Introduction

These notes provide:

- details of the legal framework and powers available to detain patients with or without their consent in a care/nursing home, assessment centre or hospital.
- the process to challenge detention and treatment.

They are intended as a general guide. Free legal advice is sometimes available under the Legal Aid scheme and a specialist Community Care / Mental Health solicitor can be found where needed using the following links:-

The Law Society
http://www.lawsociety.org.uk/find-a-solicitor/
http://www.lawsociety.org.uk/accreditation/specialist-schemes/mental-health/

The Legal Aid Agency
http://find-legal-advice.justice.gov.uk/
https://www.gov.uk/check-legal-aid

Support and referral help is also available from charities such as Respond, Mencap, MIND, and the Challenging Behaviour Foundation.
**PART ONE**

**Compulsory admission to hospital**
Under the Mental Health Act 1983 as amended 2007 (MHA), if you have a “mental disorder” you can be admitted to hospital against your wishes provided that certain procedures set out in the MHA are followed. If you are detained in hospital, it is important to seek legal advice so that you can be sure that you are detained legally. (Please note contact details above for solicitors who are on the Mental Health Accreditation panel.)

*Key point – ask for legal advice.*

**Who can apply to detain me in hospital?**
The MHA gives Approved Mental Health Professionals (AMHPs) the power to make an application to admit you to hospital under a section of the Act if they consider it necessary and the best way of ensuring you receive the right care and treatment. This is often described as “being sectioned”. Before doing this, the AMHP must interview you and be satisfied that detention in hospital is, given all the circumstances, the most appropriate way of providing the care and medical treatment you need. Your nearest relative also has the right to apply for you to be detained under the Act but, for practical reasons, the AMHP usually makes the application. Usually two doctors will examine and assess you – not necessarily at the same time – and complete recommendations to confirm that, in their opinion, you fit the criteria for being sectioned under the Act. A Magistrates’ court or Crown court can send you to hospital on conviction of a crime or plea of guilty (known as a hospital order) under s37 on the advice of 2 doctors – no AMHP is necessary. The Crown court judge has the power to add a restriction order (s41) which means that your detention and treatment in hospital will be overseen by the Ministry of Justice.

**What happens once I am sectioned?**
The MHA gives the professionals detaining you (usually an AMHP and two doctors) the power to take you to the hospital that has agreed to accept you as a detained patient. When you are at the hospital, you will be admitted onto a ward. You will be given a leaflet setting out your rights whilst on section including your right to appeal to an independent Mental Health Tribunal.
**Key point - ask for a leaflet which sets out your rights.**

**Which section will I be detained under?**

If you have not been sectioned before, or you have not been referred to the mental health professionals in your area before, it is more likely that you will be detained under a section 2, as this section is used to assess someone. However it does allow for treatment following the assessment.

If the doctors are clear that treatment is needed right away, you may be admitted to hospital immediately under section 3. If you are already in hospital under section 2, you can be re-assessed and transferred onto a section 3 without leaving hospital.

**Key point - make sure you find out under which section you are being detained.**

**Detention under s2**

If you are being detained under section 2, the Act says that two doctors, after examining you, must confirm that:

(a) you are suffering from “a mental disorder of a nature or degree that warrants detention in hospital for assessment” (or assessment followed by medical treatment) for at least a limited period; **and**

(b) you ought to be detained in the interests of your own health or safety, or with a view to the protection of others.

People with a learning disability can also be detained under s. 2 but they do not have to exhibit ‘abnormally aggressive or seriously irresponsible conduct’ which is required for s3/37 – see below.

**Detention under s3/37**

If you are being detained under section 3/37, the Act says that two doctors, after examining you, must confirm that:

(a) you are suffering from a “mental disorder of a nature or degree” that makes it appropriate for you to receive medical treatment in hospital; **and**

(b) it is necessary for your own health or safety, or for the protection of others, that you receive such treatment and it cannot be provided unless you are detained under this section and
(c) appropriate medical treatment is available for you

People with a learning disability can also be detained under S.3/37 however; only if, in addition to the criteria set out above, the person exhibits ‘abnormally aggressive or seriously irresponsible conduct’.

If you are detained under s37 (with or without s41, Ministry of Justice oversight) you will have been sent to hospital by a Magistrates’ Court or Crown Court. Certain treatments are defined in the MHA and can also be found in the MHA Code of Practice.

