

Grey Matters - legal and ethical issues arising from health and social care for older people

BEN TROKE
SARAH ERWIN-JONES
CLIVE NEWTON

7 APRIL 2008

brownejacobson

Arbitrariness of Age

- Age limits throughout the law
- 10 - be charged with a crime
- 16 - female consent to sex
- 18 - buy alcohol / tobacco
- 17 - start to drive
- 70 - licence renewal every 3 years
- 0 - legal personhood and rights
- 24/40 gestation - abortion on demand

Age Discrimination Act

- Education / training / employment
- Doesn't apply to healthcare



Access to Healthcare

- Distinguish
 - Age
 - Clinical factors associated with age
 - Clinical (and other) factors of the individual patient
- Indiscriminate age discrimination
 - Free prescriptions (over 60)
 - Free sight tests (over 60)
 - Free flu jab (over 65)

Access to Resources

- Allocation of scarce treatment / resources
- Ethics - beneficence / justice
- Inconsistency / ambivalence
 - IVF access
 - Under 35 - better clinical prospects
 - Over 35 - fairer “last chance”

Organ Transplant

- 65 yr old man v 36 yr old woman
- Mother of 2
- Grandparent of 3 bringing up children
- Social utility
 - Treat mothers not grandparents
 - Doctors not lawyers
 - Exceptionalism
- “All lives of equal value” - criminal law

The Argument of Numbers

- 85 year old v 35 year old
- a “fair innings”
- Clinical assessment of quality of life
- QALY
- Number of lives / number of years
 - 120,000 x 1 month (12,000 years)
 - 1,000 x 10 years (10,000 years)
 - 1 x 10 year old v 5 x 70 year olds
- Always favour female over male patients ?

Assumptions

Mental Capacity Act - Best interests (s4):

- (1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of—
 - (a) the person's age or appearance, or
 - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

Legal Issues

- Fairly new area of law, although practical challenges have been rumbling along for a long while.
- Frequent state of flux – who is responsible for what, and how effectively does joint working and shared services work?
- Just identifying the legal issues

Mental Health Legislation

- Health -v- Social Care needs
- Independent Mental Capacity Advocates
- Misuse of functions by nearest relative



Capacity

- Assessment
- IMCAs
- Human Rights



Community Care Needs

- Assessment
- Accommodation
- Closure/Sale of residential homes
- Regulation of Accommodation



Community Care Needs

- Distinction between health and social care
- Funding
- Pooling of resources



Age discrimination in social care

Clive Newton

National Development Manager - health &
social care

Age Concern England



brownejacobson

Self Directed Support

The big 'new idea' in social care:

- Transformation
- Personalisation
- Self assessment
- Individual budgets (RAS)
- Support planning and brokerage

A history of discrimination ...

- Social/emotional needs ignored
- Care packages capped at lower level
- Excluded from Independent Living Fund (<66)
- Excluded from Direct Payments (1st 4 years)
- Excluded from Attendance Allowance (mobility component)
- Discouraged from Direct Payment take-up
- Patronised as incapable/incompetent

Lacking a voice ...

- SDS driven by grass roots organisations
- Powerful voices in disability movement
- But older people not represented
- No equivalent grass roots movement
- Organisations 'for', not 'of'

Resource Allocation System

- Convert from block to individual purchase
- Calculate average spend
- Fix a 'Price Point'
- Multiply by self assessment points
- Generate 'Indicative Budget'

BUT ...

- Lower Price Point for older people
- Same level of need ... less money

Challenge - legal or ethical?

- Entrenching age discrimination
- Age: employment/training only
- Not goods and services

Who and how to challenge?

- National or local? ('Devolution')
- Judicial review or equity?