DH Department of Health

Mental Capacity Act 2005

Deprivation of liberty safeguards

Key points

- People who suffer from a disorder or disability of the mind, such as dementia or a profound learning disability, and who lack the mental capacity to consent to the care or treatment they need, should be cared for in a way that does not limit their rights or freedom of action.

- In some cases members of this vulnerable group need to be deprived of their liberty for treatment or care because this is necessary in their best interests to protect them from harm.

The European Court of Human Rights (ECtHR) in its October 2004 judgement in the Bournewood case (HL v UK) highlighted that additional safeguards are needed for people who lack capacity and who might be deprived of their liberty.

- The Government is closing the “Bournewood gap” by amending the Mental Capacity Act 2005. The deprivation of liberty safeguards being introduced will strengthen the rights of hospital patients and those in care homes, as well as ensuring compliance with the European Convention on Human Rights (ECHR).

Setting the Scene

The Mental Health Act 2007,which received Royal Assent in July 2007, as well as amending the Mental Health Act 1983, was used as the vehicle for introducing deprivation of liberty safeguards into the Mental Capacity Act 2005. This briefing sheet sets out information about the deprivation of liberty safeguards.

The amendments to the Mental Capacity Act 2005 both strengthen the protection of a very vulnerable group of people, and tackle human rights incompatibilities, by introducing deprivation of liberty safeguards for people who lack capacity to decide about their care or treatment, and who are deprived of their liberty to protect them from harm, but who are not covered by the Mental Health Act 1983 safeguards.

Introduction

The context for the deprivation of liberty safeguards in the Mental Capacity Act 2005 is the government commitment in the White Paper *Our Health, Our Care, Our Say* that people with ongoing care needs, whether their needs arise in older age, or through illness or disability, should be cared for in ways that promote their independence, well-being and choice. It follows from this that people should be cared for in the least restrictive regime practicable.

The Government does accept, however, that there will be some people who will need to be cared for in circumstances that deprive them of

liberty because it is necessary to do so, in their best interests, in order to provide the care or treatment they need to protect them from harm. The Government does not consider that deprivation of liberty would be justified in large numbers of cases but recognises that such circumstances arise, for example for some people with severe autism, profound learning disabilities or dementia.

The aim of the deprivation of liberty safeguards is to provide legal protection for those vulnerable people who are deprived of their liberty otherwise than under the Mental Health Act 1983, to prevent arbitrary decisions to deprive a person of liberty and to give rights to challenge deprivation of liberty authorisations. The safeguards apply to people who lack capacity to consent to care or treatment, and who are suffering from a disorder of the mind. The Government expects that implementation of the safeguards will reduce the numbers of people deprived of their liberty in care homes and hospitals.

It is planned that the safeguards will come into effect from 1 April 2009. The principles of the Mental Capacity Act 2005 will apply to the operation of the safeguards, principally the requirement to act in the best interests of the person lacking capacity.

Background – the Bournewood case

The Bournewood case concerned an autistic man with severe learning disabilities who was informally admitted to Bournewood Hospital under common law. The ECtHR found that he had been deprived of his liberty unlawfully, because of a lack of a legal procedure that offered sufficient safeguards against arbitrary detention and speedy access to a court. The Department of Health committed to introducing new legislation to close the "Bournewood gap".

The ECtHR made clear that the question of whether someone has, in fact, been deprived of liberty depends on the particular circumstances of the case. Specifically, the court said that:

"It is not disputed that in order to determine whether there has been a deprivation of liberty, the starting-point must be the concrete situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance" (paragraph 89 of the judgment).

The Government undertook a three-month consultation on the issue between March and June 2005. This involved seeking views on potential approaches for closing the "Bournewood gap". The provisions now being introduced were shaped by the views expressed in the consultation. A report of the consultation is available on the Department of Health's website, http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4136789

Who will be covered by deprivation of liberty safeguards?

The deprivation of liberty safeguards will cover patients in hospitals, and people in care homes registered under the Care Standards Act 2000, whether placed under public or private arrangements.

The safeguards will apply to people aged 18 and over who:

- suffer from a disorder or disability of mind; **and**
- lack the capacity to give consent to the arrangements made for their care or treatment; **and**
- for whom such care (in circumstances that amount to a deprivation of liberty within the meaning of Article 5 of the ECHR) is considered, after an independent assessment, to be a necessary and proportionate response in their best interests to protect them from harm.

The new procedure cannot be used to detain people in hospital for treatment of mental disorder in situations where the Mental Health Act 1983 could be used instead if they are thought to object to being in hospital or to

treatment.

This will mean that people who object will be treated in broadly the same way as people with capacity who are refusing treatment for mental disorder and who need to be detained as a result.