**How long can I be kept in hospital under a section 2 or 3 or 37?**

Under section 2, the longest you can be detained for is **28 days**. However, if there is an application to displace the nearest relative in progress, then it may be extended. If you no longer satisfy the legal requirements for being detained (see above), your Responsible Clinician (RC) i.e. your psychiatrist, can decide to discharge you from detention earlier than 28 days.

However, if your RC and AMHP decide that you should be detained under section 3 (for treatment), then the AMHP would apply for the section 3 admission before the end of the 28 days. If you are under section 3/37, you can be detained for up to 6 months at first. They can renew the section for another six months then for one year at a time. Again, this can be shorter if your RC decides that you no longer satisfy the legal requirements for being detained.

**How can I be discharged from detention under section 2 or 3 or 37?**

When you are sectioned you will be given a leaflet setting out your rights whilst detained under section. Depending on what section you are on it will tell you whether you can:

- **Ask your RC to discharge you.** Your RC must discharge you if the medical conditions that justified your admission under the Act no longer apply.

- **Ask for a Hospital Managers’ hearing and ask them to consider discharging you.** You make this request via the Mental Health Act Administrator (MHAA) at your hospital.
• Ask your nearest relative to discharge you by giving the hospital managers at least 72 hours' notice in writing. The law is quite complicated to understand so you should seek the advice of a solicitor to advise you on how this is best achieved.

• Apply to the Mental Health Tribunal (MHT) to be discharged. You will be able to get free legal advice known as Legal Aid for a solicitor to help you with your appeal to the tribunal and to represent you. (For details of how to contact and specialist Mental Health Solicitor see the introduction above).

When can I apply to the Mental Health Tribunal?
The Mental Health Tribunal is independent of the hospital and consists of a judge, a psychiatrist and a specialist lay member. The hearing will take place at the hospital where you are detained.

If you are detained

• under section 2, you must apply to the tribunal within 14 days of being detained,
• under section 3, you can apply once at any time within your first six months and if your RC renews your section 3, in each period of renewed detention
• under s37 (with or without s41) you cannot apply to a MHT in the first six months of your detention but you can in any subsequent periods of renewed detention. Under s37 (without s41) you can however apply to the Managers at any time.

In certain circumstances your nearest relative can also apply to the MHT for you to be discharged. The law is quite complicated to understand so you should seek the advice of a solicitor to advise you on how this is best achieved.

If you are detained under s3 and do not apply to the Mental Health Tribunal:

• in the first six months of detention, your case will be referred automatically to the tribunal, without you having to apply,
• after that, your case will be referred automatically every 3 years if it has not gone to a tribunal,
• if you are under 18, it will go automatically to the tribunal after one year, if you have not applied yourself.
You can appeal to the hospital managers at any time and as often as you want during your detention.

If the patient lacks capacity to appoint their own solicitor then the tribunal has the power to appoint one for them under the Tribunal Rules. Usually the MHAA informs the Tribunal office who appoints one from the Law Society’s Accreditation panel. It is the duty of the solicitor to act in the patient’s best interest. The Managers do not have this power but the MHAA often find a solicitor if alerted to the fact the patient lacks capacity to ask for one. See above the contact details of how to find a specialist solicitor.

Community Treatment Orders
If you have been detained under s.3 or s37 (without s41) you can be discharged into the community on a Community Treatment Order (s17A CTO) as long as you continue to comply with your treatment plan in the community.

Challenging Community Treatment Orders
As for s3 above you are entitled to appeal to a Mental Health Tribunal in each period of the community treatment order which lasts for 6 months and is renewable for 6 months and then a year at a time.

Guardianship Orders
Section 7 of the Mental Health Act says that a guardian can be appointed to you if you:

- are 16 or over, and
- have a mental disorder of a nature or degree that warrants guardianship, and
- need a guardian for your welfare or to protect other people.

Guardianship is used to encourage people who live in the community to use services or to live in a particular place. It is often used for people who lack the mental capacity to avoid danger or being exploited, but can also be used for people with mental capacity who are considered to be vulnerable because of their mental health problems.
You can only be placed under guardianship if two doctors recommend this. The application can be made by your nearest relative, but in most cases is made by an AMHP. The application is made to the local social services authority.

The guardian can require you to do certain things, e.g. live at a specified place, or attend particular places and times for treatment.

**Can I object to guardianship?**

You cannot prevent a guardian being appointed under section 7 of the MHA, but your nearest relative can object. As with s3 applications for admission, before applying for you to be placed under guardianship an AMHP must consult your nearest relative and if your nearest relative objects, the AMHP cannot apply for you to be under guardianship without taking legal proceedings to remove (displace) your relative from acting as nearest relative.

