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Department for
Constitutional Affairs

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FEBRUARY 2004

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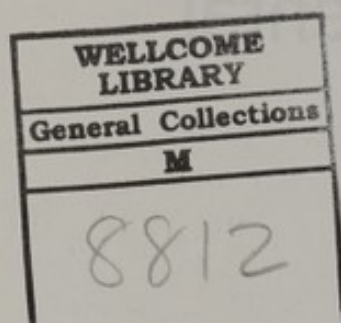


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The Government Response to the Scrutiny Committee's Report on the draft Mental Incapacity Bill

**Presented to Parliament by the Secretary of State
and Lord Chancellor by Command of Her Majesty
February 2004**



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Summary

Introduction

- 1 The Government warmly welcomes the report of the Joint Committee on the draft Mental Incapacity Bill. We recognise the hard work undertaken by the Committee to issue such a comprehensive report in a short period of time and its commitment in gaining such a wide range of evidence on the Bill.
- 2 We are pleased that the Committee endorses the purpose of the draft Bill and sees the need for legislation in this area. We agree with the Committee that the Bill covers a complex and sensitive area, and recognise that many people have strong feelings about its content and purpose. The Government does intend to legislate following the Committee's report, and we are working towards **introduction of a revised Bill later in this Parliamentary session.**

General Principles

- 3 The Government welcomes the Committee's agreement that the main principles of the draft Bill are correctly stated. The aim is to help those who may lack capacity to make their own decisions where they can and enable sound decisions to be made for them when they cannot. The Committee asked us to go a step further and to ensure that these principles are even more clearly stated at the outset of the Bill. We are committed to achieving this.
- 4 **The Committee has fully endorsed the functional test of capacity, which is a key foundation of the draft Bill. They have also endorsed the concept of best interests.** We welcome this as these are fundamental to the improved decision-making framework that we want to introduce. The Committee has pointed out that decision makers will need to be clear about what best interests requires of them. We recognise that this will be one area that the Codes of Practice will need to cover.

General Authority

- 5 The concept of the General Authority was supported by the Committee in that it seeks to create a statutory form of the common law defence of necessity. Nevertheless the Committee found that the term 'General Authority' was unhelpful and it has given rise to concerns that the General Authority would allow too much licence to intervene in the lives of people who may lack capacity. This is not the Government's intention.
- 6 We recognise these concerns, and will seek both to rename and redraft the General Authority to make its proper intention clear.

Formal Decision Making Mechanisms

- 7 The Committee noted that the draft Bill would replace the present Enduring Powers of Attorney (EPAs) with Lasting Powers of Attorney (LPAs). This gives us an opportunity to improve the safeguards available for people who use these powers. The chief safeguard that the Bill would introduce is that LPAs would have to be registered with the Public Guardian. At present EPAs can be used without an external scrutiny or record. The Committee agreed that this should be a significant improvement.
- 8 The draft Bill's proposal to introduce a new Court of Protection with an accessible single jurisdiction was welcomed by the Committee. We acknowledge that public funding for help and advice will need to be made available, as now, to enable those with limited assets to have access to the Court of Protection and are undertaking further work on the detail of this.
- 9 We agree that deputies appointed by the Court to take decisions on behalf of those who lack capacity will need clear standards of conduct and limitations on their autonomy. We will seek to use a combination of the Bill itself, Codes of Practice and guidance to achieve this. We also agree that deputies should not, as a matter of course, be able to take decisions on life-sustaining treatment. Nevertheless, there may be exceptional circumstances where the Court is convinced this offers the best protection to the person who lacks capacity. We intend to make clear in the Bill that this power can only be given expressly and in exceptional circumstances.

Advance Decisions to refuse treatment

- 10 The Committee agreed that it is right that people who have capacity should be able to state in advance what medical treatment they would not want to have in case they should become incapable in the future. The Committee, thus, agrees that advance decisions to refuse medical treatment have a place in the Bill. They point out that clear safeguards need to be in place when using advance decisions and recommend that the advance decisions should be made in writing and independently witnessed. We understand their concerns and are carefully considering this recommendation. We want to make sure that putting in extra procedural requirements when making an advance decision would not make it more difficult to withdraw an advance decision if circumstances changed. We fully agree that doctors must satisfy themselves that advance decisions are valid in relation to the treatment concerned, and that we shall need to give guidance on how advance decisions work.
- 11 We welcome the Committee's clear view that nothing in the draft Bill would permit euthanasia. The Committee wondered whether it would be advantageous for the Bill to incorporate additional assurances on this point. The Government has considered this and we believe that we can best provide reassurance by ensuring that clear guidelines are in place for when decisions are made about medical treatments on behalf of people who lack capacity.

Links with Mental Health Legislation

- 12 The Government is working simultaneously on preparing legislation both on mental incapacity and mental health issues. The Committee noted that these two pieces of legislation serve different purposes, but that there are some grey areas between the two. The Department for Constitutional Affairs and the Department of Health are working closely together on the two Bills to ensure that they do complement each other.

Codes of Practice

- 13 The Committee recognised that in this type of legislation the Codes of Practice will be critical to the success of the Bill. We agree that this is the case and that producing clear, comprehensive and workable Codes will be challenging. We have already begun work on the Codes and our intention is to have a draft outline of the Codes for Parliament to see at Committee stage.
- 14 Full consultation on the Codes will take place after the Bill receives Royal Assent. The final version of the Codes will be laid before Parliament before they are implemented.

Protecting vulnerable people from abuse

- 15 The Committee recommended that the draft Bill should go further in the protection it offers against abuse and exploitation of those lacking capacity. However, the Government is already taking action to protect vulnerable adults against abuse. In particular, the 'No Secrets' guidance requires Councils to liaise with other public authorities and other agencies in their area and to produce written and agreed, local procedures for handling incidents of abuse concerning vulnerable adults. It is right that this extends beyond adults who lack capacity to all vulnerable adults. The new Public Guardian under the Bill would have a role working with Councils and other agencies. The new criminal offence of ill-treatment or wilful neglect would also be another valuable tool in tackling potential abuse.

Medical Research

- 16 Although some respondents were strongly opposed to allowing medical research on those lacking the capacity to give consent, the Committee concluded, after careful consideration, that the Bill should allow it in limited circumstances, under strict controls administered through medical ethics committees. The Government appreciates these concerns and recognises that this is a sensitive issue. Yet we also recognise that without research into incapacitating illnesses, treatment or prevention for those who are potential victims of these illnesses may be inhibited. Our key consideration, therefore, is whether satisfactory safeguards could be introduced to achieve the benefits, whilst limiting the risks.

Advocacy

- 17 The Committee recommended that the Bill should acknowledge the valuable role that independent advocacy services can play in helping those lacking capacity asserting their rights. The Government agrees that independent advocacy has a role to play in supporting those who may lack capacity. The Bill itself provides new ways of supporting those who may lack capacity by allowing for the possibility of attorneys and deputies. It also lays down for the first time a requirement to consult with everyone interested in the welfare of the person concerned. We want to make sure that those who may lack capacity have access to the most appropriate means of helping them to make their own decisions and participate in decisions that affect them.

Additional matters

- 18 The Committee commented on the outstanding need for scrutiny of the resource implications of the Bill. The Government is committed to providing further information on this and will do so when the Bill is introduced into Parliament.
- 19 We could not include provisions in the Bill on access to information and on jurisdictional issues (e.g. if an attorney wants to act in Scotland) in the draft Bill prior to publication. The Committee noted this and also that the Government has committed to including these provisions when the revised Bill is presented to Parliament itself.
- 20 Finally, the Committee concluded that to send a more positive message about the enabling ethos of the Bill it would be more appropriate to name the Bill 'Mental Capacity' Bill. The Government fully appreciates the reason for this recommendation and shares the Committee's desire to emphasise the positive benefits the Bill is seeking for people who may lack capacity. We are committed to achieving this.

Detailed Government Response to Joint Committee's Recommendations

Recommendation	Response
<p>R1 We recommend that consideration be given to a new procedure for setting deadlines for Joint Committees carrying out pre-legislative scrutiny to enable them to give full and proper consideration to all the issues involved and to allow those wishing to offer evidence to the Committee a fair and adequate opportunity to do so.</p>	<p>We acknowledge the Joint Committee's concerns about the timetable which it was required to meet, and recognise its achievement in producing what is a very comprehensive and thought-provoking report in a relatively short space of time. The Government fully accepts the need for Committees to be given sufficient time to conduct pre-legislative scrutiny. However, the constraints of the legislative programme, and the need to give Departments sufficient time to fully consider Committees' recommendations, can mean that the required deadline has to be sooner than the Committee may wish. The Government is willing to explore how these problems could be eased, perhaps by setting up Joint Committees further in advance of the publication of the draft bill.</p> <p>The Government also recognises the need for Parliament and its Committees to have sufficient notice of the publication of draft bills. This Session the Government has given the two Houses notice at the very beginning of the Session of the draft bills which it proposes to introduce and of their provisional timetable.</p>
<p>R2 We appreciate that this inquiry has given the Government much food for thought about the Bill. We also recognise that the difficulties and implications raised later in this Report will need to be dealt with in consequential amendments. Nevertheless, we would be extremely disappointed if the Government felt unable to continue to give the Bill due priority. Those whom it is intended to help have waited long enough and deserve to have the benefits which the new legislation can bring in the very near future.</p>	<p>Again, we are grateful to the Committee for subjecting the draft Bill to such an in-depth analysis. The scrutiny process has been very valuable in highlighting areas where further thought is needed and there is work still to be done on amending the Bill and preparing for Parliamentary introduction. However, we are confident that the current momentum, much of it occasioned by the Committee's support for the Bill, will not be lost and that legislation will be brought forward at the earliest opportunity.</p>

R3

We concur with the widely-held view that a new Bill is needed to provide a comprehensive statutory framework for assisting those lacking capacity to make decisions for themselves wherever possible and for proper decisions to be made by others on their behalf where that is not possible. Even so, legislation can only go so far. It must be accompanied by changes in attitude which recognise the rights of those lacking capacity and the need to instil respect and good practice in dealing with them. The Bill must aim to preserve a satisfactory balance between enablement and protection.

