Ministry of JUSTICE

Memorandum to the Justice Select Committee

Post-Legislative Assessment of the Mental Capacity Act 2005

October 2010

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Post-Legislative Assessment of the Mental Capacity Act 2005

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by the Lord Chancellor and Secretary of State for Justice
by Command of Her Majesty

October 2010

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Introduction

1. This memorandum provides a preliminary assessment of the Mental Capacity Act 2005 (2005 Ch. 9) and has been prepared by the Ministry of Justice for submission to the Justice Select Committee. It reflects policy that spans both the Ministry of Justice and the Department of Health and the Welsh Assembly Government and so has input from all three. It will be published as part of the process set out in the document: *Post Legislative Scrutiny – The Government's Approach* (CM 7320).

2. The Act and the key push for it started with the Law Commission report in 1995 (*Mental Incapacity, Law Commission Report No 231, 28th February 1995).* This report highlighted the need to improve the current legal position in relation to those who lacked capacity. Reform of the Law was seen as pressing as the existing law was piecemeal in relation to financial decisions, relied on the inherent High Court jurisdiction for health and welfare cases; and was often based on Common Law. As the Report said:

   "The most obvious deficiencies in private law were the lack of any effective procedures for resolving disputes between individuals about the care of people without capacity, or generally for legitimating and regulating the substitute decision making which in practice regularly takes place".

3. The Court of Protection existed but was not a court as such; rather an office of the Supreme Court with a jurisdiction that became over time wholly statutory and limited to questions of "property and affairs". Enduring Powers of Attorney (EPA) were also limited to appointing an attorney to manage property and affairs on behalf of the Donor. EPAs could be used prior to registration but had to be registered as soon as the Donor lost capacity for them to continue to be used.

4. The Act gave effect to those proposals in the Consultation Paper: *Who Decides: Making Decisions on Behalf of Mentally Incapacitated Adults*, Cm 3808, December 1997. The Consultation Paper considered what changes were needed to ensure that these rights were embedded in the legal system.

Objectives of the Mental Capacity Act 2005 ("the Act")

5. The Mental Capacity Act 2005 received Royal Assent on 7th April 2005. The primary purpose of the Act was to empower, and strengthen protection for, those who have lost capacity to make decisions for themselves and to empower persons to be able to make provision for a time in the future when they may lack capacity.

6. The Act is based on five key principles that are set out at section 1 of the Act. These are:

   - A person must be assumed to have capacity unless it is established that he lacks capacity
   - A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success
   - A person is not to be treated as unable to make a decision merely because he make an unwise decision
   - An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests
   - Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedoms of action

7. These principles were added to the face of the Bill after scrutiny of the draft legislation, in order to make it clear just how important they were and to provide valuable guidance to the Courts and others in interpreting the measures contained with the Act.

8. One key aspect of the Act is the focus on protecting and empowering those who lack capacity. It allows them to make as many decisions as they can for themselves and where that is not possible to have as much input into decisions as possible.

9. The Act bought forward the very important concepts of "decision specific" and "time specific" – which means that the test for capacity should be repeated, or at least reviewed, each time a decision has to be made. There should be no presumption that just because someone has been deemed to lack capacity once that they will always lack capacity. The Act (and the Code of Practice which offers guidance on what the Act means in practice and how it should be used) sets down how the test for capacity should work, including where capacity "fluctuates".

10. As Lord Filkin stated to the Legislative Scrutiny Committee the key objective of the Act is to:

    "maximise the capacity of those who lack or who may lack capacity to take certain decisions for themselves; protect vulnerable adults with mental incapacity from abuse and neglect; and provide clarity to families, informal carers and professionals a to when they may act or take decisions on behalf of those incapable of making such decisions themselves".

11. Where people do not have the capacity to make decisions for themselves, the Act makes it very clear that decisions must be made in the person's best interests and provide protection to ensure that this principle is adhered to.

12. The second main area is to ensure that there are mechanisms in place to ensure that adults are empowered to be able to plan ahead for a time when they may lack capacity to make decisions themselves. The key features are the making and registration of Lasting Powers of Attorney (LPA) (both for property and affairs and personal welfare); the continued support to EPAs properly made in advance of the Act's implementation; and advanced decisions.

Implementation and subsequent amendment

13. Although the Act gained Royal Assent in 2005, the majority of the Act did not come into force until October 2007 or later. This was because significant time was need to ensure that the necessary structures – including the new Court of Protection (CoP) and the Public Guardian (PG) – were in place to ensure delivery of the Act's objectives. The Act also introduced a new statutory advocacy scheme, of Independent Mental Capacity Advocates (IMCAs); new provisions in relation to research with those who lack capacity and a new criminal offence of wilfully neglecting or ill treating a person lacking capacity, which has resulted in approximately two hundred prosecutions to date.

14. The Code of Practice was issued on 23 April 2007 and the regulations in relation to Independent Mental Capacity Advocates (IMCAs) came into force in April 2007 in England and October 2007 in Wales. The main sections around Lasting Powers of Attorney (LPAs), the PG and the CoP, in October 2007.

15. Primary legislation, the Mental Health Act 2007 was used to amend the Mental Capacity Act 2005 and introduce the Deprivation of Liberty Safeguards (MCA DOLS) that came into force on 1st April 2009.

