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Draft laid before Parliament under section 65(4B) of the Mental Capacity Act 2005, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2008 No. []

MENTAL CAPACITY, ENGLAND

Mental Capacity (Deprivation of Liberty: Eligibility, Selection of Assessors, Assessments, Requests for Standard Authorisations and Disputes about the Place of Ordinary Residence) Regulations 2008

Made - - - - 2008
Coming into force - - 2008

The Secretary of State for Health makes these Regulations in exercise of the powers conferred by section 65(1) of, and paragraphs 31, 33(4), 47, 70, 129(3), 130 (2), (3), (5) and (7) and 183(6) and (7) of Schedule A1 to, the Mental Capacity Act 2005(a).

A draft of this instrument has been laid before Parliament in accordance with section 65(4B) of that Act, and approved by resolution of each House of Parliament.

Citation, commencement and application

1.—(1) These Regulations may be cited as the Mental Capacity (Deprivation of Liberty: Eligibility, Selection of Assessors, Assessments, Requests for Standard Authorisations and Disputes about the Place of Ordinary Residence) Regulations 2008 and shall come into force on [] 2008.

(2) These Regulations apply in relation to England only.

Interpretation

2. In these Regulations—

“approved mental health professional” means a person approved under section 114(1) of the Mental Health Act 1983(b) to act as an approved mental health professional for the purposes of that Act;

“best interests assessor” means a person selected to carry out a best interests assessment under paragraph 38 of Schedule A1 to the Act;

“eligibility assessor” means a person selected to carry out the eligibility assessment under paragraph 46 of Schedule A1 to the Act;

(a) 2005 (c.9). Schedule A1 was inserted by section 50(5) of the Mental Health Act 2007 (c.12).
(b) 1983 (c.20). Section 114 was substituted by section 18 of the Mental Health Act 2007.

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“General Social Care Council” has the meaning given by s.54(1) of the Care Standards Act 2000(a);

“Care Council for Wales” has the meaning given by s.54(1) of the Care Standards Act 2000;

“the Act” means the Mental Capacity Act 2005.

PART 1

Eligibility to carry out assessments

Eligibility – general

3. In addition to any requirement in regulations 4, 5 and 6 a person is only eligible to carry out an assessment, other than an age assessment, where—

- (a) they are insured in respect of any liabilities that might arise in connection with carrying out the assessment; and
- (b) a supervisory body(b) is satisfied that they have successfully completed a course of study that is approved by the Secretary of State (c) , and
- (c) a supervisory body is satisfied that they have the skills and experience appropriate to the assessment they are to carry out which must include, but is not limited to, the following skills—
 - (i) understanding and respect for individual’s qualities, abilities and diverse backgrounds,
 - (ii) the ability to act independently, and
 - (iii) to establish effective relationships with service users, people lacking capacity and carers.

Eligibility to carry out mental health assessment

4. A person is eligible to carry out a mental health assessment(d) if they are—

- (a) approved under section 12 of the Mental Health Act 1983(e); or
- (b) a registered medical practitioner and a supervisory body is satisfied that they have special experience in the diagnosis and treatment of mental disorder.

Eligibility to carry out best interests assessments

5.—(1) A person is eligible to carry out a best interests assessment(f) if they are—

- (a) an approved mental health professional;
- (b) a social worker registered with the General Social Care Council or Care Council for Wales;
- (c) a first level nurse, registered in Sub-Part 1 of the Nurses’ Part of the Register maintained under article 5 of the Nursing and Midwifery Order 2001;
- (d) an occupational therapist registered in Part 6 of the register maintained under article 5 of the Health Professions Order 2001; or

(a) 2000 c. 14.

(b) The identity of the supervisory body is determined in accordance with paragraphs 180 and 182 of Schedule A1 to the Mental Capacity Act 2005 (“the Act”).

(c) A list of approved courses can be found at [].

(d) A mental health assessment is an assessment carried out under paragraph 35 of Schedule A1 to the Act.

(e) 1983 (c.20). Section 12 was amended by section 16 of the Mental Health Act 2007.

(f) A best interests assessment is an assessment carried out under paragraph 38 of Schedule A1 to the Act.

