These notes refer to the Mental Health Act 2007 (c.12) which received Royal Assent on 19 July 2007

MENTAL HEALTH ACT 2007

EXPLANATORY NOTES

COMMENTARY

Part 2 – Amendments to Other Acts

Chapter 1 – Amendments to the Domestic Violence, Crime and Victims Act 2004

Section 48: Victims' rights and Schedule 6

187. Section 48 introduces Schedule 6 which extends, with modifications, the rights of victims under the Domestic Violence, Crime and Victims Act 2004 ("the 2004 Act") to victims of persons convicted of a sexual or violent offence, where (a) the person is made subject to a hospital order without restrictions; (b) the person is made subject to a hospital and limitation direction and the limitation direction subsequently ceases to have effect; and (c) the person is transferred from prison to hospital under a transfer direction without a restriction direction, or where the restriction direction is removed.

188. As under the existing provisions of the 2004 Act, the local probation board must take reasonable steps to establish (a) if the victim of the offence wishes to make representations as to whether the patient should be subject to conditions in the event of discharge from hospital; and (b) whether the victim wishes to receive information about those conditions in the event of his discharge.

189. As the local probation board has no remit in relation to non-restricted mentally disordered offenders detained in hospital, the board must, at the appropriate point, notify the hospital managers of the hospital in which that offender ("the patient") is detained of the victim's wish to receive information and make representations. The hospital managers then have responsibility for forwarding the victim's representations to the relevant persons and bodies responsible for making decisions on discharge or community treatment orders and for passing any information received from those persons or bodies to the victim.

190. Hospital managers must inform the victim if the patient's discharge is being considered or if the patient is to be discharged. Because unrestricted patients cannot be conditionally discharged, hospital managers must inform the victim who has requested to receive information whether the patient is to be subject to a community treatment order; and, if so, to inform him of any conditions relating to contact with the victim or his family; any variation of the conditions and the date on which the order will cease. Victims also have the right to make representations about the conditions to be attached to a community treatment order, which hospital managers must forward to the responsible clinician.

191. So that hospital managers are in a position to comply with these obligations, the responsible clinician and the MHRT are required to inform hospital managers if the patient is to be discharged. Responsible clinicians must also inform hospital managers whether they are to make a community treatment order and give the managers information regarding the imposition or variation of any conditions and when the order will end.

Chapter 2 - Amendments to Mental Capacity Act 2005

Section 49: Independent mental capacity advocates: exceptions

192. Under the MCA an independent mental capacity advocate (IMCA) must be appointed in specified situations to support and represent particularly vulnerable people who have no family or friends or others whom it would be appropriate to consult. Section 40 of the MCA provides some limited exceptions to the requirement to appoint an IMCA in these circumstances.

193. Section 49 substitutes a new version of section 40, to limit the exceptions to the duty to instruct an IMCA. The amendment ensures that there will still be a duty to instruct an IMCA (for health and social care issues) for someone who lacks capacity even if they have someone to represent them on different issues, for example financial issues. There is no such duty if they already have someone to represent them on the same issue.

Section 50: Mental Capacity Act 2005: deprivation of liberty and Schedules 7 to 9

194. Section 50 inserts new sections 4A, 4B and 16A into the MCA. This makes it lawful to deprive a person of their liberty in a hospital or care home only if a standard or urgent authorisation under Schedule A1 to the MCA is in force or if it is a consequence of giving effect to an order of the Court of Protection on a personal welfare matter, in accordance with the provisions of the MCA. If there is a question about whether a person may be lawfully deprived of their liberty and the deprivation is to enable life sustaining treatment or treatment believed necessary to prevent a serious deterioration in the person's condition, a person may be detained while a decision is sought from the Court of Protection.

195. New Schedule A1 to the MCA (inserted by Schedule 7) sets out the detailed procedures and requirements relating to standard and urgent authorisations of deprivation of liberty in hospitals or care homes. These procedures apply to care or treatment funded publicly or privately. The reason that authorisation may only apply to hospitals or care homes is that the Government considers that it would only rarely be justifiable to deprive a person of liberty in their best interests in any other setting. Deprivation of liberty in other settings would be lawful if it were a consequence of giving effect to an order of the Court of Protection on a personal welfare matter, in accordance with the provisions of the MCA.

