

# Mental Capacity Implementation Programme

## Mental Capacity Act 2005

# The Presentation Is an Overview and Will Cover:

## Part one - background and key policy

- Why we needed the act and who it affects
- The Mental Capacity Act principles
- Assessing capacity
- Best interests

# The Presentation Will Cover:

## Part two - what will be different in 2007

- Planning ahead if you think you might lack capacity in the future
- What happens if you lack capacity
- The Independent Mental Capacity Advocate (IMCA)
- Research
- How the act is supported - the code, the court of protection and the public guardian

# Part One

## Background and key policy

# 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:
  - dementia
  - learning disabilities
  - mental health problems
  - Stroke and head injuries
- Up to 6 million informal carers, social care and healthcare professionals may provide care or treatment for them

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

Did you know....

- That there is no legal basis for next of kin
- If your loved one is in hospital and unable to consent to treatment, you have no legal right to give consent on their behalf, or to be consulted about their treatment?
- That as the law stands, if you lack capacity in the future there is no statutory mechanism whereby you can state your wishes for your future care with confidence that your wishes will be taken into account?

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

- 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 seen as open to abuse

# 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
- Do things or, take decisions for people without capacity 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

# Assumption of Capacity and Supported Decision Making

- Act sets out an assumption of capacity
- Obligation to take all practicable steps to help the person take his or her own decision
- Act makes it clear that a person's age, appearance, condition or behaviour does not by itself establish a lack of mental capacity
- Must give information in a clear and easy way to understand
- Must help the person who lacks capacity to communicate

# Assessing Capacity

- Act sets out the best practice approach to determining capacity - whether an individual is able, at a particular time of making a particular decision
- Decision specific
- Detail on what is involved in assessing capacity is covered in the Code of Practice

# Best Interests

- All decisions must be made in the best interests of the person who lacks capacity
- It is the key principle that governs all decisions made for people who lack capacity
- Same as the current common law
- Must consider all relevant circumstances
- Act doesn't define best interests but does give a checklist:
  - Must involve the person who lacks capacity
  - Have regard for past and present wishes and feelings
  - Consult with others who are involved in the care of the person
  - There can be no discrimination

# Part Two

**The act will come into force in April 2007 - so  
what will be different?**

# Planning Ahead for a Time When You Think You Might Lack Capacity

The act provides new and clearer defined ways of planning ahead:

1. Lasting powers of attorney
2. Advance decisions to refuse treatment
3. Making your wishes and feelings known

# 1. Lasting Powers of Attorney (LPA)

- Enables you to appoint someone you know and trust to make decisions for you on your behalf
- Two types of LPA
  - ‘Property and affairs’ which replaces the current EPA
  - ‘Personal welfare’ which is a new way to appoint someone to make health and welfare decisions for you
- Must be made while you have capacity

# 1. Lasting Powers of Attorney (LPA) cont'd....

- Must be registered with the public guardian
- Your chosen attorney can only make decisions for you in your best interests
- Work underway to develop on the forms and processes - consultation before the end of 2005

## 2. Advance Decisions to Refuse Treatment

- Allows you to refuse specified medical treatment in advance
- Are legally binding now but Act gives greater safeguards
- Must be made when you have capacity and comes into effect if you lack capacity
- Must be clear about which treatment it applies to and when and must be in writing and witnessed if it applies to life-sustaining treatment
- Doctors can provide treatment if they have any doubt that the advance decision is valid and applicable

### 3. Making Your Wishes and Feelings Known

- You can help people make decisions for you in your best interests by letting them know any particular wishes and feelings you may have
- There is no formal process for this but written statements given to professionals, carers, family or friends are likely to carry weight
- Decision makers will have to consider your wishes and feelings when deciding what is in your best interests

# What Happens If You Lack Capacity

## 1. Provision of care and treatment:

- If you have no welfare LPA or advance decision to refuse treatment you can still be provided with the care or treatment you need
- The person providing the care or treatment decides what is in your best interests
- This is the same as now - but the decision maker must follow the principles of the Act

## 2. If necessary - an application can be made to the Court of Protection (for both finance and health and welfare issues)

## 3. Independent Mental Capacity Advocate (IMCA)

## 2. Application to the Court of Protection

(A) orders of the court - applications can be made to the court of protection for complex or difficult welfare decisions or simple one-off financial decisions

(B) court appointed deputies - could be used when a series of decisions are needed and a single court order is insufficient

# (A) Orders of the Court

## Orders of the court

- Complex or difficult welfare decisions
- Simple one-off financial decisions

## (B). Court Appointed Deputies

- Court appointed deputies - could be used when a series of decisions are needed and a single court order is insufficient
- Court will decide if appointing a deputy is in the person's best interests
- OPG will carry out checks on the right person appointed
- Must still allow the person who lacks capacity to make whatever decisions they are able to and must make decisions in the person's best interests
- There are two types:
  - One which will replace receivers
  - One to deal with welfare issues which we anticipate will be rare

## 3. The Independent Mental Capacity Advocate (IMCA)

- Extra safeguard for particularly vulnerable people in specific situations
- Duty on LA's or NHS bodies to provide this service where necessary
- Who? - People with no-one to consult (other than paid carers)

### 3. The Independent Mental Capacity Advocate (IMCA) cont'd....

- When? - When decisions are being made about serious medical treatment or significant changes of residence eg moving care homes or hospital
- What? - The IMCA will represent and support the person who lacks capacity
- Consultation ended on 30th September 2005 on extending the service and the details of how it is to operate

# Research

- Act sets out new safeguards for many types of research involving people who lack capacity
- Act balances desire for people without capacity to benefit from properly conducted research with the need for strict safeguards
- Act says the interests of the person are more important than the interests of science and society

# Research - Safeguards

- Research must be approved by independent experts to say it is necessary, safe and is intended to help understand or treat the person's condition
- Carers/family or an independent person must give permission and can say no at any time
- Research must stop if the person shows signs of not wanting to be involved
- Will be consulting on guidance

# How Is the New Legal Framework Being Supported?

1. Code of practice
2. New Office of the Public Guardian
3. New Court of Protection
4. Criminal offence

# 1. Code of Practice

Act sets out a broad framework - the code will flesh that framework out

Code has legal force and the following must have regard to it:

- Those with formal powers (attorneys/deputies)
- Those acting in a professional capacity or who are being paid
- Those carrying out research under the act
- IMCA'S

# 1. Code of Practice cont'd.....

We will encourage informal carers to be aware of and follow the Code of Practice

Draft code already published and formal consultation on a revised version in Spring 2006

## 2. Office of the Public Guardian

- To build upon and replace the Public Guardianship Office
- Maintains a register of LPA's and deputies
- Will co-operate with other agencies to supervise deputies and investigate complaints
- Provides evidence to the court
- Provides information and guidance to the public
- Work now on processes and procedures that underpin the new organisation
- Public guardian will be in place by January 2006

### 3. Court of Protection

- Single specialised court staffed by trained judiciary
- Combines
  - Current court of protection (property and affairs)
  - Current high court jurisdiction (welfare including healthcare)
- Regional presence, informal style
- Work now on the rules that will govern the new court
- Consultation in Summer 2006 on rules

## 4. Criminal Offence

- New offence of ill treatment or neglect
- Work underway with CPS, home office and police to implement the criminal offence

# Key Forthcoming Dates / Action Points

- Formal consultation on the code in spring 2006
- LPA consultation paper before the end of the year
- Public guardian in place by January 2006
- Consultation on the rules by Summer 2006