16. The Government has decided that this Memorandum will not cover the sections of the Act in relation to DOLS in detail as they have been in force for less than 18 months. The Department of Health is carrying out research in this area and will report on these parts of the Act in due course.

17. Provisions were bought into force by a number of commencement orders, one transitional and consequential provisions order; and a transfer of proceedings order and additional Secondary legislation has been made pursuant to the Act (Annex A).

18. The MoJ has undertaken a significant number of public consultations. These have included such subjects as the Code of Practice; the various Regulations; fees; supervision; and the LPA form itself. This has allowed both practitioners and the public to contribute to the way in which the Act

has been implemented and the changes that have since been made. Further public consultations are expected as the Act continues to bed in and the Government continues to develop processes and procedures to improve value for money and services provided. The Department of Health consulted on the IMCA service, the research provisions and the Deprivation of Liberty Safeguards.

Code of Practice

19. The importance of the Code of Practice was raised by the Joint Committee on the Draft Mental Incapacity Bill. They said:

    "The Codes of Practice (sic) will be absolutely critical for the success of the Bill. It must be clear, comprehensive and workable."

20. During the development of the Code there was much discussion as to whether it should be a set of documents or one single document (due to its length and complexity). The decision was made in the end to publish as a single document as it was thought better to have all the information in one place and because of the significant links between the various chapters.

21. An agreement was made during the passage of the Bill (by David Lammy MP to Tim Boswell on 4 November 2004; twelfth sitting of the Commons Standing Committee) that the Code of Practice would be published before the Act came into force in order to give practitioners and the general public time to assess the impact of the Act on them.

22. The Code of Practice (*Mental Capacity Act 2005: Code of Practice*, TSO, 2007, ISBN: 9780117037465*)* was duly published on 23rd April 2007, before the Office of the Public Guardian (OPG) and the new Court of Protection came into being and before the new Lasting Powers of Attorneys were available to the general public. This was to ensure that people had a chance to look at, and become acquainted with, the Code and its contents before they were called on to put it into practice.

23. The Code of Practice is also available on the OPG website and in April 2010 the IT capability to track the number of downloads was introduced. As of 1 October 2010 this stood at 51,798. This means that those who need or want access to a copy do not need to purchase a hard copy.

24. The Code of Practice's influence has spread further than just those services and people directly affected by the MCA. For example, DWP Appointees (who are appointed to be able to collect benefits on behalf of others) have to as, part of their role, take account of the Code of Practice (as they are often responsible for the receipt of benefits for those who lack capacity). So the Code is seen as important, not just in the precise area of the MCA, but also to offer guidance to others in how they should act when mental capacity is a consideration.

25. The Government expects to review the Code of Practice within the next two years to ensure that it remains fit for purpose and contains the information that is of most use to Attorneys, Deputies and others who need to use it. It is to be a living document that develops over time to reflect changes in policy, practice and jurisprudence.

26. Much of the research on the MCA has been taken forward by the Department of Health but the Ministry of Justice has commissioned a piece of research on “Best Practice Decision Making in Complex Situations”. The outcomes of this research (due in early 2011) will feed into the review of the Code of Practice.

27. A Code of Practice in relation to the Deprivation of Liberty Safeguards to supplement the main code was issued in August 2008.

Statutory Roles and Bodies

The Public Guardian

28. Prior to the MCA, although there was a Public Guardianship Office there was no statutory role of Public Guardian (PG). The Public Guardianship Office (the fore-runner of the OPG) was the administrative arm of the "old" Court of Protection.

29. The new role has a number of functions including:

- being the registering authority for LPAs and EPAs;
- maintaining registers of LPAs, EPAs and Court-appointed Deputies;
- the supervision of Deputies;
- the investigation of allegations or concerns as to the conduct of Deputies and Attorneys; and
- offering advice to the public on matters in respect of adults who lack capacity, and to work with other organisations to support a coherent approach to addressing the potential abuse of vulnerable adults.

30. It is important to draw the distinction between the OPG and the Court of Protection (the Court), as the Act purposefully set up two separate bodies – the Court and the PG – to demarcate the decision making and regulatory functions. It ensures that in the public eye, the OPG has its own head with specific responsibilities in relation to those who lack capacity; responsibilities that are clearly distinct from those of the Court.

31. Since October 2007 the OPG, an as Executive Agency of the Ministry of Justice, has dealt with the registration of LPAs (and EPAs made before 1st October 2007) and the supervision of Court-appointed Deputies. Prior to April 2009, the Agency also provided the administrative support to the Court of Protection. Since April 2009, the Court administration has been part of Her Majesty's Courts Service (HMCS).

32. Procedures, provided for by the legislation, are in place within the OPG for the validation and registration of LPAs and EPAs. They are generally sound, though they still need to be made more resistant to the impact of fluctuating volumes. This memorandum discusses the Act in Practice in more detail below.

Public Guardian Board

33. Pursuant to section 59 of the Act, the Public Guardian Board was set up with the duty to:

    "…scrutinise and review the way in which the Public Guardian discharges his functions and to make such recommendations to the Lord Chancellor about that matter as it thinks appropriate."

34. As part of this, the Board must provide the Lord Chancellor with an annual report on the discharge of its functions.

35. The Public Guardian Board has published two annual reports with the third due for publication in December 2010. There have been a number of consistent themes from these reports.

