To consider

**Mental Capacity Act 2005: post-legislative scrutiny**

**Issue**

1. The House of Lords Select Committee on the Mental Capacity Act 2005 published its report *Mental Capacity Act 2005: post-legislative scrutiny* on 13 March 2014. This paper sets out the Select Committee’s recommendations arising for the GMC.

**Recommendations**

2. The Strategy and Policy Board is asked to:

   - **a** Agree that recommendation 7 of the Select Committee’s report is adequately addressed by work already in train or which we propose to undertake (as set out in paragraphs 8–15).

   - **b** Agree that we will formally respond to the Select Committee and the Government regarding our approach to recommendation 7.

   - **c** Note that recommendation 6 of the Select Committee may have future implications for the GMC, following the Government’s formal response, expected in May 2014.
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Issue

3 The Mental Capacity Act 2005 (the Act) signified a significant change in the statutory rights afforded to individuals who lack capacity, regardless of the cause and duration of impairment. The Act placed individuals at the heart of decision-making; outlining the presumption of capacity unless proven otherwise. The Act’s intention was to support decision-making to enable the individual as far as possible to make their own decisions, without the quality of the decision being viewed as an indicative reflection of capacity.

4 As part of the normal business of reviewing legislation, the House of Lords established a Select Committee to conduct post-legislative scrutiny of the Act which published its findings on 13 March 2014. We provided written evidence and Paul Buckley, Director of Strategy and Communication, provided oral evidence to the Select Committee to inform its deliberations last year.

5 The Select Committee endorsed the aspirations of the Act, but found that the implementation of the act has not met these aspirations. It concluded that vulnerable adults are failed by the Act, which was intended to protect and empower them. The Select Committee’s report says social workers, healthcare professionals and others involved in the care of vulnerable adults are largely not aware of the Act, and are failing to implement it.

6 In the course of the Select Committee’s scrutiny, there was criticism of the GMC from some witnesses with regard to the profile of the Act in our guidance and the level of awareness of the Act amongst doctors. There was also criticism from Mencap of our decision not to take certain cases to fitness to practise panels, which had been referred to us as incidents by Mencap, where doctors had contravened the Act.

Recommendation for the GMC from the report

7 Recommendation 7 of the report directly names the GMC:

‘In particular, we recommend that the GMC:

   i ensure that there is leadership in psychiatry within all medical schools in order to give a higher profile to mental health;

   ii place proper emphasis on the Mental Capacity Act in its publication ‘Good Medical Practice’;

   iii enhance training on the Mental Capacity Act in all post-graduate education, especially for GPs’. 
Recommendation 7i: In particular, we recommend that the GMC ensure that there is leadership in psychiatry within all medical schools in order to give a higher profile to mental health

8 We agree with this recommendation; there is a need to cover mental health appropriately in undergraduate curricula, providing an essential basis for clinical practice, and that in particular students are encouraged to consider careers in shortage specialties such as psychiatry.

9 We are able to address some aspects of this recommendation through our work to set the outcomes for medical education. However, ensuring there is leadership in medical schools, in relation to psychiatry will direct interventions from medical schools and this is beyond our direct powers. We will however write to every medical school drawing attention to the recommendations of the Committee, and asking them to indicate what action they intend to take in response to ensure the Act is given the prominence required.

10 Tomorrow’s Doctors (2009), which sets out the outcomes for graduates, includes outcomes on both mental health and capacity to consent which medical schools must reflect in their curricula and assessment system. We are reviewing the impact of Tomorrow’s Doctors. This will provide a robust evidence base for subsequent review of the outcomes for graduates. In light of evidence about new graduates’ preparedness to treat patients with mental capacity issues, we will consider whether the existing outcomes in Tomorrow’s Doctors need to be strengthened.

11 There is also a wider related issue; the Act concerns all patients in assessing their capacity to consent, not only those being treated for mental health. Therefore, it is important that medical schools have a culture of promoting generic professional skills, for example in relation to communication. All specialties need to be able to assess capacity to consent; this is becoming increasingly relevant as the population ages. Medical schools and the Foundation Programme need to properly prepare doctors for the environment in which they will be working, which includes awareness and understanding of the legislation and ethical standards by which they are bound.

12 To this end our initial work on developing generic professional capabilities with the Academy of Medical Royal Colleges and other key interests in progressing well This work will ensure that skills such as communication and leadership are better reflected and integrated into the postgraduate curricular that we approve.

