



Mental Capacity Act 2005

Deprivation of Liberty Safeguards

Part A: Consultation by the Ministry of Justice
on a Code of Practice for England and Wales

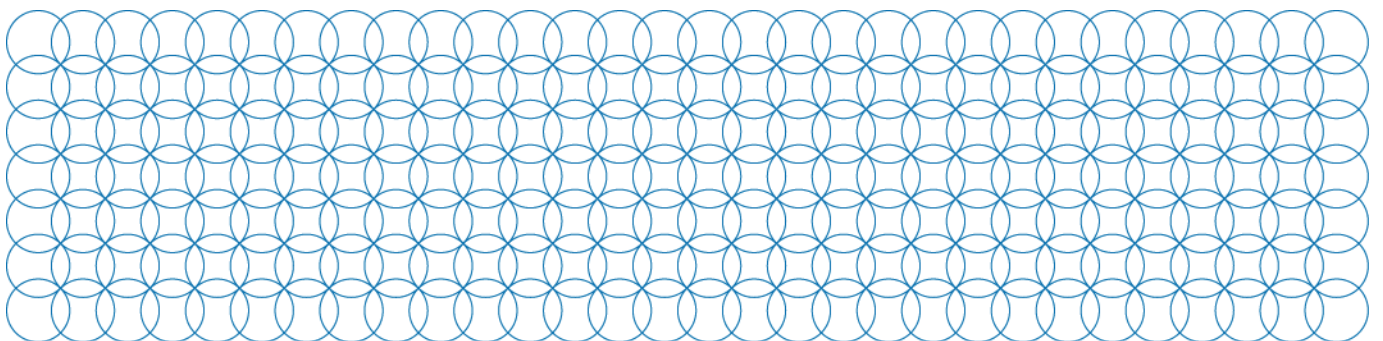
Part B: Consultation by the Department of
Health on regulations – England only

Part C: Further information

Consultation Paper CP23/07

Published on 10/09/2007

This consultation will end on 2/12/2007



DH INFORMATION READER BOX

Policy	Estates HR / Workforce Management Planning / Clinical	Commissioning IM & T Finance Social Care / Partnership Working
Document Purpose	Consultation/Discussion	
ROCR Ref:	Gateway Ref:	8319
Title	Consultation on the Mental Capacity Act 2005 deprivation of liberty safeguards draft Code of Practice and draft regulations	
Author	Department of Health and Ministry of Justice jointly	
Publication Date	10 Sep 2007	
Target Audience	PCT CEs, NHS Trust CEs, SHA CEs, Care Trust CEs, Foundation Trust CEs , Directors of Nursing, Local Authority CEs	
Circulation List	Directors of PH, Directors of Adult SSs, Voluntary Organisations/NDPBs	
Description	Consultation to seek views on draft Code of Practice guidance and draft regulations linked to the introduction of the deprivation of liberty safeguards into the Mental Capacity Act 2005.	
Cross Ref	""Bournewood" Consultation": March 2005. "Protecting the Vulnerable: the "Bournewood" Consultation": June 2006	
Superseded Docs	None.	
Action Required	N/A	
Timing	Consultation closes 2 December 2007.	
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Ministry of
JUSTICE



Mental Capacity Act 2005

Deprivation of Liberty Safeguards

Part A: Consultation by the Ministry of Justice
on a Code of Practice for England and Wales

Part B: Consultation by the Department of
Health on regulations – England only

Part C: Further information

A consultation produced by the Ministry of Justice and the Department of Health. It is also available on the Ministry of Justice website at www.justice.gov.uk/publications/cp2307.htm and the Department of Health website at www.dh.gov.uk/en/Consultations/Liveconsultations/DH_078052

This consultation exercise relates to the deprivation of liberty safeguards of the Mental Capacity Act 2005. It covers:-

- Code of Practice guidance relating to the safeguards. This consultation is being led by the Ministry of Justice in respect of the Lord Chancellor's obligation under section 42 of the Mental Capacity Act 2005 to prepare and issue a code and his obligation under section 43 to consult such persons as he considers appropriate in the preparation of a code. The consultation covers England and Wales.
- The use of regulation-making powers included in the safeguards legislation. This consultation is being led by the Department of Health. It covers England only. Welsh Ministers will be consulting separately on the use of the regulation-making powers in Wales.

The consultations are being issued together to avoid the need for respondents to send separate comments to the Ministry of Justice and the Department of Health if they wish to express views on both the Code and the regulations consultations.

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Part A: Consultation by the Ministry of Justice on a Code of Practice for England and Wales

Foreword

by Bridget Prentice, Parliamentary Under Secretary of State,
Ministry of Justice

The Mental Capacity Act 2005 introduced a number of protections for people who may lack the capacity to make decisions for themselves. The introduction of deprivation of liberty safeguards into the Act represents an important opportunity to ensure that the rights of some of the most vulnerable people in our society are further protected. They will enable us to ensure that those people who, for their own safety and in their own best interests, need to be accommodated in care and treatment regimes that may have the effect of depriving them of their liberty, but who lack the capacity to consent, are properly protected. The deprivation of a person's liberty is a very serious matter and should not happen unless it is absolutely necessary and in the best interests of the person concerned.

I am pleased that the safeguards that are being introduced are broadly welcomed by stakeholders. The Code of Practice that is the subject of this consultation will play an important part in the way the safeguards are put into practice. The Code will cover all of England and Wales and we want it to be an important tool for many different people, including professionals, people who become subject to the safeguards and their family members. We want to make sure that the people who will be affected by the safeguards are properly supported with a user friendly, detailed and accurate Code of Practice.

I want this Code to be the most helpful tool it can be. It is vital that we get your views to enable us to publish a Code that meets the needs of all those who will be using it. This will help us ensure that we are able to deliver the benefits that we want the safeguards to produce. I would encourage everyone to help us achieve these aims by responding to this consultation.



Bridget Prentice

Parliamentary Under Secretary of State,
Ministry of Justice

Executive summary

The Mental Capacity Act 2005 (the Act) provides a statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves. The introduction of the deprivation of liberty safeguards into the Act adds important further protections for some of the most vulnerable people coming within the scope of the Act.

The deprivation of liberty safeguards Code of Practice (the Code) will cover England and Wales. The consultation is being led by the Ministry of Justice in respect of the Lord Chancellor's obligation under section 42 of the Mental Capacity Act 2005 to prepare and issue a code and his obligation under section 43 to consult such persons as he considers appropriate in the preparation of a code. Whilst the Act sets out the deprivation of liberty safeguards legal framework, the related Code provides guidance and information for those implementing the safeguards legislation on a daily basis.

The guidance and information to which this consultation relates is focused on the deprivation of liberty safeguards being introduced into the Act by the Mental Health Act 2007. It adds to the guidance and information contained in the main Code of Practice on the Act published in April 2007 but, at least initially, will remain a separate document to the main Code. It incorporates good practice recommendations.

Certain categories of people have a legal duty to have regard to the Code, but we would encourage everyone to follow its guidance. This consultation aims to ensure that the Code is user friendly, detailed and accurate, through the collection, review and inclusion of the views of stakeholders and those who will apply the Code in practice.

The draft Code accompanies this consultation, and is a lengthy document. In order to assist those who wish to review it, the consultation paper briefly sets out the scope of the draft Code and outlines how it has been developed.

The consultation paper invites comments on style and content. It also asks questions on specific topics, with the aim of eliciting views on what we consider to be important aspects of the guidance. This is not intended to discourage respondents from providing comments on other aspects of the Code. The draft Code and consultation paper are available in Welsh and as an Easy Read summary. They can be made available in other formats on request.

We invite comments on the draft Code from all interested parties.

Introduction

This paper is a consultation carried out by the Ministry of Justice on the Code of Practice for the Mental Capacity Act 2005 (the Act) deprivation of liberty safeguards. The consultation relates to England and Wales.

The consultation is aimed at anyone who will have any involvement in the deprivation of liberty safeguards process, whether in a professional capacity, as somebody who may themselves be deprived of liberty or as a friend, relative or carer of a person who may be deprived of liberty.

This consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of that Code. The Consultation Criteria, which are set out on page 54, have been followed.

The deprivation of liberty safeguards Code will be issued in accordance with the provisions of the Act, and provides guidance on the safeguards contained in the Act. It does not add any new legal requirements but provides guidance on the legal framework set out in the Act.

