

Number 68

The Status of the Code of Practice

The Code of Practice to the Mental Health Act 1983 gives guidance on how the Act should be applied. In the foreword to the Code, it is said that it “should be used by everyone who works with people with mental health problems”.

The Code of Practice is prepared in accordance with Section 118 of the Act. However, the Act does not impose a legal duty to comply with the Code. Nevertheless, as it is made under statute, failure to follow it can be referred to and used as evidence in legal proceedings.

The precise legal status of the Code has now been considered by the Court of Appeal, specifically in connection with the issue of seclusion (which is dealt with at paragraphs 19.16 - 19.22 of the Code)¹.

In connection with seclusion, the Code provides a careful commentary on how this should be implemented and the checks and safeguards that should be in place. In the Munjaz case (heard with the Airedale Trust case) it was argued by the patient that the guidance in the Code should be followed (in that particular case the hospital’s internal seclusion policy did not precisely follow the guidance in the Code).

The Court of Appeal found the assertion that the Code of Practice should be followed, particularly where it related to issues concerning an individual’s Human Rights to be a persuasive argument. It held that the Code was an integral part of the protection of human rights. The Court stated:

“where there is a risk that agents of the state will treat patients in a way which contravenes Article 3² the state should take steps to avoid this through the publication of a Code of Practice which its agents are obliged to follow unless they have good reason to depart from it. Where there is an interference with the rights protected by Article 8³ the requirement of legality is met through adherence to a Code of Practice, again unless there is good reason to depart from it. The same will apply where the Code deals with the deprivation of liberty within the meaning of Article 5”.

Although the Munjaz case and this dicta technically apply to seclusion, it is likely that this approach will affect the status of the Code for all purposes, particularly where human rights are engaged.

Accordingly, although it remains the case that the Code does not have the same status as legislation, the guidance in the Code should be adhered to unless there is a reason why it is inappropriate to follow it for a particular patient or group of patients (perhaps with a particular diagnosis).

¹ Munjaz –v- Mersey Care NHS Trust and also S–v- Airedale NHS Trust [203] EWCA CIV 1036 – See Mental Health Law Briefing No. 67

² The prohibition of inhuman and degrading treatment

³ The right to privacy

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It follows that where there is to be a departure from the Code, it will be important to ensure that very careful consideration is given as to the reason for this which should be clearly documented to enable it to be justified. It would seem that it may be difficult to justify departure from the Code simply as a matter of convenient policy (however well intentioned). It is more likely to be possible to justify any departure where this relates to the clinical needs of specific patients, rather than being a generalised policy that purports to be of universal application.

However, it should be noted that adherence to the Code will not automatically provide a guaranteed defence to a human rights challenge as any such challenge may arise in connection with a specific untested provision⁴. The guidance in the Code should therefore be considered in each case to ascertain whether it provides the appropriate protection for individual rights or whether the protection of individual rights should be increased (i.e. greater than suggested by the Code). Departure from the Code in circumstances where patients have greater protection is more likely to be justifiable, albeit against the background that the starting point should always be the Code of Practice, and departure from this should only be in rare, specifically justifiable circumstances.

Summary

Although the Court of Appeal decision provides that the Code of Practice should generally be followed, equally, the Court did accept that on occasion there may be acceptable grounds for departing from it if this can be justified by good clinical reasons.

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Training for new Mental Health Act

It is clear from the recent comments of Professor Louis Appleby that a new Mental Health Act is still high on the Government's agenda. RadcliffesLeBrasseur will be running a comprehensive programme of training which is likely to be oversubscribed.

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For more information on Mental Health Law contact Andrew Parsons at RadcliffesLeBrasseur on 020 7227 7282, or email: andrew.parsons@rlb-law.com.

Out of office emergency advice available 24hrs on 07802 506 306.
Readers are advised to take specific advice before acting in reliance on the matters set out in this briefing.

⁴ Munjaz dealt only with seclusion.

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