

MENTAL HEALTH ACT COMMISSION

Guidance Note



THE MENTAL HEALTH ACT CODE OF PRACTICE: SUGGESTED ANNOTATIONS TO REFLECT CASELAW AND OTHER CHANGES SINCE PUBLICATION

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The Mental Health Act 1983 Code of Practice is prepared by the Secretary of State after consultation, and passed by negative resolution in both Houses of Parliament. The current edition was laid before Parliament in December 1998 and came into force on the 1 April 1999. Although the Mental Health Act Commission has responsibility for submitting proposals to the Secretary of State on the content and revision of the Code, it has no powers of its own to change that content or effect such revision.

This Guidance Note sets out, for the convenience of practitioners, those parts of the Code of Practice that have been rendered incorrect through judicial ruling or changes of fact since its publication. We have indicated such parts by reproducing the relevant sentence in context, and showing the part that is no longer valid as crossed-through. To avoid giving the misleading impression that we are entitled to substitute 'correct' wording, we have provided commentary on the deletions without suggesting replacement text.

1. Ethnic categories

1.13 Authorities and Trusts should keep records of the ethnicity of all patients admitted under the Act. ~~The NHS Executive's Information Management Group guidance *Collecting ethnic group data for admitted patient care – implementation guidance and training material (Department of Health 1994)* should be followed.~~ The Department of Health's standard ethnicity codes should be used, namely:

- ~~0 White~~
- ~~1 Black Caribbean~~
- ~~2 Black African~~
- ~~3 Black other~~
- ~~4 Indian~~
- ~~5 Pakistani~~
- ~~6 Bangladesh~~
- ~~7 Chinese~~
- ~~8 Any other~~
- ~~9 Not given~~

and should establish a system to monitor admissions by race and sex.

1.1 Authorities and Trusts should keep records of all patients admitted under the Act, but not classified according to the outdated NHS guidance and ethnic census categories listed at paragraph 1.13 of the Code are no longer current.

1.2 From April 2001 the Department of Health and the NHS have used a new set of 16 ethnic categories in line with those developed for the 2001 Population Census by the Office for National Statistics and the Commission for Racial Equality. Guidance on the use of the Codes is available from the DH website¹.

1.3 The current ethnic categories and their coding are listed below:

Ethnicity		Code ²
White	British	A
White	Irish	B
White	Any other White background	C
Mixed	White and Black Caribbean	D
Mixed	White and Black African	E
Mixed	White and Asian	F
Mixed	Any other mixed background	G
Asian or Asian British	Indian	H
Asian or Asian British	Pakistani	J
Asian or Asian British	Bangladeshi	K
Asian or Asian British	Any other Asian background	L
Black or Black British	Caribbean	M
Black or Black British	African	N
Black or Black British	Any other Black background	P
Other ethnic groups	Chinese	R
Other ethnic groups	Any other ethnic group	S
Not stated		Z

¹ http://www.dh.gov.uk/PublicationsAndStatistics/Statistics/StatisticalCollection/StatisticalCollectionArticle/fs/en?CONTENT_ID=4049499&chk=vi2KKe

² Although the 16+1 ethnic categories are the Departmental standard from 1 April 2001 it should be noted that the coding structures to record these categories may vary for different collections. While the codes for Admitted Patient Care, Hospital Episode Statistics and NHS Workforce data collections are as shown, some other central data collections may use different coding structures. The Department will advise data collectors of the coding structure to be used for other collection exercises as they occur.

2. Contacting Nearest Relatives for applications under section 3

2.16 Consultation by the ASW with the nearest relative about possible application for admission under section 3 or reception into guardianship, is a statutory requirement unless it is not reasonably practicable or would involve unreasonable delay (section 11(4)). Circumstances in which the nearest relative need not be informed or consulted include those where the ASW cannot obtain sufficient information to establish the identity or location of the nearest relative or where to do so would require an excessive amount of investigation. ~~Practicability refers to the availability of the nearest relative and not to the appropriateness of informing or consulting the person concerned.~~ If the ASW has been unable to consult the nearest relative before making an application for admission for treatment (section 3) he or she should persist in seeking to contact the nearest relative so as to inform the latter of his or her powers to discharge the patient under section 23. The ASW should inform the hospital as soon as this has been done.

