

Bournewood Briefing Sheet

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 should be cared for in the least restrictive regime possible.
- 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 Bournewood case highlighted a situation that is unacceptable and breaks human rights legislation.
- The Government intends to close the “Bournewood gap” by amending the Mental Capacity Act 2005. These proposals 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).

Introduction

The context for the Bournewood policy proposals 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 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 may arise, for example for some people with severe autism, profound learning disabilities or dementia.

The aim of the Bournewood proposals is to provide legal safeguards for those vulnerable people who are deprived of their liberty, to prevent arbitrary decisions to deprive a person of liberty and to give rights of appeal. The provisions apply to people who lack capacity to consent to treatment or care, who are suffering from a disorder of the mind but who are not and could not be detained under the Mental Health Act 1983. The Government intends that implementation of the Bournewood provisions and associated chapter of the Mental Capacity Act Code of Practice will reduce the numbers of people deprived of their liberty in care homes and hospitals.

The provisions will be introduced into the Mental Capacity Act 2005 through the Mental Health Bill. The principles of the Mental Capacity Act 2005 will apply to the provisions, including the requirement to act in the best interests of the person lacking capacity, and in the least restrictive manner.

Background – the Bournemouth case

The Bournemouth case concerned an autistic man with severe learning disabilities who was informally admitted to Bournemouth Hospital under common law. The European Court of Human Rights (ECtHR) found that he had been deprived of his liberty unlawfully without a legal procedure with safeguards and speedy access to a court of appeal. The Department of Health committed to introducing new legislation to close the “Bournemouth 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 specific 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 deprivation of and restriction upon liberty is merely one of degree or intensity and not one of nature or substance.” (para 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 “Bournemouth gap”. The Government’s proposed solution has been shaped by the views expressed in this consultation. A report of the consultation is available on the Department of Health’s website.

The Bournemouth proposals

Who will be covered by the Bournemouth proposals?

The proposed Bournemouth provisions 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 provisions will apply to people aged 18 and over who:

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

The new procedure will not be able to be used to detain people in hospital for treatment of mental disorder in situations where the Mental Health Act could be used instead if they object to detention for the purposes of such treatment or would object if they were in a position to do so. 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.

The potential “Bournemouth group” 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 Bournemouth proposals? (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.

It will be unlawful to deprive someone of liberty under the Mental Capacity Act without such an authorisation (unless the Court of Protection orders it).

The Bournemouth provisions do not include any new powers to decide that a person who lacks capacity should be accommodated in a care home or hospital, nor any new power to take and convey people to hospital or care homes. They are solely about ensuring there is a proper process in place where people are, or are to be, deprived of their liberty in order to receive care or treatment in their best interests.

- The Mental Capacity Act Code of Practice will be updated to include a checklist of issues to consider to help managers assess whether deprivation of liberty may occur.
- If a person is at risk of deprivation of liberty, consideration should always be given to less restrictive alternatives.
- Guidance was issued by the Department of Health and the Welsh Assembly Government, following the ECtHR decision, on assessment, care planning and monitoring to avoid deprivation of liberty where possible. This will form part of the Bournemouth chapter to be added to the Mental Capacity Act Code of Practice. Care homes and hospitals will need to follow this guidance in order to avoid unlawful deprivation of liberty.
- Such authorisation would be requested – and the outcome implemented – by the hospital or care home in which the person is or will be resident.
- Regulations may set out the information to be provided with a request for authorisation. This might include, for example, information

resulting from current best practice in care planning.

- 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 within seven days of the start of the deprivation of liberty.

B When a supervisory body receives a request for authorisation of deprivation of liberty they must obtain assessments to establish whether the person is:

- aged 18 or over (*age assessment*);
- suffering from a disorder or disability of the mind (*mental health assessment*);

and

- lacking capacity in relation to the question of whether or not he or she should be a resident in the hospital or care home (*mental capacity assessment*);
- eligible, that is, not the subject of a requirement under the Mental Health Act which conflicts with the authorisation sought, e.g. a guardianship order requiring them to live somewhere else (*eligibility assessment*).

It must also be:

- in the best interests of the person to be subject to the authorisation, to be detained as a resident in the hospital or care home in circumstances which amount to deprivation of his or her liberty; **and**
- necessary for the person to be a patient in the hospital or care home in order to prevent harm to him or her; **and**
- a proportionate response to the likelihood of suffering harm and the seriousness of that harm (***best interests assessment***).

The authorisation sought must not conflict with a valid decision by a donee or deputy with

lasting power of attorney for the relevant person.

If the authorisation is for detention and includes life sustaining treatment or treatment believed necessary to prevent a serious deterioration in the person's condition, the application would be considered to meet the objections requirement while a decision is sought from the Court of Protection on any objections.

An authorisation may not be sought for depriving a person of liberty, for the purpose of giving treatment in a hospital where the Mental Health Act 1983 could be used instead, if there is any evidence that the person objects or would object (objections assessment).

- Regulations may set out who can carry out the assessments. It is proposed that regulations should cover qualifications and training needed to be an assessor, need for more than one assessor, and the need for the best interests assessor to be independent of the admissions/care planning process.
- The best interests assessor will be required, under section 4(7) of the Mental Capacity Act, 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 donee of a lasting power of attorney granted by the person; and
 - any deputy appointed for the person by the court.
- The best interests assessor may indicate conditions that should 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.
- The Mental Capacity Act Code of Practice will cover the importance of needs assessment and care planning (to include 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 is unbefriended will have an Independent Mental Capacity Advocate (IMCA) appointed 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 appointed and all interested persons consulted by the best interests assessor of the decision and the reasons. This is so that all with an interest are aware that the person may not lawfully be deprived of their liberty.

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 may 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 recommended by the best interests assessor, and the reasons that each of the assessment 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 appointed and all interested persons consulted by the best interests assessor.

When an authorisation is granted the supervisory body must appoint someone to act as the person's representative, based on the recommendation of the best interests assessor. Regulations may prescribe the procedure for appointing a person's representative.

- 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 appeal to the Court of Protection on their behalf where necessary.
- If there is no one available among friends or family then an advocate would be appointed 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 may appeal 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 An authorisation may be reviewed 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 because the person's circumstances have changed.

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 the 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 their representative or a donee or deputy, may request a review at any point when an authorisation is in force.

The person concerned or the person appointed as their representative, or a donee or deputy, can at any time request that an authorisation be reviewed by the supervisory body and also has the right of appeal to the Court of Protection against a decision to authorise deprivation of liberty, at any time. Any other person may apply to the Court of Protection for leave to appeal against a decision to deprive someone of their liberty. Legal Aid¹ will be available, subject to the means and merits test, for appeals 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 be rare and should be authorised by the Court of Protection. The Mental Capacity Act 2005 will bar deprivation of liberty occurring in cases where the deprivation has not been authorised through the Bournemouth provisions or by the Court of Protection.

In developing the Bournemouth provisions, the Government has sought to minimise new burdens arising from the provisions, but some will inevitably arise. Government funding will be provided to meet additional costs arising from the introduction of the Bournemouth provisions.

Further information

To obtain an easy read version of this document or for further information on the Mental Health Act 1983 and the amending Bill:

Visit: www.dh.gov.uk/MentalHealth

Telephone: 020 7972 4477

Email: MentalHealthBill@dh.gsi.gov.uk

Additional briefing sheets on key policy areas are available by visiting:

www.dh.gov.uk/MentalHealth

For more information on the Mental Capacity Act, visit:

www.dca.gov.uk/capacity/index.htm

Overview of Bournemouth proposals