As the preparation and issuing of a Code of Practice is a statutory requirement of the Act, this consultation is concerned with improving the quality and content of the Code rather than exploring alternatives. Therefore, we are not consulting about whether a code should be introduced but how the Code has been drafted to ensure that it meets the needs of those who will implement it in practical situations.

A full Regulatory Impact Assessment (RIA) was carried out on the Mental Health Bill (now the Mental Health Act 2007), of which the introduction of the deprivation of liberty safeguards into the Act forms part, and this is available on the DH website at www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Regulatoryimpactassessment/DH_076477. The Bill RIA does not specifically mention the Code that is the subject of this consultation, but does assess the impact of the legal and good practice framework contained in the draft Code.

We believe that the Bill RIA does adequately cover the costs and impacts of complying with the Act and subsequently the Code. If you disagree with this, please provide comments with your response to the consultation.

In line with the latest Cabinet Office guidance, an Impact Assessment specifically focused on the deprivations of liberty safeguards is included in this paper. We would welcome comment on whether we have identified the potential impact fully.

The proposals

The purpose of the following section is to outline the scope of the draft deprivation of liberty safeguards Code, how the consultation documents have been developed so far, and the anticipated supplemental material that will be available to support the Code.

We hope that this information will help you to respond more effectively and we would therefore encourage everyone to consider the following sections before responding.

1. How the draft deprivation of liberty safeguards Code has been developed for consultation

A draft Code for England and Wales was prepared to assist Parliament during the passage of the Mental Health Bill, which was used as the vehicle through which to introduce the deprivation of liberty safeguards into the Mental Capacity Act 2005. The original draft, published in November 2006, incorporated comments made by certain stakeholders who formed part of an advisory network that was set up to provide an informal input to the development of the first published version of the draft Code. The publication of the draft Code in November 2006 incorporated a general invitation for people to comment on its contents.

The contents of the draft Code have subsequently been further developed and updated in the light of:

- Legislative changes that were made to the deprivation of liberty safeguards during their passage through Parliament

- Parliamentary commitments

- Responses to the invitation to comment issued at the time of the publication of the November 2006 version of the Code

- Ongoing informal consultation with various stakeholders

2. The scope of the draft Code

The preparation and issue of a Code of Practice relating to the deprivation of liberty safeguards is a statutory requirement. It must reflect the provisions of the Act and cannot endorse actions that are not in accordance with the provisions of the Act or, conversely, deny opportunities where the Act makes provision for them. The Code guidance and information on which this consultation focuses is that relating to the deprivation of liberty safeguards of the Mental Capacity Act 2005. Although it adds to the guidance and information contained in the main Mental Capacity Act 2005 Code of Practice, it is intended that it will initially remain a separate document from the main Code. There is, though, the

possibility that it could become part of the main Code when that is reviewed at a later date. In the meantime, the two Codes should be read in conjunction with each other.

3. Further material available to support the Code of Practice

The primary audiences for the Code are:-

- People who are performing functions in a professional capacity that are related to the implementation of the deprivation of liberty safeguards.
- Anybody else receiving payment for working with a person lacking capacity to consent to the arrangements made for their care or treatment who is, or may become, deprived of their liberty.
- People appointed as Relevant Person's Representatives for those lacking capacity to consent to the arrangements made for their care or treatment who are deprived of their liberty.
- Those who may themselves be deprived of their liberty in accordance with the safeguards or the friends, relatives or carers of a person who is, or may become, deprived of their liberty.
- Anybody not already covered above who has Lasting Power of Attorney in respect of a person who is, or may become, deprived of their liberty.
- Anybody not already covered above who is a deputy appointed by the Court of Protection for a person who is, or may become, deprived of their liberty.

But it is intended that anybody who is involved with a person lacking capacity to consent to the arrangements made for their care or treatment who is, or may become, deprived of their liberty should find the Code helpful, since it expands on the statutory safeguards set out in the Act, and provides many examples of good practice. The Code will help everybody to understand the safeguards and seek to ensure that they are applied correctly.

We anticipate that organisations that provide professional or paid care and support will supply further material to supplement the Code, focusing on both professional standards and on detailed information relevant to their members. The Code makes appropriate signposts where known, but these and any links that are provided to other materials do not form part of the Code and have no legal status. The Ministry of Justice do not endorse such external guidance unless otherwise expressly stated.

It is intended that the Code should be a living document and will be regularly reviewed and revised to ensure it continues to reflect best practice and new case law.

4. The consultation documents

The draft Code is divided into 8 chapters that cover a wide range of information relating to the deprivation of liberty safeguards. Each chapter commences with introductory paragraphs outlining its content.

We recognise that the draft Code is a lengthy document so, to help your review, we have included a set of questions on what we consider to be important aspects. The questions are there to assist your response but you do not need to respond to all questions. And this is not intended to discourage you from providing comments on other issues.

We are aiming to produce a Code that meets the needs of a diverse range of people facing a wide range of practical situations. We would ask you to consider the practical situations you face, or will face in the future, when you review the Code.

The scenarios included within the draft Code are found within boxes and provide examples, using imaginary characters and situations. The examples do not provide templates for all decisions that need to be made in similar situations and have no legal status. They are only intended to help illustrate what is meant in the main text of the chapter. We would like to know if the scenarios provide assistance and offer examples of realistic situations.

Much of the draft Code is based upon examples of good practice. We would like to know whether the good practice we have included is correct and whether it meets your needs.

Questionnaire

Consultation responses are sought in particular on the questions set out below but responses on any other points will also be welcomed.

Draft Addendum to the Mental Capacity Act 2005 Code of Practice: Deprivation of Liberty Safeguards

1. We would welcome general comments on whether this Code will give Primary Care Trusts, Local Health Boards, Local Authorities and hospital and care home managers clear guidance on how to deliver the deprivation of liberty safeguards and how it could be improved (specific drafting suggestions and general comments on format, style and ordering would be welcomed).
2. Will the guidance give the assessors in the deprivation of liberty safeguards process a clear understanding of their role and how they should fulfil it? If not, how could the guidance be made clearer?
3. Has the information in the Code for service users, family, friends and informal carers been presented in a clear and helpful way? Has the correct balance been maintained between the best interests of the individual and the importance of involving family and carers in decision-making?
4. Is the role of the Court of Protection in the operation of the deprivation of liberty safeguards clear? If not, how could the guidance be made clearer?
5. Are the roles of IMCAs and relevant person's representatives in the operation of the deprivation of liberty safeguards clearly expressed? If not, how could the guidance be made clearer?
6. Is there sufficient guidance in the Code for the commissioners of care? If not what additional points need to be made?
7. Does the Code address the necessary practical points relating to care planning? Are there links to other guidance that need to be made?
8. Is there sufficient guidance on the review process and, if not, how could the guidance be made clearer?
9. It is not possible to give a definition of deprivation of liberty in the Code because it is defined by judgements of the Courts. Is the summary of case law and list of factors to be taken into account helpful? If not, how could it be made clearer?

10. Is the guidance on how to avoid deprivation of liberty useful? How could it be strengthened?
11. Is the description of the inter-relationship between the deprivation of liberty safeguards and detention under the Mental Health Act 1983 clear? If not, how could it be made clearer?
12. This Code will initially be a standalone document, to be used alongside the main Mental Capacity Act 2005 Code – are the links to the Main Code clear? Should it remain as standalone or would it be more appropriate to integrate it into the main Code when that is reviewed?

Impact Assessment

The Impact Assessment is intended to cover issues arising from the draft Code. Have we covered all of the significant areas of impact of the deprivation of liberty safeguards? Do you have additional evidence to submit? Would you propose changes that would have a positive impact on equality or which would reduce burdens? We would be particularly interested in any comments on ways in which the draft Code may impact adversely on people because of their age, disability, race, religion and belief, gender or sexual orientation, and on any ways in which it could be used positively to promote equality.

Thank you for participating in this consultation exercise.

Part B: Consultation by the Department of Health on regulations – England only

Foreword

by Ivan Lewis, Parliamentary Under Secretary of State,
Department of Health

The deprivation of liberty safeguards are an important contribution to improving the protection of some of the most vulnerable people in our society, those who lack capacity to consent to the arrangements made for their care and treatment and in respect of whom the care regime is so restrictive that it amounts to a deprivation of their liberty. We owe it to these people to ensure that such restrictive care regimes can only be used when there is no other alternative in order to ensure their safety.

The deprivation of liberty safeguards legislation includes a robust assessment process that must be undertaken before deprivation of liberty may be authorised, and detailed arrangements for renewing and challenging the authorisation of deprivation of liberty. Also encompassed within the legislation are a number of important regulation-making powers. We must ensure that these are appropriately used.

