

*Draft Regulations 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. 000**

# MENTAL CAPACITY, ENGLAND

# The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008

Made - - - - 2008

*Coming into force* - - 3rd November 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 and 183(6) and (7) of Schedule A1 to, the Mental Capacity Act 2005(1).

A draft of this instrument has been laid before Parliament in accordance with section 65(4B)(2) of that Act, and approved by resolution of each House of Parliament.

## PART 1

## Preliminary

### Citation, commencement and application

**1.—**(1) These Regulations may be cited as the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 and shall come into force on 3<sup>rd</sup> November 2008.

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

## Interpretation

**2. In these Regulations—**

(1) **2005 (c.9).** Schedule A1 was inserted by section 50(5) of and Schedule 7 to the Mental Health Act **2007 (c.12).**

(2) Section 65(4B) was inserted by section 50(7) of and Schedule 9 to the Mental Health Act 2007.

“approved mental health professional” means a person approved under section 114(1) of the Mental Health Act 1983(3) 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;

“General Social Care Council” has the meaning given by section 54(1) of the Care Standards Act 2000(4); and

“the Act” means the Mental Capacity Act 2005.

## PART 2

### Eligibility to carry out assessments

#### Eligibility – general

3.—(1) In addition to any requirement in regulations 4 to 9, a person is eligible to carry out an assessment where paragraphs (2) to (4) are met.

(2) The person must—

- (a) be insured in respect of any liabilities that might arise in connection with carrying out the assessment; and
- (b) satisfy the supervisory body(5) that he or she has such insurance.

(3) The supervisory body must be satisfied that the person has the skills and experience appropriate to the assessment to be carried out which must include, but are not limited to, the following—

- (a) an applied knowledge of the Mental Capacity Act 2005 and related Code of Practice(6); and
- (b) the ability to keep appropriate records and to provide clear and reasoned reports in accordance with legal requirements and good practice.

(4) The supervisory body must be satisfied that there is in respect of the person—

- (a) an enhanced criminal record certificate issued under section 113B of the Police Act 1997(7) (enhanced criminal record certificates); or
- (b) if the purpose for which the certificate is required is not one prescribed under subsection (2) of that section, a criminal record certificate issued pursuant to section 113A of that Act(8) (criminal record certificates).

#### Eligibility to carry out a mental health assessment

4.—(1) A person is eligible to carry out a mental health assessment(9) if paragraphs (2) and (3) are met.

(2) The person must be—

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(3) 1983 (c.20). Section 114 was substituted by section 18 of the Mental Health Act 2007.

(4) 2000 (c.14).

(5) The identity of the supervisory body is determined in accordance with paragraphs 128, 180 and 182 of Schedule A1 to the Mental Capacity Act 2005.

(6) Published by The Stationery Office, ISBN 978 0 11 7037465. The current Code of Practice can also be found at [www.publicguardian.gov.uk/mca/code-of-practice.htm](http://www.publicguardian.gov.uk/mca/code-of-practice.htm).

(7) 1997 (c.50). Section 113B was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005 (c.15).

(8) Section 113A was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005.

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

- (a) approved under section 12 of the Mental Health Act 1983<sup>(10)</sup>; or
  - (b) a registered medical practitioner who the supervisory body is satisfied has at least three years post registration experience in the diagnosis or treatment of mental disorder.
- (3) The supervisory body must be satisfied that the person has successfully completed the Deprivation of Liberty Safeguards Mental Health Assessors training programme made available by the Royal College of Psychiatrists<sup>(11)</sup>.
- (4) Except in the 12 month period beginning with the date the person has successfully completed the programme referred to in paragraph (3), the supervisory body must be satisfied that the person has, in the 12 months prior to selection, completed further training relevant to their role as a mental health assessor.

### **Eligibility to carry out a best interests assessment**

**5.—**(1) A person is eligible to carry out a best interests assessment<sup>(12)</sup> if paragraphs (2) and (3) are met.

