Mental Health Alliance

Code of Practice

House of Lords Committee Stage Briefing

Page 1, line 4 insert the following new Clause -

"( ) After Section 118 of the 1983 Act, insert the following new Clause:

"**(1118A) Code of Practice Duty**

(1) It is the duty of a person to have regard to the code if he is acting in relation to a patient and is doing so in a professional capacity.

(2) If it appears to a court or tribunal conducting any criminal or civil proceedings that either,
(a) a provision in the code, or
(b) a failure to comply with the code
is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question.

(3) The Code must be followed unless there is good reason for departing from it in relation to an individual patient. The reasons for departing from the Code must be recorded."

Purpose of the amendment

To impose a legal duty on mental health professionals to comply with the Code of Practice to the Mental Health Act 1983 except where it is not possible in the circumstances of the case.

Briefing

The status of the Code of Practice is central to the proper safeguarding of patients' rights under the Act. As the Mental Health Act Commission has stated,

> "Government therefore has a role through its Code of Practice in providing guidance and standards to ensure that rights are respected by different authorities; to provide transparency and predictability in the operation of the law; and, not least, to help authorities avoid spending time and other resources "re-inventing wheels" in drawing up policies and attending to their own practice."[1]

[1] Placed Amongst Strangers: Twenty Years of the Mental Health Act 1983 and Future Prospects for Psychiatric Compulsion: Tenth Biennial Report 2001-2003; Mental Health Act Commission 2003. Page 68, Paragraph 6.23

The Draft Illustrative Code of Practice to the Mental Health Bill states that 'the people to whom it is addressed should not depart from the guidance contained in it without cogent reasons."[2] The Alliance believes that this provision is deficient for two reasons:

- the Code of Practice still does not have statutory force
- the reasons which would justify departures from the Code are too wide

The status of the Code

Normally codes of practice are given 'higher status' in one of two ways:

1. They issued under the section 7 of the Local Authority Social Services Act 1970 and this must be clearly stated in the preface to any such code. This gives the guidance a higher status and means that it must be complied with unless there are exceptional reasons for not doing so. An examples of 'section 7 guidance' is 'the Framework for the Assessment of Children in Need and their Families'. Other guidance not issued under section 7 is not law but ought to be followed.

2. The primary legislation includes a clear statement about the status of the code of practice. For example section 42 of the Mental Capacity Act 2005 explicitly states it is the duty of certain people (who are listed – such as professionals and advocates) to have regard to the Code of Practice.

However the Code of Practice for the Mental Health Act 1983 was not issued under section 7 of the Local Authority Social Services Act 1970 (nor the health service equivalent - section 2(b) of the NHS Act 1977). Furthermore there is explicit statement in the Mental Health Act about the status of the Code. This has led to widespread confusion about the exact status of the Code.[3]

We accept that case law has clarified that the Code is "more than mere advice which the addressee is free to follow or not as it chooses…it is more than something to which those to whom it is addressed must 'have regard to." This is to be welcomed but it is unlikely that many busy mental health practitioners will be fully aquainted with the detail of case law – indeed most research shows that to many practitioners the law is a 'foreign land and certainly an unfamiliar language.'[4]

We believe the exact status of the Code needs to be clearly stated on the face of the Mental Health Act to mental health practitioners are left in no doubt that it has statutory force which must be followed.

The Richardson Committee decided against recommending that the Code should have statutory force because they argued some parts of the Code operate more as good practice than as details of the implementation of the act itself. However this may not necessarily be an obstacle if it were clearly stated which parts of the Code were to have statutory force (e.g. seclusion and restraint provisions) and which were to operate as Good Practice. The Part III Code of Practice of the Disability Discrimination Act is an example of a Code that successfully combines good practice with interpretation of legal obligations. Similarly the Mental Capacity Act Code of Practice includes both best practice and statutory requirement.

Case law has established that there are only express circumstances where clinicians can depart from the Code. The Alliance believes that if there is any departure from the Code, the

[2] Draft Illustrative Code of Practice para 4
[3] This is evidenced in the Munjaz case where the Court of Appeal and the House of Lords came to different conclusions about the status of the Code (R (on the application of Munjaz) v Mersey Care NHS Trust [2003] MHLR 362)
[4] 'Decision making in Mental Health Law' (2005) Jill Peay

reasons for doing so must be recorded. Tribunals should also be bound by the principles when making decisions about a patient.

Departure from the Code

In R v Munjaz [2003] the Court of Appeal decided that, on the basis that only a strong Code could ensure transparency and predictability for detained patients, that the Code must be followed unless there is good reason for departing from it in relation to an individual patient.[5] This decision was widely welcomed.

However in 2005 this decision was over turned by the House of Lords by a majority of three to two. It was stressed that the Code should be followed unless there are cogent reasons for not doing so, however it also made clear that detaining authorities may lawfully apply their own policies which may depart from the Code provided that they do not in themselves breach the European Convention on Human Rights. Before this ruling policy level departures from the Code – for example on seclusion - would have been unlawful. Therefore it no longer has the elevated status given it by the Court of Appeal.

We believe that this judgment has left service users and their relatives, as well as professionals, without anything which to measure the standard of care provided or received under the Mental Health Act. The human rights of vulnerable people are not promoted by creating inconsistency between hospitals on important matters and uncertainty for staff and patients alike.

The Alliance is further concerned at the impact of the decision on the new Code of Practice under the Mental Health Bill. The Bill has been written - unlike the Mental Health Act - with a view to placing significant safeguards and protections in the Code, without the same quality and level of protection appearing on the face of the primary legislation.

The Alliance recommends wording in the Act which reinstates the Court of Appeal judgment in the Munjaz case[6] that all practitioners operating or discharging duties under the Mental Health Act should do so in accordance with the principles and specific guidance provided by the Mental Health Act Code of Practice, except where individual clinical need demands departure from that specific guidance.

This also reflects the dissenting speech of Lord Steyn who derided the majority view as 'a lowering of the protection offered by the law to mentally disordered patients' and 'a set-back for a modern and just mental health law'.[7] Neither dissenting judge was convinced by the majority's emphatic rejection that the judgment created discretion for hospitals to depart from the Code as they saw fit.[8] Lord Steyn warned of a 'free-for-all in which hospitals are at liberty to depart from the published Code as they consider right'[9], and Lord Brown similarly remarked that patients and their carers must be reconciled to substantial departures from the Code on the part of individual hospitals[10]. Lord Brown further suggested that 'hospital policies themselves provide too insubstantial a foundation for practice so potentially harmful and open to abuse as… seclusion' and that such policies may 'not have the necessary legal quality to render them compatible with the rule of law'.[11]

[5] Munjaz case – see above
[6] ibid
[7] Para 48
[8] for example para 69 (Lord Hope)
[9] para 33
[10] Para 127
[11] Para 127