

EXPLANATORY MEMORANDUM TO

**THE DEPRIVATION OF LIBERTY SAFEGUARDS
SUPPLEMENT TO THE MENTAL CAPACITY ACT 2005 CODE
OF PRACTICE**

Laid before Parliament on 13 June 2008

1 This explanatory memorandum has been prepared by the Department of Health in liaison with the Ministry of Justice and is laid before Parliament at the command of Her Majesty.

2 Description

2.1 The Mental Health Act 2007 has amended the Mental Capacity Act 2005 (“the Act”) to introduce a scheme, known as the deprivation of liberty safeguards. This scheme provides a framework for approving the deprivation of liberty for people who lack the capacity to consent to treatment or care in either a hospital or care home that, in their own best interests, can only be provided in circumstances that amount to a deprivation of liberty.

2.2 The Mental Capacity Act 2005 Code of Practice (“the main Code”) was published in April 2007. It is for the guidance of a range of people with various functions and duties under the Act. The Act also places specific groups of people, mainly those acting in a paid or professional capacity or occupying certain roles created by the Act, under a formal duty to “have regard” to the Code. The Code now laid forms a supplement (“the Code supplement”) to the main Code. The Code supplement contains guidance on the deprivation of liberty safeguards that have been inserted into the Act.

3 Matters of special interest to the Joint Committee on Statutory Instruments

3.1 None.

4 Legislative Background

4.1 This Code supplement is part of the implementation of the deprivation of liberty safeguards inserted into the Act.

4.2 The Act provides a statutory framework for people who lack the mental capacity to make their own decisions. It sets out who can take decisions, in which situations, and how they should go about this. It contains principles, procedures and safeguards to empower people to make as many decisions themselves as

they can and to play as full a part as possible in the decision-making process when they lack the capacity to make a decision. The Act also enables people to make provision for a time in the future when they may lack the capacity to make some decisions.

- 4.3 The deprivation of liberty safeguards have been introduced into the Act by the Mental Health Act 2007 (which was identified as a suitable vehicle through which to introduce the safeguards) in response to the European Court of Human Rights (ECtHR) judgement in *H.L. v the United Kingdom* (2004)¹. The Court found that an autistic man with a learning disability, who lacked the capacity to decide about his residence and medical treatment, and who had been admitted informally to hospital, was unlawfully deprived of his liberty in breach of Article 5 of the ECHR.
- 4.4 The deprivation of liberty safeguards legislation contains detailed requirements about when and how deprivation of liberty may be authorised. Section 42(1) of the Act requires the Lord Chancellor to produce one or more Codes of Practice for the guidance of certain specified groups of people. Section 42(4) also places some of these groups under a formal duty to have regard to the Code or Codes when acting in relation to a person who lacks capacity.
- 4.5 The Code supplement provides guidance to anyone working with and/or caring for adults who lack capacity, but it particularly focuses on those who have a duty of care to a person who lacks the capacity to consent to the care or treatment that is being provided, where that care or treatment may include the need to deprive the person of their liberty.
- 4.6 The Code supplement is also intended to provide information for people who are, or could become, subject to the deprivation of liberty safeguards, and for their families, friends and carers, as well as for anyone who believes that someone is being deprived of their liberty unlawfully.
- 4.7 Family carers and other informal or unpaid carers, unless they hold a formal role under the Act, are not under a duty to have regard to the Code of Practice but will still need to follow the Act's provisions. The guidance and best practice in both the main Code and the Code supplement is therefore aimed at them as well, and has been written with both the professional and lay audience in mind.
- 4.8 Section 43(1) of the Act requires the Lord Chancellor to have consulted Welsh Ministers and such other people as he considers appropriate before preparing a Code of Practice. Such consultation has been undertaken, as set out below.
- 4.9 Section 43(2) also states that before a Code can be issued, a draft must have laid before both Houses of Parliament for 40 days with neither House resolving not to approve the draft. It is therefore subject to a process akin to the negative resolution procedure for Statutory Instruments.
- 4.10 The deprivation of liberty safeguards legislation is due to come fully into force in April 2009

5 Extent

- 5.1 The Code supplement applies to England and Wales only.

6 European Convention on Human Rights

¹ (2004) 40 EHHR 761.