13 We currently provide guidance and support through GMP, explanatory guidance and Good medical practice in Action using our Regional Liaison Service and Devolved Offices to promote the guidance on these issues, and are placing high priority on the issue of capacity to consent in our ongoing work. In 2014, one of
our focuses is good practice around end of life care, and ensuring that this is understood and implemented across specialties. Every doctor needs to know about the Act and it is integral to good end of life care. We will also support the Professional Standards Authority which is considering the issue of implied consent.

Recommendation 7ii: In particular, we recommend that the GMC place proper emphasis on the Mental Capacity Act in its publication ‘Good Medical Practice’

14 We accept the principle of this recommendation; doctors have a legal duty to have regard to the Act and its supporting Code of Practice in their day-to-day decisions about the treatment and care of patients who lack capacity. It is important that doctors take steps to familiarise themselves with the legal principles and provisions in the code and we do already draw attention to this in our guidance. The full suite of our guidance, Good medical practice (GMP) and relevant explanatory guidance, which carries equal weight, give appropriate emphasis to the Act and associated issues. We will be developing new learning materials to support GMP, including Good medical practice in Action and our Learning Disabilities microsite. In light of this recommendation, we will ensure there is additional new material to reflect the importance of the Act.

15 GMP includes doctors’ responsibilities to keep up to date with, and follow, the law and other regulations relevant to their area of work (GMP, paragraphs 11-12); and to work effectively with patients to make decisions about their treatment and care (GMP paragraphs 31-34, 46-49).

16 Our explanatory guidance Consent: patients and doctors making decisions together, Treatment and care towards the end of life (EOLC) and 0-18 years: guidance for all doctors all make reference to the Act and include decision making principles that are consistent with the provisions of the Act and Code.

Recommendation 7iii: In particular, we recommend that GMC enhance training on the Mental Capacity Act in all post-graduate education, especially for GP’s

17 We accept this recommendation within the constraints of our regulatory role and are encouraging enhanced training for postgraduate trainees in this area through our work with the Medical Royal Colleges and Faculties on the development of postgraduate curricula to reflect the changing needs of specialties and wider legislative changes. More generally, the Shape of Training review, which we sponsored and to which we contributed, recommended that postgraduate training should enhance ‘its response to changing demographic and patient needs’.

18 We will write to the Royal College of General Practitioners and to all postgraduate Deans, drawing attention to the recommendations of the
Committee and asking them to indicate what action they intend to take in response to ensure the Act is given the prominence that is required.

19 As part of our work with the Academy of Medical Royal Colleges on developing generic themes (Generic Professional Capabilities) for all undergraduate and postgraduate curricula, we aim to ensure that the essential information all doctors need to know is highlighted including the range of legislation which impacts on medical practice. The Mental Capacity Act is a vital part of this and will be included.

Other recommendations relevant to the GMC

Recommendation 6: We recommend the Government work with professional regulators and the medical Royal Colleges to ensure the Act is given a higher profile. This work should emphasise the empowering ethos of the Act, and the best interests process as set out in section 4 of the Act. In future, we would expect the responsibility for this to sit with the independent oversight body.

20 Although we are not implicated directly to initiate action in relation to this recommendation, the Strategy and Policy Board is asked to note this as part of the wider context of the GMC’s continued work. We await further indication of the Government’s plans regarding this recommendation and the establishment of an independent oversight body in mid-May 2014.

Responding to the Committee and Department of Health England

21 We have been in correspondence with the Department of Health England (DH(E)) regarding their ‘system wide response’. Given the short timetable outlined by the DH(E) we have responded indicating our intention to take responsibility for addressing recommendation 7 and that we will inform DH(E) and the committee how we will address this recommendation following the consideration of the Strategy and Policy Board.
Supporting information

How this issue relates to the corporate strategy and business plan

22 Strategic aim two of the Corporate Strategy 2014–2017 is to help raise standards in medical education and practice.

How the action will be evaluated

23 We are transitioning to reporting and tracking these dependencies as part of the established business planning and reporting processes. The dependency of the Select Committee’s recommendation will be added to the relevant projects in directorate Operational Plans.

What engagement approach has been used to inform the work (and what further communication and engagement is needed)

24 Project and subject matter experts have been engaged in formulating the proposed approach to addressing the Select Committee’s recommendation. Public Affairs colleagues are and will continue to be in correspondence with the Government about the Department’s wider work to address the other recommendations of the Select Committee.

25 Following consideration of the proposed approach, we will write to DH(E) and the Select Committee to inform them of our next steps.

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