**How long can I be kept on a guardianships order?**

Guardianship lasts for up to six months and can be renewed for a further six months and then for a year at a time.

**How can I be discharged from guardianship?**

- You can apply to the Mental Health Tribunal for discharge from guardianship once at any time within your first six months and if your RC renews the section, in each period of renewal.
- Your nearest relative can also discharge you from guardianship, unless s/he has been displaced (see above), in which case s/he can apply to the tribunal instead.
- The local social services authority can discharge you from guardianship at any time.
- The guardianship will end automatically if you are detained in hospital under section 3 of the MHA.

**Independent Mental Health Advocates**

Under the MHA you are entitled to help and support from Independent Mental Health Advocates (IMHAs) where:
• you have been detained under sections 2 or 3 or any criminal section,
• you are living in the community under Mental Health Act guardianship,
  conditional discharge or supervised community treatment order (CTO).

If the above conditions are not met but you are receiving treatment in hospital for mental health problems, you may also be entitled to IMHA support if the treating team are considering certain treatments under the MHA, such as neurosurgery and electro convulsive therapy.

Information on IMHA’s and how to contact them should be given to you when admitted to hospital or accepted into guardianship. IMHAs can also be contacted by family members, nearest relatives.

The role of an IMHA is to provide information or help obtain advice on any rights that you or your nearest relative may have under the MHA, as well as on any MHA powers being used by professionals who affect you and any medical treatment being considered.

The Secretary of state has made regulations that say that an IMHA must have appropriate training or experience or a combination of both. The Department of Health guidance says that IMHAs should be expected to have successfully completed the IMHA module of the National Advocacy Qualification by the end of the first year in practice. The qualification is modular in structure, consisting of four core modules on generic advocacy and several specialist modules including the IMHA module. There is no requirement to complete the core units before completing a specialist unit. The qualification is approved by City & Guilds.

It may be possible for IMHAs to assist with complaints about your care and treatment under the MHA, attend ward rounds or to resolve problems with the services received under the MHA while in hospital or in the community. Note however that an IMHA cannot represent you at a Mental Health Tribunal but can obtain information needed for a tribunal or assist in other ways, for example finding you a solicitor.
Can I change or complain about my IMHA?
IMHA projects are run by different organisations. There is no cohesive body but most Advocacy projects are signed up to the Advocacy Charter (drawn up by Action for Advocacy). The standard on complaints reads: “The advocacy scheme will have a written policy describing how to make complaints or give feedback about the scheme or about individual advocates. Where necessary, the scheme will enable people who use its services to access external independent advocacy support to make or pursue a complaint.’ So complaint procedures do depend on the policy of the organisation but if you wish to make a compliant they should tell you how to go about it.

Independent Mental Capacity Advocates (IMCAs)
An IMCA represents vulnerable people who lack capacity to make important decisions about serious medical treatment and change of accommodation where they have no family and friends available for consultation about those decisions.

The criteria for appointing an IMCA are:

- The person is aged 16 or over
- A decision needs to be made about either a long-term change in accommodation or serious medical treatment,
- The person lacks capacity to make that decision, and
- There is no one independent of services, such as a family member or friend, willing and able to represent them or be consulted in the process of working out their best interests.

There is a duty to instruct an IMCA where a person who lacks capacity has nobody to represent them in the following circumstances:

- providing, withholding or stopping serious medical treatment;
- moving a person into long-term care in a hospital or care home;
- moving the person to a different hospital or care home.

The only exception to this rule can be where an urgent decision is needed.

The role of the IMCA can be divided into two parts:
• the advocacy role of supporting and representing a person’s wishes and feelings so that they will fully be taken into account; and
• the role of providing assistance for challenging the decision makers when the person has no one else to do this on their behalf

Note that IMCAs do not make decisions on behalf of the person they are representing. This is the responsibility of the ‘best interest’s decision maker’ such as the healthcare professional responsible for the procedure or treatment in question. Like IMHAs, IMCAs are employed by different organizations and referrals are made to them as staff in the NHS or a Local Authority, for example, doctors, care managers and social workers all have a duty under the Mental Capacity Act to instruct an IMCA where the eligibility criteria are met.

Key Point – Detention under Mental Health Act or DOLS?

The advantages to being detained under the Mental Health Act to those being detained under DOLs provisions detailed below, are that you are entitled to appeal to the Mental health tribunal on a regular basis as well as to the managers for your discharge. Further under the MHA for patients who lack capacity to consent to their treatment their treating psychiatrist is obliged to ask an independent doctor (SOAD doctor) to authorise the treatment.

