Advice requested

The issue for this note is whether a departure from the Code of Practice involving restrictions on a patient's freedom could be justified as a result of measures needed to contain a risk of viral contamination.

Summary of advice

The detailed provisions for monitoring and reviewing restrictive interventions may be departed from with good reason. While a blanket policy is not permissible, where there are clear and cogent factors which render it impossible to comply with the demands of the Code that would be sufficient justification for departing from it.

Background/context

Factual Background

NAPICU has compiled draft guidance (the draft guidance) on the management of patients at risk of transmission of or infection with coronavirus in a mental health unit.

A key issue is whether the provisions for seclusion at 26.112 of the Code may be departed from where a patient is suspected of being contaminated or is showing symptoms of Covid-19. More particularly, the question is whether a patient's behaviour, either by way of failing to comply with a need for isolation or deliberately or recklessly creating a risk of contamination, requires professionals who manage it with seclusion to apply the Code's safeguarding provisions. The draft guidance does not purport to use the powers under the Mental Health Act (the Act) to act as a vehicle for infection control. Coincidentally, that may be the effect of such steps, but only where the risk is created because of a symptom or manifestation of the patient's underlying mental disorder and the steps proposed are address a therapeutic need and are the least restrictive way of dealing with the matter

Legal Background

The general, uncontroversial, starting point is that restrictive interventions to control disturbed behaviour must be part of a response to the underlying mental disorder suffered by the patient. A capable, informal patient who refuses to self-isolate would be on the ward under licence from the Trust and may be asked either to leave or not go into certain areas. Enforcing that may present a challenge, but that is not a situation where the restrictive intervention regime would apply. An informal patient could be discharged if unwilling to abide by reasonable requests in respect of infection control. In such circumstances the powers introduced by the Coronavirus Act may apply to allow screening or isolation of patients suspected of presenting a risk of infection.

For an incapable informal patient, restraint could be applied if in the patient's best interests, including restrictions on access to those parts of the ward.

For detained patients whose behaviour does engage the provisions of Chapter 26 of the Code, there is a significant likelihood that in the current environment staff shortages will become a reality on mental health wards. Anecdotally, staff are being redeployed to acute hospitals, the changes to procedures prescribed in the Act as set out in the Coronavirus Act are based on an acceptance that there will be fewer people available to fulfil the safeguarding roles enshrined in the Act.

Advice

DEPARTURE FROM THE CODE

Provided the behaviour leading to a need for seclusion as described in the draft guidance is in response to a symptom or manifestation of a mental disorder (rather than just the existence of a risk of transmission or illness) then in the absence of sufficient staff to undertake the monitoring and reviews required by the Code this would be sufficient justification for not adhering to it.

The Courts have made it clear that any such departure must be spelled out clearly, logically and consistently.

In the clinical assessment of the situation, a judgement would need be made about the extent to which any resistance to cooperation with infection control requirements amounts to disturbed behaviour arising from mental disorder that likely to cause serious risk to others.

It is equally important to bear in mind that any step taken in relation to such patients, particularly where they are deprived of their liberty, should be the least restrictive possible. Where feasible, even if the provisions of the Code cannot be met, such steps as are reasonable and practicable in the circumstances should be taken.

Alternative powers for detaining people suspected of being contagious for screening or isolation are set out in the Coronavirus Act 2020. Those powers supersede the provisions of the Coronavirus Regulations issued in February this year, but which are now revoked. The powers are conferred on Public Health Officers (to be designated by the Secretary of State), Police Officers and Immigration Officers. Such powers apply irrespective of a patient's mental disorder and could be implemented for patients whose mental disorder was not connected with behaviour giving rise to a risk of contagion.

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