

Mental Health Law Briefing

Number 103

Plugging the “Bournewood” Gap – The Government’s response to consultation

The Government has recently¹ published its response to the Consultation on the appropriate new safeguards to protect people who lack capacity following the Bournewood case.

The Government has proposed a regime of protective care for so called Bournewood patients, namely those who lack capacity but are not detained under the Mental Health Act.

The Government has already announced that it proposes to address these issues by amending the Mental Capacity Act². It is hoped that protection will be provided whilst keeping bureaucracy to the minimum. In response to the Consultation the Government has announced:

1. There will be formal authorisation to deprive an individual of liberty. This will be provided by the Local Authority in respect of a resident in a Care Home, and by the relevant PCT for a Hospital resident. To deprive incapacitated people of their liberty (other than in Hospitals and Care Homes) will require prior authority from the Court of Protection. It will be based on assessments of the need for the

person to be cared for or treated in circumstances which amount to a deprivation of liberty. Mandatory consultation with the relatives, friends and carers will be required. Those individuals will be entitled to a copy of the authorisation to deprive of liberty.

2. Primarily legislation will specify who can deprive a person of their liberty and in what circumstances. It will set out the main safeguards although the detail will be covered in Regulations and a Code of Practice.
3. Those placed in Care Homes as a result of a private arrangement will expressly be within the scope of the Bournewood provisions.
4. The Government does not intend to provide a clear definition of “deprivation of liberty”, rather the Code of Practice will provide detailed guidance on the factors to be taken into account when considering whether an individual is or needs to be deprived of their liberty.
5. Appeals against deprivation of liberty may be made to the Court of Protection.
6. Incapacitated persons will be entitled to have a suitable person appointed to act as their

¹ Published June 2006: “Protecting the Vulnerable: The “Bournewood” Consultation.

² Not yet in force but anticipated to come into force in April 2007.

representative who will be able to bring proceedings on their behalf before the Court of Protection. If a suitable person is not available amongst the individual's relatives, friends and carers then an independent person will be appointed by the relevant Local Authority (for Care Homes) or the relevant PCT (for those receiving healthcare).

7. The proposal that disputes regarding detention should be referred to a Reviewing Officer as part of a "first tier" review has been rejected on the grounds this might interfere with Human Rights. Review will therefore be subject to an application to the Court of Protection by way of appeal, although there will also

be the possibility of a "review" which may be requested by the incapacitated person's representative.

8. The Government does not propose to confer new powers on the Mental Health Act Commission, Healthcare Commission or CSCI as it considers their existing powers are sufficient to review issues arising.

Having recently announced that the Government will be amending the Mental Health Act to update this (rather than bringing forward an entirely new Mental Health Bill), we now await the draft Amendment which will be the subject of a further Briefing in due course.

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