UNDERSTANDING THE NEW CRIMINAL OFFENCES CREATED BY THE MENTAL CAPACITY ACT 2005

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Mental Capacity Act 2005

- Aims to protect and empower people with decision-making problems arising from lack of capacity
  - Enables Lasting Power of Attorney (health, welfare & finance and affairs)
  - Deputies appointable under Office of Public Guardian
- Provides greater autonomy and guardianship of those unable to make decisions for themselves
As part of this, two new offences of wilful neglect and ill-treatment created under Section 44

- Criminalises neglect & abuse occurring in a relationship of trust, including professionals and family carers
- Offender indulges in behaviour believing person lacks capacity, and aware that they were under duty to perform required standards of treatment
- If reported and prosecuted, penalty for criminal offences may be fine and/or a prison sentence for up to five years
- As yet, no public national reporting of S44 MCA charges, results and sentences
- Local media reports relied on
Jail for care trio who filmed their abuse of elderly at X nursing home

Three care workers have been jailed after filming the “inhuman and degrading” abuse of two old people… Harrowing mobile phone footage of an 86-year-old man being bullied, baited and taunted and a 99-year-old woman sprawled, legs apart, on the floor pleading for help were played to a packed courtroom.

Healthcare worker jailed for neglect of elderly patients at X hospital

XX was sentenced to 12 months in prison for four counts of ill treatment or neglect of a person without capacity under Section 44 of the Mental Capacity Act 2005. Two other healthcare assistants were also sentenced. Y was sentenced to 5 months in prison for one count of ill treatment or neglect of a person without capacity and one count of common assault. Z was sentenced to 2 months in prison, suspended for 12 months, and 100 hours of unpaid work for one count of ill treatment or neglect of a person without capacity. The three were all found guilty after a student-nurse whistle-blower reported their abuse to senior hospital staff.
Crown Prosecution Service (CPS) data on charges that reached a first hearing in the Magistrates’ Court in England under S44 MCA 2005 (Series, 2013)

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But do these offences simply ‘reinforce the sense that disabled people are different, necessarily more vulnerable, and that offences against them are not about their rights to autonomy but about not being kind’ (Series, 2012)?
OUR RESEARCH

Funded by National Institute of Health Research
Objectives of study

- To understand how MCA was being implemented in community-based dementia care, focusing on frontline practice.
- Specifically, to understand how the offences were being understood and applied in dementia care settings amongst front-line staff.
Method

- Qualitative longitudinal study
- Interviewed 279 practitioners 2-3 times over three years (2009/2010-2013)
  
  +

- Focus group conducted with key stakeholders (N=11), including Policewoman, social worker, GP trainer, carer and user representatives
- Framework analysis to structure themes around interview guide questions
- Compared and contrasted views between and within groups
## Table of participants

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<tr>
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<th>2008 (N=106)</th>
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<td><strong>Age Concern (voluntary sector) staff</strong> (Time 1, June 2008)</td>
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<td><strong>Safeguarding Adult Coordinators</strong> (Time 1, July 2008)</td>
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<td><strong>Alzheimer’s Society staff</strong> (Time 1, June 2008)</td>
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<td><strong>Staff from voluntary associations and Carers’ centres</strong> (Time 1, June 2008)</td>
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<td><strong>Specialist community nurses</strong> (Time 1, June 2008)</td>
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<td><strong>Care home staff</strong> (Time 1, July 2008)</td>
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<td><strong>Social Services staff</strong> (Time 1, March 2009)</td>
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<td><strong>Alzheimer’s Society staff survey</strong> (Time 2, November 2011)</td>
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<td><strong>Care home staff</strong> (Time 2, June 2012)</td>
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Findings – Staff interviews

General awareness

- Sketchy knowledge, but awareness growing
- Safeguarding practitioners most knowledgeable about this
- Unclear boundaries regarding “wilful”

“Whoever devised the clause of wilful neglect hasn’t thought it through. Maybe the company (care provider) should be culpable for neglect rather than the individual. The Police don’t seem to do that because the legislation isn’t there but that would be more helpful.” (Safeguarding Adult Coordinator 05; Time 2, January 2010)
Findings – Staff interviews

Specialist knowledge sometimes required

- Difficult to determine neglect, especially in context of family care, particularly if practitioner felt carer was their client:

“I suppose it’s often a difficult one with carers [family caregivers]. When is it wilful? What is wilful, because I find that you know as you work with carers, you know, although (there are) safeguarding procedures we’d probably say, this is abuse. I have to work slightly differently because the carer is my client. I come from a slightly different angle from that. Like... a carer having to lock up the door if they have to go out shopping, they have to dash out shopping and they lock the door and somebody would kick up a fuss and say, ‘they shouldn’t do that’. I can understand why they are doing it. We know they shouldn’t. It’s often the carer hasn’t got any [support] service. They need to go out and shop and there is no help, there is no sitting service or the person has refused to have a sitter.” (Specialist community nurse 10; Time 2, January 2010)
Findings – Staff interviews

Change over time

- Specialist nurses were suspicions of wilful neglect or ill-treatment among clients with dementia; none had led to legal proceedings.
  - At Time (2008), had shown much less awareness of these aspects of MCA.
- Care home staff still largely unaware of offences
  - One-off training sessions when MCA was implemented; limited opportunities for refreshment courses and updating of in-depth, specific knowledge:

  “Offences and mistreatment: we are dealing with one at the moment – she neglects herself – we volunteer to help her – she says ‘no’ because she has her rights.” (Senior care home worker 15; Time 2, May 2012)
Findings – Staff interviews

Producing evidence difficult

- Problems progressing cases to and through Crown Prosecution Service

“Mistreatment and neglect of an older woman – it was very tortuous. The Police had to really push it through. We did have powers (to charge the alleged perpetrator) for an ordinary assault but we wanted to make it wider. It’s been in the public domain. A nurse was convicted of ill treatment. What was difficult to prove whether or not she [the victim] had capacity – she clearly had no capacity – she had been in (several) care homes. The family didn’t want to take it further. They just wanted it to die. But it was involving a member of staff of a care home.”

(Safeguarding Adult Coordinator 03; Time 2, January 2010)
Senior care home staff always vigilant, but producing evidence harder in group care settings:

“[This authority] hasn’t made any prosecutions. I think it falls down on wilful neglect – in a care home you can’t pin it down on one person, and then you have to prove it’s wilful and it usually comes down to incompetence.”

(Safeguarding Adult Coordinator 05; Time 2, January 2010)
Findings – Focus group

- Policewoman: Social workers not very confident
- Former carer: Ambivalence and limited action can also result in harm
- Day centre worker: One-off training events have limited impacted, poster or something more tangible better used and appreciated
- Carer: Multi-disciplinary approach to cases required
- Keep voice of person with dementia central to the case, never assuming they cannot give evidence
Final thoughts

- Clinicians should refer considering personal and public benefits of doing so

- New criminal offence of “corporate neglect” proposed to broaden culpability beyond individual failings (Burstow, 2013)

- Do vulnerable or frail people not proven as lacking mental capacity lack legal protections and can allegations about their possible neglect be adequately dealt with by an application made to the High Court under its inherent jurisdiction (Abrams, 2013)?
THANK YOU!

For more information, please contact: jill.manthorpe@kcl.ac.uk
Thank you

Disclaimer:

This report presents independent research funded by the National Institute for Health Research (NIHR) under its Programme Grants for Applied Research scheme (RP-PG-0606-1005). The views expressed in this presentation are those of the authors and not necessarily those of the NHS, the NIHR or the Department of Health.