This consultation on the regulations relates to England only. Welsh Ministers will be undertaking a separate consultation exercise in Wales. The Department of Health are leading on the consultation on the English regulations, which cover the following topics:-

- Information to be included in requests for standard authorisations of deprivation of liberty.
- The eligibility and selection of people to undertake assessments for the purpose of the deprivation of liberty authorisation process.
- The eligibility and appointment of people to become Relevant Person's Representatives, i.e. to become independent representatives of people in respect of whom deprivation of liberty is authorised.
- The need to ensure that any dispute about which local authority should be the supervisory body for the purpose of the deprivation of liberty safeguards process should not delay any decision making about whether the deprivation of liberty should be authorised.

The deprivation of liberty safeguards are being introduced into the Mental Capacity Act 2005 through the Mental Health Act 2007. We indicated our initial intentions with regard to the use of the regulation-making powers in England in order to assist Parliament with the passage of the Mental Health Act 2007. Our thinking about the regulations has subsequently been further developed during the passage of the Act and it is now most important that we seek the views of a wider audience in order to ensure that we make the best possible use of the regulation-making powers. I would encourage everyone with an interest to help us meet this objective by responding to this consultation.

A handwritten signature in black ink, appearing to read 'Ivan Lewis'. The signature is fluid and cursive, with the first name 'Ivan' being larger and more prominent than the last name 'Lewis'.

Ivan Lewis

Parliamentary Under Secretary of State,
Department of Health

Executive summary

The introduction of the deprivation of liberty safeguards is adding to the Mental Capacity Act 2005 important protections for people who lack capacity to consent to arrangements made for their care and treatment and who need to be deprived of their liberty in their own best interests in order to keep them safe.

The deprivation of liberty safeguards legislation contains detailed requirements about when and how deprivation of liberty may be lawfully authorised. Within the legislation there are a number of regulation-making powers. It is these regulation-making powers that are the subject of this consultation. The consultation concerns how the powers should be used in relation to England. It is being led by the Department of Health. Welsh Ministers will be conducting a separate consultation exercise on the use of the regulation-making powers in Wales.

The regulations that are being consulted on include those relating to information to be included with requests for authorisation of deprivation of liberty, the selection of people to undertake deprivation of liberty assessments, the appointment of independent representatives for people deprived of their liberty and the identification of responsible local authorities in case of doubt. If we are to gain the maximum benefit from the deprivation of liberty safeguards legislation, it is most important that we put these regulation-making powers to best use.

We invite comments from all interested parties in response to this consultation.

Introduction

This paper is a consultation carried out by the Department of Health on the use of the deprivation of liberty safeguards regulation-making powers in the Mental Capacity Act 2005. The consultation concerns the use of these powers in England only. Welsh Ministers will be undertaking a separate consultation exercise on the use of the regulation-making powers in Wales.

The consultation is aimed at anyone who will have an interest in the deprivation of liberty safeguards process, whether in a professional capacity, as somebody who may themselves be deprived of liberty or as a friend, relative or carer of a person who may be deprived of liberty.

The consultation is being conducted in line with the Code of Practice on Consultation issued by the Cabinet Office and falls within the scope of that Code. The Consultation Criteria, which are set out on page 54, have been followed.

A full Regulatory Impact Assessment (RIA) was carried out on the Mental Health Bill (now the Mental Health Act 2007), of which the introduction of the deprivation of liberty safeguards into the Mental Capacity Act 2005 forms part, and this is available on the DH website at www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Regulatoryimpactassessment/DH_076477. The Bill RIA does not specifically mention the regulations that are the subject of this consultation, but does assess the impact of the legal framework contained in the regulations.

We believe that the Bill RIA does adequately cover the costs and impacts of complying with the Act and regulations. If you disagree with this, please provide comments with your response to the consultation.

In line with the latest Cabinet Office guidance, an Impact Assessment specifically focused on the deprivation of liberty safeguards is included in this paper. We would welcome comment on whether we have identified the potential impact fully.

The proposals

The purpose of the following section is to outline the scope of the regulation-making powers and how the consultation document has been developed so far.

We hope that this information will help you to respond more effectively and we would therefore encourage everyone to consider the following sections before responding.

1. How the draft deprivation of liberty safeguards regulations have been developed for consultation

Information about intentions with regard to the use of the deprivation of liberty regulation-making powers in England were published in order to assist Parliament during the passage of the Mental Health Bill, which was used as the vehicle through which to introduce the deprivation of liberty safeguards into the Mental Capacity Act 2005. These intentions were made available on the Department of Health website.

The plans for the use of the regulation-making powers in England have subsequently been further considered and updated as the Mental Health Bill passed through Parliament and in the light of ongoing informal consultation with various stakeholders.

2. The scope of the regulations

The deprivation of liberty safeguards regulation-making powers embraced within this consultation cover the following issues:-

- The information to be included in requests for standard authorisations of deprivation of liberty.
- The eligibility and selection of people to undertake assessments for the purpose of the deprivation of liberty authorisation process.
- The eligibility and appointment of people to be Relevant Person's Representatives, i.e. to become an independent representative of a person in respect of whom deprivation of liberty is authorised.
- The need to ensure that any dispute about which local authority should be the supervisory body for the purpose of the deprivation of liberty safeguards process should not delay any decision making about whether the deprivation of liberty should be authorised.

There are, in addition, regulation-making powers relating to:-

- The prescribing of bodies to monitor, and report on, the operation of the deprivation of liberty safeguards.
- The disclosure of information to such prescribed bodies.

These matters currently remain the subject of discussion with potential inspection bodies and do not form part of this consultation process. They will be covered in a separate consultation exercise at a later date.

The issues covered by the regulation-making powers are wide ranging and we expect aspects of them to be of interest to anybody who may become involved in the deprivation of liberty safeguards process. This would include people who are involved in the safeguards in a working capacity, those who are subject to the safeguards and the relatives, friends or carers of a person who is, or may become, deprived of their liberty.

3. The consultation document

The draft regulations come in two attached documents, one containing affirmative regulations and the other regulations for negative resolution. The affirmative regulations, when finalised, will need to be approved by resolution of each House of Parliament, while those for negative resolution will be laid before Parliament and will come into force unless they are prayed against in Parliament within 40 days of their being laid.

To help your consideration, we have included a set of questions on what we consider to be important aspects of the regulations. The questions are there to assist your response. You do not need to respond to all questions, and the inclusion of the questions is not intended to discourage you from providing comments on other issues.

Questionnaire

Consultation responses are sought in particular on the questions set out below but responses on any other points will also be welcomed.

Mental Capacity (Deprivation of Liberty: Eligibility, Selection of Assessors, Assessments, Requests for Standard Authorisations and Disputes about the Place of Ordinary Residence) Regulations 2008

These regulations concern application to the supervisory body for a deprivation of liberty authorisation and the process of assessment of whether the criteria are met for authorisation to be granted. They also cover how disputes about the identification of the supervisory body in respect of people in care homes should be handled.

1. Do you support the general eligibility requirements for assessors? (These eligibility requirements need to be read in the light of paragraph 129(2) of schedule A1 to the Mental Capacity Act 2005, which requires the supervisory body to select an assessor who is both eligible to carry out that assessment and suitable to carry out the assessment having regard to the type of assessment and the person to be assessed). If not what changes would you propose?
2. Do you support the professional qualifications and experience required for mental health, best interests and mental capacity assessors (regulations 4,5,6)? If not, what changes would you propose?
3. Do you support the exclusions to who can be an assessor in regulations 7 and 8? If not, what changes would you propose? Given these exclusions, and any others you wish to propose, what are your views on the issues for supervisory bodies in identifying suitable assessors?
4. Are the time-frames in regulations 9 and 10 appropriate and practicable given the nature of the assessments to be carried out?
5. The aim of regulation 12 is to promote both the quality and the timeliness of the assessment process by ensuring that the supervisory body has the necessary information to appoint the right assessors and that the assessors have the information that they need to carry out the assessment. Do you agree with the proposed information to be provided with an application? Would you suggest any changes?
6. It is the government's intention, as far as possible, that assessors should be used who are based where the person currently is. This will mean in some cases that a supervisory body uses assessors from another area, rather than

sending assessors to travel to the place where the person is receiving care. Therefore, the assessment workload will need to be reflected in the allocation of funding. We are considering how this should be done and currently favour the allocation formula used for the Independent Mental Capacity Advocacy service for this purpose too. Do you agree with this approach? If not what formula would you propose?

