

# Mental Capacity Implementation Programme

## The Mental Capacity Act 2005 - putting it into practice

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## The presentation will cover

- Background context
- What the Act contains
- Implementation
- Implications for practice and services

## Why We Needed the Act and Who It Affects

- Mental capacity issues potentially affect everyone
- Over 2 million people in England and Wales lack mental capacity to make some decisions for themselves, for example, people with:
  - mental health problems
  - dementia
  - learning disabilities
  - stroke and brain injuries
- Up to 6 million family and unpaid carers, and people working in health and social care who may provide support or treatment for them

## Why we needed the Act and who it affects (cont'd)

- No existing mental capacity legislation for England and Wales
- Current common law lacks consistency
- People's autonomy not always respected
- People can be written off as incapable because of diagnosis
- No clear legal authority for people who act on behalf of a person lacking mental capacity
- Limited options for people who want to plan ahead for loss of mental capacity
- No right for relatives and carers to be consulted
- Enduring Powers of Attorney (EPAs) seen as open to abuse

## The 5 Principles of the Act

- Assume a person has capacity unless proved otherwise
- Do not treat people as incapable of making a decision unless you have tried all practicable steps to help them
- Do not treat someone as incapable of making a decision because their decision may seem unwise
- Things done, or decisions made for people without capacity must be in their best interests
- Before doing something to someone or making a decision on their behalf, consider whether you could achieve the outcome in a less restrictive way

## Other key elements of the Act

- Assessment of capacity - it must be decision and time-specific (the 'functional' test) but no formal procedure
- Determining best interests of someone who lacks capacity - must involve the person and consult with others
- Assessing capacity and determining best interests must not be based upon their age, appearance or behaviour alone
- Care and treatment can be provided for someone who lacks capacity without incurring legal liability but restraint (where used) must be minimum necessary to prevent harm

## How the Act can help someone plan ahead for a time when they might lack capacity

- Lasting Powers of Attorney (LPAs) - appointing someone to make decisions on your behalf. LPAs will cover:
  - 'Property and affairs'
  - 'Personal welfare' - including health
- Advance decisions to refuse treatment - with safeguards
- Making your wishes and feelings known - including written statements

## Other important components of the Act

- New safeguards for research involving people who lack capacity
- A Code of Practice to explain how the Act should work at a practical level - people acting in a paid/professional capacity must have regard to the Code
- A new criminal offence of ill treatment or neglect of someone who lacks capacity

## Key safeguards in the Act

- A new Court of Protection
  - for complex, difficult or disputed decisions
  - can make single orders, declarations, or appoint a 'deputy'
- The Public Guardian (PG)
  - Will register LPAs and help supervise deputies
  - Supported by a new Office of the Public Guardian which will replace the Public Guardianship Office (PGO)
  - OPG will provide information and deal with complaints

## Key safeguards in the Act

### The Independent Mental Capacity Advocate (IMCA)

- Only for people lacking capacity who have no-one to be consulted
- Duty on local authorities or NHS bodies to provide this service where necessary
- Only for those people where decision-maker is NHS or local authority and the decision is about:
  - serious medical treatment *or*
  - a long term care move - moving into hospital or residential care, provided by NHS or local authority

## Relationship between the Mental Capacity Act and the Mental Health Act 1983

- Mental Capacity Act does not apply to any treatment being given under Part 4 (consent to treatment) of the Mental Health Act 1983
  - therefore advance decisions for treatment for mental disorders can be over-ruled - and LPAs
- IMCA not involved where treatment/accommodation provided under the Mental Health Act (except 117 after-care)

## Implementation - timescale and responsibilities

- 16,588,800 seconds to go
  - The Act is due to come into effect in April 2007 in England & Wales for adults age 16 and over
- Mental Capacity Implementation Programme (MCIP) responsible for making this happen and consists of 4 organisations:
  - Department for Constitutional Affairs (DCA)
  - Department of Health (DH)
  - Public Guardianship Office (PGO) - future OPG
  - Welsh Assembly Government (WAG)

## Implementation - legislation and processes

- DCA co-ordinating MCIP until April 07 and dealing with:
  - Regulations and consultations on Code of Practice, LPA forms and guidance (and changes to EPAs), Court Rules, Fees, Public Guardian and PG Board
  - Communications and stakeholder involvement including public awareness raising and information provision
- PGO - 'business as usual' + EPA/receivership transition but also designing new structures, procedures, roles for OPG including customer service and advice function

## Implementation - legislation and processes

- DH and WAG dealing with:
  - Implementation networks established with Care Services Improvement Partnership (CSIP) regional leads, local authority leads and events being held
  - Producing and disseminating training materials for people working in health and social care (including the non-statutory sector)
  - Best practice tool for health and social care organisations
  - Funding available at a national and local level for training, awareness-raising and education for health and social care staff

## Implementation - legislation and processes - DH & WAG (cont)

- Liaison with inspection and regulatory bodies
- Liaison with professional training and accreditation bodies
- IMCAs - regulations, commission, training
- Research regulations and guidance
- Bournemouth but in consultation with DCA and stakeholders

## Implementation - information for stakeholders

- General awareness raising - including using the media
  - e.g. newsletter, leaflet, “launch” events, website
- More targeted communication on key stakeholder groups
  - e.g. Code, Mental Capacity booklets, DH training materials, stakeholder events, specialist media, - information in accessible formats
- Specialist communication
  - e.g. guidance for existing users of PGO and Court, IMCAs, LPA forms and guidance, deputies

## Implications for service users

- Clear rights and safeguards regarding decision-making processes including support, assistance, involvement and advocacy, and protection against being assumed not to have capacity
- Enhanced opportunities to plan ahead

## Implications for carers

- Helps carers understand how and when they can and can't make decisions on behalf of a family member who lacks capacity
- Gives carers a legal right to be consulted when decisions are made by practitioners about someone who lacks capacity

## Implications for practitioners and service providers

- Information, training and knowledge of Code of Practice
- Understanding how and when to assess capacity and determine best interests
- Being aware someone may have an LPA, advance decisions, or written statement of wishes and feelings
- Understanding the relationship with other legislation and care processes - and when to use what
- Involving IMCAs where required

## Challenges - and opportunities

- Proper applications of the principles - supporting people to make decisions themselves wherever possible
- Applying the decision-specific test of capacity
- Ensuring people who lack capacity are still involved in decision-making
- Encouraging people to plan ahead - and respecting their plans!

## Challenges - and opportunities

- Relationship between the Act and other policy initiatives/legislation
- Seeking to resolve disagreements at appropriate level without resorting to the Court
- Enhancing good practice - Act not to be frightened of, or seen as a threat
- Changing and improving the culture and structure of the way services - and the rights of service users and carers that use them

## Mental Capacity Implementation Programme (MCIP)

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