The Government is very much aware that whilst the Bill is vital in establishing a fundamental legal framework to govern decision-making on behalf of those lacking capacity, the Bill is one of a range of building blocks in effecting a significant change in attitudes towards those lacking capacity. We believe however that this Bill is a very important part of the process of effecting widespread change – not least through its insistence on an assumption of capacity and an assessment of capacity dependent only on the decision to be taken. We are confident that the widespread support for the Bill which we have already encountered is an indication of the determination of stakeholders and professionals to ensure that there is a greater public awareness of the rights of incapacitated adults as well as an awareness of the need to protect them.

R4

We welcome the Department's commitment to give further consideration to the possibility of incorporating a statement of principles on the face of the Bill. We believe that such a statement inserted as a initial point of reference could give valuable guidance to the Courts, as well as helping non-lawyers to weigh up difficult decisions. Evidence given to us indicates this would be welcome to a wide range of those who have to deal with the problems of substitute decision-making in practice. We also believe that such a statement would be valuable in helping to frame the Codes of Practice based on the Bill.

The Government agrees with the Committee that the principles, such as the assumption of capacity, that already exist in the Bill are key to its operation. We understand that many people think that redrafting these principles more clearly at the outset of the Bill would be helpful and we are committed to achieving this.

Recommendation	Response
<p>R5 We further recommend that the statement of principles should include the following:</p> <ul style="list-style-type: none"> • Every adult has the right to make his/her own decisions and must be assumed to have capacity to do so unless it is proved otherwise; • Everyone should be encouraged and enabled to make his/her own decisions, or to participate as fully as possible in decision-making, by being given the help and support s/he needs to make and express a choice; • Individuals must retain the right to make what might be seen as eccentric or unwise decisions; • Decisions made on behalf of people without capacity should be made in their best interests, giving priority to achieving what they themselves would have wanted; and • Decisions made on behalf of someone else should be those which are least restrictive of their basic rights and freedoms. 	<p>We are grateful to the Committee for clearly setting out the key principles on which the Bill is based. We agree that these are the fundamental concepts of the Bill and we will include them in the Bill and the Codes of Practice.</p>
<p>R6 We are of the opinion that under the proper interpretation of article 2, the State has a secondary obligation to protect life, but an individual can choose not to uphold that right. Accordingly, the mechanisms under the draft Bill, which permit the refusal of consent to the carrying out or continuation of treatment, in accordance with the wishes of the patient, do not contravene article 2 of the European Convention on Human Rights.</p>	<p>The Government welcomes the Committee's endorsement of the fact that the Bill does not contravene Article 2 of the European Convention on Human Rights.</p>

R7

Although we have made recommendations that access to the Court of Protection should be further enhanced for persons lacking capacity, we are of the opinion that there are sufficient mechanisms provided under the draft Bill to ensure that persons lacking capacity receive a prompt, fair and public hearing.

We are pleased that the Committee views the mechanisms provided by the Bill as sufficient to enable access to a fair hearing and therefore to be compatible with rights under Article 6 of the European Convention on Human Rights.

R8

Accordingly, we are of the opinion that the arguments put to the Committee that the draft Bill violates the rights enshrined in article 3 are without merit. In agreement with the Joint Committee on Human Rights, we conclude that the draft Bill provides sufficient safeguards to ensure that the right to be free from degrading treatment is protected.

The Government also welcomes the opinion of the Committee that the Bill is compatible with rights under Article 3 of the European Convention on Human Rights.

R9

We agree with the definition of capacity and the additional clauses under Clause 1 of the draft Bill. We support the principle of presumption of capacity which underpins the draft Bill. We note the functional approach adopted by the draft Bill when allied to best interests is intended to provide protection to those lacking capacity. In this context, we believe that every effort should be made in the Bill and in the Codes of Practice to ensure that this Bill is seen as enabling rather than restricting.

We welcome the Committee's endorsement of the draft Bill's definition of capacity and the functional test, which we see as fundamentally enabling. We also agree with the Committee's belief that the Bill as a whole should be seen as enabling rather than restricting. We are currently looking at how we might redraft relevant parts of the Bill so that its enabling message is reinforced, whilst still maintaining the important balance between enabling and protecting people. We are also considering how best to embed and more fully set out this thinking in our work on the draft Code of Practice.

R10

We recommend that the current clause 3 in the draft Bill before us becomes either clause 2 of any new draft, if our recommendations as to the inclusion of the general principle is accepted; or if not, then the current clause 3 should be clause 1 of any new draft Bill. This is because it better reflects the positive nature of the Bill's purpose and will increase confidence in the operation of this legislation.

We agree with this recommendation in principle and are currently considering how we might reorder the opening clauses of the Bill. We agree that giving clause 3, the presumption against a lack of capacity, precedence is in line with the idea of enablement and the message that intervention should take place only where necessary and after capacity has been properly assessed.

Recommendation	Response
<p>R11 We see the need for recognising the issue of 'general incapacity' in the draft Bill in a way that will not undermine the primacy of the functional approach and have recommended accordingly. We endorse the criteria of capacity set out in Clause 2 of the draft Bill for assessing whether a person is unable to make a decision and therefore lacks capacity. But we recommend that consideration be given to recognising the issue of 'general incapacity' in the draft Bill in a way that will not undermine the primacy of the functional approach.</p>	<p>The Government is completely committed to the functional approach to assessing capacity. As the Committee realised, it is not immediately easy to see how this can be reconciled with a recognition of 'general incapacity'. We do however recognise that for some people, in order to provide adequate protection, it is necessary to consider their ability to make a range of inter-related or sequential decisions; or to consider their ability to manage a whole portfolio of assets, rather than each individual asset. We do not consider this inconsistent with the functional approach and envisage giving guidance to explain this.</p>
<p>R12 We recommend that the Codes of Practice should state clearly that all relevant parties must use appropriate strategies to maximise the chance that persons will have the capacity to make decisions. This might include using specific communication strategies, providing information in more accessible form, or treating an underlying mental disorder to enable a person to regain capacity.</p>	<p>We recognise that the Codes of Practice will play an important role in providing detailed guidance but they will also be important as a means of reinforcing the key messages contained in the Bill, for example the principle that everyone should have the right to make as many of their own decisions as possible. We fully intend that the Codes will reinforce this message and will provide information on how such decision-making capacity might be maximised, including considerations such as those mentioned by the Committee in its recommendation.</p>
<p>R13 We endorse the functional approach to the determination of incapacity and the need to demonstrate 'an impairment of or a disturbance in the functioning of the mind or brain' in asserting whether a person's capacity is temporary or permanent. We do not see the need to distinguish in the Bill between the temporary or potentially permanent nature of incapacity.</p>	<p>Again, we welcome the Committee's endorsement of the functional test of capacity, which we consider to be one of the most important provisions in upholding the rights of adults lacking capacity. They have recognised the need for there to be some impairment or disturbance in the functioning of the mind or brain (a diagnostic threshold) before evidence of inability to make a decision should be considered. We are pleased that the Committee recognises that the question of whether incapacity is temporary or permanent should not form part of the test (although it is important in terms of 'best interests').</p>

R14 We recommend that the Codes of Practice should set out clearly the need for evidence of both 'impairment of or disturbance in mental functioning' and of lack of capacity, as defined in the draft Bill, and the appropriate means of determining that evidence in the best interests of the person concerned so that the criteria against which an appeal might be judged are transparent.

Again, assessment of capacity is a key area in which the Code needs to provide detailed and practical guidance, bearing in mind the millions of different situations and circumstances in which this will take place. We are aware of the need to achieve in the Code or supporting guidance the correct balance between detailed information for professionals involved in the assessment of people potentially lacking capacity and clear information for lay people.

R15 We recommend that the Codes of Practice should make clear that those acting under the General Authority or an LPA must appreciate the concept of capacity/incapacity and be fully aware of the responsibilities thus placed on them when carrying out or assisting decision-making on behalf of any person who is considered incapacitated. While it would be unreasonable to expect all those acting under the General Authority to have the necessary knowledge to determine that person's capacity to make any given decision, it is reasonable to expect them to take appropriate advice and have appropriate people to assist them where necessary. The Codes of Practice must set out a framework on these matters which is readily understandable to lay persons.

The Codes of Practice will play an important role in setting out the responsibilities of both formal substitute decision-makers and those acting in the course of providing care, but without formal authority. The Committee is therefore right to point out that the Codes must give guidance to all who have to consider and assess capacity. We envisage that as well as providing information on what must be done, the Codes will also provide guidance, and signposts to further more detailed guidance where necessary, on what constitutes good practice when acting for or making decisions on behalf of others.

