

Order of the Day

2. BILL FOR SECOND READING

2.1. Capacity Bill 2022 – Second Reading approved

Mr Hooper to move:

That the Capacity Bill 2022 be read a second time.

The Speaker: We then turn to Item 2, Bill for Second Reading, and the Capacity Bill 2022. I call on the Hon. Member for Ramsey, Mr Hooper, to move.

Mr Hooper: Thank you very much, Mr Speaker.

785 Hon. Members, I am very pleased to move the Second Reading of the Capacity Bill 2022.

Currently, there is no legal framework for those adults who either cannot communicate their decisions or who are unable to make decisions for themselves. The lack of legislation in this area not only puts the Isle of Man behind other jurisdictions, but relying on the principles of best practice and necessity leaves the Island open to legal action and, fundamentally, it fails to protect the people who are the most vulnerable. It is essential, therefore, that the provision of services for people without capacity are underpinned with a modern and clear legal framework which safeguards their rights, dignities, freedoms and well-being.

790 As Hon. Members will be aware, the Department has had plans to introduce capacity legislation for a number of years. The introduction of this legislation is long overdue and I am pleased that the Capacity Bill is now being progressed through the Branches of Tynwald. (**A Member:** Hear, hear.) The primary purpose of the Bill is to better protect and safeguard those who have lost capacity to make decisions for themselves, and to empower them to be able to make provision for a time in the future when they may lack capacity.

800 In its simplest form, the Bill places the people who are unable to make decisions for themselves at the centre of every decision-making process, placing the best interests of that person at the forefront of every decision that is taken by any person, whether informally or professionally. It does this by setting out overarching principles which will apply to any decision taken under the Bill. These are: a person must be assumed to have capacity unless it is established that they lack capacity; assumptions should not be made about a person's capacity based upon their age, appearance, condition or behaviour; a person is not to be treated as unable to make a decision unless all practicable steps to help them to do so are taken without success; a person is not to be treated as unable to make a decision merely because they make an unwise decision; an act done, or a decision made under this Act for or on behalf of a person who lacks capacity, must be done or made in their best interests; and, when acting or making a decision on behalf of a person lacking capacity, the least restrictive course of action must always be considered.

805 The Bill introduces and places on a statutory footing, the concepts of 'decision specific' and 'time specific'. This means that the test for capacity should be repeated or reviewed each time a decision has to be made, which means that just because a person was deemed to lack capacity at one time or in one instance, they will not be automatically assumed to lack capacity in every instance thereafter. Additionally, the Bill introduces mechanisms to ensure that adults are empowered to be able to plan ahead for a time when they may lack capacity to make decisions for themselves, with the introduction of lasting powers of attorney for both property and financial affairs, and health and welfare decisions, as well as the legal recognition of advanced decisions.

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820 Some of the key components of the Bill are: the overarching principles of capacity which underpin all decisions that may be taken under this Bill. And as I have already stated above, these principles are set out on the face of the Bill to ensure a high and consistent standard of care and practice, providing the cornerstone for which all decisions under the Bill are to be made.

825 Secondly, the basis for assessing whether a person has the capacity to make a decision for themselves. The Bill sets out the definition of what is meant by 'lack of capacity', setting out a framework for determining what is meant by 'inability to make decisions' and introduces the notion of an 'appropriate period' of time in the context of decision making.

830 Thirdly, the governance of decision making for individuals who have lost the ability to make decisions for themselves. The introduction of a statutory 'best interests' test for all actions and decisions will as far as possible permit and encourage the person to whom the decision applies to participate as fully as possible in the decision-making process.

835 Fourthly, the Bill introduces a new form of statutory power of attorney, which is referred to as a 'lasting power of attorney', which will replace the existing 'enduring' powers of attorney framework. By doing so, powers of attorney will extend not only to property and financial affairs but also to health and welfare matters. By making a lasting power of attorney, an individual, who is referred to as 'the donor', confers on someone else, who is referred to as 'the donee', the authority to make decisions about their health and welfare or property and financial affairs. Whilst any existing enduring powers of attorney already made will continue to have effect, moving forward 'lasting' powers of attorney will replace them.

