
Report of the Director of Adult Social Services

Scrutiny Board - Adult Social Care

Date: 12th November 2008

Subject: The Mental Capacity Act 2005

Electoral Wards Affected:

All

☐

Ward Members consulted
(referred to in report)

Specific Implications For:

Equality and Diversity ☒

Community Cohesion ☐

Narrowing the Gap ☐

EXECUTIVE SUMMARY

The Mental Capacity Act is a wide ranging piece of legislation potentially affecting the lives of many thousands of citizens in Leeds. It's main provisions, covered in greater detail in this report, are aimed at protecting the interests of the most vulnerable people in our community, people who, for a great variety of reasons, are judged to lack the mental capacity to make significant decisions in relation to their own life and circumstances.

Although the provisions of the Act were laid out in 2005, such were the technical challenges associated with it's implementation that the timetable for its introduction (published in December 2006) spanned 3 phases: April and then October 2007 with the final phase, dealing with the 'Deprivation of Liberty' requirements, commencing in November 2008. All the provisions of the Act will be applicable from April 2009.

The Act and it's associated guidance placed responsibilities on Local Authorities to lead the process, supported by a comprehensive 'Code of Practice' published in April 2007. The lead Government Department for Implementation was Department of Constitutional Affairs (now Ministry of Justice) supported by Department of Health.

In December 2006 The Local Authority were required to undertake two principal tasks, firstly to procure an Independent Advocacy service by April 2007 utilising ring-fenced monies and secondly to immediately establish a Local Implementation Network (LIN) comprising all the principal organisations most likely to be affected by the provisions of the Act (NHS Leeds {formerly Leeds PCT}; Acute Trust; Partnership Foundation Trust; Advocacy provider; LCC Legal Services and the Police). The role of the LIN Board has been to co-ordinate the implementation of the Act, to oversee the expenditure of the grant monies which have been provided to support its implementation, to ensure the procurement and availability of Advocates for those people lacking capacity, to ensure awareness of the provisions of the Act are raised amongst the wider public and staff and to secure the availability of general and specialist training for those responsible for the day to day requirements associated with the Act's provisions. This report also deals with the work undertaken by the Leeds LIN.

A report covering the main provisions of the Act was considered by the Executive Board of the Council on the 5th November this year.

1.0 Purpose of Report

- 1.1 The purpose of this report is to inform members of Scrutiny Board with regard to the implications associated with the implementation in Leeds of the Mental Capacity Act 2005. This report also outlines the requirements of the Deprivation of Liberty Safeguards (DoLS) which are incorporated into the Mental Capacity Act but which also feature prominently in the implementation of the Mental Health Act 2007 (the requirements of which are the subject of a companion report).
- 1.2 This report summarises the principal requirements of the Act, highlighting how it will potentially affect people in a variety of circumstances. The report deals with the implications for staff within the main statutory organisations, including Adult Social Care, and describes the co-ordination arrangements that have been established to oversee the implementation of each element and fulfil the statutory reporting and monitoring associated with that.

2.0 Background

- 2.1 The Mental Capacity Act is a wide ranging piece of legislation potentially affecting the lives of many thousands of citizens in Leeds. It's main provisions are aimed at protecting the interests of the most vulnerable people in our community, people who, for a great variety of reasons, are judged to lack the mental capacity to make significant decisions in relation to their own life and circumstances. The Act has potential implications for many adults and some children, it is estimated that, at any one time, up to 2 million people in England and Wales lack mental capacity to make decisions for themselves by virtue of, for example, dementia; learning disabilities; mental health problems; stroke and brain injuries. The Act therefore applies to all those aged 18+, and has provisions relating to Young People aged 16+ in specific circumstances.
- 2.2 The Mental Capacity Act therefore provides a welcome, statutory framework to empower, support and protect people aged 16+ who may not be able to make all their own decisions all the time. It provides a legal framework for good practice and current common law principles. It deals with the assessment of a person's capacity and any acts of care by those looking after or working with those who lack capacity. The Act also provides additional rights in relation to making advance plans concerning medical treatment and control over an individuals financial affairs.
- 2.3 The Act sets duties on Local Authorities to ensure the provision of Independent Advocates for people determined to lack capacity, to ensure the appropriate training of staff to undertake specialist roles associated with the determination of capacity and to ensure that staff are available to protect the interests of those deemed to lack capacity.
- 2.4 As part of the provisions of the Mental Capacity Act (and incorporated into the provisions of the Mental Health Act 2007) Deprivation of Liberty Safeguards are introduced. The Safeguards are designed to prevent arbitrary decisions that deprive vulnerable people of their liberty by providing processes of application, assessment, authorisation and review when it is necessary to deprive a person of their liberty, and providing them with representation and rights of review.

