EXPLANATORY MEMORANDUM TO

THE COURT OF PROTECTION (AMENDMENT) RULES 2009

2009 No. 582 (L.4)

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

2. Purpose of the instrument

2.1.These Rules amend the Court of Protection Rules 2007 principally by adding new Part 10A, consisting of new rule 82A, which introduces a new practice direction (a copy of which is attached for the Committee's information) setting out procedure for dealing with applications to the Court of Protection under the deprivation of liberty provisions inserted into the Mental Capacity Act 2005 by the Mental Health Act 2007 and which come into force on 1st April 2009. There are supporting amendments to the definition of P in rule 6 (interpretation) and to rule 51 (where the court's permission is not required).

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

3.1 None

4. Legislative Context

4.1 This instrument amends the Court of Protection Rules 2007 by adding a supporting rule relating to the new deprivation of liberty jurisdiction inserted into the Mental Capacity Act 2005 by section 50 of, and Schedules 7, 8 and 9 to, the Mental Health Act 2007.

4.2 The Mental Capacity Act 2005 provides a statutory framework for people who lack the mental capacity to make their own decisions. It sets out who can take decisions, in which situations, and how they should go about this. It contains principles, procedures and safeguards to empower people to make as many decisions themselves as they can and to play as full a part as possible in the decision-making process when they lack the capacity to make a decision. The Act also enables people to make provision for a time in the future when they may lack the capacity to make some decisions.

4.3 The deprivation of liberty safeguards have been introduced into the Mental Capacity Act 2005 by the Mental Health Act 2007 (the timing of the passage through Parliament of the Mental Health Act 2007 made it a suitable vehicle through which to introduce the deprivation of liberty safeguards into the Mental Capacity Act 2005).

4.4 The deprivation of liberty safeguards legislation contains detailed requirements about when and how deprivation of liberty may be authorised. The safeguards provide an assessment process that must be undertaken before deprivation of liberty may be authorised and detailed arrangements for continuing and challenging the authorisation of deprivation of liberty. The legislation is due to come fully into force on 1st April 2009.

4.5 The rules are made by the Lord Chief Justice (or his judicial nominee) with the agreement of the Lord Chancellor. The Lord Chief Justice has nominated the President of the Court of Protection to make the new Rules.

5. Territorial Extent and Application

5.1 These Rules apply to England and Wales only.

6. European Convention on Human Rights

6.1 As the Rules are subject to the negative resolution procedure and do not amend primary legislation, no statement is required.

7. Policy background

Deprivation of Liberty safeguards

7.1 The deprivation of liberty safeguards are a response to the European Court of Human Rights (ECtHR) judgement in *H.L. v the United Kingdom* (2004)**1**. The ECtHR found that an autistic man with a learning disability, who lacked the capacity to decide about his residence and medical treatment, and who had been admitted informally to hospital, was unlawfully deprived of his liberty in breach of Article 5 of the ECHR.

7.2 The safeguards 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 protect them from harm, in either hospitals or care homes.

7.3 This is achieved by introducing a system for "authorising" deprivation of liberty based on assessments to determine whether six "qualifying requirements" are met. A "standard" authorisation should normally be obtained in advance of deprivation of liberty commencing but an "urgent" authorisation may be given, as a preliminary to obtaining a standard authorisation, if the need for a person to be deprived of liberty is so urgent that it is appropriate for the deprivation to begin before the standard authorisation process can be completed.

1 (2004) 40 EHHR 761.

Schedule 9 to the Mental Health Act 2007 inserted new section 21A into the Mental Capacity Act 2005 giving the Court of Protection the power to determine appeals against urgent or standard authorisations.

8. Consultation outcome

8.1 The deprivation of liberty safeguards policy was the subject of a formal consultation exercise run by the Department of Health for a period of 12 weeks between March and June 2005. This consultation invited responses to outline proposals for addressing the legal shortcomings identified by the ECtHR in its 2004 judgement. The consultation document**2** identified three possible options. The deprivation of liberty safeguards have been developed from the option that received most support within the consultation responses. A report on the outcome of the consultation process was published on 29th June 2006**3**. At the same time, an announcement was made setting out the proposed deprivation of liberty safeguards policy.

