

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity (Amendment) Act 2019, SCHEDULE 1. (See end of Document for details)*

PROSPECTIVE

## SCHEDULES

### SCHEDULE 1

Section 1(4)

SCHEDULE TO BE INSERTED AS SCHEDULE AA1 TO THE MENTAL CAPACITY ACT 2005

### “SCHEDULE AA1

Section 4A(5)

DEPRIVATION OF LIBERTY: AUTHORISATION OF  
ARRANGEMENTS ENABLING CARE AND TREATMENT

### PART 1

#### INTRODUCTORY AND INTERPRETATION

##### *Contents of this Schedule*

- 1 In this Schedule—
- Part 1 (this Part) describes the arrangements dealt with and gives definitions (including “the responsible body”)
  - Part 2 sets out the procedure for the responsible body to authorise arrangements
  - Part 3 is about the duration, renewal, variation and review of authorisations
  - Part 4 is about Approved Mental Capacity Professionals (involved under Part 2 in certain cases)
  - Part 5 is about appointing persons to give representation and support in connection with arrangements
  - Part 6 gives power to provide for monitoring and reporting
  - Part 7 excludes—
    - (a) mental health arrangements, and
    - (b) arrangements that are not in accordance with mental health requirements
  - Part 8 contains transitory provision.

##### *Arrangements this Schedule applies to*

- 2 (1) This Schedule applies to arrangements—
- (a) for enabling the care or treatment of a person (the “cared-for person”) described in sub-paragraph (2),
  - (b) that give rise to a deprivation of the cared-for person's liberty, and
  - (c) that are not excluded by Part 7.
- (2) The cared-for person must be a person who—
- (a) is aged 16 or over,
  - (b) lacks capacity to consent to the arrangements, and

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- (c) has a mental disorder.
- (3) The arrangements may for example be—
  - (a) for the cared-for person to reside in a particular place;
  - (b) for the cared-for person to receive care or treatment at a particular place;
  - (c) for the means and manner of transport for the cared-for person to, from or between particular places.
- (4) The arrangements may be ones that are proposed, or that are being carried out.
- (5) If they are proposed, references in this Schedule to where or how they are carried out are to whatever is proposed in the arrangements.
- (6) If provision to which sub-paragraph (1)(a) and (b) apply and other provision are combined, the “arrangements” for the purposes of this Schedule do not include that other provision.

### *Definitions*

3 In this Schedule—

“Approved Mental Capacity Professional” means a person approved in accordance with Part 4 as an Approved Mental Capacity Professional for the purposes of this Schedule;

“arrangements” must be read in accordance with paragraph 2;

“authorisation” means authorisation of arrangements under this Schedule, and “authorise” and related words are to be read accordingly;

“authorisation conditions” has the meaning given by paragraph 13;

“authorisation record” has the meaning given by paragraph 27;

“care home” means—

- (a) a place which is a care home within the meaning given by section 3 of the Care Standards Act 2000, or
- (b) a place in Wales at which a care home service within the meaning of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2) is provided wholly or mainly to persons aged 18 or over;

“care home arrangements” means arrangements, in relation to a cared-for person aged 18 or over, carried out wholly or partly in a care home;

“care home manager”, in relation to a care home or care home arrangements, means—

- (a) in relation to England, the person registered, or required to be registered, under Chapter 2 of Part 1 of the Health and Social Care Act 2008 in respect of the provision of residential accommodation, together with nursing or personal care, in the care home, and
- (b) in relation to Wales, the person registered, or required to be registered, under Chapter 2 of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 (anaw 2) in respect of the provision of a care home service, in the care home;

“cared-for person” has the meaning given by paragraph 2(1);

“clinical commissioning group” means a body established under section 14D of the National Health Service Act 2006;

“Education, Health and Care plan” means a plan within the meaning of section 37(2) of the Children and Families Act 2014;

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“English responsible body” has the meaning given by paragraph 11;  
“hospital manager” has the meaning given by paragraph 7;  
“independent hospital” has the meaning given by paragraph 5;  
“local authority” has the meaning given by paragraph 4;  
“Local Health Board” means a Local Health Board established under section 11 of the National Health Service (Wales) Act 2006;  
“mental disorder” has the meaning given by section 1(2) of the Mental Health Act;  
“mental health arrangements” has the meaning given by paragraph 46;  
“mental health requirements” has the meaning given by paragraph 57;  
“NHS hospital” has the meaning given by paragraph 5;  
“responsible body” has the meaning given by paragraph 6;  
“specified”, except in paragraph 57, means specified in an authorisation record;  
“Welsh responsible body” has the meaning given by paragraph 12.