840 The Bill also widens the power of the courts. The Bill confers a general power on the courts to permit the making of declarations as to whether an individual has capacity or not, either in relation to a specific decision that needs to be made, or in relation to decisions on such matters as are described in the declaration. Furthermore, the court may appoint a delegate or delegates to make such decisions as the court may determine.

845 Sixth: the widening of the Department of Health and Social Care's functions regarding the supervision of donees and court-appointed delegates. The supervision of donees and delegates appointed under the Bill will be undertaken by the Department –

850 **The Speaker:** Mr Hooper, sorry to interrupt, but your speech keeps knocking the microphone which is providing a bit of interference, if you do not mind. Apologies.

Mr Hooper: Thank you, Mr Speaker.

855 The Bill provides for the supervision of donees and delegates that are appointed under the Bill ... will be undertaken by the Department. This will include dealing with any complaints and representations in connection with the way in which donees and delegates, appointed under the Bill, discharge their duties. The Department will also have the power to institute inquiries in this respect.

860 The Bill also places advance decisions to refuse treatment on to a statutory footing. An advance decision is a clear instruction made by a person with capacity, aged 16 years or over, to refuse a medical procedure or intervention at a point of time in the future if they are not, at that time, able to communicate their wishes because of a lack of capacity. The Bill sets out a clear framework and safeguards in respect of such decisions.

The Bill also sets out the matters which are outside the scope of the Bill. It provides a list of decisions which are of such a personal nature that they can never be made on behalf of somebody who does not have capacity. These are known as excluded decisions.

865 The Bill also introduces a framework around provisions relating to research. This is a framework under which intrusive research may be permitted, with a key principle that the interests of the person who may lack the capacity to consent must, at all times, be assumed to outweigh this of science and society. The Cabinet Office will have a regulation-making power in respect of provisions made under this section.

870 The Bill also introduces an offence of ill-treatment and neglect. The Bill creates a specific offence of ill-treatment and neglect for anybody, either professionally or informally, who is caring for or making decisions on behalf of someone who lacks capacity.

875 Significantly, the Bill will also make provision for a code of practice, which will support the legal framework provided by the Capacity Act. The code will provide guidance and information to anyone who is working with or caring for a person who is captured by the Bill. It will describe their responsibilities in layman's terms about how the legislation will work in practice. Whilst the Bill does not impose a legal duty to comply with the code, it *will* have statutory force, which means that a number of people, including professionals, paid carers, donees and delegates, will be under a formal duty to have regard to the code.

880 Mr Speaker, as I have mentioned, the introduction of capacity legislation is long overdue and is one of the Department's key commitments. It is an important step in ensuring that not only is the Island up to date with our jurisdictional counterparts but that provision of services for the care of people who lack capacity will be underpinned with a modern and clear framework with robust safeguards.

885 Mr Speaker, I beg to move that the Capacity Bill 2022 be read for a second time.

The Speaker: I call on the Hon. Member for Douglas East, Ms Faragher.

890 **Ms Faragher:** Gura mie eu, Loayreyder.
I rise to second and reserve my remarks.

The Speaker: Dr Allinson, Hon. Member for Ramsey.

895 **Dr Allinson:** Thank you very much, Mr Speaker.
I welcome the Minister's move to have the Second Reading on this important bit of legislation. Whilst we are catching up with many other jurisdictions, perhaps he could indicate the provision for training also within the Bill to help make sure that the legislation is implemented in the right way by all those involved.

900 Thank you.

The Speaker: I call on the Hon. Member for Douglas Central, Mrs Corlett.

905 **Mrs Corlett:** Thank you, Mr Speaker.
I would also like to add my support to the bringing forward of this Bill and what it aims to achieve. If it is passed, it will put into statute current best practice and common law principles concerning people who lack the capacity to make decisions and those who take decisions on their behalf. The proposed Bill sets out people's rights in relation to decision-making and the responsibilities of people supporting those who lack capacity to do so. It also supports those who have capacity to plan for their future.