7. These regulations also cover what should happen if the local authority that receives an authorisation disputes that it should be the supervisory body. The aim of the regulations is to ensure that this does not delay the assessment process. Do you consider that the arrangements in regulations 13 to 15 will be practical and workable?

Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008

When a standard deprivation of liberty authorisation is granted, a representative will be appointed to support and represent the person for the duration of the authorisation. These regulations concern the selection and appointment of the representative.

1. Do you support the eligibility criteria in regulation 5 for appointment as the relevant person's representative? If not, what changes would you propose?
2. Do you support the requirements for appointing the representative in regulations 4 and 6-13, read with the guidance in chapter 4 of the draft Code? If not what changes would you propose?
3. Do you support the requirements in regulation 14 for terminating the appointment of a representative?

Impact Assessment

The Impact Assessment is intended to cover issues arising from the draft statutory instruments. Have we covered all of the significant areas of impact of the deprivation of liberty safeguards? Do you have additional evidence to submit? Would you propose changes which would have a positive impact on equality or which would reduce burdens? We would be particularly interested in any comments on ways in which the draft statutory instruments may impact adversely on people because of their age, disability, race, religion and belief, gender or sexual orientation, and on any ways in which they could be used positively to promote equality.

Thank you for participating in this consultation exercise.

Part C – Further information of relevance to both consultations

Organisations being consulted

We are targeting this consultation on a range of stakeholders that we believe will have a particular interest. A list is provided below:

Action for Advocacy

Action on Elder Abuse

ADSS

Advocacy in Somerset

Advocacy Matters

Advocacy Wales

Advice UK

Afiya Trust

African Caribbean Community Initiatives

Age Concern

AHP Federation

Alcohol Concern

Alcoholics Anonymous

All Wales Black & Minority Ethnic MH Group Ltd

Alzheimers Society

Association for Real Change (ARC)

Association of Directors of Social Services

Association of Medical Research Charities

All Welsh Local Health Boards

All Community Health Councils (Wales)

Association for Residential Care

Association of Authority Public Receivers

Association of Black Social Workers and Allied Professionals

Association of Contentious Trust and Probate Specialist (ACTAPS)

Association of Healthcare Communicators

Association of Learned Societies in the Social Services

ASW Interest Group – Manchester

ASW Interest Group – Yorkshire and Humberside

ASW Leads Network

BASWs Mental Health Special Interest Group

BILD (British Institute for Learning Difficulties)

Ceratas (Formally British Association of Domiciliary Care)

Black Mental Health Resource Centre

Black Mental Health UK (DRE/BME)

BMA Medical Ethics Committee

BMA Psychiatric Sub-Committee

BME Programme Board

British Association of Social Workers

British Bankers Association

British Council for Disabled People

British Institute of Human Rights

British Institute of Learning Difficulties

British Medical Association

British Neuropsychiatry Association

British Psychological Society

British Sikh Federation

British Society of Rehabilitation Medicine

CARE

Care Council for Wales

Care Services Improvement Partnership (CSIP)

Care and Social Services Inspectorate Wales (CSSIW)

Carers UK

Carers Wales

Caring Matters

Caritas Social Action

Central Office for Research Ethics Committee (COREC)

Change

Chinese in Britain Forum

Chinese Mental Health Association

Church of England Mission & Public Affairs Council

Citizen Advocacy Information and Training (CAIT)

Citizens Advice Bureaux

College of Occupational Therapists

Commission for Racial Equality

Commission for Social Care Inspection

Confederation of Indian Organisations

Consultant Psychiatrist (DRE/BME)

Consumers in Health and Social Care Research

Council of Circuit Judges

Council of Ethnic Minority Voluntary Sector Organisations

Council on Tribunals

Counsel and Care

Court of Protection

Crossroads – Caring for Carers

CSCI

CSIP

Dementia Care Trust

Dementia North

Democratic Health Network

Depression Alliance

Disability Awareness in Action (DAA)

Disability Law Service

Disability Rights Commission (DRC)

Disabled Parents Network

DrugScope

East Dorset MH Carers Forum

English Community Care Association

Ethnic Health Forum

Family Welfare Association

5 Boroughs Partnership NHS Trust (DRE/BME)

Foundation Trust Network

General Medical Council

General Social Care Council

Haldane Society of Socialist Lawyers

Having a Voice

Hafal

HARG

Headway

Healthcare Commission

Healthcare Inspectorate Wales

Health Professions Council

Help the Aged

Homeless Link

Hindu Council

HUBB MH User Group

Imagine

Imperial College

Independent Healthcare Association

Independent Healthcare Commission

Independent Healthcare Forum

Institute for Health Research

Institute of Chartered Accountants

Institute of Mental Health Act Practitioners

Islamic Medical Association UK

The Jewish Association for the Mentally Ill

Jewish Care (including Ravenswood)

Joint Epilepsy Council

Justice

King's College London

King's Fund

Law Centres Federation

Law Society of England and Wales

Learning Disabilities Advisory Group (LDAG)

Learning Disability Wales

Leeds Mental Health Advocacy Group

Legal Services Commission

Leonard Cheshire

Liberty

Local Government Association

Manchester Race & Health Forum

Manic Depression Fellowship

Making Decisions Alliance (including all member organisations)

Medical Protection Society

Medical Research Council

MENCAP

Mental Health Act Commission

Mental Health Alliance

Mental Health & Learning Disability Trust Chairs Forum

Mental Health Foundation

Mental Health Lawyers Association

Mental Health Media

Mental Health Nurses Association

Mental Health Partnership

MIND

Motor Neurone Disease Association

Multiple Sclerosis Society

National Autistic Society

National Black & Minority Ethnic Mental Health Network (NBMEMHN)

National Care Association

National Care Forum

National Centre for Independent Living

National Centre for Palliative Care

National Family Carers Network

National Forum for People with Learning Disabilities

National Institute for Mental Health in England (NIMHE)

National Mental Health Partnership

National Palliative Care Nurse Consultant Group

National Youth Advocacy Service, Warrington

NUS

Neurological Alliance

NHS Confederation

NHS Employers

NHS Litigation Authority

NIMHE (DRE/BME)

Nuffield Foundation

Nursing and Midwifery Council

Office of the Public Guardian

Older Peoples Advocacy Alliance

Parkinsons Disease Society

People First

POhWER

Practitioner Alliance Against Abuse of Vulnerable Adults

Princes Royal Trust for Carers

Race Equality Adviser

Race on the Agenda

RADAR

Refugee Action

Registered Nursing Homes Association

RESCARE

Residents and Relatives Association

Rethink

Revolving Doors Agency

Richmond Fellowship

Rowntree Foundation

Royal Colleges of Anaesthetists; General Practitioners; Nursing; Psychiatrists;
Surgeons

SANE

The Sainsbury Centre for Mental Health

Scope

Section 12 Administrators

Skills for Care

Skills for Health

Sign

SIRI

SLAM

Social Action for Health

Social Care Association

Social Care Institute for Excellence (SCIE)

Social Perspectives Network (SPN)

Social Services Inspectorate Wales

Social Services Research Group

Solicitors for the Elderly

Somali Mental Health Project

Standards and Ethics Section, GMC

Strategic Health Authorities

Stroke Association

Support (MH) Carers Better Network

The Advocacy Project, Granby Community MH Group

The Care Forum

The Institute of Mental Health Law

The 1990 Trust

The Princess Royal Trust for Carers

The Relatives and Residents Association

Together

Turning Point

UK Advocacy Network

UK Clinical Research Collaboration

UK Council for Psychotherapy

UK Federation of Smaller MH Agencies

UNISON

United Kingdom Acquired Brain Injury Forum

United Response

Voices Forum

Wales Council for Voluntary Action (WCVA)

West Dorset Mental Health User Forum

Westminster Advocacy Service for Senior Residents

Witness Against Abuse

Yorkshire & Humberside ASW Interest Group

Young Minds

ZITO Trust

However, this list is not meant to be exhaustive or exclusive and responses are welcomed from anyone with an interest in, or views on, the subject covered by this paper.

About you

Please use this section to tell us about yourself

Full name	
Job title or capacity in which you are responding to this consultation exercise (e.g. member of the public etc.)	
Date	
Company name/organisation (if applicable):	
Address	
Postcode	
If you would like us to acknowledge receipt of your response, please tick this box	<input type="checkbox"/> (please tick box)
Address to which the acknowledgement should be sent, if different from above	

If you are a representative of a group, please tell us the name of the group and give a summary of the people or organisations that you represent.

