

MENTAL CAPACITY ACT 2005

Deprivation of Liberty Safeguards

FORMS & RECORD- KEEPING

*GUIDE FOR MANAGING AUTHORITIES
IN ENGLAND (HOSPITALS AND CARE
HOMES)*

Introduction

The Mental Capacity Act 2005 provides a statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves.

From 1 April 2009 onwards, the Act contains procedures for authorising the deprivation of liberty in hospitals and care homes of some people who lack capacity to consent to being there. Guidance on the operation of the procedures is contained in the deprivation of liberty safeguards Code of Practice¹, which is a supplement to the main Mental Capacity Act 2005 Code of Practice.

This guide is for managing authorities (hospitals and care homes) in England. It includes and explains the deprivation of liberty safeguards standard forms, and other records that need to be completed and kept by managing authorities when they use these procedures.

The forms included in this guide are not statutory forms that have to be used. They are standard forms offered to support managing authorities to perform their role under the deprivation of liberty safeguards and to aid the maintenance of appropriate records. Whilst there is no legislative requirement to use these standard forms, their use is recommended by the Department of Health. They cover the record-keeping that is required by statute and therefore their use in unedited form will help managing authorities ensure compliance with the safeguards and also promote a consistent approach to record-keeping.

In response to requests from a number of stakeholders, a 'case number' box has been included on each standard form. This is an optional item designed to facilitate the identification of the person to whom the form relates and to support the keeping of records and the linking of different forms for the same person. It is for managing authorities and supervisory bodies (primary care trusts (PCTs) and local authorities) to decide how, if at all, to make use of this box, and to determine what form of identifier is the most appropriate for their purposes. In some cases, for example, the person's NHS number might be deemed appropriate. It is likely to be most beneficial if all the forms relating to a particular person, whether completed by a supervisory body, managing authority or assessor, use the same number. Such a consistent approach is an issue that a managing authority may wish to consider in consultation with each supervisory body with which they have dealings in relation to applications for deprivation of liberty authorisations.

A companion guide has been produced for supervisory bodies.² The guide for supervisory bodies contains a complete set of deprivation of liberty safeguards

¹ The deprivation of liberty safeguards Code of Practice can be accessed via:-

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

² Mental Capacity Act 2005 Deprivation of Liberty Safeguards Forms and Record-Keeping: Guide for supervisory bodies in England (Primary Care Trusts and Local Authorities), accessible via:-

http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089772.

standard forms, so is a useful point of reference for managing authorities wishing to view any of the forms not included in this managing authority guide.

Standard and urgent deprivation of liberty authorisations

In general terms, the new legal framework:

- Provides that a person may not be deprived of their liberty in a hospital or care home unless a standard authorisation or an urgent authorisation is in force.
- Applies to local authority, NHS, independent and voluntary sector hospitals and care homes, and to anybody being treated or cared for in those environments, irrespective of whether they are publicly or privately funded.
- Requires that managing authorities must request a standard authorisation when one is necessary. Wherever possible, this should be in advance of deprivation of liberty commencing. They must also ensure that any conditions attached to a standard authorisation are complied with.
- Provides for a standard authorisation to be given by the supervisory body. The supervisory body must also appoint a “relevant person’s representative”³ to support and represent the person deprived of liberty.
- Specifies that the supervisory body for care homes is the relevant local authority, and for hospitals is the relevant PCT.
- Specifies that, if it is necessary to deprive a person of their liberty before a standard authorisation can be given, the managing authority must give itself an urgent authorisation. This may last for a maximum of seven calendar days, by which time a standard authorisation must be in place. A supervisory body may, however, extend an urgent authorisation for a maximum of a further seven calendar days if, in exceptional circumstances, it has not been possible to complete the standard authorisation process within the timescale of the original urgent authorisation.
- States that, for the purposes of the Mental Capacity Act 2005, references to deprivation of a person’s liberty have the same meaning as in Article 5(1) of the European Convention on Human Rights.
- Provides for two main exceptions to this scheme. First, the Court of Protection may authorise the deprivation of a person’s liberty in a hospital or care home. Second, some hospitals are registered to detain people under the Mental Health Act 1983⁴. Sometimes that Act may be used instead.

³ The Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative) Regulations 2008 deal with the selection and appointment of relevant person’s representatives. The regulations are accessible via: http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/DH_084948

⁴ References in this guide to provisions of the Mental Health Act 1983 include provisions of other enactments that have the same effect

It is important to bear in mind that, whilst the deprivation of liberty will be for the purpose of providing a person with care or treatment, neither a standard nor urgent deprivation of liberty authorisation authorises such care or treatment. The arrangements for providing care or treatment to a person in respect of whom a deprivation of liberty authorisation is given are subject to the wider provisions of the Mental Capacity Act 2005.

Who is the managing authority?

In the case of NHS hospitals, the NHS trust or authority that manages the hospital is the managing authority.