36. The Board has consistently pointed to the potential within the Act for every adult citizen to have the opportunity to make a Lasting Power of Attorney; and to ensure that they exercise choice over who makes decisions for them should they ever lose capacity. The Board has acknowledged that uptake has been higher than predicted, but that it only covers a very small percentage of the population and is largely restricted to the older age groups. It has signalled that significant work is necessary to extend and expand this take-up.

37. The Board has been consistent in the view that more can be done in relation to stakeholder engagement and the setting up of partnerships to achieve the aim of increasing LPA (and MCA) awareness.

38. The Board's reports have also helped the OPG in its formative period by highlighting issues which may have prevented some customers from receiving a sound and sustainable service.

39. As part of the Government's review of Arms Lengths Bodies, the Public Guardian Board is to be abolished. The Government is currently working on proposals for anew governance structure for the Office of the Public Guardian which will include suitable non-executive input.

Court of Protection

40. October 2007 also saw the setting up of the new Court of Protection, which is a Superior Court of Record and not an Office of the Supreme Court as was the case with the old Court of Protection. The Court administrative staff are based in London, co-located with the main Court centre. However, the Court also operates regionally and sits outside of London providing wider access to the Court without the need to travel to London.

41. The MCA made changes to the types of Judiciary who could sit in the new Court of Protection compared with the old Court of Protection. Pursuant to section 46(2), those who can sit need to be one of the following:

    - the President of the Family Division,
    - the Vice-Chancellor,
    - a puisne judge of the High Court,
    - a circuit judge, or
    - a district judge.

Independent Mental Capacity Advocates (IMCAs)

42. IMCAs provide a new type of statutory advocacy and were introduced as part of the MCA.

43. IMCAs are there to offer non-instructed advocacy and as part of this the IMCA plays a role in safeguarding the rights of people who:

    - are facing a decision about a long-term move or about serious medical treatment
    - lack capacity to make a specified decision at the time it needs to be made
    - have nobody else who is willing and able to represent them or be consulted in the process of working out their best interests, other than paid staff.

44. IMCAs also have a role under DOLS, although this is not covered in the Memorandum for the reasons outlined previously (paragraph 16).

The Act in Practice

Lasting Powers of Attorney

45. One of the key new policies of the MCA was the introduction of Lasting Powers of Attorney (LPAs) to replace the previous Enduring Powers of Attorney (EPAs). There were a number of key policy changes between the two, mainly brought in to protect those making LPAs from the possibility of fraud.

46. A key principle is that LPAs cannot be used before they have been registered with the Public Guardian (i.e. with the OPG). EPAs only have to be registered with the OPG at the point the Donor begins materially to lose capacity, but can be used as an ordinary power at any time up to that point.

47. So in the past, the Government had no idea how many EPAs were being used as there was no requirement to register them whilst the Donor had capacity. It was therefore difficult to gauge: the extent to which fraud was taking place; and whether powers were still being used when they should have been registered.

48. New Property and Financial Affairs LPAs may still be used before the Donor loses capacity, but they cannot under any circumstances be used before they are registered with the OPG. In this way there is a complete register of all LPAs that can be searched by those who may have concerns about a person.

49. Another change with LPAs is the need for a certificate provider. That is someone independent of the Donor who certifies that the Donor has the necessary capacity to make the instrument, understands what its provisions mean, and that no undue influence has been exerted.

50. There were also changes to the forms, with the key decision to bring in a statutory form. The original forms were considerably longer than the previous EPA forms as a result of the extended jurisdiction and the additional safeguards that were introduced (e.g. certificate providers). Prescribed information and guidance had been provided on the forms to help people to complete them. This had the downside of making them appear long and complex.

51. There are a number of steps to the making of, and registration of, an LPA. These include a statutory 6 week waiting period when any notified people have a chance to object to the registration of the LPA. This is sometimes misinterpreted as administrative delay – particularly when applicants require LPA registration urgently – and underlines the importance of making provisions well before any risk to capacity may arise.

52. The Government appreciated that changes were likely to be necessary and the Ministry of Justice reviewed the implementation of the Act within its administration. Consultation launched in October 2008 looked again at the LPA forms in the light of users' experiences – having received feedback that they were too long and too easy to get wrong.

53. In the resulting SI (SI 2009 No. 1884), the forms were reduced in length (by nearly half), while further guidance was incorporated. The use of plain English was increased throughout and design was applied to minimise errors (for instance, using colour more effectively and including a checklist). In order to ensure that the new forms met the needs of those wishing to make an LPA, the Government involved users and stakeholders at all stages of the design.

54. The length of the form and the guidance provided needs to remain balanced with the objective to make LPAs more accessible – so that individuals can realistically consider filling in the forms themselves (or with help from family or friends) without the need to engage legal advisors. That was a key principle with the implementation of the LPA and one which the Government wishes to maintain.

55. Given an LPA is a deed, making the LPA correctly is a prime consideration. A core task for the OPG is the validation of instruments submitted for registration. If there are mistakes, that need not be the end of registration. An instrument can be considered imperfect, which means that it cannot be registered in its current form but that the errors can be corrected (usually by providing replacement parts). If there is a mistake in an LPA that cannot be rectified then it is invalid and must be re-made in whole (and registration started afresh).

56. The changes made to the forms and guidance have supported the drive to reduce the number of both imperfect and invalid instruments. To further support this, the OPG also provides information on its website about the most common mistakes that are made.