PART TWO
Deprivation of Liberty DOLS

The Mental Capacity Act deprivation of liberty provisions (known as DOLS) are intended to provide protection for vulnerable people who are accommodated in hospitals, hospice or care homes in circumstances that can be said to amount to a deprivation of their liberty and who lack the capacity to consent to the care or treatment needed. In such cases, DOLS provide a lawful way to deprive you of your liberty, provided that this is in your own best interests and necessary to keep you from harm. Guidance says that DOLS should only be used for as short a time as possible and only for a particular treatment plan or course of action.
In order to be subject to DOLS, not only must you be staying in a hospital, hospice or care home but you must meet some qualifying requirements which the supervisory body has to conduct before issuing a DOLs authorisation. The supervisory body is the Local Authority.

In particular they have to carry out a mental capacity assessment to assess whether you lack capacity to decide whether to be admitted to, or remain in, the hospital or care home in which you are being, or will be, deprived of your liberty. In addition a recent case of P v Cheshire West and Chester Council [2012] has redefined the test to be applied if someone is being, or is to be, deprived of their liberty. The test is: *whether you are free to leave your residence and if you are under continuous supervision and control of the staff. If you are not free to leave and are under continuous supervision and control then you are being deprived of your liberty and entitled to the safeguards of DOLS.*

At the moment the DOLS provisions do not apply to people living in supported living arrangements or shared lives schemes so if the Local Authority wanted you detained under DOLS they will have to apply to the Court of Protection for specific authorisation.

They must also carry out a mental health assessment to assess whether you or the person being deprived of liberty is suffering from a mental disorder within the meaning of the Mental Health Act 1983.

Most importantly a best interests assessment must be carried out as it must be in your best interests for you to be subject to the authorisation of DOLS and it must be necessary in order to prevent you from coming to harm and it must be a proportionate response to the likelihood of you suffering harm and the seriousness of that harm.

If a DOLS authorisation is granted by the supervisory body then that body must appoint a representative for you (known as a relevant persons’ representative RPR). That person has a number of powers including asking the supervisory body to review the DOLs. They can also appeal to the Court of Protection against the DOLS.
It is important to know that if the grounds for your detention are met under the Mental Health Act then that Act should usually be used to detain someone rather than the Mental Capacity Act (see flow chart below). The maximum authorisation for DOLS is 12 months but it can also be just for a few weeks. An authorisation can be renewed.

**HOW CAN A DOLS ASSESSMENT/DETENTION BE CHALLENGED?**

A review of your DOLS by the supervisory body can be at any time and it is by an assessor. If you or your RPR appeal against the DOLS to the Court of Protection then Legal Aid is available and it is non means tested as long as you remain deprived of your liberty under the authorisation or by an order of the court so it does not matter what your income is you can receive free legal advice from a solicitor, see above introduction for details of how to find a specialist solicitor. It is advisable to have legal representation.
PART 3
CARE HOMES, COMMUNITY CARE AND THE COURT OF PROTECTION

Community care Services

What am I eligible for?
If you have difficulty in managing your daily care tasks such as showering, toileting, dressing, meal preparation, cleaning, shopping, managing medication, etc as a result of old age, physical or mental health problems, you may be eligible for assistance from a Local Authority under the Community Care legislation. To receive community care services from a Local Authority you initially must be able to satisfy a 3 stage test;

a) You must show you are eligible for assistance by a Local Authority - if you are a British citizen, an EU or EEA national who is a worker or who has immigration status, ie. Discretionary Leave to Remain, Limited Leave to Remain, or Indefinite Leave to Remain, you are eligible for community care assistance from a Local Authority.

b) You must show you have community care needs that meet the criteria for services to be provided (see below).

c) You must have a local connection with the Local Authority you are applying to - if you apply to the Local Authority in whose area you have been living for some time you are likely to satisfy the local connection test.

To access community care assistance there is a two stage process;

Request a community care assessment
Under s.47 of the NHS & Community Care Act 1990 if it appears to a Local Authority that you may be in need of community care services and you are a person to whom they may provide such services, they have a duty to carry out a community care assessment. The assessment process would involve a social worker from the Local Authority meeting with you and assessing what your needs are. As part of the
assessment the social worker must consider the Fair Access to Care Services (FACS) criteria. There are 4 categories; critical, substantial, moderate and low. As a result of a general lack of resources, Local Authorities will only provide services in respect of any tasks you have been assessed to fall within the categories of critical or substantial. Once a conclusion has been reached, if you have been assessed to have community needs that are critical or substantial (which are known as eligible needs), you then go to the next stage. If a Local Authority refuses to assess your community care needs this would be challengeable in the same way as the process described below for challenging an assessment and free legal advice is available from a solicitor to do so.