How to respond

Please send your response by 2/12/2007 to:

**Communications Team
Mental Capacity Implementation Programme
Public Guardianship Office
Archway Tower
2 Junction Road
London
N19 5SZ**

Tel: 020 7664 7184

Fax: 020 7664 7165

Email: safeguardsconsultation@guardianship.gsi.gov.uk

Extra copies

Further paper copies of this consultation can be obtained from this address and it is also available on-line at www.justice.gov.uk/publications/cp2307.htm and www.dh.gov.uk/en/Consultations/Liveconsultations/DH_078052

Alternative format versions of this publication can be requested via the e-mail address above.

Publication of response

A paper summarising the responses to this consultation will be published within 3 months of the closing date for the consultation.

Representative groups

Representative groups are asked to give a summary of the people and organisations they represent when they respond.

Confidentiality

Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we

receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry.

The Ministry will process your personal data in accordance with the DPA and in the majority of circumstances, this will mean that your personal data will not be disclosed to third parties.

Regulatory Impact Assessment

Summary: Intervention & Options		
Department /Agency: Ministry of Justice and Department of Health	Title: Impact Assessment of the Mental Capacity Act 2005 deprivation of liberty safeguards to accompany the Code addendum and regulations consultation	
Stage: Consultation	Version: 1	Date: 2 September 2007
Related Publications:		

Available to view or download at:

www.dh.gov.uk/en/Consultations/Liveconsultations/DH_078052

Contact for enquiries: Mike Preston

Telephone: 0207 972 3963

What is the problem under consideration? Why is government intervention necessary?

European Convention on Human Rights incompatibility regarding the protection of people who lack capacity to consent to arrangements made for their care from arbitrary deprivation of liberty.

This was identified by the October 2004 European Court of Human Rights judgment in *H.L. v the United Kingdom* (the Bournemouth judgment) which requires that people may only be deprived of their liberty through a process set out in law with safeguards to prevent arbitrary detention and speedy access to a Court to review the detention.

What are the policy objectives and the intended effects?

To provide safeguards for people who are cared for in hospitals or registered care homes in circumstances that deprive them of their liberty and who are unable to consent (but who are not detained under the Mental Health Act 1983). The policy objective is to ensure that people are only deprived of their liberty when there is no other way to care for them safely.

What policy options have been considered? Please justify any preferred option.

Option 1: The introduction of a new system of deprivation of liberty safeguards into the Mental Capacity Act 2005. This is the preferred Option - see the Evidence Base below for the reasons for preferring this Option.

Option 2: Extending the use of sectioning under the Mental Health Act 1983.

Option 3: Extending the use of guardianship under the Mental Health Act 1983.

When will the policy be reviewed to establish the actual costs and benefits and the achievement of the desired effects?

The operation of the safeguards will be monitored by the NHS and Social Care regulators, and will be formally reviewed by the Department of Health after the first year of implementation.

Ministerial Sign-off For consultation stage Impact Assessments:

I have read the Impact Assessment and I am satisfied that, given the available evidence, it represents a reasonable view of the likely costs, benefits and impact of the leading option.

Signed by the responsible Minister:

A handwritten signature in black ink, appearing to read 'Ivan Lewis', written in a cursive style.

Ivan Lewis
Parliamentary Under Secretary of State,
Department of Health

Date: 030907

Summary: Analysis & Evidence			
Policy Option: Option 1		Description: The introduction of a new system of deprivation of liberty safeguards into the Mental Capacity Act 2005	
COSTS	ANNUAL COSTS		Description and scale of key monetised costs by 'main affected groups' Pre-implementation training costs are estimated at around £3.9m Annual costs (in Evidence Base) are estimated by calculating the costs of conducting the assessments each year.
	One-off (Transition)	Yrs	
	£ 3.94m		
	Average Annual Cost (excluding one-off)		
	£ 3.4-11.8m		
		Total Cost (PV)	£
Other key non-monetised costs by 'main affected groups' The costs to individual hospitals or care homes where the nature of care regimes may need to change are non-monetised. This is due to uncertainty about the extent and nature of any changes that may be required.			
BENEFITS	ANNUAL BENEFITS		Description and scale of key monetised benefits by 'main affected groups'
	One-off	Yrs	
	£		
	Average Annual Benefit (excluding one-off)		
	£		
		Total Benefit (PV)	£
Other key non-monetised benefits by 'main affected groups' There had to be a legislative solution to the issues highlighted by the Bournemouth judgment – these changes to the Mental Capacity Act 2005 will resolve the infringement of the European Convention on Human Rights. This represents a considerable benefit.			
Key Assumptions/Sensitivities/Risks See Evidence Base			
Price Base Year	Time Period Years	Net Benefit Range (NPV) £ n/a	NET BENEFIT (NPV Best estimate) £ n/a
What is the geographic coverage of the policy/option?			England & Wales
On what date will the policy be implemented?			October 2008
Which organisation(s) will enforce the policy?			LAs/PCTs

What is the total annual cost of enforcement for these					£ 3.0m-£10.5
Does enforcement comply with Hampton principles?					Yes/No
Will implementation go beyond minimum EU requirements?					No
What is the value of the proposed offsetting measure per year?					£ 0
What is the value of changes in greenhouse gas emissions?					£ 0
Will the proposal have a significant impact on competition?					No
Annual cost (£-£) per organisation <small>(excluding one-off)</small>		Micro	Small	Medium	Large
Are any of these organisations exempt?		No	No	N/A	N/A
Impact on Admin Burdens Baseline (2005 Prices)					(Increase - Decrease)
Increase	£	n/a	Decrease	£	n/a
			Net	£	n/a

Key: Annual costs and benefits: Constant Prices (Net) Present Value

Evidence Base (for summary sheets)

Brief summary of policy options consulted on from March to June 2005

Three main options were identified.

The first was for the introduction of a new system of deprivation of liberty safeguards, referred to as "Protective Care", into the Mental Capacity Act 2005. The new safeguards were to govern the circumstances in which a person who lacks capacity to consent to the arrangements made for their care and treatment might lawfully be deprived of liberty. They were also to cover the arrangements for review of, and appeals in relation to, deprivation of liberty, including the right of access to a court to determine the lawfulness of the deprivation of liberty.

The second option was to extend the use of sectioning under the Mental Health Act 1983. This would have involved extending the criteria for detention under the Mental Health Act 1983 to cover the wider group of people affected by the Bournewood judgment, including the need to bring registered care homes within the ambit of the Mental Health Act 1983.

The third option was to extend the use of guardianship under the Mental Health Act 1983. This would have provided European Convention on Human Rights compliant safeguards, whilst avoiding the need for people to be formally sectioned under the Mental Health Act 1983.

Policy has subsequently been developed in the light of the outcome of the consultation. The policy has been based on the "Protective Care" option that was favoured by the majority of respondents to the consultation. Most people felt that the vulnerable groups of people for whom the new safeguards were required were more appropriately linked with the Mental Capacity Act 2005, with the principles of that Act applying. This would include the requirement that any act done, or decision made, on behalf of a person who lacks capacity must be done, or made, in the person's best interests.

A report on the outcome of the consultation was published in June 2006. At the same time, the Government announced its decision to proceed with the Protective Care option favoured by the majority of respondents to the consultation, with a view to new deprivation of liberty safeguards being introduced into the Mental Capacity Act 2005. The Mental Health Bill was identified as a suitable vehicle through which to amend the Mental Capacity Act 2005 for this purpose. The deprivation of liberty safeguards continued to be developed in the lead up to the introduction of the Mental Health Bill into Parliament in November 2006. The safeguards were subsequently the subject of Parliamentary scrutiny, and some amendment, during the passage of the Mental Health Bill, which was completed on 4 July 2007. What is now the Mental Health Act 2007 received Royal Assent on 19 July 2007.