57. The Government has not stopped looking at ways of improving and refining the LPA registration process. The Government continues to look at how the guidance can be improved, and how the administrative process of registration can be developed so as to retain the important safeguards inherent to the LPA, without maintaining a system that is complex, lengthy and off-putting for those who wish sensibly to plan and make provision for the future.

58. Since the implementation of the MCA on 1st October 2007, the OPG has received 265,000 and registered 210,000 LPAs and EPAs. Of the number registered, 38,000 have been health and welfare LPAs.

Deputies

59. If a person loses capacity to make decisions for themselves, and has not made either an LPA or EPA, then the Court of Protection can appoint a Deputy. Deputies can be appointed for property and affairs and/or for health and welfare matters. They are often family members or friends, but can also be professionals such as solicitors or local authorities.

60. For those who do not have anyone who is willing to act as Deputy, and are in need of such an appointment, the OPG maintains a panel of Deputies from which the Court can appoint someone to act. In order to ensure that there is diverse representation on that Panel, and to assure value for money for individuals with a panel deputy acting, the Government recently reviewed the panel arrangements. The period for applications to the new panel closed on 8th October 2010 and appointments to the new panel are expected to be finalised by the spring of 2011.

61. Once a Deputy has been appointed by the Court of Protection it is the statutory responsibility of the OPG to supervise those Deputies. This is done by through a risk-based supervision regime that is currently broken down into 4 different levels:

    - **Type 1 supervision**: for the most complex cases: for example where there are ongoing family disputes or concerns have been raised about actions of the Deputy;
    - **Type 2a supervision**: For those cases who do not need the consistent in-depth supervision of Type 1, but need more intervention than Type 2. These are often those cases where there is a new Deputy appointed or where issues have been raised, but which are not serious enough to involve a full investigation. As a result, this is a supervision class that Deputies tend not to stay in longer than 18 months;
    - **Type 2 supervision**: This is the ongoing supervision type for those cases where there are few or no issues to consider and the estate being managed on behalf of an individual is above a £16,000 threshold (using OPG criteria to determine what does or does not count towards that threshold).
    - **Type 3 supervision**: This is the lowest level of supervision and covers those cases below the £16,000 threshold. The level of supervision in de minimis but covers the requirements in relation to substitute decision makers under the UN Convention on the Rights of Persons with Disabilities.

62. In September 2010 there were just over 35,000 Deputyship cases subject to the Public Guardian's supervision.

63. This supervision regime is not statutory and has developed and been enhanced since the OPG came into being in 2007. As a risk-based scheme it will continue to develop in the light of experience and jurisprudence. Key principles are that appropriate supervision is available and that the associated fees adequately reflect the level of work involved.

64. As part of the supervision regime, Deputies may be visited by a Court of Protection Visitor. This is a statutory title and a bit of a misnomer as visits are commissioned by the PG. Most visits are general in nature and the OPG maintains a panel of Visitors with relevant skills and experience in Mental Capacity issues. A panel of special, medical, visitors is also maintained to allow the PG or the Court to obtain an independent medical assessment of capacity (typically only in contentious or complex matters). Visits form part of ongoing routine supervision or form could pay a lead part in any investigation that is taking place. Visitors are used for visiting both Deputies and Attorneys.

65. Deputies must act in accordance with the Order of the Court. Routinely the Court requires the provision of a security bond to protect at least a significant proportion of an estate from fraud or misuse of funds. The level of security bond required is set by the Court at the point at which the Deputy is appointed. If there is a change of circumstances the Deputy must apply to the Court to reconsider the security level.

66. Security bonds can be purchased from any provider but it is a highly specialised product. Accordingly the Government has a contract with a preferred supplier, Marsh Brokers, with bonds underwritten by Aviva. In line with the terms of the contract, the Ministry of Justice will at the appropriate time seek to re-compete and renew the contract.

Investigations

67. In section 58 of the MCA the functions of the PG include the ability to deal with representations (including complaints) about the way in which a donee (otherwise know as an attorney) of a lasting power of attorney or a deputy appointed by the court is exercising his powers.

68. As a result, the OPG deals with referrals from a number of sources such as the general public and Local Authorities and has a duty to investigate. Since 1 October 2007 the OPG has received a total of 2,559 referrals all of which have undergone an initial risk assessment. Of those, 1,195 were deemed to require a more formal in depth investigation by the OPG.

69. The breakdown of these year on year is:

- Oct–Dec 2007 29
- 2008 294
- 2009 544
- Jan–Sep 2010 427

70. As it can be seen, the total is going up year on year. Part of this reflects the increase in the number of LPAs and EPAs that have been registered, but part of it is also a reflection of the addition publicity that the MCA has given to the role of the Public Guardian. This includes the increase in knowledge amongst the general public that the OPG is the place to contact should they have doubts about the behaviour of an Attorney or a Deputy. To put the impact of the MCA in context, in the 12 months ending 31 March 2007, the former Public Guardianship Office commenced only 44 investigations.

71. Of these initial investigations the majority (1080) have been signposted to a third party such as the police or a social services department as they fall outside of the OPGs jurisdiction, often because they do not relate to a registered EPA, LPA or a court appointed Deputy.

