

EXPLANATORY MEMORANDUM TO
THE MENTAL HEALTH ACT 2007 (COMMENCEMENT NO. 10 AND
TRANSITIONAL PROVISIONS) ORDER 2009

2009 No. 139 (C.9)

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 To commence those deprivation of liberty safeguards provisions of section 50 of, and Schedules 7, 8 and 9 to, the Mental Health Act 2007 that have not yet been commenced, and to make transitional provisions for the introduction of the safeguards. This instrument also commences those provisions on independent mental health advocates (IMHAs) in section 30 of the Mental Health Act 2007 to the extent to which they have not yet been commenced.

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

3.1 Since it includes a transitional amendment, which makes a minor amendment of primary legislation, the Commencement Order has been cleared with Parliamentary Counsel.

4. **Legislative Context**

4.1 This Order commences deprivation of liberty safeguards provisions that were inserted into the Mental Capacity Act 2005 by section 50 of, and Schedules 7, 8 and 9 to, the Mental Health Act 2007. It also makes transitional provisions that cover the implementation period immediately following the introduction of the safeguards.

4.2 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.

4.3 The deprivation of liberty safeguards have been introduced into the Mental Capacity Act 2005 by the Mental Health Act 2007 (the timing of the passage through Parliament of the Mental Health Act 2007 made it a suitable vehicle through which to introduce the deprivation of liberty safeguards into the Mental Capacity Act 2005).

4.4 The deprivation of liberty safeguards legislation contains detailed requirements about when and how deprivation of liberty may be authorised. The safeguards provide an assessment process that must be undertaken before deprivation of liberty may be authorised and detailed arrangements for continuing and challenging the authorisation of deprivation of liberty. The legislation is due to come fully into force on 1st April 2009.

4.5 This order also completes the commencement of provisions on IMHAs in section 30 of the Mental Health Act 2007.

4.6 Section 30 of the Mental Health Act 2007 requires the Secretary of State to make such arrangements as he considers reasonable to enable IMHAs to be available to help qualifying patients. Regulations directing primary care trusts (PCTs) to exercise this duty on behalf of the Secretary of State, and making provisions about the arrangements for the appointment of IMHAs and appointment requirements for IMHAs have already been made but are not yet in force.

5. Territorial Extent and Application

5.1 This Commencement Order applies to England and Wales in respect of the provisions on deprivation of liberty safeguards and the transitional provisions for the introduction of the safeguards. The order applies to England in respect of the provisions on IMHAs; these provisions have already been commenced in respect of Wales in Commencement Order No. 8(a).

6. European Convention on Human Rights

6.1 The Minister of State for Care Services has made the following statement:

“In my view the provisions of “The Mental Health Act 2007 (Commencement No. 10 and Transitional Provisions) Order 2009” are compatible with the Convention rights.”

7. Policy background

Deprivation of Liberty safeguards

7.1 The deprivation of liberty safeguards are a response to the European Court of Human Rights (ECtHR) judgement in *H.L. v the United Kingdom* (2004)(b). The ECtHR 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.

a S.I.2008/2561(C.113)
b (2004) 40 EHHR 761.

7.2 The safeguards 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 to protect them from harm, in either hospitals or care homes.

7.3 This 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 normally 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.

7.4 Some parts of Section 50 of the Mental Health Act 2007 were commenced from 1st April 2008. Those provisions are:-

- subsection (5) – this gave effect to Schedule 7 to the Mental Health Act 2007 but only for the purpose of making regulations or directions and inserting any definition relevant to those regulations or directions.
- subsection (7) – insofar as it gave effect to paragraphs 8 (codes of practice), 10 (interpretation) and 11(rules, regulations and orders) of Schedule 9 to the Mental Health Act 2007.
- subsections (8) to (13) – relating to Wales.

7.4 The relevant Commencement Order was “The Mental Health Act 2007 (Commencement No. 4) Order 2008”(a). The purpose of commencing those parts of Section 50 were so that Code of Practice guidance and two sets of regulations could go through the Parliamentary process well in advance of the proposed deprivation of liberty safeguards commencement date of 1st April 2009. The two sets of regulations were:-

- The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008.
- The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative) Regulations 2008.

Both these sets of regulations came into force on 3rd November 2008.