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- (e) a chartered psychologist who is registered with the British Psychological Society and who holds a practising certificate issued by that Society.
- (2) The supervisory body must also be satisfied that a person has the ability to take account of diverse views and weigh them appropriately in decision making.

Eligibility to carry out mental capacity assessment

6. A person is eligible to carry out a mental capacity assessment^(a) if they are eligible to carry out —
- (a) a mental health assessment; or
 - (b) a best interests assessment.

PART 2

Selection of Assessors

Selection of assessors - general

- 7.—(1) A supervisory body may only select a person to carry out an assessment in any individual case where the person is—
- (a) not financially interested in the care of the relevant person;
 - (b) not a close relative of the relevant person; and
 - (c) not a close relative of a person who is financially interested in the care of the relevant person.
- (2) For the purposes of this regulation a “close relative” means:
- (a) a spouse, civil partner or partner;
 - (b) a parent or child,
 - (c) a brother or sister;
 - (d) a grandparent or grandchild;
 - (e) a child of a person falling with sub-paragraphs (a) or (c);
 - (f) a stepfather or stepmother; or
 - (g) a half-brother or half-sister;
- (3) For the purposes of this regulation a person is another’s partner if the two of them (whether of different sexes or the same sex) live as partners in an enduring family relationship.

Selection of best interests assessors

- 8.—(1) This regulation applies in addition to the requirements in regulation 5.
- (2) A supervisory body may only select a person to carry out a best interests assessment where—
- (a) that person is not involved in the care, or making decisions about the care, of the relevant person;
 - (b) the assessment relates to detention in a care home and the person is not employed by the care home; and
 - (c) the assessment relates to detention in a hospital and the person is not employed to work at the hospital.

(a) A mental capacity assessment is an assessment carried out under paragraph 37 of Schedule A1 to the Act.

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(3) Where the managing authority and supervisory body are both the same body, the supervisory body may not select a person who is employed to work for the body to carry out a best interests assessment.

PART 3

Assessment

Time frame for assessments

9.—(1) Subject to paragraph (2), all assessments required for a standard authorisation must be completed within 21 days from the date the supervisory body receives a request for such an authorisation.

(2) Where a supervisory body receives a request for a standard authorisation and the managing authority has given an urgent authorisation under paragraph 76 of Schedule A1 to the Act, all assessments required for that standard authorisation must be completed during the period the urgent authorisation is in force.

Time limit for carrying out an assessment to decide whether or not there is an unauthorised deprivation of liberty

10. Subject to paragraph 69(3) to (5) of Schedule A1 to the Act, an assessment required under paragraph 69 of Schedule A1 to the Act must be completed within 7 days from the date the supervisory body receives the request from an eligible person.

Relevant eligibility information

11. This regulation applies where an individual is being assessed and the eligibility assessor and the best interests assessor are not the same person.

(1) The eligibility assessor must request that the best interests assessor provides him with any relevant eligibility information that the best interests assessor may have.

(2) The best interests assessor must comply with any request made under this regulation.

PART 4

Request for a standard authorisation

Information to be provided in a request for a standard authorisation

12.—(1) — A request for a standard authorisation must include the following information—

- (a) the name of the relevant person;
- (b) the name, address and telephone number of the managing authority;
- (c) the diagnosis of the mental disorder (within the meaning of the Mental Health Act 1983 but disregarding any exclusion for persons with learning disability)(a) that the relevant person is suffering from;
- (d) the purpose for which the authorisation is requested, together with any relevant care plans and relevant needs assessment;

(a) See paragraph 14 of Schedule A1 to the Act.

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- (e) details of the proposed restrictions on the relevant person's liberty;
- (f) the date from which the standard authorisation is sought;
- (g) whether the managing authority has given an urgent authorisation under paragraph 76 of Schedule A1 to the Act and, if so, the date on which it expires;
- (h) whether section 39A of the Act (Person becomes subject to Schedule A1)(a) applies.