**Care Plan/ Support Plan**

If you have been assessed to have eligible needs the Local Authority has to prepare a document setting out how they intend to meet your eligible needs. This document is called a Care Plan or Support Plan. You are entitled to be involved in the preparation of your Care / Support Plan through meetings with your social worker. The Plan should set out each eligible need, what services will be provided to meet that need, who is responsible for ensuring the service is provided and by when it should be provided. The Plan should also set out the outcome that is intended to be achieved by the services being provided. Usually, the document is called a Care Plan if the Local Authority is providing the services to you, and if a family member is arranging the assistance through for example direct payments, then it is referred to as a Support Plan.

**What can I do if I am not happy?**

If you are not happy with the conclusion reached by the Local Authority following their assessment of your community care needs or if you do not feel the Care / Support Plan meets your needs, you may be able to challenge it. Any challenge to a decision by a Local Authority must be made by a process called Judicial Review which is an application made to the Administrative Court. Prior to being in a position to make a claim in Judicial Review, the pre-action protocol for Judicial Review must be followed. This involves a formal pre-action letter being sent to the Local Authority and their legal department which sets out the decision being challenged, the reason for the challenge, the action the Local Authority is expected
to take to resolve the dispute and by when. It is usual to provide a Local Authority with 14 days in which to respond to a pre-action letter unless your situation is urgent. If a satisfactory response is not received within the time limit provided an application can be made for public funding (Legal Aid, if required) and a solicitor will consider and prepare an application for Judicial Review to be issued in the Administrative Court for the Court to consider whether the Local Authority's decision is lawful.

**Court of Protection (COP)**

**What does the COP deal with?**
The COP has jurisdiction to deal with matters in respect of those who lack mental capacity to make decisions for themselves. The relevant legislation is the Mental Capacity Act 2005. Issues that the COP can deal with include where a person should reside, what medical treatment they should receive, who should or should not be able to visit them, who should deal with their property and affairs, etc.

**When is an application to the COP useful?**
An application to the COP can be useful to resolve disputes between families and Local Authorities or between different family members regarding the care that should be provided to elderly or mentally incapacitated individuals. This can include whether they should be provided with care in their own homes or placed in a care home, with whom they should reside, who can visit them, and what would be an appropriate care home to meet the person's needs, in terms of location, type of facility, etc.

Before placing someone in a care home against their wishes, a Local Authority should have carried out a community care assessment which concluded the best or only way to meet the person's needs is by a placement in residential care, with reasons for the decision. This will enable you to seek legal advice as to whether the decision is challengeable or not, either through the Judicial Review procedure referred to above or through COP proceedings.

**What is needed to make an application to the COP?**
If an application is being made to the COP it must be supported by a witness statement setting out the reasons for the application and what is being sought. If possible it should also be accompanied by evidence from an appropriately qualified
medical professional that the person in question lacks mental capacity. The COP will consider the application and make an order with directions. In most cases a directions hearing is listed to determine how the case will proceed to trial. Further witness statements will need to be prepared and in most cases, independent expert evidence will need to be obtained before the final hearing to assist the COP to make a decision.

Obtaining Legal Advice

Who can seek legal advice?
A person entitled to community care services can seek legal advice regarding obtaining an assessment, challenging an assessment, securing a valid care plan or support plan or to challenge the services being offered. If the person lacks capacity to instruct a solicitor, a family member who can give instructions on their behalf, can seek legal advice, although the person lacking capacity will technically be the client. In respect of COP proceedings, the person lacking capacity can be represented through a family member who is able to instruct a solicitor on their behalf, or if the dispute is between family members, each family member can seek their own legal advice.

Who can obtain free legal advice?
Legal Aid is means tested in this area. Anyone in receipt of income support, income based employment support allowance, or guaranteed pension credit, is likely to be eligible for legal aid (unless you have large savings or a partner with large savings). Those on low incomes with dependant children may also be eligible. An eligibility calculation can be done to see if you are financially eligible for legal aid (link to online calculator). If you are not eligible for legal aid, assistance can be provided on a private basis and reduced rates can be agreed if required.

You will need a firm of solicitors which specialises in this work and there are solicitor locators on the Law Society and Legal Aid Agency websites detailed above. When choosing a solicitor be sure to confirm if required whether they undertake Legal Aid work.
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