Mental Capacity Act 2005: Deprivation of Liberty Safeguards

Impact Assessment

Background

1. The Mental Health Act 2007, which received Royal Assent on 19 July 2007, amends the Mental Capacity Act 2005 in order to introduce deprivation of liberty safeguards into that Act. The safeguards are a response to the European Court of Human Rights (ECtHR) judgment in October 2004 in the case of *H.L. v UK* (commonly referred to as the Bournemouth judgment). This case concerned a man, lacking the capacity to consent to arrangements being made for his care and treatment, who was admitted to hospital into a care regime that the ECtHR considered deprived him of his liberty without appropriate safeguards against arbitrary detention being in place.
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 within the Bournemouth judgment. One hundred and eight (108) replies were received. Those responding made helpful and supportive comments.
3. The consultation document identified three options for addressing the Bournemouth judgment. The first was a system of safeguards, referred to as "Protective Care", that would be introduced into the Mental Capacity Act 2005 and would provide the protection necessary to meet those requirements of the European Convention on Human Rights (ECHR) that had been infringed in the Bournemouth case. The other two options concerned extending either the sectioning or guardianship provisions in the Mental Health Act 1983 to cover the wider group of people who would fall within the scope of the Bournemouth judgment. This again would have provided the safeguards needed to meet the requirements of the ECHR.
4. Overall, there was good support for the "Protective Care" option outlined in the consultation document. Respondents generally thought that, since the Bournemouth judgment was about a person who lacked capacity, it was most appropriate to put the necessary safeguards into the Mental Capacity Act 2005. All the principles of the Mental Capacity Act 2005 would then apply, for example about how capacity should be assessed, and the requirement to act in the best interests of a person lacking capacity. Wider use of the Mental Health Act 1983, including extending its coverage to embrace registered care homes (hereafter referred to as care homes), received relatively minor support. There were concerns about extending the "stigma" of detention under the Mental Health Act 1983 and it was also seen as a disproportionate response running

counter to the principle of seeking to identify approaches that are less restrictive of a person's rights and freedom of action.

5. Detailed policy proposals were subsequently developed, building on the Protective Care option, in the light of the consultation responses and further consideration of the issues involved. A report on the outcome of the consultation process was published on 29 June 2006. At the same time, an announcement was made setting out the proposed deprivation of liberty policy.
6. The legislative amendments now being made introduce into the Mental Capacity Act 2005 ECHR compliant safeguards in respect of the initiation and review of care and treatment arrangements for people with a mental disorder who lack capacity, are being deprived of their liberty within the meaning of Article 5 of the ECHR and who are not detained under the Mental Health Act 1983. The new safeguards will encompass people in care homes as well as people in hospital. It is currently envisaged that the safeguards will be brought into effect from October 2008.

Coverage of this Impact Assessment

7. Although the current consultation relates to the draft deprivation of liberty addendum to the Mental Capacity Act 2005 Code of Practice for England and Wales (hereafter referred to as the Code addendum) and two sets of draft regulations for England, this Impact Assessment looks at the overall costs of implementation of the deprivation of liberty safeguards in England and Wales. This is because the changes to the main legislation, the use of the regulation-making powers and the contents of the Code addendum are so inter-linked as to make it impractical to seek to break the costs down between the three elements. As such, this Impact Assessment draws for its content on those parts of the June 2007 Regulatory Impact Assessment for the Mental Health Bill (now the Mental Health Act 2007) that relate to the deprivation of liberty safeguards of the Mental Capacity Act 2005.
8. The element of this consultation relating to the Code addendum covers England and Wales. The addendum has been developed in conjunction with the Ministry of Justice, which has responsibility for the Mental Capacity Act 2005, and the Welsh Assembly Government. The consultation on the regulations relates to England only. The regulations have been developed in conjunction with the Ministry of Justice. Welsh Ministers will be consulting separately on the use of the regulation-making powers in Wales. The costings in this Impact Assessment cover both England and Wales and, as mentioned in paragraph 7 above, relate to the overall costs of implementation of the deprivation of liberty safeguards
9. Comments on this Impact Assessment are sought as part of the consultation process on the Code addendum and draft regulations.

Benefits

10. There had to be a legislative solution to the issues highlighted by the Bournemouth judgment. Following the public consultation between March and June 2005, it was decided that the introduction of the deprivation of liberty safeguards into the Mental Capacity Act 2005 was the most appropriate way in which to respond to the Bournemouth judgment.
11. The main benefits of the deprivation of liberty safeguards are that they provide protection for a very vulnerable group of people and bring the legislation for England and Wales into compliance with the ECHR. Other benefits are mentioned elsewhere in this Evidence Base. The safeguards are most appropriately placed in the Mental Capacity Act 2005 since the Bournemouth judgment raised what were primarily mental capacity rather than mental health issues. This means that the principles of the Mental Capacity Act 2005 (e.g. best interests) will apply in the context of the deprivation of liberty safeguards. The incorporation of the safeguards into the Mental Capacity Act 2005 avoids the need to extend sectioning under the mental health legislation to cover the people to whom the safeguards will apply. The extension of sectioning was one of the alternative options contained in the March to June 2005 policy consultation document. The majority of respondents to that consultation opposed the extension of sectioning.

Risks

12. It is difficult to estimate with confidence the numbers of people who might need to be covered by the deprivation of liberty safeguards, and thus the extent of the additional workload that will be generated for the field, and for the Court of Protection. The Court of Protection will be the legal route through which the giving of deprivation of liberty authorisations may be challenged. Through communication and training, hospitals and care homes will be encouraged to make every effort to avoid instituting deprivation of liberty care regimes wherever possible and, consequently, the numbers of people who genuinely need to become subject to the safeguards are expected to be relatively small.

Costs

13. It is estimated that there are nearly 500,000 people in England and Wales who have a mental disorder and who lack capacity, including over 190,000 people with severe learning disabilities and about 230,000 older people with dementia living in institutions. This estimated number also includes people who lack capacity for other reasons, such as physical injury. A study undertaken by the Department of Health's analysts in 2000 concluded that around 1 in 10 of that number - about 50,000 people - would require additional restrictions for their protection, including restrictions that would prevent them from leaving the facility, which in some cases may amount to a deprivation of liberty.

14. Hospitals or care homes that operate a “locked door” policy are not, however, necessarily depriving of liberty those people who reside in the facility. In its Bournemouth judgment, the ECtHR stated that whether a person was deprived of liberty under the ECHR depended on the specific facts of each individual case. In the Bournemouth case, the ECtHR observed that “as a result of the lack of procedural regulation and limits, the hospital's health care professionals assumed full control of the liberty and treatment of a vulnerable incapacitated individual solely on the basis of their own clinical assessments completed as and when they considered fit.”.
15. This was an extreme set of circumstances and indicates that an individual is more likely to be deprived of liberty in ECHR terms the greater the degree of control exerted over their circumstances (eg excessive limitations on freedom of movement within the facility, unreasonable controls over timing of visits from family or friends, barring family and friends from taking the person out for social purposes or refusing a request from carers for the person to be discharged to their care) without taking on board the views of other interested parties. The Code addendum that is the subject of this consultation gives guidance on how to assess whether a care or treatment regime may constitute deprivation of liberty in ECHR terms.
16. In the past, the assessment of such people has concentrated on whether they were able to live independently, or in sheltered accommodation or a care home, or needed to be in hospital for treatment. Decisions rarely, if ever, considered whether the nature of the regime that should be applied to such people within the care home or hospital setting needed to amount to a deprivation of liberty. It is expected that the introduction of the deprivation of liberty safeguards will focus attention on the potential for deprivation of liberty to arise and that, while the nature of the regimes operated by individual hospitals or care homes will vary, few if any are likely to choose to deprive people of liberty unless it is essential to do so.
17. The interim guidance issued by the Department of Health in December 2004¹ and the Welsh Assembly Government in January 2005² following publication of the ECtHR's judgment drew to the attention of hospital and care home managers the importance of avoiding the deprivation of individuals' liberty, and it is expected that action to implement the guidance will already have been taken. The deprivation of liberty procedures cannot be used in situations where a person should more appropriately be detained under the Mental Health Act 1983.