Recommendation	Response
<p>R16 We considered carefully the dilemma created when a person with apparent capacity was making repeatedly unwise decisions that put him/her at risk or resulted in preventable suffering or disadvantage. We recognise that the possibility of over-riding such decisions would be seen as unacceptable to many user groups. Nevertheless, we suggest that such a situation might trigger the need for a formal assessment of capacity and recommend that the Codes of Practice should include guidance on:</p> <ul style="list-style-type: none"> • whether reasonable doubt about capacity and potentially serious consequences of not intervening indicated the need for an appropriate second opinion; • circumstances in which the statutory authorities should be responsible for providing a level of support as a safeguard against abuse; and • where there was genuine uncertainty as to capacity and an urgent decision was required to prevent suffering or to save life, the benefit of doubt would be exercised to act in that person's best interests in relation to any assessment of capacity. 	<p>We are aware of the difficulties presented in such circumstances and accept that the Codes will need to provide guidance in such circumstances. We are therefore grateful to the Committee for their consideration of these issues and we will use their recommendations as the basis for considering how the whole issue of unwise or self-destructive decisions is dealt with in the Codes.</p>
<p>R17 We take the view that the general principles set out at the start of the Bill should confirm that any act done for, or any decision made on behalf of a person who lacks capacity must be in the person's 'best interests', and agree that statutory guidance on determining best interests should be included in the Bill.</p>	<p>The concept of 'best interests' is key to ensuring that steps for or decisions made on behalf of those who lack capacity are taken correctly and with the full involvement of all those close to the person. We are pleased that the Committee has agreed with the Government's view that although statute cannot ever adequately define the nature of best interests in each individual case, the checklist of criteria that appears in the draft Bill provides the right starting point for making such a determination of best interests.</p>

<p>R18 We agree that no list of 'best interest' factors can ever be comprehensive or applicable in all situations. We therefore endorse the approach of a statutory checklist of factors to be considered in all cases should be set out in statute. However, it should be made clearer in the Bill that, in addition to these common factors, all other matters relevant to the particular individual and particular decision must also be considered.</p>	<p>We welcome the Committee's endorsement of the statutory checklist approach for best interests. We can provide reassurance that the statutory checklist in clause 4 is not intended to be in any way exhaustive. It operates in the same way as the checklist of factors found in the Children Act when considering the welfare of the child. In redrafting, we will consider whether this can be further emphasised.</p>
<p>R19 In the context of the comprehensive decision-making framework created under the draft Bill, we concluded that the concept of benefit may be too prescriptive if added to the checklist.</p>	<p>We accept the Committee's conclusion that it would not be appropriate to add the concept of benefit to the best interests checklist as to do so would potentially be too prescriptive. There may be instances where the concept of 'benefit', especially if interpreted as requiring 'positive benefit' could act as an unjustifiable barrier to a course of action which was indeed in an incapacitated person's overall best interests. We would be concerned about it being interpreted as imposing a 'starting-point' of inaction.</p>
<p>R20 We concluded that the addition of the word personal to best interests would not provide any better clarification and indeed might cause confusion.</p>	<p>We welcome the Committee's conclusion regarding use of the word personal. We believe that the best interests criteria as set out in the Bill, where the Bill states that this is in the 'person's best interests' accompanied by further guidance in the Codes of Practice, will be sufficient to ensure that all factors relevant to the person lacking capacity are taken into account when determining their best interests.</p>
<p>R21 We do not recommend any weighing or giving priority to the factors involved in determining best interests. It will be important for the Codes of Practice to provide guidance on how judgements about best interests may be reached, particularly where there are conflicting or competing concerns.</p>	<p>Again, we welcome the Committee's view in this area. We assume there is no contradiction between this and Recommendation 5 (4th bullet point, which mentions 'giving priority' to achieving what the person would have wanted). We believe that any prioritising of factors within the best interests checklist would have the effect of unnecessarily fettering the application of all factors in the checklist. We believe that the checklist as it is in the draft Bill is sufficiently flexible to allow the factors to be applied to any particular individual in their particular circumstances. We agree that the Codes of Practice will be particularly valuable in expanding on the determination of best interests, particularly in the case of potential disagreements.</p>

Recommendation	Response
<p>R22 We seek reassurance that the form of words used in the Bill will require a person's values to be given due weight.</p>	<p>It is intended that the consideration of someone's best interests would include consideration of a person's values. In particular, clause 4(2)(c) (ii) says that regard must be had to the factors which the incapacitated person would consider if he were able to do so. 'Factors' here would include 'values'. Nevertheless, we recognise that it may be possible to make the drafting clearer here and we will seek to do so if possible. We will also explain this in the Code.</p>
<p>R23 We considered it would be too onerous on relatives, carers and other informal decision-makers to require an understanding of human rights legislation when determining best interests. The Codes of Practice and any Departmental guidance issued to the general public should explain the relevant human rights considerations.</p>	<p>We welcome the Committee's thinking in this area and agree that a full understanding of human rights legislation would be unduly onerous for the majority of decision-makers under the Bill. We envisage that the Codes of Practice will be a valuable tool in providing the correct amount of information which potential decision-makers need to know.</p>
<p>R24 We consider that specific provision should be made to confirm that consultation with people close to the incapacitated person will include consideration of their views on what is likely to be in that person's best interests. In advance of the legislation anticipated on the status of civil partners we would expect the expression 'people close to' to include civil partners.</p>	<p>We accept the Committee's recommendation that such a provision should be inserted in order to make clear that consultation with those close to an incapacitated person should also cover the question of what they think is in that person's best interests. We confirm that people whose views we would expect to be taken into account would include civil partners. This is implicit in clause 4 (2) (d) (ii) of the Bill, and we will make it explicit in the Code.</p>
<p>R25 We recommend that the drafting of Clause 4 be amended to impose a requirement on decision-makers to seek the least restrictive option, and to specify that, in determining best interests, account must be taken of all the factors set out in the checklist.</p>	<p>We agree in principle that such a provision could reinforce the Bill's message of enablement and could provide further safeguards against unwarranted interventions in the lives of people lacking capacity. We would, however, be concerned about divorcing the 'least restrictive option' factor from the best interests principle and the checklist, in case people felt obliged to pursue the least restrictive option even if it were not in fact the option best promoting the person's best interests. In redrafting the Bill, we will seek to address the Committee's concerns while avoiding this danger.</p>

R26 We take the view that a requirement on decision-makers to seek the least restrictive option would involve having to consider whether any intervention at all was necessary. We therefore see no need for a specific 'no intervention' provision other than in relation to court proceedings.

We will consider this recommendation in reworking the best interests checklist and the place of the 'least restrictive option' factor.

R27 We strongly recommend that the requirements of a standard of conduct be included in the Codes of Practice aimed at those exercising formal powers under the Bill. We also recommend that the Department should issue clearly understandable guidance to informal decision-makers on the standards of conduct expected.

We agree that the Codes of Practice should provide clear guidance on the standards of conduct expected from formal decision-makers under the Bill. As mentioned in recommendation 28 below, the legal issues relating to standards of conduct of attorneys and deputies are complex. We are exploring using a combination of clearer drafting in the Bill, guidance in the Codes and additional guidance as appropriate to set out the requirements on these decision-makers.

R28 We seek reassurance that a common law duty of care would apply to all decisions makers under the Bill and ask that consideration be given to imposing a duty of care through express statutory provision. Here, too, the Department will need to issue guidance to informal decision-makers on the expected standards of conduct.

This is a complex legal area where the Mental Incapacity Bill works in conjunction with the common law.

The Bill expressly provides that a deputy is an agent for P (clause 19(6)). This triggers a range of common law duties under the law of agency, including a duty to act with due care and skill. It is also well-established that an attorney is an agent for the donor, with similar common law duties. An agent may also be liable in tort for acting negligently. We are considering whether it would be helpful to specify that an attorney is an agent for P. We tend to think it would be more useful to use the Codes of Practice to set out, in ordinary language, the range of common law duties which apply to agents, and the way these interact with the new statutory duty to act in P's best interests.

A person acting under the general authority will not generally be acting as an agent for P but will always be under the new statutory duty to act in the person's best interests. All of these people (deputies, attorneys and those acting under the general authority) may have a 'duty of care' to P, but this is independent of the Bill. The legal significance of having a duty of care is that you may be liable in the tort of negligence if you act or fail to act in such a way that loss is caused. The Bill does not affect anyone's obligations in the law of negligence. Many people involved with P (clinicians, social care professionals, informal carers who have taken on a caring role) will have such obligations.