72. There are a range of possible outcomes in cases where the Public Guardian has commenced a full investigation, ranging from a finding that there is no cause for concern, to applications to Court to discharge a Deputy or revoke a Power of Attorney and call in the Deputy's security bond. In some cases, prosecution has followed. Since implementation the outcomes of investigations have included:

    - 194 Court applications to discharge Deputies/Attorneys (117 Deputies and 38 Attorneys removed by the Court to date)
    - 42 other Court applications (for example, ordering the Deputy/Attorney to account)
    - 60 applications by third parties, mainly local authorities, working in partnership with the OPG
    - 35 cases reported to the Police
    - 31 formal censure letters from the Public Guardian to Attorneys
    - 62 Deputies placed in a higher supervision level for ongoing monitoring.

73. An additional 64 Court applications have been made as a direct result of the Public Guardian's supervision of Deputies.

74. A key aim of the Act was to protect those who lack capacity and the OPG introduced its first Safeguarding Vulnerable Adults policy in December 2008. The policy pulls together the various protective activities of the Agency and is supported by a set of procedures, key performance indicators and service Standards for responding to allegations or suspicions of abuse. A protocol for working constructively with local authorities in their lead role of co-ordinating and leading on safeguarding issues has also been developed, and includes guidance on the respective roles of the OPG, Court of Protection and local authorities and a protocol for the exchange of information.

75. Safeguarding activity typically involves promoting legal safeguards such as Lasting Powers of Attorney and searches of the registers of Deputies and Attorneys, liaising with local authorities to signpost concerns, participating in local safeguarding case meetings, providing training and information on the OPG's and Court of Protection's role and networking with other agencies involved in safeguarding.

76. At a strategic and policy level, the OPG is actively involved with the Department of Health's review of the "No Secrets" safeguarding guidance to English local authorities, is on the "No Secrets" Advisory Group and has contributed to the Association of Chief Police Officers' report into Financial Crime against vulnerable adults.

Court of Protection

77. The Court of Protection faced a challenging beginning with applications far exceeding the predicted volumes, especially as the transitional arrangements for the first nine months allowed many people to apply to the Court without paying a fee.

78. In the first Annual Report from the Court (*Court of Protection: 2009 Report*, 10th June, 2010*)* Senior Judge Lush commented that:

    "The court has had to endure more than its fair share of setbacks, which were caused in the main by a failure to anticipate, prior to the implementation of the Act, the volume of work that would inundate the court during the initial transitional period, and the overall burden it would place on the judges and staff"

79. However, on a more positive note, he also noted that new judiciary had been taken on and the Court now had a full complement of London-based judiciary.

80. One of the key policy aims of the Law Commission report and the draft bill was to ensure that the new Court of Protection could operate in the same way as other mainstream courts. One of the challenges was to provide processes that were equally appropriate for cases relating to property and affairs (previously heard by the old Court of Protection) and personal welfare cases (previously heard under the inherent jurisdiction of the High Court); and which ensured that the human rights of the person lacking capacity were adequately protected.

81. The policy intention of creating a mainstream court was implemented by following the precedent of the Civil Procedure Rules (CPR), underpinned by practice directions; including adopting many of the provisions and workings of the CPR and rules relating to family proceedings. These were tailored where necessary to meet the needs of the CoP jurisdiction. This included:

    - greater use of standard court forms
    - provisions for serving people who might wish to participate in the proceedings and notifying those who might have an interest
    - provisions for the person who is the subject of the proceedings to be notified at various stages and to participate where possible
    - the requirement to obtain permission of the court for certain types of applications.

82. This necessarily resulted in processes that were more formal than the previous Court of Protection. There are more procedural provisions which mean it takes longer to decide cases under the new law. Feedback from practitioners was that CoP processes were not working well, and this lead to the then President, Sir Mark Potter, setting up an ad hoc committee to review the CoP Rules (SI 2007 1744) in December 2009. The key concerns of practitioners were:

    - court forms are too long and there is excessive duplication
    - the attempt in 2007 to merge the property and affairs jurisdiction of the old CoP with the declaratory jurisdiction of the Family Division has not been wholly successful and there are significant differences in practice between property and affairs and personal welfare cases
    - court procedures have been weighted too much in favour of family division practice which imposes an unnecessarily litigious approach for non-contentious matters
    - costs in certain types of cases have increased significantly
    - there is no satisfactory procedure for bringing urgent but not critical cases to court quickly.

83. The committee's report was published on 29 July (http://www.judiciary.gov.uk/publications-and-reports/reports/court-protection-rules-committee-report) and accepted in full by the President of the Court of Protection. The Ministry of Justice is currently deciding how to take the recommendations forward. These include:

    - recognition that the practice of the court should reflect the differences in the nature of the following categories of its work, namely a) non-contentious property and affairs applications, b) contentious property and affairs applications and c) health and welfare applications;
    - recommendations for substantial revision of the forms to cater for this recognition and to remove the duplication required (including the abolition of separate forms for applications for permission, such applications being incorporated into the main form);
    - a recommendation that strictly defined and limited non-contentious property and affairs applications should be dealt with by court officers (e.g. applications for a property and affairs deputy by local authorities and in respect of small estates which do not include defined types of property). The provisions will include provision for an automatic right to refer any such decision to a judge and internal supervision by the judges
    - a considerable number of amendments to practice directions and rules in order to cater for problems encountered during the first three years of the CoP's new life, to include reworking of practice directions associated with health and welfare applications to give clearer guidance as to when applications should be brought, who to name as respondents and the role of experts.