In the case of care homes and independent hospitals, the managing authority is the person registered under Part 2 of the Care Standards Act 2000 in respect of the care home or hospital.

Whether a private 'nursing home' is a hospital or a care home depends on its registration.

Who is the supervisory body?

All requests and completed forms must be sent to the person's supervisory body.

The rules for deciding which PCT or local authority is the supervisory body vary, depending on whether one is dealing with a hospital or a care home.

Hospitals

In the case of hospital patients, where a PCT is commissioning the patient's care or treatment then the PCT is the supervisory body. In all other cases, the supervisory body is the PCT for the area in which the relevant hospital is located.

It can be seen that the hospital's local PCT will not necessarily be the supervisory body. For example, where a PCT in London commissions in-patient hospital treatment for a person in Manchester, the PCT in London is their supervisory body. All forms and requests should be directed there.

Care homes

In the case of care homes, the supervisory body is the local authority for the area in which the person ordinarily resides. If the person has no ordinary place of residence — they are of no fixed abode — then the supervisory body is the local authority for the area in which the care home is situated.

Again, it can be seen that a care home's own local authority will not necessarily be the supervisory body. For example, if a person ordinarily resided in London before moving to a care home in Sussex, the relevant local authority in London will be their supervisory body.

Qualifying requirements

Certain conditions must be met before a person may be deprived of their liberty under a standard authorisation. These conditions are known as the 'qualifying requirements'. The qualifying requirements are:

- age requirement
- no refusals requirement
- mental capacity requirement
- mental health requirement
- eligibility requirement
- best interests requirement.

Wherever possible, a managing authority should request a standard authorisation of deprivation of liberty in advance of the deprivation of liberty commencing. However, an urgent authorisation must be given, as a forerunner to a standard authorisation, if the managing authority has a reasonable expectation that the qualifying requirements for a standard authorisation are likely to be met but there is not enough time to complete the standard authorisation process before the deprivation of liberty needs to commence, or if the person is already believed to be deprived of their liberty.

Where necessary, the qualifying requirements are stated on the forms.

Assessing whether the qualifying requirements are met

Once a standard authorisation is requested, the person concerned will be assessed by professionals chosen by the supervisory body⁴.

The assessors must decide whether or not the person satisfies the qualifying requirements. Because a standard authorisation may be applied for before the person needs to be deprived of their liberty, the person's circumstances may change before the authorisation is granted. When assessing whether or not a person meets a particular qualifying requirement, the assessor must take into account the circumstances as they are expected to be when the requested standard authorisation comes into force.

Assessors may at all reasonable times examine and take copies of:

- any health record relating to the person;
- any local authority record compiled in accordance with a social services function; and
- any record held by a person registered under Part 2 of the Care Standards Act 2000
- which the assessor considers may be relevant to their assessment.

³ The eligibility criteria for assessors are contained in the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 accessible via: http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/DH_084948

Assessment time limits

If a managing authority has given itself an urgent authorisation, all of the assessments required for a standard authorisation must be completed during the period the urgent authorisation is in force.

Where no urgent authorisation is in force, all assessments required for a standard authorisation must be completed within 21 days from the date the supervisory body receives a request for such an authorisation.

Why record-keeping is important

A key aim of the Department of Health has been to minimise the number of forms and records that need to be completed by managing authorities and supervisory bodies.

The need to make and keep written records comes from several sources: the Mental Capacity Act 2005 itself, regulations made under the Act, and the Code of Practice.

Some records and forms are necessary because the procedures involve depriving a fellow citizen of their liberty. Carefully and systematically recording how this was done is an important safeguard, and consequently an important part of the law, good practice and concern for the welfare of others.

Completing these forms and records also enables managing authorities to demonstrate that they acted lawfully if their actions are later challenged. Their completion should be viewed as a way of helping them to practise safely within the law, so that necessary care or treatment can be provided without unnecessary fear of legal liability.

Blue and green forms

The forms drafted for managing authorities to use are coloured blue.

The forms drafted for supervisory bodies to use are coloured green.

The use of these forms will help to ensure that the correct procedures are followed when decisions are made about whether or not to deprive a person of their liberty. Their use will also facilitate consistent practice across the country and simplify reviews, auditing, inspection and the collection of statistics. In addition, completion of the forms will ensure compliance with the record-keeping required by statute.

Letters have also been drafted for people subject to a deprivation of liberty authorisation and their representatives to use.

Electronic copies of all of these forms and letters can be downloaded from: http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089772

Basic house-keeping skills

Managing authorities will need to establish a separate record of all deprivation of liberty related documents for a person whenever an urgent authorisation is given or a standard authorisation is requested.

This record should remain open until the person ceases to be deprived of their liberty under the Mental Capacity Act 2005. It should contain all of the completed forms, notices, requests and other documents concerning the person and their deprivation of liberty.