Recommendation	Response
<p>R29 We recommend that the Codes of Practice should explain more clearly the circumstances in which reasonable belief should be relied upon.</p>	<p>The Codes of Practice will contain guidance in this area, including what is meant by reasonable belief (and, potentially, how this should be viewed 'objectively'). We envisage that this is an area where the use of case studies and scenarios may be especially useful in conveying the guidance.</p>
<p>R30 We recommend that clauses 6 and 7 be redrafted to clarify the legislative intent of the general authority, in order to counter what appear to be widespread misunderstandings of the concept and its purpose. It might also be helpful for the Department to consider an alternative to the term 'general authority' which would avoid its misleading connotations and clarify that it is intended to convey permission to act in the incapacitated person's best interests in circumstances currently covered by the Common Law.</p>	<p>We acknowledge the concerns raised both by the Committee and by several stakeholder groups, about the nature of the general authority and how this is presented in the draft Bill. This is an extremely complex area of law and as a result there have been misunderstandings about the purpose of the general authority.</p> <p>We now agree that the term 'general authority' has created false and unhelpful impressions and we will seek to change this.</p> <p>The purpose of the general authority is to enunciate a statutory defence against liability for those who are caring for someone who lacks capacity and who engage, as part of the care they are giving, in actions that are <i>prima facie</i> unlawful (in the law of tort). The general authority does not give anyone any new right to intervene or take particular actions. It follows that it gives rise to no accompanying duty to act.</p>
<p>R31 We recommend that the Department should clarify the term 'care' in clause 6(1) and in any guidance given under the Codes of Practice.</p>	<p>The general authority is intended to be relevant when things that are done 'to' or 'for' the person who lacks capacity – things that would normally require the person's consent. For example, washing the person, entering their house, giving medical treatment. The general authority confirms what is already the law, that these actions will not be wrongful if they are reasonable and in the best interests of the person, and there is no-one else who has authority to provide the consent (e.g. an attorney or deputy).</p> <p>We have recognised that the drafting of clause 6 overall has been difficult to understand and will seek to clarify all its elements.</p>

<p>R32 In addition, we recommend that a sustained and comprehensive training programme for professionals, and a public information campaign for informal carers should be implemented, in order to provide these groups with an accurate understanding of the general authority.</p>	<p>We agree with the Committee that it is important for mental incapacity legislation to be accompanied by appropriate training for professionals who will effectively be implementing the legislation on the ground. There is also a need for substantial information to be provided for informal carers who will be affected by the Bill's provisions. This training and guidance will complement information contained in the Codes of Practice and we have already started work, in conjunction with the Department of Health, on assessing the level of guidance and training which is currently available on decision-making procedures so that we can accurately assess what more needs to be provided.</p>
<p>R33 We recommend that in re-drafting clause 6 the Department should emphasise the over-riding importance of the best interests of the person concerned, as defined in clause 4.</p>	<p>We agree that no-one should benefit from the proposed statutory defence against liability unless they have adhered to the best interests principle and checklist. We will attempt to make this very clear in the Bill, and in the Codes.</p>
<p>R34 We are concerned that the provision of the general authority should not undermine the 'enabling' ethos of the draft Bill.</p>	<p>We hope that by stressing the fact that the general authority is a defence against liability as opposed to a positive right to intervene that this provides some comfort to those who feared its over-use or abuse. The Government fully agrees that the 'enabling' ethos of the Bill is very important. We will seek to make clear that no-one will be able to rely on the defence against liability unless they have gone through the steps of helping the person to make their own decision and assessing capacity according to the functional test.</p>
<p>R35 We recommend that a reasonable belief should be objectively held.</p>	<p>We agree, in principle, that a reasonable belief (as to a person's lack of capacity) should be objectively held in order to ensure that the general authority is used correctly and only where necessary. We are exploring how we can make that intention clear in the Bill or in the Codes.</p>

Recommendation	Response
<p>R36 We strongly recommend a redrafting of the clauses concerning the general authority in order to clarify that its use is intended to be limited to day-to-day decision making and emergency situations.</p>	<p>We hope that the above responses to the Committee's earlier recommendations provide some reassurance that the general authority is not intended to be the broad, all encompassing power that has been feared. As the key purpose is to provide a limited and targeted defence against liability, we cannot agree that it would be appropriate to limit it to day-to-day or emergency situations.</p> <p>For example, a doctor needs the defence against liability so that he can undertake a serious operation even though it is neither an emergency nor 'day to day' for the patient. Without this defence the doctor may wait, as sometimes happens now, for the condition to become serious, so that he is covered by taking emergency action. This would not be in an incapacitated person's best interests. It will not always be possible, or appropriate, for everyone to have an LPA or deputy to deal with such a situation as it would cause unacceptable delay.</p> <p>To ensure that the general authority is not used blithely for serious decisions we will seek to make it clear, in the Bill or the Codes, that for more serious decisions the requirements of reasonableness and best interests will only be met by careful and measured consideration of all relevant issues. For example, it will obviously be 'practicable and appropriate' to consult family members and carers about a major issue such as a non-emergency operation. The requirement to establish what the incapacitated person would wish and what their values are 'so far as ascertainable' might call for more extensive efforts and more specialist input if the matter is serious or finely-balanced. The same would apply to the question of what is the least restrictive option.</p> <p>It follows that although the general authority covers a wide range of situations, it does require greater process safeguards for the more serious decisions, by the application of the reasonableness and best interests tests.</p>
<p>R37 We recommend that the Codes of Practice relating to the general authority should include a specific reminder that all practicable steps must be taken to help an incapacitated person contribute towards the process of every decision made on their behalf, however minor.</p>	<p>Again, we fully intend that the Code of Practice should reinforce the Bill's key message that an incapacitated person must have as much involvement as possible when steps are taken or decisions made on his behalf. In providing guidance in this area, we will need to consult both professionals and lay people about current good practice and, for example, technological advances in communication that potential decision-makers should be aware of.</p>

R38

We conclude that the Codes of Practice accompanying the draft Bill should emphasise that all persons undertaking actions or decisions under the general authority must be aware that they may subsequently be called upon to justify their actions. They should therefore maintain sufficient records in order to be able to show that their actions were reasonable and in the best interests of the person in question.

It is right that if anyone is seeking to use the general authority to defend themselves for an allegation of unlawful action then they would need to justify the action they have taken. For the defence to be successful they will need to demonstrate that they had an objective reasonable belief that the person lacked capacity, having first sought to help the person make their own decision. They will also need to show that they acted in the person's best interests and had regard to the statutory checklist. It is appropriate that the Codes should warn those using the general authority that this is what would be required and we accept that record-keeping is likely to be important. Much of this is current best practice.

R39

We disagree with Lord Filkin's assessment. We recommend that consideration be given to imposing a statutory requirement for an independent second medical opinion to be sought in relation to the need for serious or invasive forms of medical treatment. Furthermore they conclude that greater availability of advocacy services would provide a counter to the potential inappropriate use of the general authority.

At present where a treatment has particularly serious consequences or where a doctor has some doubt about how to proceed it is standard practice to gain a second opinion. The Government intends this practice to continue. The Bill's emphasis is rightly on reasonableness and best interests (and the checklist) in providing treatment. It is these requirements that determine whether providing a treatment is lawful. We want to make sure that any requirement for second opinions in particular cases does not detract from the importance of reasonableness and best interests. Therefore, we are currently exploring ways that we could use the Codes to lay down provisions relating to second opinions.

R40

We recommend that the Bill makes provision for a Regulation making power to enable further specific decisions to be excluded from the general authority and therefore always taken to the Court of Protection. This should include:

- sterilisation;
- withdrawal of artificial nutrition and hydration from patients permanent vegetative state;
- procedures of an experimental kind that carry significant risks (like new CJD treatment); and
- significant decisions concerning the management of financial affairs.

The list of decisions provided by the Committee represents the current situation where decisions should be taken only by a Court. The Government intends this situation to continue under the Bill. However, in this area it is important to maintain flexibility to provide for new treatments when they arise. We consider that it would be most effective to use the Codes of Practice to specify the situations where decisions should only be taken by a Court.

Recommendation	Response
<p>R41 We recommend that a right to a second opinion in cases of disagreement which have not been resolved through discussion be included on the face of the draft Bill.</p>	<p>Currently, the great majority of complaints in health and social care are resolved locally where the problem arises. New complaints procedures are being put in place to be accessible to anyone who wishes to complain about the way they have been treated, or about the services they have (or indeed have not) received. They provide for the proper investigation of the circumstances leading to the complaint, and will contain an independent element by way of the Commission for Healthcare Audit and Inspection or the Commission for Social Care Inspection, with ultimate recourse to the relevant Ombudsman. When people have a complaint to make about NHS or social services, these are the routes they should go through.</p> <p>We consider that it will be most appropriate to use the Codes of Practice to explain the mechanisms that will be available in cases of dispute.</p>
<p>R42 We accept the value of mediation services and would like to see reference in the Codes of Practice accompanying the draft Bill to their utility as an alternative mechanism of dispute resolution. In situations where strong disagreements remain over what is in a person's best interests, the dispute should always be referred to the Court of Protection.</p>	<p>We welcome the Committee's support for alternative methods of dispute resolution and we can confirm that we will be giving further information about such methods in the Codes of Practice. We are very keen that the Court of Protection is not unduly burdened with cases that could be resolved without the need for court involvement to the benefit of all parties. We are therefore currently looking at existing mechanisms for resolving disputes with the aim of utilising these procedures as an alternative to the Court of Protection. Effective use of these procedures will mean that the Court remains as a forum of last resort for cases that cannot be resolved in any other way.</p>
<p>R43 We recommend that cl.7 be redrafted to specify that detention can only be justified in a situation of urgency (incl. emergency) and that the period of detention be as short and least restrictive as possible.</p>	<p>We are undertaking further work in relation to cl.7 and the use of force and restriction of liberty. Bearing in mind ECHR rights, the Government agrees that detention should be as short and least restrictive as possible. We want to capture that requirement in the Bill whilst allowing the care of people with particular needs to continue without undue restriction.</p>

R44

We welcome Lord Filkin's acknowledgement that the Department needs to look again at the way in which the general authority is set out in the draft Bill. Unlike the Adults with Incapacity (Scotland) Act 2000 the general authority ensures that all decisions relating to personal care and health matters are brought within a statutory framework. Despite our concerns, we are convinced that with greater clarification of the intention and scope and with wider and more rigorous safeguards, the general authority would significantly improve the legislative framework for substituted decision-making in England and Wales.