84. These recommendations, coupled with the judicial complement available to the Court, support improved flexibility and are aimed at ensuring the right degree of resource and consideration is allocated to the decision to be made.

85. Since April 2009 the Court moved, from being supported administratively within the OPG, to become part of the HMCS Royal Courts of Justice Group. This had an immediate impact with the court management being able to use the experience of the RCJ leadership team. This has led to the Court beginning to remodel its processes.

86. Evidence in the Court of Protection Report 2009 shows that there are far fewer disputes in relation to LPAs than EPAs, which may reflect the fact that the policy objectives of the MCA have been achieved and working well. EPA objections outnumber LPA objections by a ratio of 6:1.

The implementation of the Act in health and social care services

87. Local authorities, the NHS, independent hospitals, care homes and third sector organisations have carried out a great deal of work to embed the principles of the Mental Capacity Act into their work.

88. The Act's definition of lacking capacity means that an estimated two million adults in England and Wales are unable on a daily basis to make decisions for themselves. This means in turn that three million paid social care and healthcare staff and three million people who care for people lacking capacity, typically family and friends, are required to make daily best interests decisions on their behalf.

89. The new Independent Mental Capacity Advocacy (IMCA) services are commissioned by local authorities, jointly on their own behalf and on behalf of primary care trusts, in England, and by Local Health Boards in Wales. To date, IMCAs have represented and supported more than 20,000 people lacking the capacity to take part in major decisions about their lives.

90. The Act introduced a legal duty on the NHS and local authorities to refer eligible people to an IMCA service. People who lack capacity to make a decision for themselves, who have nobody to speak on their behalf, must be represented and supported by an advocate in specific circumstances. Either when there is a decision they are unable to make in relation to either a long-term move and / or a serious medical treatment matter and a health or social care professional is now making such a decision in their best interests.

91. Secondary legislation provided the NHS and local authorities with powers to instruct an IMCA in care reviews and / or adult safeguarding procedures, in the latter case even if there is somebody appropriate to support them.

92. In England, the commissioning of this new statutory service was greatly assisted by the experience of seven pilot IMCA organisations, which had been set up during the period between Royal Assent and commencement. The early lessons from the pilots was captured in a published report by Cambridge University.

93. Since the inception of the service, IMCAs have worked closely to promote common practice and learning. They continue to meet in nine regional networks, in England, to this end. National IMCA development workers based at the Social Care Institute for Excellence (SCIE), and Action for Advocacy (A4A) support their work and have published a suite of guidance documents about both practice and the commissioning of the service, in England. Two national IMCA conferences have been held, in

England, and the DH will shortly publish its third annual report on the work of the IMCA services.

94. A major training initiative across local health and social care economies has been delivered, and continues for new staff. Training in the Act's requirements is now embedded in, for example, the training requirements of all doctors.

95. A wide variety of organisations and professional bodies have produced materials and guidance to inform their profession, members or staff how the act affects their work in more specific detail than the general guidance offered in the Code of Practice. Local authority public information web sites typically include comprehensive information about the Act.

96. The Care Quality Commission (CQC) regulates care provided by the NHS, local authorities, private companies and voluntary organisations, in England. They have issued guidance that enables regulated care, treatment and support service providers to be aware of the duties and responsibilities placed on them by the Mental Capacity Act, and enables them, and CQC staff, to judge whether they are meeting their legal responsibilities in relation to people who may lack capacity. The guidance explains how Health and Social Care Act 2008 requirements about assessments, care planning, dignity and choice link to the MCA's Code of Practice.

97. Although the Act largely codified the existing common law and underpinned best practice, its coming into force and the associated awareness raising has undeniably raised questions about how health and social care practitioners are working with people who may lack capacity. While most health and social care organisations have embraced and delivered the Act's principles and requirements the CQC, where necessary, is able to demand improved compliance.

98. In April 2010, NHS Trusts, for the first time, had to register with the Care Quality Commission (CQC). A number of Trusts were only registered on conditions such as:

> "The trust must have a system for assessing the capacity of patients to consent to treatment is in place and that staff are trained to effectively use this by 1 June 2010. Evidence must be available to demonstrate this from 1 June 2010."

A key issue identified in another trust was:

> "that the Mental Capacity Act is not fully embedded."

All such trusts have since met the required conditions.

99. Monitoring of health care in Wales is undertaken by Healthcare Inspectorate Wales (HIW), and of social care by Care and Social Services Inspectorate Wales (CSSIW).

100. A follow up report of an investigation carried out by the Ombudsman[1] has identified that the Mental Capacity Act's requirements are not always adhered to in the health care of people with learning disabilities.

101. In March 2009, the Parliamentary and Health Service Ombudsman and Local Government Ombudsman published 'Six Lives: The provision of public services to people with learning disabilities', an investigation into the deaths of six people with learning disabilities who were in the care of the NHS. Their report contained serious criticism of the way public services responded to the needs of people with learning disabilities.

102. 'Six Lives' included a series of recommendations, one of which was for the Department of Health to support implementation and publish a progress report outlining what had been done. That report was published earlier this month. It recognises that much work has been done in some organisations to improve health care for people with learning disabilities, and progress has been made, but good work is not embedded everywhere and serious concerns remain. One of the concerns particularly centres on how far the law is being followed in terms of assessing capacity, gaining consent and best interests decision making in line with the Mental Capacity Act 2005.

