

Mental Health Law Briefing

Solicitors

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Mental Health Act 2007 Plugging the Bournemouth Gap: Authorising Deprivation of Liberty

Since the Judgment of the European Court of Human Rights in the Bournemouth case, the government have been aware that the English common-law doctrine of necessity does not comply with the Human Rights Act where it is used to authorise the detention of incapacitated but compliant adults.

The government's response to the problem caused by the Bournemouth case¹ is to introduce an amendment to the Mental Capacity Act 2005 by Section 50 and Schedule 7 of the Mental Health Act 2007.

Following the Bournemouth case, where a person without capacity is deprived of their liberty other than in accordance with the Mental Health Act this would be likely to be unlawful. The amendments to the Mental Capacity Act ("MCA") brought in by the Mental Health Act 2007 will permit an individual to be deprived of his liberty lawfully under the terms of the MCA where this is authorised by the new procedures introduced by the legislation.

MCA Authorisation

Where an adult² lacks capacity, a care plan that amounts to a deprivation of their liberty may be authorised on the request of hospital or care home managers by the commissioning PCT (for hospitals in England) or the local authority (for care homes), each known as an "authorising body". Where an application is made, the relevant authorising body will appoint an independent person to undertake a series of assessments:

1. The individual's age
2. That the individual suffers from a mental disorder
3. That he lacks capacity to consent to residence in the hospital or care home
4. That the deprivation of liberty is in the individual's best interest, is necessary to prevent harm, and is a proportionate response to the likelihood of such harm.
5. Additional assessments of both eligibility and no refusal must be carried out.

¹ See previous briefings

² i.e aged 18 or over

Conditions may be imposed by the authorising body who may grant authorisation for a period of up to a year.

The authorisation can be required to be reviewed at any time by the individual, his or her representative or the authorising body.

If an assessment determines that the criteria for a lawful deprivation of liberty are not met, then the patient's care would have to be reviewed and an alternative care plan, which did not amount to a deprivation of liberty, put in place.

MCA Conflicts

If the circumstances that amount to a deprivation of an adult's liberty conflict with any advance decision by him, or any decision made by his LPA or a deputy appointed by the Court of Protection, then the authorisation scheme cannot override that refusal. If the individual objects himself to the deprivation of liberty, detention under the Mental Health Act should be considered.

Urgent Procedure

In cases of urgency, hospital or care home managers can authorise themselves to deprive an adult of their liberty

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for up to 7 days. The relevant authorising body can extend this for a further period of 7 days whilst the standard authorisation procedure assessments are carried out.

Representatives

Once authorisation is granted adults are entitled to a representative who can be chosen by them if they have the necessary capacity. Alternatively, the representative can be chosen by the adult's LPA or deputy³, or by the best interests assessor of the authorising body. The representative is intended to support the adult in all matters that relate to the authorisation of the deprivation of his liberty. The representative has a right to require a review or can appeal to the Court of Protection on the adult's behalf. Where no representative is appointed, the authorising body must appoint an IMCA⁴ to undertake that function.

Comment

The need for a legislative answer to the Bournemouth problem was unavoidable. This new process will clearly impact significantly in particular on those providing care to patients with dementia and severe learning disabilities who will need to follow the procedures outlined above at least annually.
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Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

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