- 2.4 In Leeds the co-ordination of the implementation of the Act, its associated requirements and statutory reporting of progress towards full implementation has been ongoing since December 2006 with the establishment of a Local Implementation Network Board chaired by the Chief Officer – Social Care Commissioning and containing representatives of each of the main statutory organisations in the City. The specific work of the LIN Board is highlighted later in this report.
- 2.5 The LIN Board has also overseen the expenditure of grant monies provided to support those elements of the Act set out at paragraph 1.3, a short summary of the overall grant provided 2006 – 2010 is set out in section 5 of this report.

3.0 Main Issues

- 3.1 The Act is based on 5 key principles which are:

- ◇ A presumption of capacity.
- ◇ Right of individuals to make their own decisions.
- ◇ Right not to be treated as lacking capacity merely because of unwise or eccentric decisions.
- ◇ Need to ascertain what is in the best interests of the individual.
- ◇ Least restrictive intervention.

- 3.2 The main provisions of the Act introduced since 2007 are set out below.

- ◇ **Independent Mental Capacity Advocacy (IMCA)** Service to be operational. – this is a legally defined role in the Act to support a person who lacks capacity, has no-one to support them and there is a major health or residential care decision to make – but also can be appointed if either the perpetrator or victim in a Safeguarding investigation lacks capacity. Additional powers to instruct IMCA's in Adult Protection cases and reviews of accommodation. The first annual report of the Leeds IMCA service is attached as Appendix 1.
- ◇ Two new **Criminal Offences** are introduced of ill treatment or wilful neglect of a person without capacity carrying up to five years imprisonment if found guilty.
- ◇ **Capacity Defined**, the Act sets out the criteria for assessment, and codifies existing Common Law it also sets out a clear decision specific test. Under the new regulations no one can be labelled as 'incapable' just because s/he has a particular condition, nor can lack of capacity be established just through reference to age, appearance, or any condition or behaviour which may lead to others making unjustified assumptions.
- ◇ **Best Interest Checklist**. The Act provides a checklist that decision makers must work through in deciding what is in the person's best interests and how to decide this
- ◇ **Acts in Connection with Care/Treatment** ('Section 5 acts') For the first time there is law to protect carers, healthcare and social care staff from liability when acting in connection with care or treatment for those who lack capacity under Section 5 – but only if they follow the guiding principles of the Act, believe that the person lacks capacity to give permission for the action and act in the person's Best Interests.

- ◇ **Lasting Powers of Attorney** (L.P.A's) appointed in advance by someone if s/he should lose capacity - able to make health and welfare decisions as well as property and affairs if authorised.
- ◇ **A new Court of Protection.** the new Court will have jurisdiction relating to the whole Act so its remit includes social care and health decisions when appropriate. this structure replaces current receivership and deputies are able to make welfare, financial and most health decisions as authorised by the Court.
- ◇ **A new Public Guardian.** - who will supervise Court of Protection deputies and powers of attorney, and work with all agencies in relation to any concerns with these roles.
- ◇ **Court Appointed Deputies** (replace receivership's this structure replaces current receivership and deputies are able to make welfare, financial and most health decisions as authorised by the Court.
- ◇ **Advance Decisions** (formerly know as Advance Directives or Living Wills) there will be statutory rules with safeguards and strict formalities, so that people can make an advance decision about refusing medical treatment.
- ◇ **Research Issues.** very clear guidelines that protect the person who lacks capacity.

3.3 In relation to the **Deprivation of Liberty Safeguards**, the safeguards create two new legal entities, **Managing Authority** (Care Homes/Hospitals) who provide care and must request authorisation to deprive the liberty of an individual who may be deemed to lack capacity. **Supervising Bodies** who must organise assessments and issue authorisations if assessments require them to do so. Leeds Adult Social Services will undertake both functions which will require appropriate processes, governance, management and operational arrangements to be put into place to assure the independence of decision making.

3.4 Supervising Bodies (SB) must arrange for assessments to be carried out, one of these assessments (a Mental Health assessment) must be carried out by a registered medical practitioner, the others by a 'Best Interest Assessor' (BIA). In discharging their responsibilities as a SB Local Authorities (who will chiefly be the source of Best Interest Assessors) and Primary Care Trusts (the source of registered medical practitioners) must ensure sufficient assessors are available, ensure the assessors have the skills, qualifications and training to provide the role; appoint the assessors, ensure the assessors have the relevant skills and experience required for that assessment (for example in relation to the needs of people with Learning Disability/Older People/ People with Mental Health needs) and ensure there is no conflict of role.