7.5 The Commencement Order to which this Explanatory Memorandum relates commences those parts of the deprivation of liberty safeguards legislation that have not yet been commenced.

a http://www.opsi.gov.uk/si/si2008/uksi_20080745_en_1

7.6 The transitional provisions included in the Commencement Order are aimed at easing the handling of what is expected to be an initial high number of applications for deprivation of liberty safeguards authorisations when the safeguards first come into force on 1st April 2009. The transitional provisions extend the timescale for standard authorisation assessments from 21 days to 42 days, and from 7 days to 21 days where an urgent authorisation is given. These transitional provisions will apply only in respect of applications for authorisations received in April 2009.

IMHAs

7.7 The Government, in amending the Mental Health Act 1983, decided to introduce statutory IMHAs for certain patients subject to compulsory measures under the Act (“qualifying patients”). Qualifying patients are most patients who are liable to be detained under the Act, patients on supervised community treatment or under guardianship and certain other patients whose treatment is subject to special safeguards under the Act.

7.8 IMHAs will help qualifying patients understand and exercise their legal rights. Mental health advocacy is already available as a non-statutory service from a number of agencies in parts of England, but current provision is not uniform and is unregulated.

7.9 The main provisions of the 2007 Act were introduced on 3rd November 2008. However, a decision was made not to bring the provisions on IMHAs into force in England until 1st April 2009, because of the need to develop suitable commissioning and training arrangements before the service is introduced.

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 document^(a) 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 29th June 2006^(b). 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 was about deprivation of liberty safeguards Code of Practice guidance and two sets of deprivation of

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

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

liberty safeguards regulations(a). A report on the outcome of the consultation was published on 9 June 2008(b).

8.3 The proposed date for commencing the deprivation of liberty safeguards, and the proposed transitional provisions, have not been the subject of a formal consultation process, but they have been put into the public domain, for example through a deprivation of liberty safeguards newsletter and through a briefing sheet, both available through the deprivation of liberty safeguards webpage(c).

8.4 Public consultation on draft IMHA regulations took place as part of the programme of consultation on draft secondary legislation arising from the Mental Health Act 2007, which ran from October 2007 to January 2008. A range of stakeholder views were sought and there were an array of events and workshops.

8.5 Generally, the proposals were welcomed. Responses mainly focussed on which body would have responsibility for commissioning IMHA services at a local level.

9. Guidance

9.1 The main source of guidance about the deprivation of liberty safeguards is the Code of Practice(d) that was laid in draft before Parliament on 13 June 2008, 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.

9.3 The Mental Health Act 1983 Code of Practice provides guidance on the role and rights of the IMHA. Guidance for PCTs on commissioning IMHA services has also been published.

10. Impact

10.1 The most recent deprivation of liberty safeguards Impact Assessment(e) was produced in May 2008 for the passage of the Code of Practice and two sets of regulations through the Parliamentary process. That Impact Assessment contains calculations of the additional costs for the main parties involved in the deprivation of liberty safeguards process.

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

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

c <http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm>

d http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

e http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsLegislation/DH_084982

10.2 The main impact on the public sector will be in respect of the need for PCTs and local authorities to manage the deprivation of liberty safeguards assessment and authorisation process. Additional funding has been provided to cover the implementation costs, as set out in the Impact Assessment.

10.3 An Impact Assessment on the duty to provide statutory IMHA services was carried out in the Mental Health Bill^(a). Further work has not changed this assessment.

10.4 An Impact Assessment has not been specifically prepared for this Commencement Order since the Impact Assessments referred to in paragraphs 10.1 and 10.3 covered the introduction of the deprivation of liberty safeguards and statutory mental health advocacy.

11. Regulating small business

11.1 The legislation on deprivation of liberty safeguards 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 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.

11.3 The legislation on IMHAs will apply to any small business that is commissioned by a PCT to provide IMHA services on its behalf. No additional consultation was carried out specifically in respect of small businesses. This is because the requirements will not impose any additional requirements on the providers of IMHA services above those that any reputable organisation (of any size) whose staff work with vulnerable people, would normally undertake.

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.

12.3 PCTs will have a statutory duty to ensure that qualifying patients have access to IMHA services of an appropriate quality. Accordingly, it will be for

^a http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Regulatoryimpactassessment/DH_076477

PCTs to include in their local arrangements, the necessary standards and procedures for ensuring the quality of the service provided on their behalf.

13. Contact

13.1 Kate Hardy at the Department of Health, Area 124, First Floor, Wellington House, 133-155 Waterloo Road, London SE1 8UG, e-mail: kate.hardy@dh.gsi.gov.uk, telephone: 020 7972 4039 can answer any queries regarding this instrument.