- (2) The person must be one of the following—
- (a) an approved mental health professional;
  - (b) a social worker registered with the General Social Care Council;
  - (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<sup>(13)</sup>;
  - (d) an occupational therapist registered in Part 6 of the register maintained under article 5 of the Health Professions Order 2001<sup>(14)</sup>; or
  - (e) a chartered psychologist who is listed in the British Psychological Society's Register of Chartered Psychologists and who holds a relevant practising certificate issued by that Society<sup>(15)</sup>.
- (3) The supervisory body must be satisfied that the person—
- (a) is not suspended from the register or list relevant to the person's profession mentioned in paragraph (2);
  - (b) has at least two years post registration experience in one of the professions mentioned in paragraph (2);
  - (c) has successfully completed training that has been approved by the Secretary of State<sup>(16)</sup> to be a best interests assessor;
  - (d) except in the 12 month period beginning with the date the person has successfully completed the training referred to in sub-paragraph (c), the supervisory body must be satisfied that the person has, in the 12 months prior to selection, completed further training relevant to their role as a best interests assessor; and
  - (e) has the skills necessary to obtain, evaluate and analyse complex evidence and differing views and to weigh them appropriately in decision making.

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<sup>(10)</sup> 1983 (c.20). Section 12 was amended by section 16 of the Mental Health Act 2007.

<sup>(11)</sup> The Royal College of Psychiatrists is at 17 Belgrave Square, London SW1X 8PG.

<sup>(12)</sup> A best interests assessment is an assessment carried out under paragraph 38 of Schedule A1 to the Act.

<sup>(13)</sup> S.I. 2002/253. The register is divided into parts in accordance with articles 2 and 3 of and Schedule 1 to the Nurses and Midwives (Parts of and Entries in the Register) Order of Council 2004 (S.I. 2004/1765).

<sup>(14)</sup> S.I. 2002/254. The register is divided into parts in accordance with articles 2 and 3 of and Schedule 1 to the Health Professions (Parts of and Entries in the Register) Order in Council 2003 (S.I. 2003/1571).

<sup>(15)</sup> The British Psychological Society is at St Andrews House, 48 Princess Road East, Leicester, LE1 7DR.

<sup>(16)</sup> Approved courses can be found at <http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm>.

### **Eligibility to carry out a mental capacity assessment**

6. A person is eligible to carry out a mental capacity assessment(17) if that person is eligible to carry out—

- (a) a mental health assessment; or
- (b) a best interests assessment.

### **Eligibility to carry out an eligibility assessment**

7. A person is eligible to carry out an eligibility assessment(18) if that person is—

- (a) approved under section 12 of the Mental Health Act 1983 and is eligible to carry out a mental health assessment; or
- (b) an approved mental health professional and is eligible to carry out a best interests assessment.

### **Eligibility to carry out an age assessment**

8. A person is eligible to carry out an age assessment(19) if that person is eligible to carry out a best interests assessment.

### **Eligibility to carry out a no refusals assessment**

9. A person is eligible to carry out a no refusals assessment(20) if that person is eligible to carry out a best interests assessment.

## **PART 3**

### **Selection of Assessors**

#### **Selection of assessors – relatives**

10.—(1) A supervisory body must not select a person to carry out an assessment if the person is—

- (a) a relative of the relevant person(21); or
- (b) a relative of a person who is financially interested in the care of the relevant person.

(2) For the purposes of this regulation a “relative” means—

- (a) a spouse, ex-spouse, civil partner or ex-civil partner;
- (b) a person living with the relevant person as if they were a spouse or a civil partner;
- (c) a parent or child;
- (d) a brother or sister;
- (e) a child of a person falling within sub-paragraphs (a), (b) or (d);
- (f) a grandparent or grandchild;
- (g) a grandparent-in-law or grandchild-in-law;
- (h) an uncle or aunt;

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

(18) An eligibility assessment is an assessment carried out under paragraph 46 of Schedule A1 to the Act.

(19) An age assessment is an assessment carried out under paragraph 34 of Schedule A1 to the Act.

(20) A no refusals assessment is an assessment carried out under paragraph 48 of Schedule A1 to the Act.

(21) “relevant person” is defined in paragraph 7 of Schedule A1 to the Act.