103. The CQC registration process, above, and the 'Six Lives' follow-up report[2] both indicate that matters of capacity and consent continue to require attention. People who lack capacity should not be prevented from accessing the treatment they need. The Mental Capacity Act's best interests decision making powers enable staff to positively intervene and provide treatment where it is needed to somebody unable to consent. They also require professionals to do all they can to empower somebody to make that decision for themselves, and to be continuously consulted even when they are unable to consent.

104. There is emerging evidence that the rights and protections offered by the Act to some of the most vulnerable people in our society are being reflected in how services are provided locally. This evidence includes:

- year on year increases in the numbers of people lacking capacity being referred to local IMCA services,
- increased and enthusiastic use of the MCA audit tools published by the Social Care Institute for Excellence in early 2010,
- the Act featuring in commissioning plans and frameworks and service development plans,

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[1] http://www.ombudsman.org.uk/improving-public-service/reports-and-consultations/reports/health/six-lives-the-provision-of-public-services-to-people-with-learning-disabilities

[2] http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/@ps/documents/digitalasset/dh_120494.pdf

- the Act being specifically referred to in policy guidance documents,
- the second year of the deprivation of liberty safeguards showing increasing numbers of applications for authorisations compared to the first year.

105. The DH has commissioned research into how best interests decisions are being carried out and into professionals' understanding of the interface between the Mental Health and Mental Capacity Acts. Both are due to be published in 2011.

106. In 2006 each of the, now, 152 Directors of Adult Social Services in England were invited to appoint a MCA implementation Lead and to form a Local Implementation Network (LIN). This invitation was in the form of a Local Authority Circular which outlined the task of implementation and invited local leadership and local partnerships to be formed. The Welsh Assembly Government similarly encouraged the establishment of local MCA networks.

107. Local statutory, independent and voluntary sector health and social services, advocacy providers and voluntary agencies came together to form the networks and they were charged with the task of planning, overseeing and monitoring local implementation of the Act. Particular emphasis was placed on LINs representing local organisations providing care, treatment and support to people who may lack the capacity to consent to those services.

108. That now firmly established structure of local multi-agency and multi-disciplinary MCA implementation networks has made a significant contribution to embedding the Act's requirements into day-to-day practice. The networks include a range of health and social care staff across the statutory, independent and voluntary sectors. In England, they are based on each of the 152 geographical areas of local authority social services departments.

109. The ongoing leadership of the local implementation networks and the regional networks that they form, and the continuing presence of MCA leads in many local authorities and NHS organisations, should ensure that a sound structure is in place to continue to deliver the Act's requirements, including the Deprivation of Liberty Safeguards, and carry forward local accountability and scrutiny of the Act.

110. The systems and structures required to implement the new Deprivation of Liberty Safeguards (MCA DOLs) have been introduced, as required, by local authorities, primary care trusts, local health boards, care homes and hospitals.

111. The CQC has a duty to monitor the Deprivation of Liberty Safeguards in England, with the duty falling to Welsh Ministers in relation to Wales. Later this year provide the CQC will provide its first annual report to Parliament on the Safeguards.

112. The CQC has issued guidance that enables CQC staff and care and treatment service providers to understand the duties and responsibilities placed on them by the Mental Capacity Act Deprivation of Liberty Safeguards, and to judge whether they are being met. The guidance explains what CQC fieldwork staff will look for when monitoring practice under the Safeguards. HIW and CSSIW will be publishing reports on the operation of the MCA DOLS within Wales.

113. The Information Centre for health and social care publishes activity and monitoring data for the Safeguards, in England.

114. The Act's introduction has undoubtedly increased the awareness of the needs and rights of people lacking capacity amongst health and social care staff.

115. It is of great significance to health and social care services as noted by Baroness Finlay in a debate on the Act's implementation in the House of Lords in March 2009:

"this is one of the most important pieces of legislation affecting health and social care that we have seen in my time here. It provides a framework to empower and protect individuals who lack the capacity to make decisions for themselves. These principles are honourable and important, and recognise the state's duty to uphold public safety while respecting the dignity and worth of each human being."

Going forward

116. The Act is still relatively young – and as its primary impact is on behaviours and attitudes in settings that involve a lack of, or the potential for a loss of, mental capacity – may require more time to fully achieve its aims in these areas. As the Act matures; as the research and evidence bases grow; and as the Government continues to review the Act's influence and operation, areas for further development will no doubt emerge.

117. Thus far, there have been only small and technical areas where the MCA as drafted has thrown up a lacuna or issues that present themselves in the delivery of the policy. Examples are: the inability to appoint Deputy District Judges to the Court; and elements of the interaction between the Court and the PG where objections to EPA registrations are received.

118. Given further primary legislation is necessary to correct such technical points, and as they do not have a material impact on the aims of the Act, they await a suitable time and legislative vehicle to address.

119. Schedule 3 of the MCA deals with the Hague Convention on the International Protection of Adults (2000) which is still awaiting formal ratification in the UK. Practitioners and others are pushing for this to take place and the Government is currently considering its approach to the ratification of Hague and the requirements of its full implementation into UK law.

