deciding for Themselves, April 2002</i></p> <p><i>‘The issues you are discussing affect the lives of us all in one way or another and at one time or another – as someone we know or love needs help in making decisions as they get older, or following some traumatic event.... We remain committed to introducing legislation as soon as parliamentary time allows, but I am sure you are aware of how busy the current legislative schedule is. I can assure you that in the Lord Chancellor’s Department we are doing everything we can to ensure the case is made strongly.’ Rosie Winterton MP, Parliamentary Secretary at the Lord Chancellor’s Department, in a speech at the Joint Conference of the Law Society and the Royal College of Psychiatrists in June 2002</i></p> <p>Yet more consultation...</p> <p><i>‘I now want to turn to the recent establishment of a consultative forum, involving many of the voluntary organisations and stakeholders within the area of mental capacity. That forum met for the first time last week and the event stimulated discussion amongst the delegates and ourselves, helping us to focus on what matters to those who are involved in caring for incapacitated adults in their daily lives.’ Rosie Winterton MP, Parliamentary Secretary at the Lord Chancellor’s Department, in a speech at the Joint Conference of the Law Society and the Royal College of Psychiatrists in June 2002</i></p> <p>In December 2002 the Lord Chancellor’s Department announced “the start of work on a draft Bill” to build on the Government’s 1999 Policy Statement and follow on from the Law Commission’s recommendations in 1995.</p> |
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