¹Available at http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4097992.pdf

² Available at <http://www.wales.nhs.uk/sites3/Documents/438/WHC%5F2005%5F005The%20BournemouthCase%2Epdf>

18. In discussion with key stakeholders, we have formed the view that the circumstances of the Bournemouth case were so extreme that only a relatively small number of individuals might be detained in a manner equivalent to taking full control over the individual's liberty. We would expect too, following the issue of the interim guidance referred to in paragraph 17, that hospital and care home managers will have taken steps to ensure compliance with the law.
19. For these reasons, the Government considers that there are likely to be very few people of unsound mind and who lack capacity who need to be deprived of liberty in ECHR terms. A precise estimate could not be obtained without an exercise to examine the circumstances of all individuals judged to be in the at-risk group. So, in costing the implementation of the deprivation of liberty safeguards, we have taken advice from professionals with experience of such cases. We have assumed that, once understanding has developed about deprivation of liberty and how to avoid it, 10% of the relevant population (5,000 people) will be subject to assessment for authorisation, of whom no more than 25 per cent (1,250 people) at any one time are likely to be justifiably deprived of liberty. We have also assumed, based on the Ministry of Justice forecasts of use of the Court of Protection, that of those for whom a deprivation of liberty authorisation is issued, 2.5 per cent (1 in 40) might result in a Court of Protection hearing.
20. For current planning purposes, it is assumed that an assessment might cost about £500, to cover the costs of all necessary associated procedures and paperwork. Costs would be higher where an authorisation is given because of the extra work involved (eg appointment of a representative), and lower where an authorisation is not given. The figure of £500 represents an average across both categories. The costs of each oral hearing of the Court of Protection are estimated to be £9,000, including legal aid. Legal advice will be available to people subject to a deprivation of liberty authorisation and their representative. We have assumed this will be taken up in 25% of cases, in which case the cost would be £48,000. The total cost of implementing the policy would be £3.391m per year.
21. The Government introduced an amendment during the passage of the Mental Health Bill through Parliament giving access to the support of an Independent Mental Capacity Advocate (IMCA), if requested by a person deprived of liberty under a Mental Capacity Act 2005 authorisation, or by their representative. Access to an IMCA will not be available to a person who already has a professional representative because there is no one to appoint as representative among friends and family. Assuming that 90% of those subject to an authorisation, and who are represented by friends or family, request an IMCA, and that an average of 8 hours of IMCA support is needed, then this amendment would cost £756k in the first year of the safeguards. The cost is expected to decrease in subsequent years as fewer authorisations are issued, falling to £198k in 2014/15.

22. Inevitably, these estimates are highly tentative, and must be so unless a comprehensive survey of the potential population deprived of liberty were to be undertaken. The possibility remains, however unrealistic, that assessments will be requested in respect of the entire at-risk population, i.e. 50,000 people, at a cost of £30.8m. We consider this unrealistic because it is clear that not all of the at-risk population are, or need to be, deprived of their liberty. The actual cost in the first year will depend on how clearly hospital and care home managers and assessors understand the distinction between deprivation and restriction of liberty, and therefore how well they can identify those to whom the deprivation of liberty safeguards apply. We do have an estimate of numbers from one local authority, which gives us a basis on which to estimate a realistic “worst-case” scenario.
23. The alternative model assumes a higher proportion of:
- Older people with dementia who lack capacity (10% of 50% of those in institutions)
 - People with learning disabilities (25% of 75%)
 - People with physical disabilities (2% of 5%) and
 - People with mental illness (3% of 5%)
24. On this basis, applying these percentages to the England and Wales population used for the earlier estimates, a total of 17,000 people in local authority residential care might be subject to a deprivation of liberty assessment. A further 25% might be in hospitals, which would make a total potential population of 21,000.
25. Applying the same cost estimates as before, including the same proportion of Court of Protection hearings and uptake of legal advice, total costs would be £11.754m.
26. Implementation is therefore likely to cost between £3.391m and £11.754m per year. We envisage more assessments being undertaken in the first year, with progressively fewer in subsequent years as all parties become familiar with the circumstances. The proportion of deprivation of liberty authorisations would, however, remain fairly constant, with numbers of authorisations ranging from no more than a few hundred each year, to around 5,000.
27. In the period before the deprivation of liberty provisions come into force, the Department of Health and the Welsh Assembly Government will commission communication and training for hospitals, care homes, supervisory bodies and assessors, which will include a focus on the meaning of deprivation of liberty in ECHR terms. The cost of these extra provisions is estimated at £1.0m for England and £100,000 for Wales. The policy priority is that authorisation for such an extreme and restrictive regime is only given where it is necessary in

MoJ (Court of Protection)	1,125	1,240	1,072	904	736	568	400	358
TOTAL	9,812	11,754	10,161	8,568	6,975	5,383	3,790	3,391

30. It is expected that the introduction of deprivation of liberty safeguards into the Mental Capacity Act 2005 will have a relatively small impact on workforce numbers:-

Table 2a: WTE net additional numbers of staff in 2008/09 – assumed to be the first year of implementation (England & Wales)

	Deprivation of liberty safeguard amendments
Psychiatrists	26
Social workers	102
Nurses	0
Advocates	50 ³
other staff	51
all staff	229

Table 2b: WTE net additional numbers of staff in 2015/16 – assumed to be when steady state is reached (England & Wales)

	Deprivation of liberty safeguard amendments
Psychiatrists	7
Social workers	27
Nurses	0
Advocates	13
other staff	13
all staff	60

³ Includes IMCA and paid representative appointed by Supervisory Body

Competition Assessment

31. The Code addendum and draft regulations are not expected to have a significant effect on competition. The resource implications of the introduction of the deprivation of liberty safeguards as a whole are expected to impact largely on the NHS and local authorities. It is possible that the implementation of the safeguards could have different effects on different independent hospitals and care homes, and thus affect their charges differently, depending on the extent to which they have “deprivation of liberty type” regimes, but the draft Code addendum and draft regulations do not change that situation.
32. The impact on individual care homes is likely, for example, to vary depending on the nature of the client groups that they care for. Homes that specialise in caring for the Elderly Mentally Ill are more likely to be affected, but all such homes will be affected in the same way. Some other care homes may only be minimally affected, but will need to be aware of the safeguards.

Small Firms Impact Test

33. The Mental Capacity Act 2005 deprivation of liberty safeguards will require care homes to seek authorisation if a person in their care is, or is to be, deprived of liberty. It is estimated that the application will take an hour of management time on average. Authorisation will not be required for the majority of care home residents. In the first year of operation of the safeguards, it is anticipated that there will be some 16,800 (80% of the total estimate of 21,000) applications for authorisation relating to care home residents. This is in the context of approximately 440,000 care home residents in England in 2006, of whom approximately 338,000 were in independent care homes⁴. The latest estimates indicate that there are also some 24,000 care home residents in Wales.
34. It will be necessary for care home managers to consider, for residents who are not able to consent, whether an authorisation needs to be sought. However, the need to consider the lawful basis of care provided and the risk of deprivation of liberty is not new as it was addressed in the interim guidance on the matter published by the Department of Health in December 2004 and the Welsh Assembly Government in January 2005. This should form part of the existing arrangements for care review and there is no requirement to carry out a separate care review for the purpose of the safeguards.
35. Care homes currently face difficult judgements about the point where restrictions needed for a person’s protection fall short of, or constitute, a deprivation of liberty. They will benefit from the clarity provided by a duly completed authorisation about the lawfulness of care to be provided.

⁴ Commission for Social Care Inspection “The state of Social Care in England” December 2006

36. The views of small businesses will be sought in this consultation by involving each of the umbrella organisations representing providers of residential care and the Federation of Small Businesses. The Commission for Social Care Inspection will publicise the consultation to all registered care homes.

Legal Aid Impact Assessment

37. The Legal Aid rules will be the same for anybody who becomes subject to a standard or urgent deprivation of liberty authorisation. In particular, non-means tested Legal Aid will be available to enable the person to challenge the giving of either a standard or urgent deprivation of liberty authorisation through the Court of Protection.
38. There is a merits test for all categories of legal aid application, though it operates differently for certain areas. We are considering how best the merits test should work in deprivation of liberty safeguards cases. The principle will be that those who need legal aid in the Court of Protection for these cases will be able to get it.
39. Each person subject to a standard deprivation of liberty authorisation will have available the support of an IMCA and/or relevant person's representative to help them make application to the Court of Protection, so the opportunity for challenge will be the same regardless of the extent of the lack of capacity of the person who is subject to the deprivation of liberty safeguards. Legal Aid costs are included in the estimates for the Court of Protection contained in Table 1 above.

Age Impact Assessment

40. The deprivation of liberty safeguards apply only to people aged 18 and over. If the issue of depriving a person under the age of 18 of their liberty arises, other safeguards must be considered. In these circumstances, the existing powers of the court, particularly those under Section 25 of the Children Act 1989, provide safeguards that meet the requirements of Article 5 of the ECHR. Use of the Mental Health Act 1983 may also be possible if the relevant criteria are satisfied. Applying the deprivation of liberty safeguards from the Mental Capacity Act 2005 to people under the age of 18 is not therefore necessary.
41. The safeguards will apply in the same way to people aged 18 and over who meet the criteria for deprivation of liberty, regardless of their actual age. However, a major cause of lack of capacity is dementia, which is more prevalent in older age groups. For this reason, it is likely that the nature of the criteria (lacking capacity to consent to the arrangements made for their care and treatment and needing to be deprived of liberty for their own safety and in their best interests) is more likely to embrace elderly people, particularly those with dementia. This is considered to be a positive aspect of the safeguards in that it is giving this group of disadvantaged people protections that have previously been lacking.