We are encouraged by the Committee's albeit cautious endorsement of the general authority and we agree that we need to do further work to ensure that the true nature of the legal rule currently encompassed in the general authority is accurately and effectively presented in the Bill. We are pleased that the Committee agrees it is important to include this rule in the Bill, rather than relying on its continued (but little known) existence in the common law. We are carefully considering the concerns that have been expressed regarding the general authority – particularly its scope and the language used to describe it. We are also taking account of Scotland's experience.

R45

We recommend that the Bill should make clear whether it is intended that personal welfare decisions, excluding those relating to medical treatment, may be taken when a donor retains capacity. Further clarification of the extent and limitation of the powers, as well as guidance and training for donees, are also strongly recommended.

At present the draft Bill does make a distinction between healthcare and welfare decisions in an LPA. It provides that the attorney can take welfare, but not healthcare, decisions whilst the donor retains capacity. We agree it appears sensible for both healthcare and welfare decisions to be limited to when the donor lacks capacity. This is the approach that the Scottish Act takes and assuming that they have not found any difficulties with this approach, we propose to adopt it as well. We also agree that donees will require greater clarity about their role and guidance and will consider how best to provide this.

R46

Whilst we support the intention of the draft Bill to allow individuals the freedom to choose their donee(s) when making an LPA, we recommend that further guidance is provided to warn donors of an LPA of the potential for conflict. Furthermore, we recommend the inclusion, in Codes of Practice, of an additional safeguard mechanism by which the Court of Protection or Public Guardian could monitor the use of LPAs with a view to preventing the abuse and exploitation of donee's powers.

We recognise that there may be potential for conflict of interest in an LPA and we agree that donors should be given information about this and more generally about the seriousness of making an LPA. All financial LPAs will be under the supervision of the Public Guardian in any case. It may be possible for a higher level of monitoring of an LPA to be offered to donors who are concerned about the potential for a conflict of interest or who foresee other difficulties.

Recommendation	Response
<p>R47 We strongly recommend that an express duty of care is incorporated into the Bill in respect of donees acting under an LPA (and for Court appointed deputies). We further consider that a greater degree of accountability is required from those groups in order to limit the potential for abuse of their powers and therefore, we recommend the exploration of effective methods to achieve that end. In particular, we recommend that specific requirements in the form of a standard of conduct should be included in the Codes of Practice, aimed at those exercising formal powers under the draft Bill.</p>	<p>Duties of care generally across the Bill have been discussed above at Recommendation 28. There we noted that LPAs and deputies under the Bill will be acting as agents of the person who lacks capacity. This is the same as EPAs and receivers at present although with the additional requirement of having to act in the donor's best interests. Therefore they will be subject to the fiduciary duties of an agent. We will consider whether it would be helpful to state this expressly in the Bill. We will also consider how we can best use the Codes of Practice in explaining the nature and extent of fiduciary duties, and how these interact with the new statutory duty to act in P's best interests.</p>
<p>R48 We have concluded that the proposed system requiring registration of LPAs before use will assist in monitoring the use of LPAs and detecting possible abuse. However, we recommend that donees should be placed under an obligation to notify both the donor and the Public Guardian that the donor is, or is becoming incapacitated, thereby putting this information on the public record an opening it up to challenge. We further recommend that guidance should be provided to assist financial institutions with the operational realities of an LPA.</p>	<p>We welcome the Committee's conclusion that registration of LPAs prior to use will be beneficial. Further notification by the donee at a notional point of incapacity could bring difficulties though. We consider that this runs contrary to the functional approach to capacity. It would be wrong to rely on blanket labels of incapacity to avoid the complexities of assessing capacity in relation to the particular decision at the particular time. We have already begun work with financial institutions because we want to ensure they are assisted with their new responsibilities under the Bill and we will continue this work through to implementation and beyond.</p>
<p>R49 We believe that there should be an additional safeguard of requiring two additional persons to witness the certification of capacity where there are no named persons for notification of the registration of an LPA.</p>	<p>The requirement for a certification of capacity is at the time of making an LPA not registration. We agree, however, that it makes sense to have additional safeguards for the registration of an LPA where there are no named persons. We are looking at the best way to achieve this and it may be that additional notification or other formal requirements may be appropriate.</p>

<p>R50 We recommend that further guidance should be provided to assist the Court in deciding when a single order is more appropriate than the appointment of a deputy.</p>	<p>We agree that this may be helpful. This type of guidance could be given by way of rules of court or Practice Direction (see cl. 41 and 42).</p>
<p>R51 We strongly recommend that further consideration is given to the provision of independent advocacy services and other means of enabling people lacking capacity to participate as fully as possible in any hearing affecting their rights and entitlements.</p>	<p>The Bill already provides that rules of court can make provision for a person to be represented by any suitable person, as well as by the Official Solicitor (cl 41(2)(d)). The Official Solicitor is the independent expert currently used by the Courts as an advocate for those with incapacity. We are considering whether there is a role for lay advocates. As is the case with the current Court of Protection, we do not intend the new court to adopt formalistic or legalistic procedures excluding anyone who can promote the interests of the person concerned.</p>
<p>R52 We seek assurances that public funds will be made available to ensure that the Court of Protection is sufficiently accessible for those with limited assets. Furthermore, we seek clarification as to the types of cases for which legal aid will be provided to mentally incapacitated applicants and alternative remedies for those cases which will not qualify.</p>	<p>We acknowledge that public funding for legal help and advice will need to be made available, as now, to enable those with limited assets to have access to the Court of Protection. Legal representation will continue to be available, if necessary, for serious health or welfare issues which are currently heard in the High Court but will transfer to the Court of Protection. The detail remains to be resolved regarding provision in individual cases. We are undertaking further work on the provision of legal advice and envisage that the Public Guardian will offer a telephone information line.</p>
<p>R53 We believe that further guidance is required for deputies as to the standard of conduct they must maintain in the operation of their duties.</p>	<p>We have acknowledged the importance of the Codes making clear what standards of conduct are expected, and this applies to deputies also.</p>

Recommendation	Response
<p>R54 We strongly urge that the provisions allowing deputies to consent to treatment be restricted to exclude the withdrawal or refusal of life-sustaining treatment. Unless there is a valid LPA or advance decision expressing the individual's wishes in relation to the subject, decisions relating to the carrying out or continuation of life-sustaining treatment should be referred to the Court of Protection for determination.</p>	<p>Whilst the Bill already states that deputies would be given powers that are as limited in scope and duration as possible we understand the reasoning behind this recommendation. Giving a deputy the authority to refuse consent to the provision or continuance of life-sustaining treatment on behalf of a person who lacks capacity is very significant, and we understand the concerns that people have. We are not, however, persuaded that a blanket exclusion of a power to refuse treatment is necessary. We would only expect deputies to be given healthcare powers in rare cases, for example where there is a dispute between family members as to who has the patient's best interests at heart and where the patient has chronic and/or degenerative health problems calling for repeated assessments and decisions by doctors and carers.</p> <p>It is also the case that the power of a deputy would, in any event, be no greater than the power of a patient with capacity, being a power to give or refuse consent. The role of clinicians, to assess what treatment should be offered and recommended, is unaffected. We would like the Court to have the option, after careful consideration of the evidence and all the circumstances, of considering it appropriate to give a deputy powers to give or refuse consent to treatment including life-sustaining treatment. In a situation of the late stages of a degenerative illness, for example, having to return to court at such a juncture could be very distressing for caring family members. If doctors felt that a deputy with authority to refuse life-sustaining treatment, and who was refusing it, was doing so in breach of the best interests principle and checklist, then it would be open to the doctors to refer the matter back to the court, while providing life-sustaining treatment in the meantime (this is the effect of clause 7, subsections (2), (3) and (4), which the Committee may have overlooked).</p>

R55 The Committee strongly recommend that it should be made clear on the face of the Bill which decisions or acts should fall under the remit of a court appointed deputy and not under the general authority. Furthermore, guidance should be provided to family members, carers and others exercising the general authority as to the point at which it would be appropriate to apply to the Court of Protection for the appointment of a deputy.

This is an extremely complex area in law and we recognise the importance of trying to improve the clarity here.

There appears to be a misunderstanding of the relationship between the general authority and LPAs and deputies.

As discussed above, attorneys and deputies would be agents of the person who lacks capacity. As such they have authority to do legally significant acts *on behalf of P and which bind P*, e.g. to enter into a contract, sign documents when P lacks capacity to do so or sell an item of property and spend the money on something P needs more.

The general authority, on the other hand, is primarily a defence against liability where someone has to, whilst caring for P, do something to or for P that might otherwise be *prima facie* unlawful (in the law of tort). e.g. helping P to wash, entering P's house, taking P out to the cinema, operating on P. It follows that the general authority and LPAs/deputies deal with different situations. There is not necessarily a linear relationship where you move from the general authority to an LPA/deputy. They may well co-exist with, for example, an LPA/deputy providing consent to medical treatment but the general authority justifying the LPA/deputy/ appropriate professional in helping P to dress. In most cases where money or property is concerned, and especially where the property is held by a third party such as a bank or other financial institution, the general authority offers the institution no form of protection. It does not affect the institution's contractual obligations as a debtor of P's. As now, we intend it to be for someone to establish they have proper agency authority in the form of an LPA or a court-ordered deputyship to enter into contracts which bind P.