910 The Bill's five statutory principles provide the benchmark to underpin all acts carried out and decisions taken in relation to the Bill. The Bill's starting point is to confirm in legislation the proposed presumption of capacity, and it is important to balance people's rights to make a decision with their right to safety and protection when they cannot protect themselves. But the starting assumption must *always* be that an individual has the capacity until there is proof that they have not.

915 The Bill sets out to ensure that people are given all appropriate help and support to enable them to make their own decisions or to maximise their participation in any decision-making process. The Bill acknowledges that a person's lack of capacity to make a decision can be time- and matter-specific.

920 Mr Speaker, everyone has their own values, beliefs, preferences and attitudes and a person should not be assumed to lack the capacity to make a decision just because another person thinks

their decision is unwise. What matters is their ability to carry out the process involved in the making of the decision, and not the outcome. The Bill also requires that any decisions made on another person's behalf are the least restrictive of their rights and freedoms and are in their best interests.

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This is a hugely important piece of legislation, but quite frankly, it has made slow progress for such a major issue. We are way behind other jurisdictions in this and much of the legislation in place now, and legislation to come, depends on capacity. Mr Speaker, I sincerely thank the Minister, Members and officers of DHSC for bringing forward this much-needed legislation. But I also want to take the opportunity to thank the Members sitting in this Hon. House today who were Members of DHSC in the last administration, (**A Member:** Briefly.) because without their political teamwork pushing relentlessly for this legislation to be progressed, it would not be in front of us today.

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For at least the first 18 months of our tenure in DHSC, Members spent part of almost every Department meeting asking for resources to progress this, as the Department legislation report continually read 'Capacity Bill: on hold, lack of resource'. It even dropped off the Department's legislation report altogether on occasion and only collective insistence from political Members put it back on. Things began to move in the right direction when Mr Ashford joined us and added ministerial clout to the progression of this legislation.

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Mr Speaker, in the absence of any clear legal framework, there are no specific statutory safeguards or protections for the rights, freedoms, dignity or well-being of those who lack capacity. We all recognise that this legal framework is much needed, and although the journey has been frustrating in some ways, it is here now and we must get this right if we opt to protect some of the most vulnerable in our society.

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Thank you, Mr Speaker.

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A Member: Hear, hear.

The Speaker: Hon. Member for Arbory, Castletown and Malew, Mr Glover.

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Mr Glover: Gura mie eu, Loayreyder.

I welcome, as well, the moving of this Capacity Bill, which has been long overdue here on the Island; but I did communicate last night with the Minister. My main concern is, having seen what happened across in the UK, where it got mired down in the House of Lords, and an amendment Bill came forward ... Those concerns really are twofold: people not having their liberty deprived inappropriately; and those in detention wanting safeguards to appeal against their situation. I just want some reassurance that that is the case.

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But my main concern is communication. Across, it was identified that a lack of knowing about these regulations really hit the vulnerable most of all. So I would just like to hear what the Minister has to say. Hopefully this does become an Act in law here on the Isle of Man so that people are aware of the capacity regulations, because that seems to have been a weakness across.

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Thank you.

The Speaker: Member for Douglas Central, Mr Thomas.

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Mr Thomas: Thank you, Mr Speaker; and I congratulate the Minister, departmental Members and the officers on this important Bill.

Just like Mrs Corlett – the speaker before me – I want to recognise all those that have gone before. This Bill has been high up the legislative programme for 10 years or so, and Minister Ashford had the capacity to put in place the second-fit plumbing and the second-fit electricians and all of those sorts of things. I am delighted that Minister Hooper has got the ability with his team to actually put in place the soffits and the fascias and all of those sorts of things to

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finish off the construction. But this Capacity Bill has been a long time in coming and it is excellent that it has finally arrived after 10 years of work.