196. Deprivation of liberty is defined as having the same meaning as in Article 5(1) of the ECHR (see paragraph 10(4) of Schedule 9 to the Act which amends section 64 of the MCA). In its judgment in *HL v UK*, the European Court of Human Rights said that the difference between restriction or deprivation of liberty is one of degree or intensity rather than of nature or substance and therefore, in order to determine whether a person is being deprived of liberty, there must be an assessment of the specific factors in each individual case for example the type, duration, effects and manner of implementation of the measure in question and its impact on the person. Guidance on identifying deprivation of liberty will be included in amendments to the MCA Code of Practice to reflect the amendments to the MCA.

197. An authorisation does not entitle the hospital or care home to do anything other than for the purpose of the authorisation. The reason for this provision is that the authorisation procedure is to ensure the lawfulness of deprivation of liberty. It is not directly concerned with the provision of care or treatment to people who lack capacity to consent: this is governed by the existing provisions of the MCA except where the provisions of mental health legislation apply.

198. Part 3 of the new Schedule A1 sets out the qualifying requirements that must be met before a standard authorisation can be given to detain a person as a resident in a hospital or care home in circumstances which amount to deprivation of their liberty.

199. The person must:

- be aged 18 or over (the age requirement)
- be suffering from a mental disorder within the meaning of the 1983 Act (the mental health requirement), and
- lack capacity to decide whether or not they should be a resident in the hospital or care home (the mental capacity requirement) .

200. The deprivation of liberty authorised must also be:

- in the best interests of the person
- necessary in order to prevent harm to him or her, and
- a proportionate response to the likelihood of suffering harm and the seriousness of that harm (the best interests requirement).

201. A person must also meet the eligibility requirement, which relates to cases where a person is, or might be made, subject to the 1983 Act. Grounds for ineligibility are set out in new Schedule 1A to the MCA (inserted by Schedule 8). In summary, a person is ineligible if they are already subject to the 1983 Act in one of the following circumstances:

- they are actually detained in hospital under the main powers of detention in the 1983 Act (or treated as such).
- they are on leave of absence from detention or subject to guardianship, SCT or conditional discharge and in connection with that are subject to a measure (such as a requirement to live in a particular place) which would be inconsistent with the authorisation if granted. This means that a person who is subject to the 1983 Act but who is not in hospital could be subject to an authorisation under these new provisions. This might be necessary for example if a person subject to guardianship who normally lived at home needed respite care in a care home.
- they are on leave of absence from detention, or subject to SCT or conditional discharge and the authorisation, if given, would be for deprivation of liberty in a hospital for the purposes of treatment for mental disorder. This means that a authorisation cannot be used as an alternative to the procedures for recall in the 1983 Act.

202. A person is also ineligible if the authorisation would be for deprivation of liberty in a hospital for the purposes of treatment for mental disorder, the person concerned would otherwise meet the criteria for detention under Part 2 of the 1983 Act and the person objects to being detained in the hospital or to some or all of the treatment.

203. In deciding whether a person objects consideration must be given to the circumstances including his or her behaviour, wishes, views, beliefs, feelings and values, including those expressed in the past to the extent that they remain relevant. This will inevitably call for a judgment on the part of the relevant decision-maker. The fact that a person cannot (or does not) express a view (or otherwise communicate an objection) does not of itself mean that the person should not be taken to object.

204. The purpose of this provision is to treat people in this situation as if they had capacity to consent but are refusing to be admitted to (or stay in) hospital or are not consenting to the treatment for mental disorder they are to be given there. In such cases, they would either have to be detained under the 1983 Act, or another way of giving treatment would have to be found.

205. A person's objections will not make them ineligible if a donee of Lasting Power of Attorney (an "attorney") or a deputy appointed by the Court of Protection (or the Court

of Protection itself) has made a valid decision to consent to the hospitalisation and treatment on their behalf.

206. For consistency, the Court of Protection may not make an order which would lead to a person being deprived of their liberty if the person is ineligible under the new Schedule 1A.

207. A person must also meet the no refusals requirement. There are refusals if:

- the authorisation sought is for the purposes of treatment or care covered by a valid and applicable advance decision by the person (an advance decision being a decision to refuse treatment at a later date, made in anticipation of not having capacity to make the decision at the time in question), or
- it would conflict with a valid decision by an attorney or a deputy on their behalf (or a relevant decision of the Court of Protection).