8.2 There was a further formal 12 week consultation exercise between September 2007 and December 2007. This consultation was about deprivation of liberty safeguards Code of Practice guidance and two sets of deprivation of liberty safeguards regulations**4**. A report on the outcome of the consultation was published on 9 June 2008**5**.

8.3 A group comprising of members of the legal profession with experience of the operation of the current court and cases that have contained deprivation of liberty issues have provided advice on the development of the Rules particularly with respect to their practicality and workability. We have also had the assistance of the Court of Protection and High Court judiciary in developing the Amendment Rules and associated Practice Direction.

9. Guidance

9.1 The main source of guidance about the deprivation of liberty safeguards is the Code of Practice**6** that was laid in draft before Parliament on 13 June 2008, and was subsequently published on 26 August 2008.

9.2 A range of further guidance will be available through the website www.hmcs.gov.uk.

10. Impact

2 http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_4113613
3 http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_4136791
4 The consultation papers can be accessed at: http://www.dh.gov.uk/en/Consultations/Closedconsultations/DH_078052
5 http://www.dh.gov.uk/en/Consultations/Responsestoconsultations/DH_085353
6 http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

10.1 It is the considered view of the department that no impact on the private or voluntary sector is foreseen.

11. Regulating small business

11.1 The legislation does not apply to small businesses.

12. Monitoring & review

12.1 With effect from 1 April 2009 the Court of Protection will become part of Her Majesty's Court Service and therefore monitoring and review will fall under that department.

13. Contact

13.1 Any enquiries about the contents of this memorandum should be addressed to

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PRACTICE DIRECTION

DEPRIVATION OF LIBERTY APPLICATIONS

This practice direction supplements Part 10A of the Court of Protection Rules 2007

Introduction

1.1 This practice direction sets out the procedure to be followed in deprivation of liberty ("DoL") applications. "DoL applications", for these purposes, means applications to the court for orders under section 21A of the Mental Capacity Act 2005 relating to a standard or urgent authorisation under Schedule A1 of that Act to deprive a person of his or her liberty; or proceedings (for example, relating to costs or appeals) connected with or consequent upon such applications. By their nature, such applications are of special urgency and therefore will be dealt with by the court according to the special procedure described here. Other applications may, while not being DoL applications within the meaning of the term explained above, raise issues relating to deprivation of liberty and require similarly urgent attention; and while the special DoL procedure will not apply to such applications, they should as explained in paragraph 3.4 be raised with the DoL team at the earliest possible stage so that they can be handled appropriately. The key features of the special DoL procedure are:

a) special DoL court forms ensure that DoL court papers stand out as such and receive special handling by the court office;

b) the application is placed before a judge of the court as soon as possible – if necessary, before issue of the application – for judicial directions to be given as to the steps to be taken in the application, and who is to take each step and by when;

c) the usual Court of Protection Rules (for example, as to method and timing of service of the application) will apply only so far as consistent with the judicial directions given for the particular case;

d) a dedicated team in the court office ("the DoL team") will deal with DoL applications at all stages, including liaison with would-be applicants/other parties;

e) the progress of each DoL case will be monitored by a judge assigned to that case, assisted by the DoL team.

Before issuing an application

2.1 Potential applicants should contact the DoL team at the earliest possible stage before issuing a DoL application. Where this is not possible, the applicant should liaise with the DoL team at the same time as, or as soon as possible after, lodging the application. The DoL team can be contacted by telephone in the first instance and by fax.

2.2 The information that the DoL team needs, with as much advance warning as possible, is (1) that a DoL application is to be made; (2) how urgent the application is (i.e., by when should the Court's decision, or interim decision, on the merits be given); and (3) when the Court will receive the application papers. In extremely urgent cases, the DoL team can

arrange for a telephone application to be made to the judge for directions and/or an interim order even before the application has been issued. Further brief details should be given which may include:

- the parties' details
- where the parties live
- the issue to be decided
- the date of urgent or standard authorisation
- the date of effective detention
- the parties' legal representatives
- any family members or others who are involved
- whether there have been any other court proceedings involving the parties and if so, where.