Annex A

Primary Legislation

The Mental Capacity Act
http://www.legislation.gov.uk/ukpga/2005/9/contents

Secondary Legislation

The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006, No. 1832
http://www.opsi.gov.uk/si/si2006/uksi_20061832_en.pdf

The Mental Capacity Act 2005 (Appropriate Body) (England) Regulations 2006, No 2810
http://www.opsi.gov.uk/si/si2006/uksi_20062810_en.pdf

The Mental Capacity Act 2005 (Commencement No. 1) Order 2006, No 2814
http://www.opsi.gov.uk/si/si2006/uksi_20062814_en.pdf

The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Role) Regulations 2006, No. 2883
http://www.opsi.gov.uk/si/si2006/uksi_20062883_en.pdf

The Mental Capacity Act 2005 (Commencement No. 1) (Amendment) Order 2006, No 3473
http://www.opsi.gov.uk/si/si2006/uksi_20063473_en.pdf

The Mental Capacity Act 2005 (Appropriate Body) (England) (Amendment) Regulations 2006, No 3474
http://www.opsi.gov.uk/si/si2006/uksi_20063474_en.pdf

The Mental Capacity Act 2005 (Commencement No. 1) (England and Wales) Order 2007, No 563
http://www.opsi.gov.uk/si/si2007/uksi_20070563_en.pdf

The Mental Capacity Act 2005 (Loss of Capacity during Research Project) (England) Regulations 2007, No. 679
http://www.opsi.gov.uk/si/si2007/uksi_20070679_en.pdf

The Mental Capacity Act 2005 (Appropriate Body) (Wales) Regulations 2007, No 833
https://www.opsi.gov.uk/legislation/wales/wsi2007/wsi_20070833_en_1

The Mental Capacity Act 2005 (Loss of Capacity during Research Project)(Wales) Regulations 2007, No 837
http://www.opsi.gov.uk/legislation/wales/wsi2007/wsi_20070837_en_1

The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007, No 852
http://www.opsi.gov.uk/legislation/wales/wsi2007/wsi_20070852_en_1

Mental Capacity Act 2005 (Commencement)(Wales) Order 2007, No 856
http://www.opsi.gov.uk/legislation/wales/wsi2007/wsi_20070856_en_1

The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian Regulations 2007, No. 1253
http://www.opsi.gov.uk/si/si2007/uksi_20071253_en.pdf

The Public Guardian Board Regulations 2007, No 1770
http://www.opsi.gov.uk/si/si2007/uksi_20071770_en.pdf

The Court of Protection Rules 2007, No. 1744
http://www.opsi.gov.uk/si/si2007/uksi_20071744_en.pdf

The Court of Protection Fees Order 2007, No 1745
http://www.legislation.gov.uk/uksi/2007/1745/contents/made

The Mental Capacity Act 2005 (Commencement No 2) Order 2007, No 1897
http://www.opsi.gov.uk/si/si2007/pdf/uksi_20071897_en.pdf

The Mental Capacity Act 2005 (Transitional and Consequential Provisions) Order 2007, No 1898
http://www.opsi.gov.uk/si/si2007/corrections/uksics_20071898_en.pdf

The Mental Capacity Act 2005 (Transfer of Proceedings) Order 2007, No 1899
http://www.opsi.gov.uk/si/si2007/uksi_20071899_en_1

The Public Guardian (Fees, etc) (Amendment) Regulations 2007, No 2616
http://www.opsi.gov.uk/si/si2007/uksi_20072616_en.pdf

The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2007, No 2161
http://www.opsi.gov.uk/si/si2007/uksi_20072161_en.pdf

The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008, No 1315
http://www.opsi.gov.uk/si/si2008/pdf/uksi_20081315_en.pdf

The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008, No 1858
http://www.opsi.gov.uk/si/si2008/uksi_20081858_en.pdf

The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Amendment) Regulations 2008, No 2368
http://www.opsi.gov.uk/si/si2008/uksi_20082368_en.pdf

The Court of Protection Fees (Amendment) Order 2009, No 513
http://www.opsi.gov.uk/si/si2009/uksi_20090513_en.pdf

The Public Guardian (Fees, etc.) (Amendment) Regulations 2009, No 514
http://www.opsi.gov.uk/si/si2009/uksi_20090514_en.pdf

The Court of Protection (Amendment) Rules 2009, No 582
http://www.opsi.gov.uk/si/si2009/uksi_20090582_en.pdf

The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009, No 266
http://www.opsi.gov.uk/legislation/wales/wsi2009/wsi_20090266_en_1

The Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009, No 783
http://www.opsi.gov.uk/legislation/wales/wsi2009/wsi_20090783_en_1

The Mental Capacity (Deprivation of Liberty: Monitoring and Reporting; and Assessments – Amendment) Regulations 2009, No 827
http://www.opsi.gov.uk/si/si2009/pdf/uksi_20090827_en.pdf

The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guardian (Amendment) Regulations 2009, SI 2009 No. 1884
http://www.opsi.gov.uk/si/si2009/uksi_20091884_en.pdf

The Mental Health and Mental Capacity (Advocacy) Amendment (England) Regulations 2009, No 2376
http://www.opsi.gov.uk/si/si2009/uksi_20092376_en.pdf

The Public Guardian (Fees, etc.) (Amendment) Regulations 2010, SI 2010 No. 1062
http://www.opsi.gov.uk/si/si2009/uksi_20101062_en.pdf

The Lasting Powers of Attorney, Enduring Powers of Attorney and Public Guarding (Amendment) Regulations 2010, No 1063
http://www.opsi.gov.uk/si/si2009/uksi_20101063_en.pdf

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