



briefing

Health and Social Care - September 2008

Deprivation of liberty safeguards introduced

Amendments to the Mental Capacity Act 2005

Deprivation of liberty without lawful justification is prohibited under Article 5 of the European Convention on Human Rights (ECHR) which is incorporated into UK law through the Human Rights Act 1998. Liberty can be deprived not just by physical confinement, but also by other restrictions, such as on a person's freedom of movement. The circumstances in which a finding of deprivation could be made are varied, making the area potentially complex.

Physical or mental health

In consequence, Article 5 ECHR has always been of relevance to those confined for their own care for reasons of either physical or mental health. In the 'Bournewood case' (HL v UK, Application no. 45508/99) the European Court (ECtHR) found that additional legal safeguards were required in UK law to ensure that decisions made about those who lack capacity, and who might be deprived of their liberty, are made in accordance with an appropriate procedure. Prior to Bournewood, informal admission procedures had relied upon the common law principle of necessity in the best interests of the person. The ECtHR regarded this procedure as insufficiently clear to satisfy the requirements of Article 5 ECHR.

The safeguards

The UK has responded to this judgment by amending the Mental Capacity Act 2005 (MCA) (through the Mental Health Act 2007) to introduce 'deprivation of liberty' (DOL) 'safeguards' into the MCA. The safeguards will come into force from April 2009.

In essence, the safeguards require any hospital or care home ('the managing authority') which identifies that a person lacks capacity and risks being deprived of their liberty, to apply to the 'supervisory body' (the PCT or Local Authority with responsibility for the care of that person) for authorisation of the DOL (unless deprivation has already been authorised). The supervisory body will have to conduct a range of assessments prior to making an authorisation, with any decision subject to an appeal to the Court of Protection.

Managing authorities will face challenges in determining when and how to apply for an authorisation. A draft Code of Practice has been published to assist the determination of when a risk of DOL is present such as to warrant an application. Applications will then have to be compliant with the Mental Capacity (DOL; Standard Authorisations, Assessments and Ordinary Residence) Regulations 2005, which specify all the information to be included on any application.

What assessments need to be done

Supervisory bodies will have to conduct the following assessments prior to making a decision: age; mental health; mental capacity; whether the individual is subject to the Mental Health Act 1983; whether any DOL would conflict with other valid decisions made by the individual (i.e. under a lasting power of attorney) and, finally, whether the DOL would be in the best interests of the individual (i.e. a proportionate response necessary in order to prevent the likelihood and severity of the harm anticipated).

Conducting the assessments properly is likely to require careful management in accordance with the Regulations (cited above). For example, 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. In addition, there is scope for the person to be legally represented, or represented by an Independent Mental Capacity Advocate (IMCA) to support and represent them during the assessment process.

The maximum duration of a single authorisation is 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. Consideration must always be given to less restrictive alternatives than DOL, although there is scope in the rules for emergency DOL to enable life sustaining treatment whilst a decision is sought from the Court of Protection.

Who will be affected

The likely focus of the new procedures will be those with learning disabilities, dementia or physical injuries, thus care homes serving those with these needs are likely to be most affected by the new procedures. The Ministry of Justice Impact Assessment (May 2008) estimates that there are a maximum of 50,000 such individuals who could require authorisations, although predicts that no more than 21,000 actual applications will be made in the first year, with 15 hours of supervisory body time engaged per application. The Assessment is optimistic, and predicts a steady decline in applications, and time engaged, once the principles and procedures become more familiar to those operating them.

Although the 'Bournewood' population may not be great, and the challenges posed in organising and managing the new procedures are not insurmountable, the greatest challenge to supervisory bodies will no doubt be in defending their procedures and decisions from the inevitable legal challenges that will follow.

More information

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