(2) Subject to paragraph (3), a request for a standard authorisation must include the following information if it is available or could reasonably be obtained by the managing authority —

- (a) any medical information relating to the relevant person's health that the managing authority reasonably considers to be relevant to the proposed restrictions to the relevant person's liberty;
- (b) the name, address and telephone number of —
 - (i) anyone named by the relevant person as someone to be consulted about his welfare;
 - (ii) anyone engaged in caring for the person or interested in his welfare,
 - (iii) any donee of a lasting power of attorney granted by the person,
 - (iv) any deputy appointed for the person by the court, and
 - (v) any independent mental capacity advocate appointed under sections 37 to 39C(b) of the Act;
 - (vi) the address and telephone number where the relevant person is currently living;
- (c) the age of the relevant person;
- (d) the gender of the relevant person;
- (e) the racial or ethnic origin of the relevant person ;
- (f) where the purpose of the proposed restrictions to the relevant person's liberty is to give treatment, whether the relevant person has made an advance decision that may be valid and applicable to some or all of that treatment;
- (g) whether a standard authorisation has been given in relation to the detention of the relevant person and, if so, the date of the expiry of that authorisation,
- (h) whether the relevant person is subject to —
 - (i) the hospital treatment regime,
 - (ii) the community treatment regime, or
 - (iii) the guardianship regime(c); and
- (i) whether the relevant person has any special communication needs.

(3) Where—

- (a) there is an existing authorisation in force in relation to the detention of the relevant person, and
- (b) the managing authority makes a request in accordance with paragraph 30 of Schedule A1 to the Act for a further standard authorisation in relation to the same relevant person,
the request does not have to include any of the information mentioned in paragraph (2) if that information remains the same as stated in the request for the existing authorisation.

(4) In this regulation "existing authorisation" has the same meaning as in paragraph 29 of Schedule A1 to the Act.

(a) Section 39A was inserted by section 50 of and Schedule 9 to the Mental Health Act 2007.

(b) Sections 39B and 39C were inserted by section 50 of and Schedule 9 to the Mental Health Act 2007

(c) The hospital treatment, community treatment and guardianship regimes are defined in Part 2 of Schedule 1A to the Mental Capacity Act 2005. Schedule 1A was inserted by section 50 of and Schedule 8 to the Mental Health Act 2007.

PART 5

Supervisory bodies: care homes

Dispute about the Place of Ordinary Residence

Application of Part 5

13. This Part applies where —

- (a) a local authority (“local authority A”) (a) receives a request —
 - (i) from a care home for a standard authorisation under paragraph 24, 25 or 30 of Schedule A1 to the Act; or
 - (ii) from an eligible person to decide whether or not there is an unauthorised deprivation of liberty in a care home, under paragraph 68 of Schedule A1 to the Act;
- (b) local authority A wishes to dispute that it is the supervisory body; and
- (c) a question as to the ordinary residence of the relevant person is to be determined by the Secretary of State.

Arrangements where there is a question as to the ordinary residence

14.—(1) Local authority A must act as supervisory body in relation to a request mentioned in regulation 13(a) until the determination of any question as to the ordinary residence of the relevant person.

(2) But where another local authority (“local authority B”) agrees to act as the supervisory body in place of local authority A, local authority B shall become the supervisory body until the determination of any question as to the ordinary residence of the relevant person.

(3) When the question about the ordinary residence of the relevant person has been determined, the local authority which has been identified as the supervisory body shall become the supervisory body.

Effect of change in supervisory body following determination of any question about ordinary residence

15.—(1) Where the question of ordinary residence of the relevant person is determined in accordance with paragraph 183(3) of Schedule A1 to the Act, and a local authority (“local authority B”) becomes the supervisory body in place of the local authority A, the following paragraphs shall apply.

(2) The time limit required by —

- (a) regulation 9 for carrying out the assessments required for a standard authorisation, or
- (b) regulation 10 for carrying out an assessment required under paragraph 69 of Schedule A1 to the Act,

shall apply, as the case may be, as if local authority B had been the supervisory body that received a request mentioned in regulation 13(a).

(3) Anything done by or in relation to local authority A in connection with the authorisation or request, as the case may be, has effect, so far as is necessary for continuing its effect after the change, as if done by or in relation to local authority B.