People who need to be covered by the deprivation of liberty safeguards will be mainly those with significant learning disabilities or elderly people suffering from dementia, but will include a minority of others who have suffered physical injury.

What are the deprivation of liberty safeguards? (See flow chart on page 7)

A Whenever a hospital or care home identifies that a person who lacks capacity is being, or risks being, deprived of their liberty, they must apply to the "supervisory body" for authorisation of deprivation of liberty. Where a person is in a care home the supervisory body will be the relevant local authority. Where the person is in a hospital, this will be the relevant Primary Care Trust (PCT) or, in Wales, the National Assembly for Wales. **The Mental Capacity Act will not permit someone being deprived of their liberty without such an authorisation (unless it is a consequence of following a decision of the Court of Protection on a personal welfare question).**

The deprivation of liberty safeguards do not introduce a new system for determining whether a person who lacks capacity to decide the matter for themselves should receive care or treatment. Nor do they provide any new power to take and convey people to hospitals or care homes. They are solely about ensuring that there are appropriate safeguards in place when it is deemed that a person who lacks the capacity to decide the matter for themselves needs to receive care or treatment, in their best interests, in a hospital or care home, in circumstances that deprive them of their liberty.

- Code of Practice guidance will identify issues to consider to help managers assess whether a person is at risk of deprivation of liberty.

- If a person is at risk of deprivation of liberty, consideration should always be given to less restrictive alternatives.

- Interim guidance about assessment, care planning and monitoring to avoid deprivation of liberty where possible was issued by the Department of Health in December 2004 and by the Welsh Assembly Government in January 2005, following the October 2004 ECtHR judgment. This is being followed up by Code of Practice guidance that care homes and hospitals will need to follow in order to avoid unlawful deprivation of liberty.

- An authorisation should be requested – and the outcome implemented – by the hospital or care home in which the person is or will be resident.

- Regulations will set out the information to be provided with a request for authorisation.

- Authorisation should be obtained in advance except in circumstances where the need is thought to be urgent. In an emergency, the hospital or care home may issue an urgent authorisation, giving their reasons in writing, and a standard authorisation must be obtained before the expiry of the urgent authorisation. An urgent authorisation may be for a maximum of 7 days but may be extended by the supervisory body for up to a further 7 days in exceptional circumstances.

- Anyone with a concern, eg a family member, can apply to the supervisory body to trigger an assessment of whether a person is deprived of liberty, if they have asked the care home or hospital to apply for an authorisation but it has not been done. This would lead on to the full assessment process if the finding is that the person is deprived of liberty.

B When a supervisory body receives a request for authorisation of deprivation of liberty they must obtain 6 assessments:

1 *Age assessment* – they are aged 18 or over.

2 *Mental health assessment* – they are suffering from a mental disorder.

3 *Mental capacity assessment* - they lack capacity to decide whether to be admitted to or remain in the hospital or care home.

4 *Eligibility assessment* - a person is eligible unless they are:

- detained under the Mental Health Act 1983,
- subject to a requirement under the Mental Health Act 1983 that conflicts with the authorisation sought e.g. a guardianship order requiring them to live somewhere else,
- subject to powers of recall under the Mental Health Act 1983.

or

• unless the application is to enable mental health treatment in hospital and they object to being in hospital or to the treatment in question. In deciding whether a person objects, their past and present behaviour, wishes, feelings, views, beliefs and values should be considered where relevant.

5 *Best interests assessment* - the proposed course of action would constitute a deprivation of liberty and it is:

• in the best interests of the person to be subject to the authorisation, and

• necessary in order to prevent harm to them; and

• a proportionate response to the likelihood of suffering harm and the seriousness of that harm

6 *No refusals assessment* - the authorisation sought does not conflict with a valid decision by a donee of lasting power of attorney ("an attorney"), or by a deputy appointed for the person by the Court of Protection, and is not for the purpose of giving treatment that would conflict with a valid and applicable advance decision made by the person.

• Regulations will set out who can carry out the assessments. It is proposed that regulations should cover qualifications, skills and training needed to be an assessor, the need for there to be at least two assessors, and the need for the best interests assessor to be independent of the admissions/care planning process. Best interests and mental health assessments must be carried out by different assessors and the mental health assessment must be carried out by a doctor.

• The best interests assessor will be required to take into account the views of:

- anyone named by the person as someone to be consulted;
- anyone engaged in caring for the person or interested in his or her welfare;
- any attorney; and
- any deputy.

• The best interests assessor may recommend conditions to be attached to any authorisation issued, for example steps to be taken to keep contact with family or to ensure cultural or faith-based needs are met.

• Code of Practice guidance will cover the importance of needs assessment and care planning (including the Single Assessment Process, Person Centred Planning, Care Programme Approach and Unified Assessment as relevant) and the best interests assessment must take account of such needs assessment and care plans.