2.3 Contact details for the DoL team are:

Court of Protection
DoLs Application Branch
Archway Tower
2 Junction Road
London
N19 5FZ

DX 141150 Archway 2

Telephone: 0845 330 2900
Fax: 020 7664 7712

2.4 The court office is open for personal attendance between the hours of 10 a.m. to 4.00 p.m. on working days. The DoL team can receive telephone calls and faxes between the same hours. Faxes transmitted after 4.00 p.m. will be dealt with the next working day.

2.5 When in an emergency it is necessary to make a telephone application to a judge outside normal court hours, the security office at the Royal Courts of Justice should be contacted on 020 7947 6000. The security officer should be informed of the nature of the case. In the Family Division, the out-of-hours application procedure involves the judge being contacted through a Family Division duty officer, and the RCJ security officer will need to contact the duty officer and not the judge's clerk or the judge.

2.6 Intending applicants/other parties may find it helpful to refer to:

- the *Code of Practice Deprivation of Liberty Safeguards* (June 2008), *ISBN* 978-0113228157, supplementing the main *Mental Capacity Act 2005 Code of Practice:* in particular Chapter 10, *What is the Court of Protection and who can apply to it?*; and

- the judgment of Mr Justice Munby in *Salford City Council v. GJ, NJ and BJ (Incapacitated Adults)* [2008] EWHC 1097 (Fam); [2008] 2 FLR 1295. Although this case was decided before the coming into force of the DoL amendments to the Mental Capacity Act 2005, it sets out helpful guidance on the appropriate court procedures for cases relating to the deprivation of liberty of adults.

2.7 The DoL team will be pleased to explain the court's procedures for handling DoL cases. Please note that the team (as with all court staff) is not permitted to give advice on matters of

law. Please do not contact the DoL team unless your inquiry concerns a deprivation of liberty question (whether relating to a potential application, or a case which is already lodged with the Court).

DoL court forms

3.1 The special DoL court forms are as follows:

- *DLA: Deprivation of Liberty Application Form*: to be used for all DoL applications;

- *DLB: Deprivation of Liberty Request for Urgent Consideration*: this short form allows applicants to set out the reasons why the case is urgent, the timetable they wish the case to follow, and any interim relief sought. A draft of any order sought should be attached. Ideally, the DLB (plus any draft order) should be placed at the top of the draft application and both issued and served together;

- *DLC: Deprivation of Liberty Permission Form*: P (the person who is being, or may be, deprived of his/her liberty); and P's appointed representative, attorney or deputy do not need the court's permission to make a DoL application. Anyone else (including family members) needs permission.

  Where the applicant needs permission to make a DoL application, the DLC form should be lodged and served together with a draft of the DLA and, where appropriate, the DLB. The DLB should always be placed at the top of the papers and (where this is so) mention that permission is required and that a completed DLC is attached;

- *DLD: Deprivation of Liberty Certificate of Service/non-service and Certificate of notification/non-notification*;

- *DLE: Deprivation of Liberty Acknowledgement of service/notification*.

These forms can be obtained from the Court of Protection office or downloaded from the court's website www.hmcs.gov.uk.

3.2 To ensure that papers relating to DoL applications are promptly directed to the DoL team at the court, it is essential that the appropriate DoL court forms are used.

3.3 The DoL court forms should be used for, and only for, DoL applications. If in such a case it is anticipated that other issues may arise, the DoL forms should identify and describe briefly those issues and any relief which may be sought in respect of them: sections 3.5 and 5 of form DLA, the Deprivation of Liberty Application Form, offer an opportunity to do this. "Other issues" are perhaps most likely to arise in the event that the court decides the DoL application in the applicant's favour. In such a case, if the applicant has already identified the "other issues" in his/her form DLA, the court will be able to address these, either by dealing with them immediately or by giving directions for their future handling.

3.4 Accordingly, unless the court expressly directs, applicants should not issue a second and separate application (using the standard court forms) relating to any "other issues".

3.5 Where an application seeks relief concerning a deprivation of P's liberty other than under section 21A in respect of a standard or urgent authorisation (for example, where the application is for an order under section 16(2)(a)), the dedicated DoL court forms should not be used. Rather the standard court forms should be used for such an application, but it should be made clear on them that relief relating to a deprivation of P's liberty is being sought, and

the proposed applicant should contact the DoL team to discuss handling at the earliest possible stage before issuing the application.