Recognising the complexities of these distinctions, we will strive to make the Bill itself as clear as possible and provide the necessary explanation in the Codes or elsewhere.

Response

We welcome the Committee's recognition of the role of advance decisions in offering capable people the legal means to make sure that valid and applicable decisions they make in advance of incapacity are respected in the event of losing it. Including advance decisions in a statutory framework means that their legal status and the safeguards governing them will be clearly stated. It also means that the Court of Protection will have jurisdiction in respect of advance decisions. We are equally very mindful of the need to ensure that such decisions are clearly valid and applicable at the time when a decision is needed. We are considering what further safeguards might be necessary to achieve this.

We are grateful for the Committee's advice and, in redrafting, will consider whether any such statement would be possible, practicable or helpful. We are aware of precedents for clauses which state that nothing in the legislation affects other rules of law. We are not, however, fully persuaded that a clause stating that the Bill does not permit euthanasia (even if that were possible in drafting terms), would address the concerns of those who believe that the Bill does permit euthanasia. Some of the disagreements in this area are, of course, about the very definition of the word 'euthanasia'. We shall continue to take every opportunity to state what the Bill is about, and remain in contact with stakeholders who have concerns on this particular issue. We are also seeking to ensure that the Bill as it applies to end of life issues contains clear safeguards.

Recommendation

R56 We recommend that the Bill should permit the making of advance decisions to refuse treatment. We recognise the genuine and deeply felt concern of those who have moral objections to any decision being taken that could end life, but that right is recognised in law for those who are capable of making such decisions and we think it is right that the Bill should provide for those who wish to do so to have the legal means to have that decision respected should they become incapable. In doing so, the Bill should aim to set standards for good practice and ensure a means of challenge under circumstances where there were disagreements that could not be resolved.

R57 Many of the fears which have been raised with us about possible connections between the draft Bill and euthanasia appear to be misplaced. Nevertheless, in acknowledgement of the strength of feeling that clearly exists on this issue and in the hope that such misplaced fears do not detract attention from the many worthwhile aspects of the draft Bill, we recommend that additional assurance should be offered by the inclusion of a paragraph in the Statement of Principles we have recommended, or by an additional clause in the Bill, to make clear that nothing in the Bill permits euthanasia or alters the law relating to it.

R58 In most circumstances we believe that it would be reasonable for the Bill to require advance refusals should be recorded in writing and witnessed by two independent persons having no financial interest in that person's estate. An exception might, however, be made where the decision was taken during ongoing medical treatment in which case it should be recorded by the doctor in charge of the treatment in the patient's notes and independently witnessed. We believe that all individuals should be encouraged to register their advance decision with their doctors.

The Government is seriously considering this recommendation and how best we can ensure that advance decisions are made with full understanding of their consequences and free from coercion. However, there is a risk that a formal process for making an advance decision would require a formal process for revoking the decision, thus discouraging people (or making it very difficult for them) from making clear that they have changed their decision. We will investigate this further. We agree that advance decisions should be made known to clinicians and again, are investigating the most practical way of effecting this. The purpose of including advance decisions in the Bill is to make clear their legal status and this is our objective. As in relation to the general authority, the Codes can make clear what would be reasonable for a doctor to do in order to gain the benefit of the protections from liability at cl. 25(2) and (3).

R59 We recognise that advance decisions which they may not otherwise wish to make may be made by those suffering from depression, stress or other conditions that would affect their judgment. We also fully appreciate the potential for coercion or other malevolent actions on the part of others to secure advance decisions from vulnerable people. We therefore recommend that the Codes of Practice should require doctors to satisfy themselves that any advance refusal of treatment is valid and applicable.

We acknowledge that there are valid concerns surrounding the making of and use of advance decisions such as those set out here by the Committee. A decision made when the maker lacks capacity to make it would prima facie, not be effective. If the decision was made with capacity, then the tests of validity and applicability also have to be met. We agree that the Codes of Practice should stress that the validity and applicability of an advance decision must be clearly apparent to doctors and others. In redrafting the Bill we will also consider whether anything further can be done to emphasise these points.

R60 We also recommend that the Department should issue sensitive public guidance designed to promote better understanding of what is involved in making advance decisions. This should explicitly state that any advance decision to refuse treatment should be made voluntarily. It should also include encouragement to seek appropriate professional advice before making such decisions, aimed at ensuring that they were made in the full knowledge and understanding of any relevant medical factors and written in an appropriate form. The Departmental guidance might include a suitable specimen pro-forma. It should also encourage them to update such decisions regularly, especially in the light of relevant medical developments.

We fully agree with this recommendation and intend to produce guidance on advance decisions. We envisage that this guidance, which will expand upon the information contained in the Codes of Practice, will be part of the wider public information campaign that the Committee rightly recommends should take place to accompany legislation. We will have to consider the content of such guidance carefully and consider how it is presented and communicated. However, at this stage we can say that we will wish to ensure that the process of making an advance decision is as informed as possible and we will ensure that practical suggestions, such as those mentioned by the Committee, are included in the guidance to ensure that this happens. We will draw on existing good practice.

Recommendation	Response
<p>R61 We also recommend that the Codes of Practice should set out what should be considered by any doctor, when treating a person who is incapacitated and who is known to have made an advance decision, in determining whether such an advance decision is valid and appropriate. The Code should also state that, under these circumstances, any reasons why such an advance decision was considered valid, invalid or inappropriate must be recorded in that person's health records.</p>	<p>Again, we envisage that the Codes of Practice should give detailed guidance to doctors and other health professionals on how they should approach clinical decision-making for an incapacitated patient who has made an advance decision, including how such a determination of its validity and applicability should be made. This work will need to be done in consultation with health professionals and with patient groups, building on valuable guidance already available in the context of the common law's recognition of valid and applicable advance refusals.</p>
<p>R62 We believe that clause 24(4) in the draft Bill is sufficient to address the specific concern about new and unanticipated treatments becoming available which might have a bearing on an advanced decision. We recommend that specific guidance on this be given in the Codes of Practice.</p>	<p>We welcome the Committee's endorsement of this provision which, we believe, is a vital safeguard surrounding the operation of advance decisions. We agree that there is a need for further guidance surrounding the issue of applicability, including its relevance in the context of clinical advances, to be given in the Code of Practice.</p>
<p>R63 We believe that people, whether incapable or not, have the right to expect that they will be cared for to the highest standards. We recommend that the Codes of Practice should explicitly state that the duties and responsibilities placed on health professionals must apply equally to capable and incapacitated people. No assumption should be made that life has less value for the latter.</p>	<p>We strongly agree that the standards of care carried out by health professionals should apply equally to capable and incapacitated people. It is in no way our intention for anything in mental incapacity legislation to change this – quite the reverse. We will therefore give serious consideration to the Committee's recommendation that this message is reinforced in the Codes of Practice.</p>

R64 We recommend that the Bill should seek to draw a distinction between basic care (which would include the giving of nutrition and hydration by normal means as well as actions to assist general hygiene and comfort), and the use of artificial means of nutrition and hydration, such as drips or naso-gastric tubes. We support the view that the former falls outside what is normally considered to be treatment and should always be available to people whereas the latter should be regarded as treatment in that the decision to use such artificial means is a clinical one to be made in accordance with best professional practice, and in the best interests of the patient concerned, and having consulted those specified in Clause 4(2)(d).

The Government agrees that basic care should always be provided to patients who lack capacity. However, no clear legal definition of basic care currently exists and we consider it may be difficult to produce a statutory definition which commands universal agreement. We envisage the Codes giving guidance on questions of basic care.

R65 We further recommend that the use of such artificial means should be determined by the doctors concerned in consultation where possible with the patient's family, friends or recognised representatives, on the basis of that patient's best interests and having due regard to previously expressed wishes given in any advance decision. If a valid and clearly expressed wish not to have artificial means of nutrition and hydration is expressed, and the advance decision is otherwise valid, then that wish should be respected.

The Government welcomes the Committee's recommendations that the use of artificial nutrition and hydration should be determined by an assessment of the patient's best interests and that such determination should only be arrived at after full consultation with all relevant people surrounding the person lacking capacity.

R66 We recommend that priority should be given to introducing the Mental Incapacity Bill so that account can be taken of these provisions in framing new mental health legislation.

The Committee is right to point out the links between the Mental Incapacity Bill and proposed new mental health legislation. We are aware that many groups have echoed the Committee's view that mental incapacity legislation should precede mental health legislation as the former would set out the broad basis of key concepts upon which the latter would build in a very specific area.