*Local authority*

- 4 (1) “Local authority” means—
- (a) in England—
    - (i) the council of a county;
    - (ii) the council of a district for which there is no county council;
    - (iii) the council of a London borough;
    - (iv) the Common Council of the City of London;
    - (v) the Council of the Isles of Scilly;
  - (b) in Wales, the council of a county or county borough.
- (2) For the purposes of this Schedule the area of the Common Council of the City of London is to be treated as including the Inner Temple and the Middle Temple.

*NHS hospital and independent hospital*

- 5 (1) “NHS hospital” means—
- (a) a health service hospital as defined by section 275 of the National Health Service Act 2006 or section 206 of the National Health Service (Wales) Act 2006, or
  - (b) a hospital as defined by section 206 of the National Health Service (Wales) Act 2006 vested in a Local Health Board.
- (2) “Independent hospital”—
- (a) in relation to England, means a hospital as defined by section 275 of the National Health Service Act 2006 that is not an NHS hospital, and
  - (b) in relation to Wales, means a hospital as defined by section 2 of the Care Standards Act 2000 that is not an NHS hospital.

*Responsible body*

- 6 (1) The responsible body, in relation to a cared-for person, means—

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- (a) if the arrangements are carried out mainly in an NHS hospital, the hospital manager;
  - (b) if the arrangements are carried out mainly in an independent hospital in England, the responsible local authority determined in accordance with paragraph 9;
  - (c) if the arrangements are carried out mainly in an independent hospital in Wales, the Local Health Board for the area in which the hospital is situated;
  - (d) if none of paragraphs (a) to (c) applies and the arrangements are carried out mainly through—
    - (i) the provision of NHS continuing healthcare under arrangements made by a clinical commissioning group, or
    - (ii) in Wales, the provision of an equivalent to NHS continuing healthcare under arrangements made by a Local Health Board, that clinical commissioning group or Local Health Board;
  - (e) if none of paragraphs (a) to (d) applies, the responsible local authority determined in accordance with paragraph 10.
- (2) If an independent hospital is situated in the areas of two or more Local Health Boards, it is to be regarded for the purposes of sub-paragraph (1)(c) as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.
- 7 (1) “Hospital manager”, in relation to an NHS hospital, means—
- (a) if the hospital—
    - (i) is vested in a relevant national authority for the purposes of its functions under the National Health Service Act 2006 or the National Health Service (Wales) Act 2006, or
    - (ii) consists of any accommodation provided by a local authority and used as a hospital by or on behalf of a relevant national authority under either of those Acts,
 the Local Health Board or Special Health Authority responsible for the administration of the hospital;
  - (b) in relation to England, if the hospital falls within paragraph (a)(i) or (ii) and no Special Health Authority has responsibility for its administration, the Secretary of State;
  - (c) if the hospital is vested in an NHS trust or an NHS foundation trust, that trust;
  - (d) if the hospital is vested in a Local Health Board, that Board.
- (2) In sub-paragraph (1) “relevant national authority” means—
- (a) the Secretary of State,
  - (b) the Welsh Ministers, or
  - (c) the Secretary of State and the Welsh Ministers acting jointly.
- 8 In paragraph 6(1)(d) “NHS continuing healthcare” is to be construed in accordance with standing rules under section 6E of the National Health Service Act 2006.
- 9 (1) In paragraph 6(1)(b), “responsible local authority”, in relation to a cared-for person aged 18 or over, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;