- 2.1 On 13 January 2005 the High Court made a declaration that in determining whether it is practicable to consult and/or inform the nearest relative, ASWs may (and should) consider whether doing so would lead to a breach of the patient's rights under Article 8 of the European Convention of Human Rights (right to respect for private and family life)³. Bennett J ruled that it was possible to interpret the words 'practicable' and 'reasonable' in s.11 of the 1983 Act so as to take account of the claimant's wishes and her health and well-being. In doing so, it specifically rejected the advice in paragraph 2.16 of the Code of Practice that "practicability refers to the availability of the nearest relative and not to the appropriateness of informing or consulting the person concerned." The Department of Health has accepted that the Code's advice in this sentence is no longer correct.
- 2.2 The Court suggested that ASWs should not invoke impracticality lightly as a reason for excluding Nearest Relative, given the significant role given by Parliament to Nearest Relatives in the protection of patients. On the other hand, there may be circumstances where involving the nearest relative would lead to an infringement of the patient's rights which could not be justified by the benefit of that involvement.

If you have questions on the content of this guidance note, or comments or suggestions for future editions, please contact:

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³ *R (on the application of E) v Bristol City Council* (Administrative Court, 13 January 2005)

3. Previous acquaintance in medical recommendations

2.29 Unless there are exceptional circumstances, the second medical recommendation should be provided by a doctor with previous acquaintance with the patient ~~(that is, one who knows the patient personally in his or her professional capacity)~~. This should be the case even when the 'approved' doctor (who is, for example, a hospital based consultant) already knows the patient. Where this is not possible (for example the patient is not registered with a GP) it is desirable for the second medical recommendation to be provided by an 'approved' doctor (see paras 2.41 and 2.42).

3.1 The High Court has overturned the Code's implication that 'previous acquaintance' requires personal knowledge⁴. The judge determined that the 1983 Act provides 'no indication of the extent of the previous acquaintance that is necessary' and that 'the words "previous acquaintance" are ordinary English words which have to be interpreted according to the circumstances of the particular case' (para 11). In the case in dispute, a general practitioner who had had met the patient briefly immediately before attending a ward-round and scanning the patient's notes was deemed to have 'previous acquaintance'⁵.

4. Nurse's holding power (section 5(4))

9.1 A psychiatric emergency requires the urgent attendance of a doctor. In practice, a doctor may not be immediately available. This chapter sets out the circumstances in which a nurse of the "prescribed class"⁴ may lawfully prevent an informal in-patient, receiving medical treatment for mental disorder, from leaving the hospital.

⁴ Defined in the relevant orders as "a nurse registered in Part 3 (first level nurses trained in the nursing of persons suffering from mental illness) or Part 5 (first level nurses trained in the nursing of persons suffering from mental handicap) or Part 14 (nurses qualified following a course of preparation in learning disabled nursing)" of the professional register established under section 10 of the Nurses, Midwives and Health Visitors Act 1997]

4.1 The categories of nursing qualification described in the register maintained under s.7 of the Nurses, Midwives and Health Visitors Act 1997 have now changed. The Nursing and Midwifery Council has confirmed to the MHAC that the qualifications falling into 'the prescribed class' are now described as follows:

- Registered Nurse Mental Health Level 1
- Registered Nurse Mental Health Level 2
- Registered Nurse Learning Disability Level 1
- Registered Nurse Learning Disability Level 2.

⁴ *AR (by her litigation friend JT) v Bronglais Hospital and Pembrokeshire & Derwen NHS Trust* [2001] EWHC Admin 792

⁵ See Richard Jones (2004) *Mental Health Act Manual*, Ninth edition, para 1-134 (p90).

5. Renewing detention whilst a patient is on leave

- 5.1 The version of the Code of Practice available from the Department of Health website⁶ differs slightly from the print version of the Code published in 1999⁷. The website version deletes the last clause (“if the RMO thinks...” etc) of the print-version extract reproduced below. Our suggested annotation is less drastic:

20.13 A period of leave cannot last longer than the duration of the authority to detain which was current when leave was granted. If the authority to detain an unrestricted patient might expire whilst the patient is on leave the RMO may examine the patient and consider writing a report renewing the detention when the patient is still on leave, if the RMO thinks that further formal ~~in-patient~~ treatment is necessary and the statutory criteria are met¹³.

- 5.2 In this printing the footnote indicated by a superscript “13” is missing from the foot of the page. It originally referred to the first instance judgment in *R v Managers of Warley Hospital Ex p Barker [1998] COD 309*⁸, which has now been superseded.
- 5.3 The Court of Appeal ruled in 1999 that it was not necessary for a patient to be an ‘inpatient’ at the time that detention was renewed, but that it was sufficient for the patient’s care plan to include periods of treatment in hospital⁹. Subsequent cases have broadened the renewal criteria even further, with the most recent case to date ruling that it is an illogical gloss on s. 20(4)(c) of the 1983 Act to read ‘treatment in hospital’ to imply an element of *inpatient* treatment¹⁰. Therefore, in order for the renewal of a patient’s detention to be lawful when s/he is on leave, s/he must be receiving, or must be expected to receive, hospital treatment (including, for example, attending hospital-based outpatient appointments or ward-rounds) and this must make up a significant component of his or her care plan.