975 In terms of points of substance, I just wanted to ask about clause 51, which is the 'Application
to the Island of Acts of Parliament etc.' The UK legislation, as far as I remember, is a defined term
in the Interpretation Act; UK legislation means legislation from the United Kingdom of Great
Britain and Northern Ireland. But there is quite a loose use of the term inside clause 51. We talk
980 about 'legislation of the United Kingdom' and later on we talk about 'Acts of Parliament', which
suggests that we are only looking at England and Wales, which is what Acts of Parliament are.
Obviously there is capacity legislation in Northern Ireland and in Scotland. So even if the Minister
and the Department, the officers and the Attorney General's Chambers prefer the English and
Welsh arrangements at the moment, surely it would be good in legislation to stick to more specific
985 Interpretation Act definitions of UK legislation and give people in the future the chance to actually
look for what is good in Scotland and Northern Ireland.

Also, might it not be helpful to have ambulatory reference to some of the technical issues?
I think something that has been holding this Bill up for 10 years is that we constantly kept getting
behind other developments in terms of things on which this capacity legislation depended. So
would it not be a good idea to actually have in place the ability to have ambulatory reference? In
990 other words, as it changes somewhere else, would it not be a good idea to have that changing
automatically in our legislation to avoid any difficulties for the courts in future, with somebody
not having noticed that something has changed somewhere else?

I notice in the Interpretation Act we can probably get round that, but I would hope that the
Minister can give me a clear statement about how he plans to deal with it and how this legislation
995 deals with this linkage to legislation from the United Kingdom. Perhaps he would agree with me it
might be a good idea to actually specifically change, amend ... [*Inaudible*] with more specific use
of Interpretation Act 2015 language.

The second point I wanted to ask about, and this would be generally helpful to understand
capacity, is that there is a very specific clause on voting rights, clause 40, and I really do think it
1000 would be helpful for the Minister to explain why that is in there, because that is a very difficult
question for so many people. My understanding is what the intention of clause 40 is, is that there
is nothing in this legislation or any of the processes around it that affect other decisions like the
ability to cast a vote at a general election. In other words, this is about advance decisions in respect
of various things, which might not include other things.

1005 So I wanted a very clear exposition, either today or later on, on the fact that what clause 40
seems to read is that the decision to cast a vote is a separate decision from anything that relates
to anything that goes on in the Capacity Bill. It came up for quite a few people in the most recent
General Election and I am sure it did in the elections beforehand. So I think it would be quite
helpful, for the public to understand this sort of thing, to take a very specific example like voting.

1010 On that point, 'referendum' is defined, but 'elections' is not defined. Perhaps the Minister
would agree with me it might be helpful to put in a very specific definition of what elections are,
given there is a very specific clause about voting rights in this legislation.

1015 Finally, and in closing, I just wanted the Minister to confirm it is a good idea that we have
principles in primary legislation. I note there is extensive specification of principles in this
legislation and I applaud him for that.

Secondly, is my understanding correct that no new bodies are either created through this
legislation, or can be created in regulations made under this legislation; and no bodies are
effectively abolished to do with mental health and in any way related to capacity through this
legislation or regulations made under legislation? It is often what is behind, what is in secret, not
1020 on the face of the Bill, that causes most difficulties later on. So we have the Mental Health
Commission, or something, but are there no implications on this piece of legislation for those sorts
of frameworks that exist inside other pieces of legislation?

Thank you, Mr Speaker.

1025 **The Speaker:** Hon. Member for Ayre and Michael, Mr Johnston.

Mr Johnston: Thank you, Mr Speaker.

I, too, welcome this Bill and I am very grateful for the huge amount of work that has gone into that.

1030 One quick question would be with regard to donees and delegates. Will there be any form of registration to officially recognise those individuals, to ensure that when someone perhaps is receiving medical care, those medical professionals know who to contact? It may not always be immediately obvious who that is, there may be some distance involved. So having and understanding some form of register, I think, and understanding how that will work ... I would like to understand.

1035 Thank you, Mr Speaker.

The Speaker: If no other Member wishes to speak, I will call on the mover to reply.

Mr Hooper.

1040 **Mr Hooper:** Thank you very much, Mr Speaker.

I would like to thank my hon. colleagues, Dr Allinson and Mrs Corlett for their support. I think some of the points they made are quite valid around the starting assumptions actually being critical to this Bill. I myself quite like that we are codifying in legislation that you are allowed to make unwise decisions and I will be taking quite a lot of advantage of that over the next few years, I imagine.

