

EXPLANATORY MEMORANDUM TO
THE NHS BODIES AND LOCAL AUTHORITIES PARTNERSHIP
ARRANGEMENTS (AMENDMENT) REGULATIONS 2009

2009 No. 278

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.
2. **Purpose of the instrument**
 - 2.1 This instrument amends the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 to include Schedule A1 to the Mental Capacity Act 2005 (the Mental Capacity Act Deprivation of Liberty Safeguards ‘MCA DOLS’) as a function of NHS Bodies.

Matters of special interest to the Joint Committee on Statutory Instruments

3. None.

4. Legislative Context

- 4.1 This instrument is part of the implementation of the MCA DOLS, found in Schedule A1 to the Mental Capacity Act 2005 (as inserted by schedule 7 to the Mental Health Act 2007).
- 4.2 The amendment in this instrument is linked to a proposed change to the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 (the ‘assessor regulations’)¹.
- 4.3 The proposed change to the assessor regulations will ensure that MCA DOLS assessors are eligible to carry out assessments if they have either an appropriate policy of insurance **or** indemnity arrangements in place. Under the existing assessor regulations, only those assessors who have a policy of insurance in place will be eligible to carry out assessments. It was never the Government’s intention to prevent professionals with indemnity arrangements (rather than policies of insurance) from becoming assessors in this way.
- 4.4 To further enable local authorities and primary care trusts (supervisory bodies under MCA DOLS) to enter into a range of shared operational and administrative arrangements to most effectively carry out their respective MCA DOLS functions, the amendment to the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000, will enable primary care trusts to enter into formal partnership arrangements with local

¹ The Mental Capacity (Deprivation of Liberty: Monitoring and Reporting; and Assessments - Amendment) Regulations 2009, amend the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008.

authorities. Including MCA DOLS on the list of functions of NHS Bodies in regulation 5, will mean, for example, that an assessor, who is an employee of a primary care trust but undertakes an assessment on behalf of a local authority, may be covered by the indemnity/insurance of that local authority.

4.5 By virtue of paragraph 13 of Schedule 9 to the Mental Health Act 2007, MCA DOLS is already included in the list of health-related functions of local authorities in the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 (regulation 6). Therefore, a corresponding amendment to enable local authorities to enter into formal partnership arrangements with NHS bodies is not required.

The MCA DOLS

4.6 The Mental Capacity Act 2005 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.

4.7 The MCA DOLS provides a framework for approving the deprivation of liberty of people who lack the capacity to consent to the arrangements made for their care or treatment (in either a hospital or care home) but who need to be deprived of liberty in their own best interests, to protect them from harm. The MCA DOLS legislation contains detailed requirements about when and how deprivation of liberty may be authorised.

5. Territorial Extent and Application

5.1 This instrument extends to England only.

6. European Convention on Human Rights

6.1 As the instrument is subject to the negative resolution procedure and does not amend primary legislation, no statement is required.

7. Policy background

7.1 The MCA DOLS are a response to a European Court of Human Rights' (ECtHR) judgement in October 2004 – the case of HL v UK. 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 Bournemouth Hospital, was unlawfully deprived of his liberty in breach of Article 5 of the European Convention on Human Rights.

- 7.2 Lawful deprivation of liberty is achieved by introducing a system for “authorising” deprivation of liberty based on assessments to determine whether six “qualifying requirements” are met. A “standard” authorisation should be obtained in advance of deprivation of liberty commencing but an “urgent” authorisation may be given, as a preliminary to obtaining a standard authorisation, if the need for a person to be deprived of liberty is so urgent that it is appropriate for the deprivation to begin before the standard authorisation process can be completed. Where an urgent authorisation is given, the qualifying requirements assessments must be completed within 7 days, otherwise up to 21 days is allowed for the assessment process.
- 7.3 Assessors are eligible to carry out assessments if they meet the qualifying requirements set out in the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008. A minimum of two assessors are required for each deprivation of liberty case. An assessor may carry out any assessment for which they are eligible but the mental health assessment and the best interests assessment must be undertaken by different people.
- 7.4 In practice, we envisage that most local authorities and PCTs will share some assessors. For example, a local authority may wish to use a PCT employee to carry out an assessment or, similarly, a PCT may wish to use a local authority employee to carry out an assessment.

8. Consultation outcome

- 8.1 The deprivation of liberty safeguards policy was the subject of a formal consultation exercise for a period of 12 weeks between March and June 2005. This consultation invited responses to outline proposals for addressing the legal shortcomings identified by the ECtHR in its 2004 judgement. The consultation document² 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 2006³. At the same time, an announcement was made setting out the proposed deprivation of liberty safeguards policy.
- 8.2 There was a further formal 12 week consultation exercise between September 2007 and December 2007. This consultation sought views on the deprivation of liberty safeguards Code of Practice guidance and two sets of deprivation of liberty safeguards regulations⁴, one of which was the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008. A report on the outcome of the consultation was published on 9 June 2008⁵.

² http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_4113613

³ http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_4136791

⁴ http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_078052.

⁵ http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_085353

8.3 The amendment to regulation 3 of the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 has recently been the subject of a further short consultation⁶. However, the consultation was limited in scope to the detail of the amendment and not the principle: the relative merits of the principle of whether both indemnity and insurance are acceptable have been explored in a number of Parliamentary debates, including a debate on section 44C of the Medical Act 1983 which was inserted into that Act by the Medical Act 1983 (Amendment) and Miscellaneous Amendments Order 2006⁷.

8.4 As the amendment to the NHS Bodies and Local Authorities Partnership Arrangements Regulations 2000 is technical in nature and is linked to the amendment proposed to the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008, it has not been the subject of a separate consultation.

9. Guidance

9.1 The main source of guidance on the MCA DOLS is the Code of Practice that was laid before Parliament in draft on 13 June, and was subsequently published on 26 August 2008.

9.2 A range of further guidance is available through the deprivation of liberty safeguards webpage. In addition, a great deal of implementation preparatory work has been, and is being, done through links into local networks and attendance and presentations at seminars, conferences, etc.

10. Impact

10.1 A full MCA DOLS impact assessment was prepared for the formal consultation process that took place between September 2007 and December 2007. This was revised to accompany the laying of the MCA DOLS Code of Practice, the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 and the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008. Subsequent work has not changed this assessment.

11. Regulating small business

11.1 The legislation on MCA DOLS applies to small businesses largely to the extent that many of the care homes that come within the scope of the legislation will be small business enterprises.

11.2 Detailed guidance, for example the Code of Practice and a forms and

⁶ http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_092048

⁷ S.I. 2006/1914

record-keeping guide for hospitals and care homes, has been prepared that will minimise the impact of the requirements on small businesses. Because of the low numbers of people who are expected to need to be deprived of their liberty under the deprivation of liberty safeguards, it is not anticipated that the introduction of the safeguards will have a major impact on individual small businesses.

12. Monitoring & review

12.1 The Care Quality Commission will have responsibility for monitoring and reporting on the operation of the deprivation of liberty safeguards.

12.2 The Care Quality Commission is a new organisation formed by the amalgamation of the previous health and social care services inspection bodies- the Healthcare Commission, the Mental Health Act Commission and the Commission for Social Care inspection.

13. Contact

13.1 Helene Shaw at the Department of Health, Telephone: 202 7972 4958 or email: helene.shaw@dh.gsi.gov.uk, can answer any queries regarding the instrument.