208. Again, the purpose of this requirement is to treat people in this position as if they had capacity to refuse consent to the proposed course of action.

209. Part 4 of the new Schedule A1 sets out the requirements and procedure for requesting and granting a standard authorisation. The managing authority of a hospital or care home must request authorisation from the supervisory body if a person who meets or is likely to meet all of the qualifying requirements is, or is likely to be, detained as a resident in that hospital or care home in circumstances which amount to deprivation of their liberty. The reason for placing this duty with the managing authority is that it is the hospital or care home which would be at risk of civil or criminal penalties for depriving a person of liberty without authorisation. The managing authority of a hospital or care home must keep written records of requests for authorisation made and the reasons for them. Information required to be given with a request may be specified in regulations.

210. Provision is also made for a third party to seek to initiate the standard authorisation assessment process. Where anybody is concerned that a person may be deprived of their liberty without the protection of the safeguards, and they have asked the managing authority to apply for an authorisation but the managing authority have not done so, they can make application to the supervisory body. The supervisory body must appoint somebody who would be suitable and eligible to be a best interests assessor in the case to assess whether the person is deprived of liberty. If there is nobody to consult among family and friends, an IMCA (section 39A IMCA) would also be appointed to support and represent the person.

211. If the outcome of the assessment is that there is an unauthorised deprivation of liberty, then the full assessment process would be completed as if an authorisation had been applied for. If the managing authority consider that the care regime should continue while the assessments are carried out, they will be required to issue an urgent authorisation and to obtain a standard authorisation within seven days.

212. In any case where a standard authorisation is requested, the supervisory body would be:

- in the case of a care home the local authority where the person is ordinarily resident, or where the care home is situated.
- in the case of a hospital the PCT which commissions the care, or Welsh Ministers if the care is commissioned by them.

213. The managing authority means:

- the PCT, Strategic Health Authority, LHB, Special Health Authority, NHS trust or NHSFT in relation to an NHS hospital requesting an authorisation
- the person registered under the Care Standards Act 2000 in respect of an independent hospital requesting an authorisation, or

- the person registered in respect of that home under Part 2 of the Care Standards Act 2000 in relation to a care home requesting an authorisation .

214. An authorisation cannot be given unless relevant assessments have been commissioned by the supervisory body that conclude that all of the qualifying requirements listed in Part 3 of the new Schedule A1 are met. Regulations will specify who can carry out assessments, covering the need for more than one assessor, professional skills, training and competence required and independence from decisions about providing or commissioning care to the person, and the timeframe within which assessments must be completed. The mental health and best interests assessments must be carried out by different assessors. It is the responsibility of the supervisory body to appoint assessors who are eligible and who are suitable, having regard to the person to be assessed.

215. The best interests assessment must take account of any relevant needs assessment or care plan, and of the opinion of the mental health assessor on the impact of the proposed course of action on the person's mental health. In carrying out the best interests assessment, the assessor must consult the managing authority of the hospital or care home.

216. The best interests assessor will also be required, under section 4(7) of the MCA, to take into account the views of:

- anyone named by the person as someone to be consulted
- anyone engaged in caring for the person or interested in his or her welfare
- any donee of a lasting power of attorney granted by the person, and
- any deputy appointed for the person by the court.

217. The best interests assessor must record the name and address of every interested person consulted as they will be entitled to information about the outcome of the request for authorisation (spouse, civil partner, and close family are defined as interested persons). If the best interests assessment recommends authorisation, the assessor must state the maximum authorisation period which may not be for more than one year. Regulations may reduce the maximum authorisation period to less than 12 months if at a future date there is evidence that 12 month authorisations are granted inappropriately. The best interests assessor may recommend conditions to be attached to the authorisation.

218. If the best interests assessor concludes that deprivation of liberty is not in the person's best interests but becomes aware that they are already being deprived of their liberty, they must draw this to the attention of the supervisory body. The supervisory body are then required to notify the managing authority of the relevant hospital or care home, the relevant person, any section 39A IMCA and any interested person consulted by the best interests assessor.

