

Health and Social Services Committee

HSS(2)-13-06(p.6)

Meeting date: Thursday 28th September 2006

Venue: Committee Room 1, Senedd, National Assembly for Wales

Title: Bournemouth Safeguards

Purpose

The Committee is asked to note the UK Government's proposals for ensuring that the law for England and Wales on the treatment and care of people suffering from a disorder or disability of mind, who lack capacity and who need to be deprived of liberty is compliant with the European Convention on Human Rights (ECHR).

Summary / Recommendations

Through a Bill to amend the Mental Capacity Act 2005, which will also make amendments to the Mental Health Act 1983, the UK Government will introduce legislation to close the so-called 'Bournemouth gap'. The UK Government has recently said that this Bill will be introduced as soon as parliamentary time allows.

The legislation will provide that no person who lacks capacity may be deprived of their liberty in hospital or care home without that deprivation being authorised.

Background

On the 29th of June 2006, Rosie Winterton, Minister of State for Health Services at the Department of Health, made a Written Ministerial Statement regarding the UK Government's proposals for the so-called 'Bournemouth safeguards'.

The UK Government's proposals are in response to the 2004 European Court of Human Rights judgment involving an autistic man who lacked the capacity to consent who was kept at Bournemouth Hospital by doctors against the wishes of his carers. The court found that he had been deprived of his liberty unlawfully.

The so-called 'Bournemouth gap' arises when people who lack capacity to consent and need to receive care or treatment in circumstances that amount to a deprivation of liberty - such as some people with severe dementia or autism - these people have previously been "detained" under the common law, rather than under the Mental Health Act, and so do not have sufficient legal safeguards or protection. Following the decision by the European Court the Department of Health committed to introducing new legislation to close the 'Bournemouth gap'.

To inform the UK Government's response they undertook a consultation exercise in March 2005, inviting comments on options for closing the 'gap'.

People likely to be affected by the Bournemouth proposals are mainly those with significant learning disabilities, or elderly people suffering from dementia, but include a minority of others who have suffered for example a brain injury. The proposals will apply to those in hospitals or care homes, whether placed under public or private arrangements.

The key features of the proposals are:

- Hospitals and care homes will have a duty to identify anyone at risk of deprivation of liberty and, if they do not consider that a less restrictive regime is possible, request an authorisation from the supervisory body. The supervisory body would be the Local Authority in the case of a care home or, in the case of a hospital, Welsh Ministers; in practice Welsh Ministers are likely to seek to delegate to health commissioners
- It will be unlawful for a hospital or care home to deprive a person of liberty without obtaining an authorisation
- All involved must act in the best interests of the person concerned and in the least restrictive manner
- The supervisory body will commission assessments including an independent "best interests" assessment which will look at whether the deprivation of liberty is necessary in the person's best interests.
- The best interests assessor will set the period for review in each case. This must not be longer than 12 months.
- Family, friends and carers will be consulted as part of the best interests assessment and, if a person is un-befriended, an Independent Mental Capacity Advocate will be appointed
- The supervisory body will only grant an authorisation if all the assessments recommend it.
- Authorisation should be obtained in advance, except in circumstances where it is thought to be urgent, in which case authorisation should be obtained within seven days of the start of the deprivation of liberty.
- Every person detained will have someone appointed to represent their interests who are independent of the supervisory body and the hospital or care home. This may be a family member, a friend or an advocate.
- Managers of the hospital or care home will have a duty to monitor the person's circumstances because a change may require them to apply to the supervisory body for the authorisation to be reviewed.
- A review can also be triggered at any time by the person concerned or their representative.
- The person concerned or their representative, will have right of appeal at any time to the Court of Protection
- If mental health legislation could be used instead, the new procedure will not be able to be used to admit or keep people in hospital for treatment for mental disorder if it is reasonably believed that the person concerned objects to detention for the purposes of such treatment or would object if they were in a position to do so.

The provisions will be introduced into the Mental Capacity Act 2005 through a Bill that will also amend the Mental Health Act 1983.

Financial Implications

The main costs will be associated with the assessment element of authorisation, and as such will be borne by the supervisory body. The UK Government will be producing a Regulatory Impact Assessment (RIA) to accompany the introduction of these proposals into Parliament. The RIA will include the costs of these proposals.

The Welsh Assembly Government is working with the Department of Health to model costs for inclusion in this RIA, however it is expected that the costs will be containable within the resources already identified for the Mental Health Bill.

The Department for Health and Social Services Resources Directorate has seen and noted the contents of this paper (NG2722).

Cross Cutting Themes

These proposals are being brought forward by the UK Government to ensure all patients receive care which is consistent with the European Convention of Human Rights.

Action for Subject Committee

The Committee is asked to note the UK Government's proposals for closing the 'Bournewood gap'.

Brian Gibbons

Minister for Health & Social Services

Contact Point: Claire Fife, Community, Primary Care and Health Services Policy Division, tel: 029 2082 6988