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- (b) if paragraph (a) does not apply and the cared-for person has needs for care and support which are being met under Part 1 of the Care Act 2014, the local authority meeting those needs;
  - (c) in any other case, the local authority determined in accordance with sub-paragraph (4).
- (2) If more than one local authority is meeting the needs of a cared-for person for care and support under Part 1 of the Care Act 2014 the responsible local authority is the local authority for the area in which the cared-for person is ordinarily resident for the purposes of that Part of that Act.
- (3) In paragraph 6(1)(b), “responsible local authority”, in relation to a cared-for person aged 16 or 17, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
  - (b) if paragraph (a) does not apply and the cared-for person is being provided with accommodation under section 20 of the Children Act 1989, the local authority providing that accommodation;
  - (c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person is subject to a care order under section 31 of the Children Act 1989 or an interim care order under section 38 of that Act, and a local authority in England is responsible under the order for the care of the cared-for person, that local authority;
  - (d) if none of paragraphs (a) to (c) applies, the local authority determined in accordance with sub-paragraph (4).
- (4) In the cases mentioned in sub-paragraphs (1)(c) and (3)(d), the “responsible local authority” is the local authority for the area in which the independent hospital mentioned in paragraph 6(1)(b) is situated.
- (5) If an independent hospital is situated in the areas of two or more local authorities, it is to be regarded for the purposes of sub-paragraph (4) as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.
- 10 (1) In paragraph 6(1)(e), “responsible local authority”, in relation to a cared-for person aged 18 or over, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
  - (b) if there is an individual development plan for the cared-for person—
    - (i) the local authority responsible for maintaining that plan, or
    - (ii) if the plan is not maintained by a local authority, the local authority whose area the cared-for person is in;
  - (c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person has needs for care and support which are being met under Part 1 of the Care Act 2014 or under Part 4 of the Social Services and Well-being (Wales) Act 2014 (anaw 4), the local authority meeting those needs;
  - (d) in any other case, the local authority determined in accordance with sub-paragraph (6).
- (2) If more than one local authority is meeting the needs of a cared-for person for care and support under Part 1 of the Care Act 2014 the responsible local authority is the local authority for the area in which the cared-for person is ordinarily resident for the purposes of that Part of that Act.

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- (3) If more than one local authority is meeting the needs for care and support of a cared-for person under the Social Services and Well-being (Wales) Act 2014 (anaw 4), the responsible local authority is the local authority for the area in which the cared-for person is ordinarily resident for the purposes of that Act.
- (4) If the cared-for person is having needs for care and support met under both of the Acts mentioned in sub-paragraph (1)(c), the responsible local authority is the local authority determined in accordance with sub-paragraph (6).
- (5) In paragraph 6(1)(e), “responsible local authority”, in relation to a cared-for person aged 16 or 17, means—
- (a) if there is an Education, Health and Care plan for the cared-for person, the local authority responsible for maintaining that plan;
  - (b) if there is an individual development plan for the cared-for person—
    - (i) the local authority responsible for maintaining that plan, or
    - (ii) if the plan is not maintained by a local authority, the local authority whose area the cared-for person is in;
  - (c) if neither paragraph (a) nor paragraph (b) applies and the cared-for person is being provided with accommodation—
    - (i) under section 20 of the Children Act 1989, or
    - (ii) under section 76 of the Social Services and Well-being (Wales) Act 2014 (anaw 4),
 the local authority providing that accommodation;
  - (d) if none of paragraphs (a) to (c) applies and the cared-for person is subject to a care order under section 31 of the Children Act 1989 or an interim care order under section 38 of that Act, the local authority that is responsible under the order for the care of the cared-for person;
  - (e) if none of paragraphs (a) to (d) applies, the local authority determined in accordance with sub-paragraph (6).
- (6) In the cases mentioned in sub-paragraphs (1)(d), (4) and (5)(e), the “responsible local authority” is—
- (a) if the arrangements provide for the cared-for person to reside in one place, the local authority for the area in which that place is situated;
  - (b) if the arrangements provide for the cared-for person to reside in more than one place, the local authority for the area in which the main place of residence is situated;
  - (c) in any other case, the local authority for the area in which the arrangements are mainly carried out.
- (7) If a building is situated in the areas of two or more local authorities, it is to be regarded for the purposes of sub-paragraph (6) as situated in whichever of the areas the greater (or greatest) part of the building is situated.
- (8) In this paragraph—
- “individual development plan” means a plan within the meaning of section 10 of the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (anaw 2).
- 11 “English responsible body” means—
- (a) a hospital manager of a hospital in England;
  - (b) a clinical commissioning group;

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- (c) a local authority in England.
- 12 “Welsh responsible body” means—
- (a) a hospital manager of a hospital in Wales;
  - (b) a Local Health Board;
  - (c) a local authority in Wales.