219. Assessments must be made as soon as possible after application and regulations may be made to specify the time period for completing the assessment process. If existing equivalent assessments have been carried out within the past year they may be used if the supervisory body are satisfied there is no reason that they may no longer be accurate. If the person is unbefriended, defined in the MCA as having no one to speak for them who is not paid to provide care, a section 39A IMCA will be appointed to support and represent them during the assessment process.

220. If any of the assessments conclude that the person does not meet the criteria for an authorisation to be issued, the supervisory body must turn down the request for authorisation. The assessment process will be discontinued if any of the assessments reach the conclusion that the person does not meet one of the qualifying requirements. The supervisory body must inform the hospital or care home management, the person concerned, any section 39A IMCA appointed and all interested persons consulted by

the best interests assessor of the decision and the reasons. This is so that all with an interest are aware that the person may not lawfully be deprived of their liberty.

221. It is the duty of the supervisory body to give the authorisation if all of the assessors recommend it. The supervisory body must:

- set the period of the authorisation, which may not be longer than the maximum period identified in the best interests assessment
- issue the authorisation in writing, stating the period for which it is valid, the purpose for which it is given, and the reason why each qualifying requirement is met
- if appropriate, attach conditions to the authorisation, taking account of the recommendations of the best interests assessor
- appoint someone to act as the person's representative during the authorisation
- provide a copy of the authorisation to the managing authority of the care home or hospital, the person who is being deprived of liberty and their representative, any IMCA who has been involved and any other interested person consulted by the best interests assessor, and in due course to notify them when a standard authorisation ceases to be in force
- keep written records.

222. If an authorisation is granted to deprive a person of their liberty then the managing authority of the hospital or care home must (if acting on that authorisation):

- ensure that any conditions are complied with;
- take all practicable steps to ensure that the person understands the effect of the authorisation, their right to appeal to the Court of Protection and their right to request a review;
- give the same information to the person's representative;
- keep the person's case under consideration and request a review if necessary (see below).

223. If an authorisation is granted, the supervisory body will appoint a person to be the relevant person's representative as soon as practicable (Part 10 of the new Schedule A1). They must appoint someone who they consider will:

- maintain contact with the relevant person;
- support and represent them in matters concerning the authorisation, including requesting a review or applying to the Court of Protection on their behalf.

224. The person concerned and their representative have right of access to the Court of Protection to challenge an authorisation. Any other person with a concern may apply to the Court for permission to be heard.

225. Regulations may be made regarding the selection, appointment, suspension and termination of representatives but only the following can select a person to be appointed as representative:

- the relevant person if they have capacity;
- an attorney or deputy (if it is within the scope of their authority);
- a best interests assessor;
- the supervisory body.

226. If there is a section 39C IMCA appointed for a person who is the subject of an authorisation, for example to represent them until a new appointment is made after the appointment of their representative is ended, all the provisions relating to the relevant person's representative will apply to the section 39C IMCA.

227. If there is a both a section 39A IMCA and a representative appointed, the duties and powers of the section 39A IMCA do not apply except for the right to apply for permission to bring a case to the Court of Protection. However, the section 39A IMCA must take the views of the person's representative into account before applying to the Court of Protection.

228. Anyone who is deprived of their liberty and subject to a standard authorisation under the MCA, or their representative, has the right of access to advocacy support, in the form of a section 39D IMCA. This support will be available to help them to understand the authorisation, its purpose and effect and to understand and exercise the review and Court of Protection safeguards. The section 39D IMCA can help and support the person or their representative to trigger a review and can make representations to the review assessors. The section 39D IMCA can help and support the person or their representative to make an application to the Court of Protection on a question regarding the authorisation.

229. When an authorisation is granted the care home or hospital must inform the person and their representative of the statutory right to a section 39D IMCA and how to obtain this support. A section 39D IMCA will be instructed if they request one or if in the opinion of the supervisory body the support of an advocate is necessary in order for them to exercise the review or appeal safeguards. If a person already has a paid representative appointed because there was no one suitable among family and friends to act as representative, they will not also be able to receive a section 39D IMCA.