Recommendation	Response
R67 We recommend that the drafting of Clause 27 be amended to clarify its intended purpose.	<p>We agree that the intention is to ensure that the powers available under Part 4 of the Mental Health Act 1983 (MHA) will trump the decision making powers under the Bill. Part 4 requires that certain forms of treatment cannot be given to persons detained in hospital under the MHA unless either the patient consents or an independent medical practitioner has been involved. This will not be affected by the Bill. We do not believe that it could be interpreted to include any treatments where the MHA could only potentially be applied. We will, however, consider whether any further clarification is needed.</p>
R68 We recommend that the Codes of Practice include clear guidance to govern the choice of legal powers to provide treatment for mental disorder of people lacking capacity to consent.	<p>We fully acknowledge that the Codes of Practice will play an important role in clearly explaining how mental incapacity legislation operates in relation to other pieces of legislation, particularly mental health legislation.</p>
R69 We request clarification as to whether it is intended to incorporate additional safeguards for compliant incapacitated patients into the draft MI Bill if there is likely to be a delay in implementing the provisions proposed in Part 5 of the draft Mental Health Bill.	<p>We are still in the process of considering what safeguards are necessary for compliant incapacitated patients and whether such safeguards would be best placed in a Mental Incapacity Bill or a Mental Health Bill. The judgment in the <i>HL V UK</i> case is still awaited and it is anticipated that this would provide useful guidance.</p>
R70 We recommend that the provisions for obtaining a second opinion currently available to patients detained under the Mental Health Act should be extended to compliant incapacitated patients requiring specified forms of treatment for mental disorder or for physical conditions, whether in hospital or in the community. The Bill should include a regulation making power to specify the types of treatment requiring a second opinion, which can be amended as new treatments are developed.	<p>As mentioned in recommendation 69 above we are in the process of considering what provisions are necessary and appropriate for compliant, incapacitated patients and the role of second opinions for such patients forms part of the that wider consideration.</p>

R71

Although we re-iterate our anxiety to keep up the momentum and ensure that introduction of the Bill is not unduly delayed, we recommend that the Bill should not be introduced to Parliament until it can be considered alongside comprehensive draft Codes of Practice.

We are aiming to have as substantial an outline as possible of the Code of Practice ready at committee stage of the Bill. We realise the importance of giving Parliament as comprehensive an idea as possible of how Codes of Practice will look. Any final Code would, of course, need to be subject to considerable consultation.

R72

We agree that only those acting in a professional capacity or for remuneration should be under a duty to abide by the Codes of Practice. However, we believe that family members and carers should be strongly encouraged to follow the Codes of Practice.

We are undertaking further work and consultation on who should be bound by the Code of Practice and to what extent. There may be an argument that attorneys and court-appointed deputies should be bound by the Code.

R73

Given the diverse range of situations which will be covered by the statutory framework for decision-making imposed by the Bill, we consider that the processes and requirements relating to assessment of capacity would be most appropriately dealt with in a Codes of Practice, as required under Clause 30(1)(a).

We agree with this recommendation and confirm that detailed information relating to assessment of capacity will be included in Codes of Practice, building on valuable existing guidance in the context of current rules about capacity.

R74

The Codes of Practice will need to cover, amongst other matters, the concept of best interests itself; the processes and issues involved in considering the factors set out in the Checklist in Clause 4 (including ethical issues such as confidentiality); suggestions of the types of additional factors which may be relevant in different situations and guidance on weighing up competing or conflicting concerns.

We agree that the Codes of Practice will play a vital role in expanding upon the concept of best interests as set out in the Bill. As such, we envisage the Codes providing detail on how determinations of best interests should be approached, using case studies and references to further guidance as appropriate.

Response

The General Authority is a key area on which the Codes of Practice will need to provide detailed guidance. In view of the concerns which have already been raised surrounding the general authority and its operation, we also realise the importance of addressing this issue in the draft outline Code of Practice that will be ready for the Bill's introduction at committee stage and are already considering how the specific issues listed by the Committee will be addressed in subsequent drafts of the Code. Consultation on drafts will of course be vital to get the Codes right.

We are looking in detail at how the issue of standards of conduct is addressed in the Codes of Practice and in the Bill as a whole. This is a complex legal area and we recognise the need for guidance.

We agree that the Codes will need to provide information as to how those who have authority under the Bill will be supervised and the role of the Public Guardian with regard to this. It follows that information will also need to be given as to the resulting action that will be taken if a decision-maker is not complying with the standards that are required of him.

As explained above in Recommendation 47 attorneys and deputies under the Bill will be regarded in law as agents of P. It follows that they must comply with the common law duties arising from being an agent. They will also be required, by the Bill, to act in the best interests of P. Acting incompetently is likely to be a breach of the common law duty to act with due care and skill and may also fall foul of the best interests principle. The Court has the authority to remove any attorney who does not act in the best interests of P (see cl.21(3)(b)) and the Court has broad power to appoint and remove deputies according to P's best interests (see cl.16).

We will consider whether we could make this position any clearer in the Bill itself. In any case we fully agree that the Codes of Practice will need to provide further guidance on the requirements on attorneys and deputies and we are working towards this.

Recommendation

R75 The Codes of Practice will need to include, amongst other matters, a clear explanation of the general authority as the means whereby practical and legally relevant decisions can be made, in a manner that is enabling and respectful of the person lacking capacity; guidance and examples setting out when it might be 'reasonable' to act; the scope of the authority and how it links with other decision-making powers; and the requirement for all decision-makers to be fully accountable for their actions.

R76 We recommend that specific requirements of a standard of conduct be included in the Codes of Practice aimed at those exercising formal powers under the Bill.

R77 We recommend that the Codes of Practice should provide details of the OPG's supervisory role and the sanctions which may apply in the event of non-compliance with the Codes.

R78 We recommend that the Court's powers should include the power to remove a donee or deputy who is acting incompetently or failing to comply with the guidance given in the Codes as to the expected standard of conduct. It should be made clear to decision-makers that if their behaviour falls below the standard of conduct set out in the Codes of Practice, the court has power to remove them as attorneys or deputies and if their conduct is criminal, they will face the prospect and consequences of prosecution.

<p>R79 We strongly recommend that the statutory authorities should be given additional powers of investigation and intervention in cases of alleged physical, sexual or financial abuse of people lacking the capacity to protect themselves from the risk of abuse.</p>	<p>We recognise that those who lack capacity are particularly vulnerable to abuse. However, the Government is already taking action to protect vulnerable adults against abuse. In particular, the 'No Secrets' guidance requires Councils to liaise with other public authorities and other agencies in their area and to produce written and agree local procedures for handling incidents of abuse concerning vulnerable adults. The new Public Guardian under the Bill would have a role working with Councils and other agencies. The new criminal offence of ill-treatment or wilful neglect would also be another valuable tool in tackling potential abuse.</p>
<p>R80 We recommend that clause 31 be extended to include the misappropriation of the person's property and financial assets.</p>	<p>Where a person uses the funds of someone who lacks capacity for his own benefit he may already be prosecuted for the offence of theft. We consider that a new offence of 'misappropriation' would be very similar to this offence. Such an offence would be difficult to define and it may be difficult to prove to the criminal standard of proof. For these reasons the Government believes that any such new offence would not add sufficient value to the current offences available for financial abuse.</p>
<p>R81 We understand that properly-constituted medical research is the process whereby knowledge about a specific disorder or problem is obtained in order to inform the development of new treatments or support strategies that can then be demonstrated to be effective or not through the use of controlled trials. Such information is essential if new treatments are to be developed and if the National Institute of Clinical Excellence (NICE) is to advise whether those treatments should be freely available. If properly-regulated research involving people who may lack capacity is not possible then treatments for incapacitating disorders will not be developed.</p>	<p>We agree with the Committee's conclusion that properly regulated research involving people who lack capacity is important, and that without research involving those with incapacitating illnesses the development of appropriate treatments may not be possible.</p>

Recommendation	Response
<p>R82 We are aware of the stringent arrangements necessary before any medical research, particularly that involving human participation, can take place. Most importantly, there is a requirement that all research must be submitted to an ethics committee for their approval. These ethics committees always include lay representation and specifically address significant ethical questions such as that of informed consent.</p>	<p>We need to do further work to assess what the role of ethics committees will be and how they will be constituted.</p>
<p>R83 We are aware that research sanctioned by the ethics committees will vary in its invasiveness. It may extend from no more than asking questions of informants to the direct physical or psychological assessment of people with incapacity. It can also include specific investigations such as blood tests or brain scans. Such research interventions will carry with them different levels of potential inconvenience or discomfort. Informants are very likely to have the capacity to decide whether or not to participate. Assessments and many investigations of people with incapacity can only take place with their co-operation.</p>	<p>We endorse the Committee's thinking in this area and agree that such assessments and investigations should only take place with the co-operation of the potential subjects. This key principle will form the basis for our further work on addressing research issues in the context of the Mental Incapacity Bill.</p>
<p>R84 It follows that the inclusion of statutory provisions governing such research would enable the ethical requirements that must underpin research involving people with incapacity to be clearly enshrined in statute.</p>	<p>We will explore the extent to which ethical requirements need to be in statute, or whether this is already covered by existing Good Practice guidance.</p>

R85

We conclude that a clause should be included in the Bill to enable strictly controlled medical research to explore the causes and consequences of mental incapacity and to develop effective treatment for such conditions. This clause must include rigorous protocols to protect incapacitated adults from being exploited or harmed.

We accept that the Mental Incapacity Bill should include provision for strictly-controlled research to fill the gap that exists in the current law and the uncertainty and inequity this creates. We are continuing to explore with stakeholders and the Patient Information Advisory Group whether this research should be able to benefit the cohort as well as the person who lacks capacity; to clarify the safeguards needed and to provide reassurance on this sensitive issue.

