

# Deprivation-of-liberty safeguards in England and Wales

The Mental Capacity Act 2005 was fully implemented in England and Wales on 1 October 2007. A further important change to this Act was introduced in the new Mental Health Act 2007, providing safeguards against deprivation of liberty for residents of hospitals and care homes. These safeguards were formally implemented in October 2008.

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The Mental Capacity Act 2005<sup>1</sup> was fully implemented in England and Wales on 1 October 2007; this implementation was supported by the Code of Practice for the Act.<sup>2</sup> A further important addition to the Act was introduced in the new Mental Health Act 2007.<sup>3</sup> This addition introduces safeguards against deprivation of liberty for individuals resident in hospitals and care homes, and was formally implemented in October 2008. A further section will be added to the existing Code of Practice to provide further guidance on the use of these safeguards, and this additional draft guidance<sup>4</sup> is currently undergoing consultation with stakeholders.

## Why were these safeguards introduced?

Three judgements have been made on the famous Bournemouth case in England over the past decade. An autistic man, with no ability to communicate consent or dissent to hospital admission, was informally admitted (ie, not under the provisions

of the Mental Health Act) to a mental-health unit in England following agitated behaviour at a day centre. He was admitted informally because he made no attempt to leave. An application for a judicial review to quash the hospital's decision to detain him was made.

The Court of Appeal announced on 2nd December 1997 that the patient had been unlawfully detained. Reasons for this conclusion were summarised as follows: "A hospital could informally admit a person for treatment for a mental disorder under section 131 of the Mental Health Act 1983 only with his consent. A person who has no capacity to consent or dissent or a guardian to consent on his behalf had to be admitted under the statutory procedures in the 1983 Act, otherwise the hospital was detaining him. Since the common law doctrine of necessity was excluded by the statutory provision, the detention was unlawful."<sup>5</sup>

This judgement was subsequently overturned by the House of Lords<sup>6</sup> on 25 June 1998, but this ruling was felt to be based on a legal technicality.<sup>7</sup> On 5 October 2004, the European Court

of Human Rights found that the circumstances surrounding the care and treatment of the patient in the mental-health unit during a period in which he was not formally detained under the Mental Health Act 1983 constituted infringement, in the form of deprivation of liberty, of his rights under Articles 5(1) and 5(4) of the European Charter on Human Rights.<sup>8</sup> Article 5(1) was breached because the manner in which he was deprived of liberty was not in accordance with "a procedure prescribed by law". Article 5(4) was breached because he was not able to apply to a court to see if deprivation of liberty was lawful.

To prevent breaches of human rights, the Mental Capacity Act has been amended to provide safeguards for individuals who:

- lack decision-making capacity;
- are at least 18 years old;
- have a mental disorder as defined in the Mental Health Act 2007;
- whose care or treatment involves deprivation of liberty within the framework of Article 5 of the European Charter of Human Rights, but who are not detained under the Mental Health Act.

Although the European Court of Human Rights' judgement on the Bournemouth case referred to admission to hospital, the deprivation-of-liberty safeguards also apply to individuals living in care homes, because the issues related to deprivation of liberty are very similar.

## What is deprivation of liberty?

Deprivation of liberty is not specifically defined in the Mental Health Act 2007<sup>3</sup> or in the draft code of practice.<sup>4</sup> The judgement from the European Court identified the following contributors to deprivation of liberty:

1. restraint, including sedation, used to admit a resistant individual;
2. complete and effective control of care and movements exercised by staff for a significant period;
3. control over assessments, treatment, contacts, and residence exercised by staff;
4. taking a decision to prevent the individual from leaving should they choose to do so;
5. the carer's request to discharge the individual to their care was declined;
6. restrictions were placed on the individual's access other people resulting in inability to maintain social contacts;
7. continuous supervision and control resulted in the individual losing autonomy.

These factors could be taken to be the core constituents of deprivation of liberty. The draft guidance<sup>4</sup> advises that the collective impact of all restrictions should be considered in assessing deprivation of liberty irrespective of their justification for the individual's safety.

## What should be done if deprivation of liberty is identified?

If deprivation of liberty is identified or anticipated to occur during the next 28 days, then consideration should be given to safely caring for the individual with fewer restrictions. The draft code of practice provides guidance on practical steps that can be taken to reduce the risk of deprivation of liberty. However, if this is not possible and deprivation of liberty is considered to be in the best interest of the individual, then the safeguards must be invoked. The procedure is complex and detailed.

The manager of the institution has responsibility for seeking authorisation from the supervisory body in advance of depriving an individual of their liberty (standard authorisation), although in an emergency provisions exist for urgent authorisation by the manager for 7 days. The supervisory body has responsibility for granting or declining authorisation for depriving an individual of their liberty. The supervisory body for the hospital is either the Primary Care Trust, the Welsh Assembly, or the Local Health Board who commission care or treatment in hospital, and for care homes it is the local council.

## What assessments are done by the supervisory body?

The supervisory body is required to obtain six assessments within 21 days for standard authorisation and 7 days for urgent authorisation.