How to issue a DoL application

4.1 To issue a DoL application, the following forms should be filed at court:

form DLA
form DLB (plus draft order)
form DLC if appropriate
court fee of £400.00

Where a draft order is lodged with the court, it would be helpful – although not compulsory - if an electronic version of the order could also be lodged on disc, if possible.

4.2 In cases of extreme emergency or where it is not possible to attend at the court office, for example during weekends, the court will expect an applicant to undertake to file forms DLA and DLC and to pay the court fee unless an exemption applies.

Inviting the court to make judicial directions for the handling of the application

5.1 The following is a sample list of possible issues which the court is likely to wish to consider in judicial directions in a DoL case. It is intended as a prompt, not as a definitive list of the issues that may need to be covered:

- upon whom, by when and how service of the application should be effected;

- dispensing with acknowledgement of service of the application or allowing a short period of time for so doing, which in some cases may amount to a few hours only;

- whether further lay or expert evidence should be obtained;

- whether P/the detained person should be a party and represented by the Official Solicitor and whether any other person should be a party;

- whether any family members should be formally notified of the application and of any hearing and joined as parties;

- fixing a date for a First Hearing and giving a time estimate;

- fixing a trial window for any final hearing and giving a time estimate;

- the level of judge appropriate to hear the case;

- whether the case is such that it should be immediately transferred to the High Court for a High Court Judge to give directions;

- provision for a bundle for the judge at the First Hearing.

5.2 If you are an applicant without legal representation, and you are not sure exactly what directions you should ask for, you may prefer simply to invite the judge to make appropriate directions in light of the nature and urgency of the case as you have explained it on the DLB form. In exceptionally urgent cases, there may not be time to formulate draft directions: the

court will understand if applicants in such cases (whether or not legally represented) simply ask the judge for appropriate directions.

After issue of the application

6.1 The DoL team will immediately take steps to ensure that the application is placed before a judge nominated to hear Court of Protection cases and DoL applications. During working hours, the application will be placed before a Judge at Archway Tower. Out of hours, at weekends and on public holidays, the application will be placed before the judge who is most immediately available.

6.2 As soon as the court office is put on notice of a DoL application, the DoL team will notify a judge to put the judge on stand-by to deal with the application. The judge will consider the application on the papers and make a first order.

Steps after the judge's first order

7.1 The DoL team will:

- action every point in the judge's note or instruction;
- refer any query that arises to the judge immediately or, if not available, to another judge;
- make all arrangements for any transfer of the case to another court and/or for a hearing.

7.2 The applicant or his/her legal representative should follow all steps in the judge's order and:

- form DLD should be filed with the court if appropriate; and
- form DLE should be included in any documents served unless ordered otherwise.

The First Hearing

8.1 The First Hearing will be listed for the court to fix a date for any subsequent hearing(s), give directions and/or to make an interim or final order if appropriate. The court will make such orders and give such directions as are appropriate in the case.

8.2 The court will aim to have the First Hearing before a judge of every DoL application within 5 working days of the date of issue of the application.

8.3 Applicants can indicate on the DLB form if they think that the application needs to be considered within a shorter timetable, and set out proposals for such a timetable. On the first paper consideration the court will consider when the First Hearing should be listed.

8.4 If time allows and no specific direction has been made by the court, an indexed and paginated bundle should be prepared for the judge and any skeleton arguments and draft orders given to the court as soon as they are available. A copy of the index should be provided to all parties and, where another party appears in person, a copy of the bundle should be provided.

Hearing in private

9.1 Part 13 of the Court of Protection Rules 2007 provides at rule 90, as supplemented by Practice Direction A to Part 13, that the general rule is that a hearing is held in private. Rule 92 allows the court to order that a hearing be in public if the criteria in rule 93 apply.

Costs

10.1 The general rule, in rule 157 of the Court of Protection Rules 2007, is that in a health and welfare case there will be no order as to costs of the proceedings. The general rule applies to DoL applications.

Appeals

11.1 Part 20 of the Court of Protection Rules 2007 applies to appeals. Permission is required to appeal (rule 172) and this will only be granted where the court considers that the appeal would have a real prospect of success or there is some other compelling reason why the appeal should be heard (rule 173).