Decisions should be taken and reviewed in a structured way. In order to minimise the risk of mistakes, someone within the organisation should be appointed to scrutinise all deprivation of liberty related documents.

Policies, procedures and protocols

It is important not to underestimate the importance of simple and effective policies and procedures: the purpose of systems, and of being systematic, is to minimise the risk of human error, and to rectify errors before they have adverse consequences.

The deprivation of liberty safeguards Code of Practice advises managing authorities to develop some policies, procedures and protocols. For example, they should devise:

- protocols for decision-making that include considering which people are at risk of being deprived of their liberty and how this might be avoided;
- a procedure or protocol that identifies what action is required when the urgent authorisation process is used, by whom it should be taken, and within what period;
- a procedure or protocol that identifies what action is required when a standard authorisation is requested, who should take it, and how such matters should be kept under review.

Supervisory bodies should provide their local managing authorities with information about their procedures, including to whom requests and forms should be sent, and the contact details of relevant personnel.

Independent mental capacity advocates

In certain circumstances, a person who is subject to the new procedures must have an 'independent mental capacity advocate' (IMCA) instructed to support them.

Section 39A of the Mental Capacity Act 2005 applies where an urgent authorisation is given or a standard authorisation is requested and there is not an existing authorisation in force. It also applies where an assessment is being undertaken to decide whether there is an unauthorised deprivation of liberty. The managing authority must ascertain whether there is anybody, other than people engaged

in providing care or treatment in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in the best interests of the person to whom the authorisation or assessment relates.

If there is not, the managing authority must notify the supervisory body, and the supervisory body must instruct an IMCA to represent the person.

Section 39C provides for the appointment of an IMCA if a representative's appointment ends while an authorisation is in force and the managing authority are satisfied that there is nobody, other than people engaged in providing care or treatment in a professional capacity or for remuneration, whom it is appropriate to consult in determining what would be in the person's best interests.

Again, the managing authority must notify the supervisory body that this is the case, and the supervisory body must then instruct an IMCA to represent the person. The IMCA's role in this case comes to an end upon the appointment of a new representative for the person.

Section 39D provides for the instruction of an IMCA by the supervisory body where the relevant person does not have a paid relevant person's representative and:

- the person or their representative requests that an IMCA is instructed, by the supervisory body, to help them, or
- a supervisory body believes that instructing an IMCA will help to ensure that the person's rights are protected.

Training

Managing authorities and supervisory bodies should ensure that, where relevant, their staff are appropriately trained to implement the deprivation of liberty safeguards. Professionals with a statutory role in delivering the safeguards are required to undergo additional training:

- mental health assessors will undergo a common course of study developed by the Royal College of Psychiatrists,
- best interests assessors will undergo a course of study provided, or approved, by certain universities,
- IMCAs will undergo a common course of study provided by Advocacy Partners and delivered by Action for Advocacy

Other sources of guidance

Everyone involved in implementing the deprivation of liberty safeguards procedures should be able to access the Mental Capacity Act 2005 Code of Practice and the deprivation of liberty safeguards supplement to the Code.

The blue forms

There are six forms that hospitals and care homes (“managing authorities”) will need to complete:

Form	Purpose
Form 1	For the giving of an urgent authorisation by a managing authority. This form should be used if a managing authority needs to give itself an urgent authorisation to deprive a person of their liberty.
	Managing authority request for an extension in the duration of an urgent authorisation. This form should be used if there is a risk that an urgent authorisation will expire before a standard authorisation can be given.
Form 4	Managing authority request for a standard authorisation. This form should be used to request a standard authorisation, including where an existing standard authorisation is coming to an end and the person’s care or treatment still needs to be provided in circumstances that will amount to a deprivation of their liberty.
Form 14	Managing authority notifies the supervisory body that a standard authorisation should be suspended because the eligibility requirement is no longer being met. This form should be used if a standard authorisation is in force and the person then ceases to meet the deprivation of liberty safeguards eligibility qualifying requirement under the Mental Capacity Act 2005, for example, because the person has been detained under the Mental Health Act 1983 or a requirement has been imposed on them under the Mental Health Act 1983 that conflicts with the terms of the standard authorisation.
Form 15	Managing authority notifies the supervisory body that the eligibility requirement is again met and the suspension of the standard authorisation is lifted. This form should be used to lift a previous suspension of a standard authorisation, for example, because a person who was detained under the Mental Health Act 1983 has now had their detention lifted.
Form 19	Request for a review of a standard authorisation from the managing authority to the supervisory body. This form should be used to request a formal review of a standard authorisation under Part 8 of Schedule A1 to the Mental Capacity Act 2005.

Note: As mentioned in the “Introduction” above, a complete set of deprivation of liberty safeguards forms is available in the “Mental Capacity Act 2005 Deprivation of Liberty Safeguards Forms and Record-Keeping: Guide for supervisory bodies in England (Primary Care Trusts and Local Authorities)”.