• In line with the provisions of the Mental Capacity Act 2005, anyone who does not have family or friends who can be consulted will have an Independent Mental Capacity Advocate (IMCA) instructed to support and represent them during the assessment process.

C If any of the assessments conclude that the person does not meet the criteria for an authorisation to be issued, the supervisory body must turn down the request for authorisation. The supervisory body must inform the hospital or care home management, the person concerned, any IMCA instructed and all interested persons consulted by the best interests assessor of the decision and the reasons for it. If the best interests assessor considers that the person is already deprived of liberty, the supervisory body must draw this fact to the attention of the same group of people. This is so that all with an interest are aware that the person may not lawfully be deprived of their liberty. Where it is decided that it is not in a person's best interests to be deprived of liberty

in a particular home or hospital, steps will need to be taken to find an alternative way of providing the care they require.

If the authorisation is for detention to enable life sustaining treatment or treatment believed necessary to prevent a serious deterioration in the person's condition, and there is a question about whether it may lawfully be granted, it will not be unlawful to detain the person while a decision is sought from the Court of Protection.

D The duration of any authorisation will be assessed on a case-by-case basis, taking account of the individual's circumstances. If the best interests assessor concludes that deprivation of liberty is necessary in a person's best interests to protect them from harm, they will be required to recommend the time period of the authorisation, taking account of the possibility of circumstances changing. The maximum period for an authorisation would be 12 months but it is expected that authorisations would be for shorter periods in many cases.

E If the best interests assessor concludes that deprivation of liberty is necessary in a person's best interests to protect them from harm, they will be required to recommend who would be the best person to be appointed to represent the person's interests. The person concerned will choose their own representative if they have capacity to do so. If not, the best interests assessor will consider whether there is someone among those they have consulted who would be suitable.

F If all the assessments conclude that the person meets the criteria for an authorisation to be issued, the supervisory body must grant the request for authorisation of deprivation of liberty.

- The time period of an authorisation may not be longer than recommended by the best interests assessor and may not be longer than 12 months.

- Authorisation must be in writing and include the purpose of the deprivation of liberty, the time period, any conditions attached, and the reasons that each of the qualifying criteria are met.

- The supervisory body must give a copy of the authorisation to the hospital or care home managers, the person concerned, any IMCA instructed and all interested persons consulted by the best interests assessor.

- The role of the representative is to keep in touch with the person, to support them in all matters concerning the authorisation, and to request a review or to make an application to the Court of Protection on their behalf where necessary.

- If there is no one available among friends or family then the supervisory body will appoint a person, who may be paid, to act as the representative for the duration of the authorisation.

G Hospital and care home managers will have a duty to:

- take all practical steps to ensure that the person concerned and their representative understand what the authorisation means for them and how they can apply to the Court of Protection or request a review;

- ensure that any conditions attached to the authorisation are met; and

- monitor the individual's circumstances as any change may require them to request that the authorisation is reviewed.

The hospital or care home can apply for a further authorisation when the authorisation expires, in which case the procedures from point A would be repeated.

H A review may be carried out while an authorisation is in place for the following reasons:

- The hospital or care home requests a review because the person's circumstances have changed.

- The person or their representative requests a review.

The supervisory body must conduct a review if asked to do so as above. Assessments would be carried out for any of the criteria for authorisation affected by any change of

circumstances. The outcome of the review may be to terminate the authorisation, vary the conditions attached or change the reason recorded that the person meets the criteria for authorisation. The hospital or care home, the person concerned and their representative must be informed of the outcome of a review.

The person concerned, or the person appointed as their representative, or an attorney or deputy, can at any time request that an authorisation be reviewed by the supervisory body and also has the right to make an application to the Court of Protection to challenge a decision to authorise deprivation of liberty at any time. Where an IMCA is instructed, they can provide support with a review or with an application to the Court of Protection. Any other person may apply to the Court of Protection for permission to challenge a decision to deprive someone of their liberty. Legal Aid will be available for challenges by the person deprived of liberty or their representative to the Court of Protection.

The Government believes that the vast majority of people lacking capacity who are deprived of their liberty will be in hospital or care home settings. It takes the view that deprivation of liberty of such people in other settings will only exceptionally be justifiable if it is the result of following an order by the Court of Protection on a personal welfare matter. The Mental Capacity Act 2005 makes deprivation of liberty unlawful in cases where there is neither a deprivation of liberty authorisation nor a relevant decision by the Court of Protection.

In developing the deprivation of liberty safeguards, the Government has sought to minimise new burdens arising from the safeguards, but some will inevitably arise. Government funding will be provided to meet the additional costs to the NHS and Local Authorities of the assessments required by the deprivation of liberty safeguards.

Overview of Deprivation of Liberty Safeguards proposals