- (i) a brother-in-law or sister-in-law;
  - (j) a son-in-law or daughter-in-law;
  - (k) a first cousin; or
  - (l) a half-brother or half-sister.
- (3) For the purposes of this regulation—
- (a) the relationships in paragraph (2)(c) to (k) include step relationships;
  - (b) references to step relationships and in-laws in paragraph (2) are to be read in accordance with section 246 of the Civil Partnership Act 2004<sup>(22)</sup>; and
  - (c) financial interest has the meaning given in regulation 11.

#### **Selection of assessors – financial interest**

**11.**—(1) A supervisory body must not select a person to carry out an assessment where the person has a financial interest in the case.

- (2) A person has a financial interest in a case where—
- (a) that person is a partner, director, other office-holder or major shareholder of the managing authority that has made the application for a standard authorisation<sup>(23)</sup>; and
  - (b) the managing authority is a care home<sup>(24)</sup> or independent hospital<sup>(25)</sup>.
- (3) A major shareholder means—
- (a) any person holding one tenth or more of the issued shares in the managing authority, where the managing authority is a company limited by shares; and
  - (b) in all other cases, any of the owners of the managing authority.

#### **Selection of best interests assessors**

**12.**—(1) A supervisory body must not select a person to carry out a best interests assessment if that person is involved in the care, or making decisions about the care, of the relevant person.

(2) Where the managing authority and supervisory body are both the same body, the supervisory body must not select a person to carry out a best interests assessment who is employed by it or who is providing services to it.

## **PART 4**

### **Assessments**

#### **Time frame for assessments**

**13.**—(1) Except as provided in paragraph (2), all assessments required for a standard authorisation must be completed within the period of 21 days beginning with the date that 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, the

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<sup>(22)</sup> 2004 (c.33).

<sup>(23)</sup> A standard authorisation is defined in paragraph 8 of Schedule A1 to the Act.

<sup>(24)</sup> “care home” is defined in paragraph 178 of Schedule A1 to the Act.

<sup>(25)</sup> “independent hospital” is defined in paragraph 175(3) of Schedule A1 to the Act.

assessments required for that standard authorisation must be completed within the period during which 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**

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

### **Relevant eligibility information**

**15.—**(1) This regulation applies where an individual is being assessed and the eligibility assessor and the best interests assessor are not the same person.

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

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

(4) In this regulation “eligibility assessor” means a person selected to carry out the eligibility assessment under paragraph 46 of Schedule A1 to the Act.

## **PART 5**

### **Requests for a standard authorisation**

#### **Information to be provided in a request for a standard authorisation**

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

- (a) the name and gender of the relevant person;
- (b) the age of the relevant person or, where this is not known, whether the managing authority believes that the relevant person is aged 18 years or older;
- (c) the address and telephone number where the relevant person is currently located;
- (d) the name, address and telephone number of the managing authority and the name of the person within the managing authority who is dealing with the request;
- (e) the purpose for which the authorisation is requested;
- (f) the date from which the standard authorisation is sought; and
- (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.

(2) Except as provided for in 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 considers to be relevant to the proposed restrictions to the relevant person’s liberty;
- (b) the diagnosis of the mental disorder (within the meaning of the Mental Health Act 1983 but disregarding any exclusion for persons with learning disability)(26) that the relevant person is suffering from;
- (c) any relevant care plans and relevant needs assessments;

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

- (d) the racial, ethnic or national origins of the relevant person;
  - (e) whether the relevant person has any special communication needs;
  - (f) details of the proposed restrictions on the relevant person's liberty;
  - (g) whether section 39A of the Act (person becomes subject to Schedule A1)(27) applies;
  - (h) 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;
  - (i) whether the relevant person is subject to—
    - (i) the hospital treatment regime,
    - (ii) the community treatment regime, or
    - (iii) the guardianship regime(28);
  - (j) 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 in accordance with sections 37 to 39D(29) of the Act; and
  - (k) whether there is an existing authorisation in relation to the detention of the relevant person and, if so, the date of the expiry of that authorisation.
- (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 need not include any of the information mentioned in paragraph (2)(a) to (j) if that information remains the same as that supplied in relation to 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.

## PART 6

### Supervisory bodies: care homes

#### Disputes about the Place of Ordinary Residence

#### Application and Interpretation of Part 6

17.—(1) This Part applies where—

- (a) a local authority (“local authority A”)(30) receives a request from—

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

(28) The hospital treatment, community treatment and guardianship regimes are defined in paragraphs 8 to 10 of 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.

