

EXPLANATORY MEMORANDUM TO

THE MENTAL CAPACITY (DEPRIVATION OF LIBERTY: APPOINTMENT OF RELEVANT PERSON'S REPRESENTATIVE) (AMENDMENT) REGULATIONS 2008

2008 No. 2368

1. This explanatory memorandum has been prepared by the Department of Health and is laid before Parliament by Command of Her Majesty.

2. Description

2.1 The Mental Health Act 2007 has amended the Mental Capacity Act 2005 (“the Act”) and introduced a scheme known as the deprivation of liberty safeguards. This scheme provides a framework for authorising the deprivation of liberty for people who lack the capacity to consent to treatment or care in either a hospital or care home that, in their own best interests, can only be provided in circumstances that amount to a deprivation of liberty.

2.2 Schedule A1 to the Act (inserted by the Mental Health Act 2007) contains a number of powers to allow the detailed requirements about representatives to be set out in Regulations. This instrument amends one of the requirements in the process for the selection of a representative set out in the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008 (SI 2008/1315) (“the Representative Regulations”).

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

3.1 This instrument corrects an error in the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008 (SI 2008/ 1315). As indicated in the headnote, copies of the Regulations will be supplied free of charge to all known purchasers of the Representative Regulations.

4. Legislative background

4.1 This instrument amends the Representative Regulations which form part of the implementation of deprivation of liberty safeguards inserted into the Act. This instrument amends regulation 9(1)(f) of the Representative Regulations to rectify an inadvertent error, to ensure that the underlying policy is reflected in the Representative Regulations.

5. Territorial Extent and Application

5.1 These Regulations extend to England only.

6. European Convention on Human Rights

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

7. Policy background

7.1 The deprivation of liberty safeguards in the Mental Capacity Act 2005 are intended to prevent the unlawful detention of people who lack the capacity to consent to the arrangements made for their care or treatment and who need to be deprived of their liberty, in their own best interests and to prevent them from harm, in either hospitals or care homes. The Representative Regulations set out detailed requirements in relation to the selection, appointment and termination of the appointment of a representative, following the agreement of the principles in primary legislation.

7.2 These regulations amend the provision in regulation 9(1)(f) of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) Regulations 2008 (SI 2008/1315) that provides that a supervisory body may select a person to be a representative who is not employed to work in the supervisory body that is appointing the representative, in a role that is, or could be, related to the relevant person's case. The amendment in these Regulations provides that a supervisory body may select a person to be a representative if they are not employed by the supervisory body.

7.3 The Regulations will be available free of charge to those who have purchased the Representative Regulations.

7.4 This amendment will be publicised through the Department of Health website and the regular deprivation of liberty safeguards newsletter. As the amendment relates to the decision of supervisory bodies only, this change will not impact adversely on the relevant person or managing authorities.

7.5 The Representative Regulations were consulted upon widely among a range of stakeholders and were the subject of a formal 12-week consultation exercise between September 2007 and December 2007. The amendment that has been made in this instrument reflects the policy objective set out in the consultation version of the Representative Regulations. There is no policy change in these Regulations and hence no need for further external consultation.

8. Impact

8.1 An impact assessment has not been prepared for this instrument as it has no impact on business, charities or voluntary bodies. The impact on the public sector is minimal.

9. Contact

9.1 Any enquiries about the contents of this memorandum should be addressed to:- Helene Shaw, Department of Health, Area 119, First Floor, Wellington House, 133-155 Waterloo Road, London SE1 8UG. Email: helene.shaw@dh.gsi.gov.uk. Telephone: 0207 972 4958.