- **Age assessment**—to confirm that the individual is aged 18 years or older. Authorisation

under the deprivation-of-liberty safeguards cannot be given to those under the age of 18 years.

- **Mental health assessment**—to establish whether the individual has a mental disorder as defined in the Mental Health Act 2007.<sup>3</sup>
- **Mental capacity assessment**—to establish whether the individual lacks the capacity to consent to the arrangements proposed for their care.
- **Best interest assessment**—if deprivation of liberty is occurring or is going to occur, is it in the best interest of the individual concerned? Is deprivation of liberty necessary to prevent harm to the person? And is the deprivation of liberty proportionate to the likelihood of the individual suffering harm and the seriousness of that harm?
- **Eligibility assessment**—to establish the individual's status or potential status under the Mental Health Act 2007,<sup>3</sup> with the aim of confirming whether the individual should be subject to the Act or to the safeguards against deprivation of liberty under the Mental Capacity Act.<sup>1</sup>
- **No refusal assessment**—to establish whether authorisation of deprivation of liberty would conflict with other authorities' decision-making for that individual.

The supervisory body is required to appoint assessors for each of these assessments. Although some assessors may conduct more than one assessment, the mental-health and best-interest assessors must not be the same person, and there must be a minimum of two assessors.

## When is authorisation granted?

The supervisory body can grant standard authorisation of deprivation of liberty only if all six assessments conclude that the individual meets the criteria. Authorisation should be granted for the anticipated period for which deprivation of liberty is likely to be needed. The maximum duration of authorisation is 12 months, and if this period is granted, the best-interest assessor must be confident that the individual's circumstances affecting authorisation are unlikely to change over this period.

## What rights do affected people have?

The managing authority is required to inform the supervisory body if nobody appropriate (ie, other than people engaged in provision of care or treatment in a professional capacity or for remuneration) can consult during the application for authorisation of deprivation of liberty. The supervisory body is then required to immediately instruct an Independent Mental Capacity Advocate to represent the individual.

When authorisation is granted the best-interest assessor must also recommend an individual to be appointed as the patient's representative. This representative should maintain contact with the detained individual, and represent and support them in all matters relating to the operation of the deprivation-of-liberty safeguards. The patient's representative may trigger a review of the authorisation, using the organisation's complaints procedure, or make an application to the Court of Protection.

The Bournewood judgement concluded that Article 5(4) of the European charter of human rights was breached because the patient was not able to apply to a court to see if deprivation of liberty was lawful. Thus, in order to comply with the requirements of Article 5(4), the individual subject to or at risk of deprivation of liberty has the right to speedy access to the Court of Protection to review the lawfulness of their detention. The individual or someone acting on their behalf, including an Independent Mental Capacity Advocate, can apply to the Court of Protection while the authorisation for deprivation of liberty is being considered or after either urgent or standard authorisation.

These safeguards should benefit a large number of people who may be subject to deprivation of liberty in hospitals and care homes, particularly those with dementia. However, there are a number of challenges for successful implementation.

1. Ensuring awareness in all professional groups, including care-home workers, carers, and individuals potentially at risk of detention.
2. Meeting the training needs of all relevant professional groups, including those working in care homes, carers, individuals at risk, and those nominated to represent the person deprived of liberty.
3. Overcoming and managing the ambiguities of the new legislative framework (eg, in the definition of deprivation of liberty) and the interface between this legal framework and the Mental Health Act.<sup>3</sup>
4. Recruitment and training of large number of assessors to conduct the six assessments required for authorisation.
5. Recruitment and training of a

large number of Independent Mental Capacity Advocates to represent patients.

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## References

1. Office of Public Sector Information. Mental Capacity Act 2005. [www.opsi.gov.uk/acts/acts2005/20050009.htm](http://www.opsi.gov.uk/acts/acts2005/20050009.htm) (accessed 5 March 2009)
2. Ministry of Justice. Mental Capacity Act Code of Practice. [www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf](http://www.dca.gov.uk/legal-policy/mental-capacity/mca-cp.pdf) (accessed 5 March 2009)
3. Office of Public Sector Information. Mental Health Act 2007. [http://www.opsi.gov.uk/acts/acts2007/ukpga\\_20070012\\_en\\_1](http://www.opsi.gov.uk/acts/acts2007/ukpga_20070012_en_1) (accessed 5 March 2009)
4. The Mental Capacity Act Deprivation of Liberty safeguards. <http://www.dh.gov.uk/en/SocialCare/Deliveringadulthoodsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm> (accessed 5 March 2009)
5. Times Law Report. Inability to consent makes detention illegal. *The Times*, 8 December 1997.
6. *R v Bournewood Community and Mental Health NHS Trust ex parte L*. 3 WLR 108 House of Lords judgement, All ER 319. 25 June 1998.
7. Eastman N, Peay J. Bournewood: an indefensible gap in mental health law. Capacity is set to become a major clinicolegal issue. *Br Med J* 1998; **317**: 94-95
8. *HL v UK*. European Court of Human Rights (application 45508/99) Judgement. Strasbourg, 5 October 2004