Dudley Metropolitan Borough Council

Agenda Item No. 9

HEALTH AND ADULT SOCIAL CARE SELECT COMMITTEE – 18th JANUARY 2007

REPORT OF THE DIRECTOR OF ADULT COMMUNITY AND HOUSING SERVICES

THE MENTAL CAPACITY ACT 2005

PURPOSE OF REPORT

1. To brief Health and Social Care Select Committee on the main provisions of the Mental Capacity Act (2005).

2. Parts of the Act become law on 1st April 2007 and the remainder in October 2007.

BACKGROUND

3. The Mental Capacity Act 2005 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.

4. The Act enshrines in statute current best practice and common law principles concerning people who lack mental capacity and those who take decisions on their behalf.

5. The Act provides protection for doctors, social workers and other professionals, who take decisions on behalf of someone who lacks capacity, provided that they have complied with the Act's provisions on assessment of capacity and best interests' decision-making.

6. The Act replaces the current enduring powers of attorney and Court of Protection receivers with new arrangements.

The Act is underpinned by a set of five key principles

7. 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;

8. 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;

9. Individuals must retain the right to make what might be seen as eccentric or unwise decisions;

10. Best interests – anything done for or on behalf of people without capacity must be in their best interests; and

11. Least restrictive intervention – anything done for or on behalf of people without capacity should be the least restrictive of their basic rights and freedoms.

Assessment of a person's capacity

12. The Act sets out a single clear test for assessing whether a person lacks capacity to take a particular decision at a particular time. It is a "decision-specific" test. No one can be labelled 'incapable' as a result of a particular medical condition or diagnosis.

13. For most day-to-day decisions, the carer will make the decision – family carers are not expected to be experts – it will be sufficient to hold a reasonable belief that the person cared for lacks capacity. The more serious the decision, the more formal the assessment – in these cases, doctors, social workers, or psychiatrists may be involved. In some cases it is a legal requirement that a formal assessment of capacity is carried out e.g. for the Court of Protection; where there are doubts about the person's capacity to instruct a solicitor.

Best Interests decision-making

14. Everything that is done for or on behalf of a person who lacks capacity must be in that person's best interests. There is no statutory definition of best interests but the Act provides a checklist of factors that decision-makers must work through in deciding what is in a person's best interests.

    a. The principle of equal consideration – i.e. people who lack capacity are not treated less favourably. Decisions should not be based on preconceived ideas e.g. that old people have no quality of life

    b. Whether the person is likely to regain capacity – if the condition is temporary or fluctuating, it may be possible to defer the decision until the person regains capacity.

    c. The person's wishes, feelings, beliefs and values – includes past wishes e.g. written statements; beliefs & values which

would be likely to influence decision if the person still had capacity.

d. The views of other people. The Act establishes a right for carers & family members to be consulted.

e. Life-sustaining treatment involves a harder test – the person making the decision must not be motivated by a desire to bring about the person's death. Also, S62 states that the Act does not have the effect of authorising euthanasia or assisted suicide.

Acts in connection with care or treatment

15. Section 5 clarifies that, where a person is providing care or treatment for someone who lacks capacity, the person can provide the care without incurring legal liability. The key will be proper assessment of capacity and best interests.

16. Restraint/deprivation of liberty is only permitted if the person using it reasonably believes it is necessary to prevent harm to the incapacitated person, and if the restraint used is proportionate to the likelihood and seriousness of the harm.

Bournewood

17. The Bournewood case concerned an autistic man with severe learning disability who was informally admitted to hospital under common law. The European Court of Human Rights found that he had been deprived of his liberty unlawfully, i.e. without a legal procedure with safeguards and speedy access to a Court of Appeal – this is known as the Bournewood gap.

18. New Bournewood provisions will apply to patients in hospitals and residents of care homes (mainly people with severe learning disabilities and elderly people with dementia) who:

- Lack capacity

- Need care in circumstances which amount to deprivation of liberty to protect them from harm

19. A hospital or care home must apply to a 'supervisory body' (Council or PCT) for authorisation of deprivation of liberty.

Lasting powers of attorney (LPAs)

20. The Act allows a person to appoint an attorney to act on their behalf if they should lose capacity in the future. This is like the current Enduring Power of Attorney (EPA), but the Act also allows people to appoint an attorney to make health and welfare decisions.

Court of Protection

21. The Act creates a new Court of Protection which will be the final arbiter for capacity matters. It will have its own procedures and nominated judges.

22. The Court's powers in relation finance and property are similar to those of the 'old' Court, but there are additional powers in relation to personal welfare, which include

    - To decide where the person should live
    - Prohibit a named individual from having contact with the person
    - Giving/refusing consent to medical treatment

Court appointed Deputies

23. 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, health care and financial matters as authorised by the Court but they will only be appointed if the Court cannot make a one-off decision to resolve the issues.

The Act also includes three further key provisions to protect vulnerable people

24. **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 and can challenge the decision-maker on behalf of the person lacking capacity if necessary. IMCA services will be jointly commissioned by the Councils and the PCT.

25. **Advance 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.

26. **A new criminal offence** of ill treatment or neglect of a person who lacks capacity.

Implications for Services in Dudley

27. Community Care Assessments will now have to include a formal assessment of capacity in appropriate cases, which will add to the time taken on the assessment. This could impact, for example, on discharge from hospital.

28. There is scope for an increased number of complaints, where family members or professionals disagree about the assessment of capacity.

29. A judgement about capacity will also have to be made, where concerns about adult abuse are being investigated.

30. A large number of staff in the Council, the PCT and the Dudley Group of Hospitals need to be trained, especially on assessments of capacity and best interests decision-making.

31. Work has to be undertaken to raise awareness of the Act with service users, parents/carers and the voluntary/independent sector.

Implementation of the Act in Dudley

32. A Steering Group has been formed comprising representatives of both Adult Social Care Divisions, Finance, HR and Adult Protection to oversee work on implementation of the Act in Dudley.

33. A number of key tasks have been identified and are being progressed:

- Re-writing of policies/procedures in the light of the new Act.

- Commissioning the IMCA Service.

- A training programme for staff has begun including basic and more advanced training. The training programme is funded by a grant of £28,000 from Department of Health. The key DMBC groups of staff who need training are those working in mental health services – where the interface with the 1983 Mental Health Act will be crucial; staff working in care homes; and Social Workers carrying out assessments of capacity and decision-making in 'best interests'; and Home Care staff who will also need to be aware of 'best interests' and issues relating to consent.

FINANCE

34. The Council will receive a grant of £95K in 2007-08 from the Department of Health which is apportioned as follows:

    £42K IMCA Service

    £28K Training

    £25K Assessments

LAW

35. The Mental Capacity Act 2005 becomes law between 1st April and 1st October 2007. The other relevant legislation is the Mental Health Act 1983.

EQUALITY IMPACT

36. The Mental Capacity Act safeguards the position of people who lack capacity – including older people, people with a learning disability, people with mental health needs.

RECOMMENDATION

37. Select Committee is asked to note and comment on this report

Linda Sanders
Director of Adult, Community and Housing Services