Recommendation

Response

R86

We therefore recommend that the Bill should set out the key principles governing research, such as those enshrined by the World Medical Association. Those key principles should include the following:

- Research involving people who may be incapacitated must be reviewed by a properly established and independent ethics committee and can only proceed if ethical permission is granted;
- Where a person has the capacity to consent then his decision whether or not to partake in research must be respected;
- Considerable care should be taken to ensure that under these circumstances consent to participate was freely given and not a consequence of coercion;
- The inclusion of people in research, who lacked the capacity to consent, must only occur when such research has the potential for direct benefit to those with that particular problem and could not have been done through the involvement of those with capacity;
- Those undertaking research involving people lacking the capacity to consent must respect any indications that a person did not wish to participate (i.e. was dissenting); and
- Any discomfort or risk involved in the research must be, at the most, minimal.

We agree that key principles are important and will explore the extent to which these need to be in statute, or whether they are already covered by existing Good Practice Guidance.

R87 We further recommend that the Codes of Practice should set out the specific issues that ethics committees should be obliged to consider when any research includes people who may be incapacitated. These should include:

- whether the involvement of people who may be incapacitated is justified given the above; and
- whether issues of consent and consultation with others has been properly considered given the nature of the research.

We agree that clear guidance is important in this area and will explore further whether the Code of Practice should set out the role of ethics committees or the extent to which this is already covered in existing Good Practice Guidance.

R88 We also recommend that the Codes of Practice should define the duties of research ethics committees in relation to incapacitated adults. The Codes of Practice should state that these committees must include people from outside the medical profession.

We agree that clear guidance is important in this area and will explore further whether the Code of Practice should set out the role of ethics committees or the extent to which this is already covered in existing Good Practice Guidance.

R89 We are convinced that independent advocacy services play an essential role in assisting people with capacity problems to make and communicate decisions; helping them to enforce their rights and guard against unwarranted intrusion into their lives; providing a focus on the views and wishes of an incapacitated person in the determination of their best interests; providing additional safeguards against abuse and exploitation; and assisting in the resolution of disputes.

This recommendation relates to the provision of advocacy in general which goes much wider than the Mental Incapacity Bill, which only deals with decision-making for those unable to make their own decisions. The Government agrees that independent advocacy is one of the important ways that is available to people with capacity problems to help them make decisions and ensure that their wishes are listened to and respected in a range of areas. We are working with stakeholders to explore more fully the range of advocacy available, how it is most effectively used and how it might interact with the Bill. The underpinning principles of the Bill in themselves support the objectives of advocacy.

Recommendation	Response
<p>R90 We agree that it would be inappropriate for us to recommend that resources be committed to provide a statutory right to advocacy for all people affected by the Bill's provision. However, we recommend that a provision be included in the Bill, similar to that in the Health and Social Care Act 2001, to empower relevant Ministers to arrange, to such an extent as is considered necessary to meet all reasonable requirements, for the provision of independent advocacy services in incapacitated adults affected by the Bill's provisions.</p>	<p>The Government supports the use of independent advocacy. We already make some funding provision for independent advocacy and envisage continuing to do so.</p> <p>We want to give recognition to the many different ways in which people who may lack capacity can be empowered and supported. Different people will have different needs in different situations. For this reason we do not think it is appropriate to single out advocacy for particular provision in the Bill.</p> <p>One key purpose of the Bill itself is to provide a new way to support people who may lack capacity by providing people with the opportunity to have an LPA, deputy or advance decision to refuse treatment. As noted above, however, we are continuing to work with stakeholders to understand the wide and varied field of advocacy better.</p>
<p>R91 We recommend that the Government consider setting up an agency, similar to the Advocacy Safeguards Agency in Scotland, with the aim of promoting standards for good quality independent advocacy.</p>	<p>Again, this recommendation relates to the provision of advocacy in general which goes much wider than the Mental Incapacity Bill, which only deals with decision-making for people who lack capacity. It is obviously important that where advocacy is provided it is provided to a high quality standard and is independent. We recognise that there are many types of advocacy and the skills and purpose of the advocate will vary. It is more effective, and administratively efficient, to focus on the standards that those commissioning advocacy services are using. Local authorities and the NHS will be the main commissioners of advocacy services. We already have organisations with wide-ranging legal powers which are responsible for inspecting standards of commissioning and provision in the NHS and social services (CHAI and CSCI). We do not therefore think that it would be appropriate to seek to introduce a further statutory agency of the type created in Scotland.</p>
<p>R92 We recommend that the Codes of Practice produced under the Bill provide guidance on the appropriate use of advocacy services, in particular suggesting priority situations when it may be essential for an incapacitated person to have access to an advocate.</p>	<p>We are considering the whole issue of advocacy and how it relates to the Bill's provisions very carefully. This work will include consideration of how the issue of advocacy is approached in the Codes of Practice, including circumstances where the use of an advocate would be appropriate.</p>

R93 We recommend that all organisations commissioning or providing advocacy services to incapacitated adults should have satisfactory procedures in place to ensure that the standards and quality of independent advocacy services are monitored and maintained.

As mentioned above (see recommendation 91) we agree that those organisations who commission advocacy services should have systems in place to measure the quality of the service. This is already the case in the NHS and social services.

R94 The Department have not produced reliable estimates of the cost of the Bill or adequately consulted on likely costs. They have provisionally estimated a cost equivalent to the present value of £171m over ten years and some witnesses have identified still further costs. However, we recognise that not all the costs predicted by witnesses will necessarily add to the overall burden on taxpayers at national or local level; there may also very well be offsetting savings.

We are very aware of the need to provide estimates of the costs of mental incapacity legislation and regret that such estimates were not available in time to assist the Committee in their scrutiny of the draft Bill. Full costings will be available for introduction, and as the Committee notes, there may well also be offsetting savings or areas where costs are neutral. The information will be presented in the Explanatory Notes at the time of the Bill's introduction into Parliament. We are, of course, mindful of the need to ensure that legislation is as cost-effective as possible in order to minimise the burden on taxpayers, whilst still ensuring that adequate funds are made available to ensure that legislation can work effectively.

R95 Given that the Bill has been under consideration for so many years, we fail to understand why the Department were not able to produce more accurate figures and do not appear to have carried out adequate consultations on likely cost. We regret that the draft Bill was presented for Parliamentary Scrutiny without the accompanying assessments of the resource implications. We were also surprised and disappointed that the Treasury should have waived the requirement for a full resource impact assessment of costs and benefits to accompany the draft Bill. As a result of these factors, we have been placed in the invidious position of having to carry out our duty of scrutiny without any detailed indications of what the Bill might cost or what the quantum of benefits it will lead to might be.

We very much regret that the Joint Committee was put in the position of having to scrutinise the Bill without what they have described as detailed indications of both the costs and benefits of the Bill. We were extremely wary of presenting anything other than the most provisional overall estimate for the costs of implementation, given that we had practically no reliable information about the costs of current decision-making procedures, and thus no baseline from which to work. HMT expects the process of pre-legislative scrutiny to allow a full and detailed examination of costs, which will be reflected in the Explanatory Notes when the final Bill is introduced before Parliament. These costings will of course take into account changes to the Bill that flow from the Committee's recommendations. We are also undertaking work, with DH among others, on how best to ensure that adequate numbers of trained personnel are available to implement the Bill.

Recommendation	Response
<p>R96 In the absence of such indications, we regret that we are unable to reach any conclusions on the resource impact of the Bill. Many of the benefits of social legislation are unquantifiable. Nevertheless, the Department's failure to provide proper estimates of costs and likely benefits has impaired the process of pre-legislative scrutiny and made it impossible for us to judge whether the benefits of the Bill may outweigh its costs or whether the likely cost might benefit people without capacity more effectively in other ways. Nor is it clear to us whether adequate trained personnel will be readily available to ensure that the Bill is implemented effectively. We can only urge that these aspects are exposed to the most rigorous scrutiny when the Bill itself comes before both Houses.</p>	<p>See above.</p>
<p>R97 We regret that the Department do not appear to have adequately addressed the important, though admittedly complex, issues involving access to information to those acting on behalf of people lacking capacity. We welcome the Department's assurance that work is in hand to resolve these issues and that consequential amendments will be included in the Bill when it is introduced. We hope that the implications can be thoroughly investigated and adequately tackled in the consequential amendments and in the Codes of Practice. But we hope that this will not unduly delay presentation of the Bill.</p>	<p>We are moving forward with our work relating to access to information and recognise the importance of this. We have identified a number of areas in the Bill where access to information is an issue. We are working to ensure that adequate provision is made either in statute if necessary, or elsewhere. We intend that any necessary amendments will be included in the Bill for introduction.</p>

R98 We were rather surprised that the Department had not included in the draft Bill any consideration of the jurisdictional implications of the different Scottish legislation for those domiciled in one jurisdiction who suffer incapacity and require decisions to be made while in the other. We acknowledge that legal complexities might be involved in some cases and welcome the Department's confirmation that they intend to provide adequately for this aspect in the Bill when it is introduced.

We can confirm that such jurisdictional issues, governing circumstances when people lacking capacity may travel between all jurisdictions, including Scotland, will be covered in the revised Bill. When the draft Bill was published, we stated that these provisions would be included prior to introduction (see page 14 of the Commentary and Explanatory Notes published with the draft Mental Incapacity Bill).

R99 We recommend that consideration be given to changing the Bill's title to the 'Mental Capacity Bill'.

We fully appreciate the thinking behind the Committee's recommendation as to the title of the Bill and we are aware that many groups and individuals are similarly concerned that the Bill's message of enablement should be conveyed in every way possible, including by its title. We are therefore committed to achieving this in line with the Committee's recommendation.





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