- 6.1 As this proposed Code is subject to a procedure akin to the negative resolution procedure and does not amend primary legislation, no statement is required.

7 Policy Background

- 7.1 The deprivation of liberty safeguards inserted into the Act are intended to prevent the unlawful detention of people who lack the capacity to consent to the arrangements made for their care or treatment and who need to be deprived of their liberty, in their own best interests and for their own safety, in either hospitals or care homes.
- 7.2 The Government undertook a 12 week consultation exercise between March and June 2005 inviting responses to outline proposals for addressing the legal shortcomings identified by the ECtHR in its October 2004 judgment. The consultation document identified three possible options. The deprivation of liberty safeguards have been developed from the option that received most support within the consultation responses. A report on the outcome of the consultation process was published on 29 June 2006². At the same time, an announcement was made setting out the proposed deprivation of liberty policy.
- 7.3 Draft deprivation of liberty safeguards Code of Practice guidance was published to coincide with the introduction of the Mental Health Bill into Parliament in November 2006. The draft deprivation of liberty safeguards Code supplement was developed during, and following, the Mental Health Bill's passage through Parliament in preparation for a formal consultation process that took place over a 12 week period between September 2007 and December 2007. The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008 and the Mental Capacity (Deprivation of Liberty: Eligibility and Selection of Assessors, Assessments, Requests for Standard Authorisations and Disputes about the Place of Ordinary Residence) Regulations 2008 were consulted upon at the same time³.
- 7.4 An easy-read guide to the consultation was produced for people with learning difficulties. Welsh translations of both the Code of Practice guidance and the easy-read guide were also produced as part of the consultation process. There will also be a Welsh translation and easy-read guide of the revised Code supplement made available in the near future.
- 7.5 The Department of Health has worked closely with stakeholders including representatives in Wales, Primary Care Trusts, local authorities, hospitals and care homes, voluntary organisations and interested individuals whilst revising the Code supplement.
- 7.6 There were 111 responses to the consultation process referred to in paragraph 7.3⁴. The responses were helpful and constructive. Many offered extensive, detailed comments. There was a mix between broadly positive comments and suggestions for additional content and further clarification.

² A report of the public consultation process can be accessed at:
http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4136789

³ The consultation papers can be accessed at:
http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_078052

⁴ A report of the public consultation can be accessed at:
<http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm>

- 7.7 The version of the Code supplement that is laid before Parliament has been revised in the light of the consultation responses and further consideration of the issues within Government (the Ministry of Justice, the Department of Health and the Welsh Assembly Government).
- 7.8 The main changes that have been made are:-
a fully revised chapter 2 discussing the meaning of deprivation of liberty
a changed format breaking down the longest chapter into a number of shorter chapters to make the Code supplement more user-friendly
the inclusion of new flowcharts, revised scenarios and a key words and phrases table at the end of the Code.
- 7.9 The Code in its final form for laying has also been extensively reworked by professional editors to ensure that, as far as possible, it is written in a style and format that is clear and accessible to the ordinary reader. The aim has also been to achieve a style and format that is consistent with the main Code. Whilst the Code addendum remains a separate document at the present time, consideration will be given to incorporating it in the main Code at a suitable time in the future.
- 7.10 During the production and revision of the Code supplement, the Welsh Assembly Government has been involved at every stage, and the final version of the Code addendum that has been laid has received the approval of the Welsh Assembly Government.

8 Impact

- 8.1 A Regulatory Impact Assessment⁵ was produced by the Department of Health for the passage of the Mental Health Act 2007. This covered all aspects of the Mental Health Act 2007. A specific deprivation of liberty safeguards Impact Assessment was prepared for the formal consultation process that took place between September 2007 and December 2007, as referred to in paragraph 7.3 above. A further deprivation of liberty safeguards Impact Assessment has been prepared for the laying of the Code addendum in Parliament⁶.

Contact

- 9.1 Any enquiries about the contents of this memorandum should be addressed to:-Mike Preston, Department of Health, Area 125, First Floor, Wellington House, 133-155 Waterloo Road, London SE1 8UG. Email: mike.preston@dh.gsi.gov.uk. Telephone: 020 7972 3963.

⁵ http://www.dh.gov.uk/en/Publicationsandstatistics/DH_063423

⁶ The deprivation of liberty safeguards Impact Assessment can be accessed at:
<http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm>