Summary of the Mental Capacity Act 2005
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Introduction.
The Act provides a statutory framework to empower and protect vulnerable people who are not able to make their own decisions. It makes it clear who can take decisions, in which situations, and how they should go about this. It also enables people to plan ahead for a time when they may lose capacity.
The Act received Royal Assent in April 2005 but enactment is not expected until April 2007. Although not in force it is now law. It's accompanying Code of Practice (still in draft) says that it builds on common law already applied by Courts in cases regarding incapacitated persons. It enshrines in statute current best practice and common law principles for alternative decision making for people who lack mental capacity and those who take decision on their behalf. It replaces current statutory schemes for enduring powers of attorney and Court of Protection receivers with reformed and updated schemes.
As only a draft code of practice has as yet been published the full implications for social services and health practice in relation to the Act are difficult to assess. This paper provides a summary of the Act and an assessment of its possible implications.

1. Five Key Principles of the Act.
   - A presumption of capacity - every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise;
   - The right for individuals to be supported to make their own decisions - people must be given all appropriate help before anyone concludes that they cannot make their own decisions;
   - That individuals must retain the right to make what might be considered as eccentric or unwise decisions;
   - Best interests - anything done for or on behalf of people without capacity must be in their best interests; and
   - The least restrictive intervention - anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

The law already presumes capacity and the Act re-asserts this principle, but also provides that anyone involved in someone's care/treatment can assess and conclude that the subject is incapacitated, and act accordingly, on the basis of 'reasonable belief.' If there is a dispute regarding capacity or that a person is acting in the subjects Best Interests then this will generally need to be referred a judge. Currently this jurisdiction is with the Family Division of the High Court but under the Act the New Court of Protection will be the final arbiter for capacity matters.

2. Capacity.
   - Assessing Capacity. The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. No one can be labelled 'incapable' as a result of a particular medical condition or diagnosis. Section 2 of the Act makes it clear that a lack of capacity cannot be established merely by reference to a persons age, appearance or any condition or aspect of a person's behaviour which might lead others to make unjustified assumptions about capacity. The Kent and Medway Multi agency Adult Protection guidance already reflects this principle.

   - Best Interests. Everything that is done for or on behalf of a person who lacks capacity must be in that person's best interests. The Act provides a checklist of factors that decision-
makers must work through in deciding what is in a person's best interests. The subject can put his/her wishes and feelings into a written statement if they so wish, the person making the determination must consider this. Carers and family members gain a right to be consulted.

- **Acts in connection with care or treatment.** - Section 5 clarifies that, where a person is providing care or treatment for someone who lacks capacity, then the person can provide the care without incurring legal liability. The key to this will be a proper assessment of capacity and best interests. This will cover actions that would otherwise result in a civil wrong or crime if someone has to interfere with the subject's body or property in the ordinary course of caring. E.g. by giving an injection or by using the person's money to buy items for them.

- **Restrain/deprivation of liberty.** - Section 6 of the Act defines restraint as the use or threat of force where an incapacitated person resists, and any restriction of liberty or movement whether or not the subject resists. Restraint is only permitted if the person using it reasonably believes it is necessary to prevent harm to the subject, and if the restraint used is proportionate to the likelihood and seriousness of harm. Section 6 (5) makes it clear that an act depriving a person of his or her liberty within the meaning of Article 5 (1) of the European Convention on Human Rights cannot be an act to which section 5 provides any protection.

(The Department of Health has issued interim advice to NHS and Local Authorities on the implications of the ECHR judgement in the Bournewood case, pending the development of proposals for new procedural safeguards for the protection of those people falling within the "Bournewood Gap".

3. **Two new public bodies to support the statutory framework. Both of which are designated around the needs of those who lack capacity.** -

- **The new Court of Protection** - The new Court will have jurisdiction relating to the whole Act and will be the final arbiter for capacity matters. It will have it's own procedures and nominated judges. The Court may make a single order related to a particular situation or decision and if all other issues are being addressed appropriately there will be no need for a deputy to be appointed.

- **A New Public Guardian** - The Public Guardian and his/her staff will be the registering authority for LPAs and deputies. They will supervise deputies appointed by the Court and provide information to help the Court make decisions. They will also work together with other agencies, such as the police and social services, to respond to any concerns raised about the way in which an attorney or deputy is operating. A Public Guardian Board will be appointed to scrutinise and review the way in which the Public Guardian discharges his/her functions. The Public Guardian will be required to produce an annual report about the discharge of his/her functions.

4. **The Act deals with two situations where a designated decision-maker can act on behalf of someone who lacks capacity.**

- **Lasting powers of attorney (LPAs).** - The Act allows a person to appoint an attorney to act on their behalf if they should loose capacity in the future. This is like the Enduring Power of Attorney (EPA), but the Act also allows people to let an attorney make health and welfare decisions. The LPA will have to be registered with the Public Guardianship before any power of attorney can be used. The subject does not have to grant this wider power. They may make no decision about who should act in respect of health and
welfare issues or they may grant the LPA's to different people. E.g. one person to act for financial matters and another for health and welfare matters.

- **Court appointed deputies.** - The Act provides for a system of court appointed deputies to replace the current system of receivership in the Court of Protection. Deputies will be able to take decisions on welfare, healthcare and financial matters as authorised by the Court. They will not be able to refuse consent to life-sustaining treatment. They will only be appointed if the court cannot make a one-off decision to resolve the issues. *(It is likely that local authorities will be expected to act as deputies and where necessary to refer matters to the court when it is believed that a vulnerable incapacitated person is at risk of abuse by a person who is supposed to be caring for them and acting in their best interests).*

5. **Provision of three further key provisions to protect vulnerable people**

- **Independent Mental Capacity Advocate (IMCA)** - An IMCA is someone appointed to support a person who lacks capacity but has no one to speak for them. The IMCA makes representations about the person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. The IMCA can challenge the decision-maker on behalf of the person lacking capacity if necessary. *(Consultation is taking place between the Departments' of Health and Constitutional Affairs and stakeholders to determine how the IMCA service is to be commissioned and managed)*

- **Advanced decisions to refuse treatment** - Statutory rules with clear safeguards confirm that people may make a decision in advance to refuse treatment if they should lose capacity in the future. It is made clear in the Act that an advanced decision will have no application to any treatment that a doctor considers necessary to sustain life unless strict formalities have been complied with. These formalities are that the decision must have been made in writing, signed and witnessed. In addition there must be an express statement that the decision stands "even if life is at risk".

- **A Criminal Offence** - The Act creates a new criminal offence of ill treatment or wilful neglect of a person who lacks capacity. This applies to the following
  - A person who has the care of a person who lacks capacity or is reasonably believed to lack capacity or
  - A person who is the donee of an LPA or
  - A person who is a deputy appointed for the person by the court
A person found guilty of such an offence may be liable to imprisonment for up to 5 years. This offence would have been relevant to both serious case reviews carried out in Kent.

6. **Parameters for Research**

- Research involving or in relation to a person lacking capacity may be lawfully carried out if an "appropriate body" (normally a research ethics committee) agrees that the research is safe, relates to the person's condition and cannot be done effectively using people who have mental capacity. The research must produce a benefit to the person that outweighs any risk or burden. Alternatively, if it is to derive new scientific knowledge it must be if minimal risk to the person and be carried out with minimal intrusion or interference with their rights.

- Carers or nominated third parties must be consulted and agree that the person would want to join an approved research project. If the person shows any signs of resistance or indicates in any way that he or she does not wish to take part, the person must be
withdrawn from the project immediately. Transitional regulations will cover research started before the Act where the person originally had capacity to consent, but later lost capacity before the end of the project.

Other important issues
- Serious healthcare and treatment decision will generally be referred to the new President of the Court of Protection. E.g. non-therapeutic sterilisation. Other cases likely to be referred to the Court include ethical dilemmas in untested areas or where there are otherwise irresolvable conflicts between professionals or between professionals and family members or carers.

- Restraint issues are referred to in the draft code of practice and it provides clarity about two conditions, which, if satisfied, may provide protection from liability to carers and others who need to use restraint. These are:
  1. That the person taking the action must reasonably believe that it is necessary to do an act that involves restraint in order to prevent harm to the person lacking capacity.
  2. The act must be a proportionate response (in terms of both the degree and duration of the restraint) to the likelihood of the person who may lack capacity suffering harm and the seriousness of that harm.

The onus is on the person using the restraint to identify reasons, which objectively justify their belief about the level and seriousness of harm and only minimum force may be used and for the shortest duration. There are definitions of harm and what is proportionate in the code.