4.0 Implementation in Leeds

4.1 Leeds successfully procured the IMCA service in advance of the required commencement date in April 2007, the first annual report of the successful provider is available to Members, this sets out the significant amount and quality of work that has been undertaken since the commencement of this service. In contrast to many other Authorities, the method of procurement and specification used for the IMCA service in Leeds has lead to a relatively small group of advocates developing highly developed skills in this very specialist area. This has proved to be a very sustainable and cost effective model to date, in other Authorities in contrast, have experienced significant waste and quality issues associated with this service.

- 4.2 On behalf of the LIN, the Local Authority hosts a training officer with specific responsibility for implementing the training and awareness raising plan around the wider partnership. In addition to this two sub groups have been established reflecting the importance of planning and delivering training and communication, they are co-ordinating the significant task of raising awareness and communicating to the wider workforce, some of whom have specific specialist roles to play in relation to Public Guardianship and Receivership.
- 4.3 Finally, a wider stakeholder event was held in February to raise awareness of MCA among existing and potential service recipients and their carers. However, it is important to note that the extensive activity undertaken thus far has reached only a small proportion of wider public (and potential beneficiaries) of the MCA. The LIN recognises the importance of continuing to take all opportunities to raise awareness of the Act among all the communities of Leeds, to improve access to information and advice.
- 4.4 The further requirements associated with Deprivation of Liberty Safeguards to provide advanced training for specialist professional staff are now the chief focus of the work of the board and it's sub-groups, negotiations are underway with the main academic institutions in the City to ensure that the necessary courses of professional study and qualification are available for Leeds professionals and for those in the wider region.
- 4.5 All indications from the Department of Health (which has monitored the implementation of the Act) following the provision of update reports from this Authority, are that the arrangements that have been put into place in Leeds are robust and effective and that our planning in relation to the implementation of the Act and use of resources to support it has been to a high standard.

5.0 Financial Implications

- 5.1 Specific Grant funding has been made available to both the Local Authority and Health community in Leeds since 2006 to support the introduction of the new legislation and all its statutory requirements, the grant has three specific elements, the first element is for Authorities to use in relation to the procurement of the IMCA service, the second in relation to ensuring the training needs of staff are addressed and the third recognises the overall management costs of introducing this scale of legislation. Although originally 'ring –fenced' to support the implementation of the requirements associated with the legislation, the sums set out below now form part of the 'area based grant' to the Local Authority.
- 5.2 The grant amounts are:
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|---------|----------|
| 2006/07 | £94,000 |
| 2007/08 | £212,000 |
| 2008/09 | £344,000 |
| 2009/10 | £433,000 |
| 2010/11 | £416,000 |
- 5.3 In addition, within the annual budget of the Leeds PCT, £103,000 has been made available over the two years 2007 – 2009 to support the specific implications for the wider health community.

5.4 The expenditure of the two funding streams has been co-ordinated by the LIN Board to ensure that the maximum benefit is derived and that the potential for duplication is eliminated. To date funding has been expended in supporting the availability of Independent Advocates, for training provided to professional staff, the generation of publicity materials to raise awareness more generally and to provide dedicated officer support time to ensure that all the different requirements associated with the Act are implemented.

5.5 It is envisaged that as all the requirements associated with the Act are brought into effect from April next year, the totality of funding will be taken up with additional expenditure incurred in providing the training and ensuring the availability of professional staff able to fulfill deprivation of liberty assessment requirements (provision of Best Interest Assessors and availability of appropriate medical practitioners).

6.0 Legal Implications

6.1 The legal implications are set out in Section 3 of this report.

7.0 Conclusions

7.1 The provisions of the Mental Capacity Act should be regarded as establishing a welcome set of safeguards and balances designed to protect the rights and interests of a range of vulnerable people who may be deemed to lack capacity and who may have no other appropriate person to act on their behalf. The Act applies to those most essential elements of everyday life, health, accommodation, personal finance and liberty. By reaching into all those elements of the lives, the Act requires that awareness of its provisions should be raised, not only among statutory organisations and professional groups but across the general public and into all the communities of our City.

7.2 Although all the statutory provisions of the Act will be fully effective in April next year and arrangements are already in place within the statutory partners, including Adult Social Care for the effective management of those arrangements, it is likely to be some time before all the provisions contained in the Act attain widespread public understanding.

7.3 Finally, although there is an association between the provisions of the Mental Capacity Act and those of the Mental Health Act 2007, the two are distinct pieces of legislation, the latter having a much narrower focus on the needs of people with mental health needs, the former having potential applicability to any citizen.

8.0 Recommendation

8.1 Members are invited to consider the content of this report, to note the key features of the Act highlighted in it, to note the progress made to date in it's full implementation and the plans which are being progressed to raise greater awareness among the public of it's provisions and implications.

Background Documents
Mental Capacity Act 2005
Mental Health Act 2007