(4) Anything which relates to the authorisation or request and which is in the process of being done by or in relation to local authority A at the time of the change may be continued by or in relation to local authority B.

(5) But—

(a) “Local authority” is defined in paragraph 182(4) (in relation to England) and paragraph 182(5) (in relation to Wales) of Schedule A1 to the Act.

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- (a) local authority A does not, by virtue of this regulation cease to be liable for anything done by it in connection with the authorisation or request before the change; and
- (b) local authority B does not, by virtue of this regulation become liable for any such thing.

Signed by authority of the Secretary of State

Date

Name
Parliamentary Under Secretary for Health
Department of Health

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Mental Capacity Act 2005 (“the Act”) provides for the deprivation of liberty of people lacking capacity receiving care in care homes and hospitals, but only where authorisation under Schedule A1 to the Act (“Schedule A1”) exists.

Where it appears that a person who lacks capacity is detained, or is likely to be detained, in a care home or hospital, the managing authority of the care home or hospital must request an authorisation from the supervisory body. “Managing authority” is defined in paragraphs 176, 177 and 179 of Schedule A1 to the Act. The identity of the supervisory body is determined in accordance with paragraphs 180 and 182 of Schedule A1 to the Act. In the case of a care home the supervisory body will usually be the local authority in which the person is ordinarily resident and in the case of a hospital it will usually be the relevant Primary Care Trust for the area in which it is situated.

On receiving such a request the supervisory body must ensure that various assessments are carried out in relation to the individual concerned in order to determine whether it is appropriate to grant the authorisation. The supervisory body must select people to carry out those assessments in accordance with paragraph 129 of Schedule A1 to the Act and may only select people who are eligible in accordance with these Regulations.

These Regulations, together with the Act, provide the eligibility requirements for people who carry out the assessments. These Regulations require that—

- (a) all assessors are adequately insured and that the supervisory body is satisfied that they have the required training and suitable skills (regulation 3);
- (b) mental health assessments can only be carried out by medical practitioners who have been approved under section 12 of the Mental Health Act 1983 (“Mental Health Act”) or registered medical practitioners who have similar mental health experience to practitioners approved under section 12 of the Mental Health Act (regulation 4);
- (c) best interests assessments can only be carried out by mental health practitioners who have been approved under section 114(1) of the Mental Health Act or certain health professionals with specialised and relevant skills (regulation 5); and
- (d) mental capacity assessments can only be carried out by people that are eligible to carry out a mental health assessment or a best interests assessment (regulation 6).

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These Regulations provide some limitations on the ability of a supervisory body to select people to carry out assessments, even if the person meets the eligibility requirements. They do so by preventing the selection of—

- (e) people who have, or are related to a person who has, a personal financial interest in the care of the individual in need of assessment or are a family member of the individual (regulation 7); and
- (f) a best interests assessor who is involved in the care of the individual in need of assessment, or is employed to work in the individual's hospital or care home, or is employed by the supervisory body where the managing authority and the supervisory body are the same (regulation 8).

These Regulations contain provisions relating to the assessments required in response to a request for—

- (g) a standard authorisation by requiring that all of the required assessments be completed within 21 days of the date on which the supervisory body receives the request (regulation 9);
- (h) a decision as to whether or not there is an unauthorised deprivation of liberty by requiring that the assessment be completed within 7 days of the date the supervisory body receives the request (regulation 10); and
- (i) enabling the person carrying out the eligibility assessment to require the person conducting the best interests assessment to provide them with information relevant to their assessment (regulation 11);

Regulation 12 specifies the information that must be included in a request for a standard authorisation and information that must be included if it is available or could reasonably be obtained by the managing authority.

Paragraph 179 of Schedule A1 to the Act makes provision for identifying the supervisory body where the managing authority is a care home. In the case of a care home the supervisory body will be the local authority in which the person is ordinarily resident. Part 5 of these regulations apply in specified circumstance where a local authority wishes to dispute that it is the supervisory body (regulation 13).

Regulation 14 sets out who is to act as supervisory body until the question of ordinary residence is determined. Regulation 15 provides for the effect of a change in supervisory body following the determination of a question as to the ordinary residence of a relevant person.