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

(30) “local authority” is defined in paragraph 182(4) (in relation to England) of Schedule A1 to the Act.

- (i) a care home for a standard authorisation under paragraph 24, 25 or 30 of Schedule A1 to the Act, or
- (ii) 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 under paragraph 183 of Schedule A1 to the Act.
- (2) In this Part—
  - (a) “local authority A” has the meaning given in paragraph (1); and
  - (b) “local authority C” has the meaning given in regulation 18(2).

### **Arrangements where there is a question as to the ordinary residence**

**18.—**(1) Local authority A must act as supervisory body in relation to a request mentioned in regulation 17(1)(a) until the determination of the question as to the ordinary residence of the relevant person.

(2) But where another local authority (“local authority C”) agrees to act as the supervisory body in place of local authority A, that local authority shall become the supervisory body until the determination of the 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**

**19.—**(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 another local authority (“local authority B”) becomes the supervisory body in place of local authority A or local authority C, as the case may be, paragraphs (3) to (6) shall apply.

(2) 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 local authority C remains the supervisory body, paragraphs (7) to (9) shall apply.

(3) Local authority B shall be treated as the supervisory body that received the request mentioned in regulation 17(1)(a) and must comply with the time limits specified in —

- (a) regulation 13 for carrying out the assessments required for a standard authorisation; or
- (b) regulation 14 for carrying out an assessment required under paragraph 69 of Schedule A1 to the Act,

as the case may be, where the assessments have still to be completed.

(4) Anything done by or in relation to local authority A or local authority C 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.

(5) 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 or local authority C at the time of the change may be continued by or in relation to local authority B.

(6) But—



- (a) local authority A or local authority C 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.
- (7) Local authority C shall be treated as the supervisory body that received the request mentioned in regulation 17(1)(a) and must comply with the time limits specified in —
- (a) regulation 13 for carrying out the assessments required for a standard authorisation; or
  - (b) regulation 14 for carrying out an assessment required under paragraph 69 of Schedule A1 to the Act,
- as the case may be, where the assessments have still to be completed.
- (8) 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 C.
- (9) 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 C.
- (10) But—
- (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 C 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 to consent to the arrangements made for their care or treatment, who are receiving care or treatment in care homes and hospitals, where authorisation under section 4A of and 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 128, 180 and 182 of Schedule A1. 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 or the Primary Care Trust that commissions the care or treatment.

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 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 suitable skills and have undergone a Criminal Record Bureau check (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 and the supervisory body is satisfied that the person has the required training (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, certain health professionals or social workers, with specialised and relevant skills and with at least two years post registration experience. The supervisory body must be satisfied that the person has the required training (regulation 5);
- (d) mental capacity assessments can only be carried out by people who are eligible to carry out a mental health assessment or a best interests assessment (regulation 6);
- (e) eligibility assessments can only be carried out by medical practitioners who have been approved under section 12 of the Mental Health Act or an approved mental health professional and the supervisory body is satisfied that the person has the required training (regulation 7);
- (f) are eligible to carry out a best interests assessment (regulations 8 and 9).

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—

- (a) 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 relative of the individual (regulations 10 and 11); and
- (b) a best interests assessor who is involved in the care of the individual in need of assessment, or is employed by the supervisory body where the managing authority and the supervisory body are the same (regulation 12).

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

- (a) a standard authorisation by requiring that all of the required assessments be completed within 21 days from the date on which the supervisory body receives the request, except where an urgent authorisation is in force, in which case assessments must be completed during the period of the urgent authorisation (regulation 13); and
- (b) a decision as to whether or not there is an unauthorised deprivation of liberty by requiring that the assessment be completed within 7 days from the date the supervisory body receives the request (regulation 14).

Regulation 15 enables 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 16 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 182 of Schedule A1 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 6 of these Regulations applies in specified circumstances where a local authority wishes to dispute that it is the supervisory body (regulation 17).

Regulation 18 sets out who is to act as supervisory body until the question of ordinary residence is determined. Regulation 19 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.