230. Urgent authorisations (Part 5 of the new Schedule A1) may be given by the managing authority of a care home or hospital to provide a lawful basis for the deprivation of liberty where it is urgently required and where the qualifying requirements listed in Part 3 of the new Schedule A1 appear to be met, whilst a standard authorisation is being obtained. An urgent authorisation can only last for a maximum of 7 days unless in exceptional circumstances it is extended to 14 days by the supervisory body. An urgent authorisation must be in writing and the managing authority must keep a written record of their reasons for giving an urgent authorisation. The managing authority is required to take all practicable steps (verbally and in writing) to ensure that the person understands the effect of the authorisation and their right to apply to the Court of Protection and to notify any IMCA when an urgent authorisation is given.

231. The supervisory body may grant a request to extend an urgent authorisation for up to a further 7 days if there are exceptional reasons why it has not been possible to decide on a request for standard authorisation and it is essential that detention continues. This might occur for example if the best interests assessor has not been able to contact someone they are required to consult and considers that they cannot reach a judgment without doing so. An urgent authorisation ceases to be in force at the end of the period specified or earlier if a decision is reached on the application for a standard authorisation. The supervisory body must inform the relevant person and any IMCA involved when an urgent authorisation ceases to be in force.

232. The purpose of Part 6 of the new Schedule A1 is to provide a procedure for the authorisation to be suspended if the person becomes ineligible, for reasons other than their own objection, for less than 28 days. This is to allow for short periods of treatment under the 1983 Act.

233. If the person is to move to a different hospital or care home, the new managing authority must request a new authorisation, provided that the new detention would not be under the 1983 Act. The effect of this is that an authorisation will not be transferable to a new facility and a move, which is a significant change in the person's circumstances,

will trigger a fresh assessment of whether the deprivation of liberty is in the person's best interests.

234. If the person does not move but the supervisory body changes, for example because of changes in a local authority boundary, the managing authority must apply for a variation of the authorisation, provided that none of the grounds for review are met (Part 7 of the new Schedule A1). The new supervisory body must make the variation if it is satisfied that there are no grounds for review and must notify the relevant person and their representative, managing authority and the former supervisory body. In urgent cases the variation can be made by the managing authority but must be confirmed by the supervisory body.

235. The supervisory body may review (Part 8 of the new Schedule A1) a standard authorisation at any time and must do so if requested to by the relevant person, his or her representative or the managing authority of the care home or hospital. The qualifying requirements are reviewable if:

- the person does not meet one or more of the qualifying requirements, or
- the reason that they meet one of the qualifying requirements is not the reason stated in the authorisation, or
- there has been a change in the relevant person's case and because of that change it would be appropriate to change the authorisation conditions (best interests requirement only).

236. The managing authority is required to request such a review if it appears to it that there has been such a change in the person's circumstances. The relevant person or their representative may request a review at any time.

237. The supervisory body must first decide if any of the qualifying requirements appear to be reviewable. If not, no further action is required. If one or more of the age, mental health, mental capacity, objections element of eligibility or no refusals requirements are reviewable, the supervisory body must commission review assessment(s). This may lead to the authorisation being terminated or to a change in the reason recorded that the person meets one of the requirements.

238. If the best interests assessment appears to be reviewable the supervisory body must obtain a best interests review assessment unless the only ground for review is variation of conditions and the change in circumstances is not significant, in which case it can vary the conditions as appropriate. The best interests review assessment may lead to the authorisation being terminated or to a change in the reason recorded that the person meets the best interests requirement or a change in the conditions attached to the authorisation.

239. When the review is complete, the supervisory body must inform the managing authority of the hospital or care home, the relevant person and their representative.

240. The managing authority may apply for a further authorisation to begin when the existing authorisation expires. If that is the case the full assessment process is repeated.

241. The Secretary of State and the Welsh Ministers may make regulations conferring a duty on a body to monitor the operation of the new safeguards.

242. It is for the Secretary of State to make regulations under the new Schedule A1 in relation to English authorisations (where the supervisory body is a PCT or local authority in England) and for Welsh Ministers to make regulations in relation to Welsh authorisations (where the supervisory body is the Welsh Ministers or a local authority in Wales) and for the Welsh Ministers to direct a Local Health Board to exercise the functions of a supervisory body (Part 12 of the new Schedule A1).

Section 51: Amendment to section 20(11) of Mental Capacity Act 2005

243. Section 51 amends section 20(11)(a) of the MCA. It replaces the word "or" with "and". The amendment corrects a drafting error.