1045 One question that has come out from a number of Members, from Mr Glover and Dr Allinson, actually is quite an important one to bear in mind. It is not just about passing the Bill, it is about implementing it afterwards. The House of Lords did report on the implementation of the Mental Capacity Act (MCA) in the UK, which was their equivalent of this, and it did say that one of the biggest issues was actually a lack of awareness throughout providers – care providers, specifically.

1050 So we have a planned approach to how we are going to deal with that. There is going to be a general awareness campaign run on the Island as we start getting the regulations up and running. There is also ongoing training at present in common law principles, but that will be expanded to be more specific around what the Act requires; and there will be some training around best interests assessors as well. We have a plan in place for implementing this and raising awareness, and making sure people are aware that it is not just those practising that are going to need to know this inside and out, as part of their day-to-day lives, but the broader Manx public as well, so they understand what their rights are actually underneath this Act.

1060 Mr Glover mentioned around deprivation of liberty. That is not touched in this Bill in any way, shape, or form. That will be part of the second Capacity Bill that will be brought to this House, I think next year in the legislative programme. From the top of my head, that is the planned date. This Bill deals solely with the matters I have outlined in my Second Reading speech. It is solely about placing capacity and determination of capacity on a statutory footing, and to that end it also touches on Mr Thomas's comment around does this have any ramifications for bodies established – it very clearly does not.

1065 The Bill is very explicit as to what it is designed to do, and it is designed to place capacity and issues relating to capacity on a statutory footing. It does not touch anything else around mental health services. There will be other Bills coming from the Department that will touch on service provision and structures and bodies. But it is not this Bill. It is not for today.

1070 Mr Johnston I think made a comment around a register of donees. There will be a register of donees and delegates, which will be held by the Central Registry. One of the requirements around lasting power of attorney is that you have to register it in a prescribed form. It is clearly set out in the Bill that that will be the case, for exactly the reasons that you have outlined.

1075 Turning to some of Mr Thomas's broader comments. Ambulatory references sometimes make sense. I think when you are dealing with something as sensitive as capacity, you possibly do not

want to do that. You would want to make sure that any significant changes to the law would be covered, either through this House or through Tynwald approval of changes to regulations. But it is definitely something to be thought about as we go through the regulation-making process.

1080 I am not entirely sure about the point that was being made around clause 40 and voting. As I mentioned in my opening remarks, there are a number of matters that are considered to be of such a personal nature that they are excluded from the Bill, which essentially means that under no circumstances can I make a decision on behalf of somebody else because of their lack of capacity. So for example, you would not be able to enter into a marriage on behalf of somebody
1085 else, because that is a very personal decision that should not be imposed on anybody. *(Laughter)* Voting is a very similar question.

This does not impact the operations of the House of Keys Elections Act or the local authorities' elections. There are powers there within which people can register their proxy votes or advance votes or postal votes. That is all to do with the voting process. This Act simply states that one
1090 person cannot use the lack of capacity of another person to cast their vote on their behalf. There are quite distinct processes established in law for how you cast votes.

The question around UK legislation absolutely makes sense. The intention I think was to mirror the Mental Capacity Act in the UK, which is why the references in clause 51 are to an Act of Parliament. But we can definitely take it away and have a look at making sure that it is broad
1095 enough to cover Northern Ireland and Scotland. So if there are bits of legislation elsewhere that we want to pick and choose from, we will take that away and have a think about that, and if we can bring back an amendment working with the Hon. Member, we will. That is not a problem at all.

I think I have probably covered everything that is in the Bill, everything that was mentioned. If
1100 I have not, Hon. Members, please pick up the telephone. We are around in the Department, let's talk about this Bill. It will be coming back for clauses in line with the normal parliamentary timetable, so there is plenty of time for us to sit down and discuss the detailed questions and queries, or potential amendments that may be coming forward.

1105 With that, Mr Speaker, I beg to move.

The Speaker: Hon. Members, I put the question that the Capacity Bill 2022 be read for a second time. Those in favour, please say aye; against, no. The ayes have it. The ayes have it.