6. Management structure of high security services.

22.1 The Hospital Managers have a central role in operating the provisions of the Act. In England and Wales, in general, NHS Hospitals are owned by NHS trusts. For these hospitals the Trusts themselves are defined as the "managers" for the purposes of the Act. ~~But the three special hospitals are owned by the Secretary of State and Hospital Managers' functions are exercised on behalf of the Secretary of State by the Special Health Authorities which have been set up to manage those hospitals as Special Hospital Authorities.~~ In the case of a mental nursing home the person or persons in whose name the home is registered are managers for the purposes of the Act.

- 6.1 Although its is not of great consequence to many practitioners, the deleted sentence above no longer accurately reflects the management structure of the three ‘special hospitals’ forming high security services. These are now part of larger NHS Trusts, who are the “managers” of their respective hospitals for the purposes of the Act.

⁶ <http://www.dh.gov.uk/assetRoot/04/07/49/61/04074961.pdf>

⁷ Department of Health and Welsh Office (1999) *Mental Health Act Code of Practice* (Stationery Office, ISBN 0 11 322111-8)

⁸ The footnote is still reproduced as such in Richard Jones' *Mental Health Act Manual*, Ninth Edition, 2004, page 719

⁹ *B v Barking Havering & Brentwood Community Healthcare NHS Trust* [1999] 1 FLR 106

¹⁰ *R (on the application of D.R.) v Mersey Care NHS Trust* [2002] EWHC 1810 Admin; [2002] MHLR 386. See MHAC (2003) *Placed Amongst Strangers : Tenth Biennial Report*, Chapter 9.47 *et seq* for a discussion of this ruling.

7. Mental Health Act Commission Guidance Notes

7.1 Annex A of the Code of Practice provides a list of Mental Health Act Commission Guidance Notes from 1999. An updated list follows below.

7.2 The Commission publishes guidance notes (formerly called practice notes) to give advice on particular issues drawn to its attention. The guidance notes will generally refer to matters not included in the Mental Health Act Code of Practice. Occasionally they will provide amplification or explanation by the Commission of the Code. Only the courts can give any authoritative interpretation of the law; and in the absence of such an interpretation, the Commission's view can at best only be informed opinion and must not be treated as, or substituted for, professional legal advice.

7.3 The guidance notes were reviewed and reissued in May 2004, and will be reviewed every two years hereafter. We welcome any comments on the contents of the guidance notes. All guidance notes can be found on the Commission's website at www.mhac.org.uk, and single copies are available upon request from the Policy Unit at the MHAC office. The MHAC encourages authorities to reproduce its guidance notes for distribution.

- Guidance of the administration of Clozapine and other treatments requiring blood tests under the provisions of the Mental Health Act.
- Scrutinising and rectifying statutory forms for admission under the Mental Health Act.
- General Practitioners and the Mental Health Act
- Use of the Mental Health Act in general hospitals without a psychiatric unit.
- Issues relating to the administration of the Mental Health Act in Independent Hospitals
- Issues surrounding sections 17, 18 and 19 of the Mental Health Act 1983.
- Guidance on the treatment of Anorexia Nervosa under the Mental Health Act 1983.
- Nurses, the administration of medicine for mental disorder and the Mental Health Act 1983.
- Guidance for Responsible Medical Officers following the *PS* case.
(*R (on the application of PS) v (1) Responsible Medical Officer Dr. G, (2) Second Opinion Appointed Doctor Dr. W.*)
- Guidance for Responsible Medical Officers: *R (on the application of Wooder) v Dr Feggetter and the Mental Health Act Commission*
- Guidance for Second Opinion Appointed Doctors: *R (on the application of Wooder) v Dr Feggetter and the Mental Health Act Commission*
- The Status of the Code of Practice following the *Munjaz* Judgement.
(*R (on the application of Colonel Munjaz) v Mersey Care NHS Trust and (1) Secretary of State for Health and (2) Mind; S v Airedale NHS Trust and (1) Secretary of State for Health and (2) Mind [2003] EWCA Civ 1036*)
- The Mental Health Act Code of Practice: suggested annotations to reflect case law and other changes since publication