Health Impact Assessment

42. The introduction of the deprivation of liberty safeguards is expected to make a positive contribution to health improvement. A very vulnerable group of people will receive safeguards that are currently lacking, and which will place a new focus on their human rights and the lawfulness of the arrangements made for their care. We believe this will introduce a pressure to encourage excellent planning of care regimes, taking account of the whole needs of each individual. We expect this benefit to extend beyond people who are actually deprived of liberty in that hospitals and care homes will look for ways, where safety considerations permit, of increasing the freedoms and autonomy of people in their care such that they do not cross the deprivation of liberty threshold.

Race Equality Impact Assessment

43. The deprivation of liberty safeguards are not expected to impact in any different way on different racial or ethnic groups. Attention is, however, drawn in the Code addendum to the need to take care to ensure that the provisions are not operated in a manner that discriminates against particular racial or ethnic groups.

44. It is also stated in the Code addendum:-

- That managing authorities and supervisory bodies should ensure that their staff are aware of their responsibilities to different racial or ethnic groups and of the need to ensure that the safeguards are operated fairly and equitably.
- That assessors, when carrying out deprivation of liberty assessments, must take account of cultural issues, and will need to have an understanding of how to take account of the cultural background of the individual concerned.
- That interpreters should be available, where necessary, to help assessors to communicate not only with the relevant person but also with people with an interest in their care and treatment.
- That information should be made available in other languages where relevant.
- That any decision about the instruction of IMCAs or appointment of relevant person's representatives in accordance with the deprivation of liberty safeguards should take account of the cultural, racial and ethnic background of the relevant person.

45. In addition, the draft assessor regulations state that a person is only eligible to carry out a deprivation of liberty assessment if the supervisory body is satisfied that they have the skills and experience appropriate to the assessment,

including an understanding and respect for an individual's qualities, abilities and diverse backgrounds.

46. It is intended that information will be collected about the ethnicity of people coming within the scope of the deprivation of liberty safeguards. In their local populations, PCTs (in Wales, the National Assembly for Wales) and local authorities will be expected to monitor whether there are any indications that the safeguards are being applied differently in relation to different racial or ethnic groups.

Disability Equality Impact Assessment

47. The deprivation of liberty safeguards legislation will have a positive impact on disability equality. It provides important safeguards for people who lack capacity to consent to the arrangements made for their care and treatment and who need to be deprived of their liberty for their own safety.
48. The people concerned will be largely those with significant learning disabilities, or older people suffering from dementia or some similar disability, but will also include other causes such as neurological conditions (for example, if someone has a brain injury).
49. Any action taken under the deprivation of liberty safeguards must be in line with the principles of the Mental Capacity Act 2005:
- A person must be assumed to have capacity unless it is established that they lack capacity.
 - A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
 - A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
 - An act done, or decision made, under the Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
 - Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.
50. The draft deprivation of liberty safeguards Code addendum is based on these principles and reinforces the need to protect the rights of this very disadvantaged group of people. One role of the best interests assessor is to support a person in respect of whom they are undertaking an assessment to communicate their views.

51. The draft regulations also embrace these principles. For example, some people being assessed for deprivation of liberty with a view to their receiving mental health treatment in hospital will, for whatever reason, have difficulty expressing an objection. The best interests assessor, supporting them to communicate and taking account of those with an interest in their care, is likely to identify information about their objection (or not) which might not otherwise be taken into account, and this must be sought by the eligibility assessor in establishing whether or not the person objects to receiving the mental health treatment.
52. Other regulations will state the type of person who is eligible to carry out each kind of assessment, the qualifications, competences and experience they will need to have, the training they will need to have undertaken and the need to ensure that the work of the assessors is covered by liability insurance.
53. These regulations will have a positive impact on disability equality. In order to carry out a proper assessment it is vital that the assessor is able to communicate with the person being assessed and with others whose views must be taken into account. The regulations will require that all assessors have:
- diversity and equality skills, and
 - the ability to communicate with and to establish effective relationships with service users, people lacking capacity and carers.
 - the ability to act independently; and
 - the ability to take account of diverse views and weigh them appropriately in decision making.
54. The supervisory body must also choose assessors who are appropriate for the person's individual case and the Code addendum identifies the following as factors to consider:
- the reason for the proposed deprivation of liberty
 - whether the potential assessor has experience of working with the service user group from which the person being assessed comes

Gender Equality Impact Assessment

55. The Code addendum and draft regulations, like the deprivation of liberty legislation itself, do not discriminate between men and women. A principle on which the safeguards are based is that everybody should be treated as an individual, and their care regimes determined by reference to their specific needs. In some cases those needs may relate to gender.
56. It is anticipated that a large proportion of those who will become subject to the deprivation of liberty safeguards will be older people with dementia. This may

well mean that more women than men become subject to the deprivation of liberty safeguards because women tend to live longer than men do and, at higher ages (75+), the prevalence of dementia in women tends to be higher than in men. But the deprivation of liberty safeguard provisions themselves will operate in an identical way regardless of gender.

Human Rights Impact Assessment

57. The purpose of the deprivation of liberty safeguards is to bring the law for England and Wales into line with the ECHR with regard to the circumstances in which a person who lacks capacity to consent to the arrangements made for their care and treatment, and who is not detained under the Mental Health Act 1983, may be deprived of their liberty within the meaning of Article 5 of the ECHR.
58. The safeguards have been introduced in specific response to the October 2004 ECtHR judgment in the case of H.L. v the United Kingdom. This judgment found that:-
- the manner in which H.L. was deprived of liberty was not in accordance with “a procedure prescribed by law” and was, therefore, in breach of Article 5(1) of the European Convention on Human Rights (ECHR), and
 - there had been a contravention of Article 5(4) of the ECHR because H.L. was not able to apply to a court quickly to see if the deprivation of liberty was lawful.
59. The safeguards value human rights and give protection to a very vulnerable group of people. They make clear that a person’s human rights cannot be infringed simply because they are profoundly disabled, or very old, and lack the capacity to consent to arrangements made for their care and treatment.
60. The Government believe that the deprivation of liberty safeguards bring the legislation into compliance with the ECHR.

Rural Proofing Impact Assessment

61. There is no reason to believe that there will be proportionately more or less people subject to the deprivation of liberty safeguards in rural areas than there are elsewhere, and thus no reason to suppose that the Code addendum and draft regulations will impact on rural areas any differently to the way in which they impact on other areas.

Specific Impact Tests: Checklist

Use the table below to demonstrate how broadly you have considered the potential impacts of your policy options.

Ensure that the results of any tests that impact on the cost-benefit analysis are contained within the main evidence base; other results may be annexed.

Type of testing undertaken	<i>Results in Evidence Base?</i>	<i>Results annexed?</i>
Competition Assessment	Yes	No
Small Firms Impact Test	Yes	No
Legal Aid	Yes	No
Sustainable Development	No	No
Carbon Assessment	No	No
Other Environment	No	No
Health Impact Assessment	Yes	No
Race Equality	Yes	No
Disability Equality	Yes	No
Gender Equality	Yes	No
Human Rights	Yes	No
Rural Proofing	Yes	No

The consultation criteria

The six consultation criteria are as follows:

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the time scale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

These criteria must be reproduced within all consultation documents.

Consultation Co-ordinator contact details

If you have any complaints or comments about the consultation **process** rather than about the topic covered by this paper, you should contact Laurence Fiddler, Ministry of Justice Consultation Co-ordinator, on 020 7210 2622, or email him at consultation@justice.gsi.gov.uk.

Alternatively, you may wish to write to the address below:

**Laurence Fiddler
Consultation Co-ordinator
Ministry of Justice
5th Floor Selborne House
54-60 Victoria Street
London
SW1E 6QW**

If your complaints or comments refer to the topic covered by this paper rather than the consultation process, please direct them to the contact given under **the How to respond** section of this paper at page 32

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Alternative format versions of this report are available on request from:
The Communications Team, Mental Capacity Implementation Programme,
Public Guardianship Office.
Telephone 020 7664 7184 email safeguardsconsultation@guardianship.gsi.gov.uk.