



meeting **SAFEGUARDING VULNERABLE ADULTS SELECT COMMITTEE**

date **2 June 2008** agenda item number

Report of Service Manager, Mental Health

1. The Mental Capacity Act 2005 and Safeguarding Vulnerable Adults:

The interface and links between these are crucial in the provision of robust care and protection to adults who may lack capacity. This report examines the following two elements:

- 1 The most relevant aspects of the Mental Capacity Act
- 2 The issue of capacity in Safeguarding Adults

2. The Mental Capacity Act

The Mental Capacity Act 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.

3. The 5 Statutory Principles are relevant to all decisions:

- Presumption of capacity
- The right for individuals to be supported to make their own decisions and to be given all appropriate help to do so
- An individual has the right to make what may appear an unwise decision
- Best interests – any act or decision must be done or made in the person's best interests
- Always using the least restrictive alternative.

4. What does the Act do?

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:

- Assessing lack of capacity – it sets out a clear decision specific test. 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 Interests – it provide a checklist that decision makers must work through in deciding what is in the person’s best interests and how to decide this
- Restraint – clear guidelines on the very limited, legitimate use of restraint
- Supporting making advance plans through Lasting Powers of Attorneys, Advance Directives etc.

5. There are new roles:

- **Lasting Powers of Attorney** – 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.
- **Court of Protection appointed deputies** - this structure replaces current receivership and deputies are able to make welfare, financial and most health decisions as authorised by the Court.
- **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.
- **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.

6. Planning ahead:

Advance Decisions to refuse treatment – there will be statutory rules with safeguards and strict formalities, so that people can make an advance decision about refusing medical treatment.

- **Lasting Powers of Attorney**- setting these up.
- **Advance Statements** – making future wishes known in the event of losing capacity.

7. And protection for Staff:

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.

8. **Specific aspects of the Mental Capacity Act in relation to safeguarding:**

- **New Criminal Offences** – 2 new criminal offences of ill treatment or wilful neglect of a person without capacity carrying up to five years imprisonment if found guilty
- **Independent Mental Capacity Advocate** – 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
- **Excluded Decisions-** it is not permitted to make certain “ family relationship” decisions on behalf of someone else including consenting to have sexual relations
- **The Office of the Public Guardian** – particularly in that it oversees deputies, LPA registers and deals with representations and complaints about the way deputies and attorneys carry out their duties
- **Court of Protection visitors** – the Court of Protection and the Office of the Public Guardian can send a visitor to meet and interview the person who lacks capacity and can play an important part in investigating abuse – or doing general checks
- **Guidelines on restraint** – in section 6 that ensures it is only used where it is to prevent harm to the person who lacks capacity and it is a proportionate response
- **Research** – very clear guidelines that protect the person who lacks capacity
- **Deprivation of Liberty safeguards** –to be implemented in April 2009 and provide robust, legal safeguards for those who lack capacity and may be deprived of their liberty.

9. **The issue of capacity in Safeguarding Adults**

It is crucial that all those involved in Safeguarding Adults consider capacity at every stage. For instance:

- The capacity to consent to an act that others may construe as abusive is a key aspect and if the person has capacity, they can make that decision
- The capacity to consent to the process of investigation also has to be considered

- Fluctuating capacity – this can change from day to day and as maximising capacity is a core principle, there has to be a careful, evidenced decision that a person lacks capacity
- Decision specific - People may have the capacity to make one decision about for example, sexual relations, but not about their finances – and the alleged perpetrator may be the same person. This is challenging for staff , and processes and recording need to be properly followed
- Others concerned – if the person has the capacity to make a decision, the welfare of others in the home who may lack capacity must be considered
- Both the perpetrator and the victim may lack capacity.

10. What are we doing in Nottinghamshire?

- Setting up the Safeguarding Adults and Mental Capacity Act team (SAMCAT) recognised the importance of close links and having cross-over expertise
- 2 social care Senior Practitioners have been appointed to advise staff in these areas
- They will be joined by 2 Nottinghamshire County PCT funded health focussed post shortly
- Referring relevant cases to the Court of Protection
- Both Safeguarding Adults and Mental Capacity Act have multi-agency policies and procedures
- These will be reviewed in light of changing case law
- Training and reviewing the training for these areas
- Preparing, with the PCTs, for the Deprivation of Liberty Safeguards.

**L Metcalfe
Service Manager
Mental Health**