## PART 2

### AUTHORISATION OF ARRANGEMENTS

#### *The authorisation conditions*

- 13 The authorisation conditions are that—
- (a) the cared-for person lacks capacity to consent to the arrangements,
  - (b) the cared-for person has a mental disorder, and
  - (c) the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person.

#### *Rights to information etc*

- 14 (1) The following must publish information about authorisation of arrangements under this Schedule—
- (a) the hospital manager of each NHS hospital;
  - (b) each clinical commissioning group;
  - (c) each Local Health Board;
  - (d) each local authority.
- (2) The information must include information on the following matters in particular—
- (a) the effect of an authorisation;
  - (b) the process for authorising arrangements, including making or carrying out—
    - (i) assessments and determinations required under paragraphs 21 and 22;
    - (ii) consultation under paragraph 23;
    - (iii) a pre-authorisation review (see paragraphs 24 to 26);
  - (c) the circumstances in which an independent mental capacity advocate should be appointed under paragraph 42 or 43;
  - (d) the role of a person within paragraph 42(5) (an “appropriate person”) in relation to a cared-for person and the effect of there being an appropriate person;
  - (e) the circumstances in which a pre-authorisation review is to be carried out by an Approved Mental Capacity Professional under paragraph 24;
  - (f) the right to make an application to the court to exercise its jurisdiction under section 21ZA;
  - (g) reviews under paragraph 38, including—
    - (i) when a review will be carried out;
    - (ii) the rights to request a review;
    - (iii) the circumstances in which a referral may or will be made to an Approved Mental Capacity Professional.

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- (3) The information must be accessible to, and appropriate to the needs of, cared-for persons and appropriate persons.
- 15 (1) Where arrangements are proposed, the responsible body must as soon as practicable take such steps as are practicable to ensure that—
- (a) the cared-for person, and
  - (b) any appropriate person in relation to the cared-for person, understands the matters mentioned in sub-paragraph (3).
- (2) If, subsequently, at any time while the arrangements are being proposed the responsible body becomes satisfied under paragraph 42(5) that a person is an appropriate person in relation to the cared-for person, the responsible body must, as soon as practicable, take such steps as are practicable to ensure that the appropriate person understands the matters mentioned in sub-paragraph (3).
- (3) Those matters are—
- (a) the nature of the arrangements, and
  - (b) the matters mentioned in paragraph 14(2) as they apply in relation to the cared-for person's case.
- (4) If it is not appropriate to take steps to ensure that the cared-for person or any appropriate person understands a particular matter then, to that extent, the duties in sub-paragraphs (1) and (2) do not apply.
- (5) In this paragraph “appropriate person”, in relation to a cared-for person, means a person within paragraph 42(5).
- 16 (1) After authorising arrangements the responsible body must, without delay, arrange for a copy of the authorisation record to be given or sent to—
- (a) the cared-for person,
  - (b) any independent mental capacity advocate appointed under paragraph 42 to represent and support the cared-for person,
  - (c) any person within paragraph 42(5) in respect of the cared-for person (the “appropriate person”), and
  - (d) any independent mental capacity advocate appointed under paragraph 43 to support the appropriate person.
- (2) If the responsible body has not, within 72 hours of arrangements being authorised, arranged for a copy of the authorisation record to be given or sent to each of the persons mentioned in paragraphs (a) to (d) of sub-paragraph (1), the responsible body must review and record why not.
- (3) As soon as practicable after authorising arrangements, the responsible body must take such steps as are practicable and appropriate, having regard to the steps taken under paragraph 15 and the length of time since they were taken, to ensure that the cared-for person and any appropriate person understands the matters mentioned in paragraph 14(2)(a), (c), (d), (f), and (g) as they apply in relation to the cared-for person's case.

#### *Authorisation*

- 17 The responsible body may authorise arrangements—
- (a) under paragraph 18, if the conditions in that paragraph are met, or
  - (b) under paragraph 19 if—



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- (i) the arrangements are care home arrangements,
  - (ii) the responsible body decides that authorisation should be determined under that paragraph instead of under paragraph 18, and
  - (iii) the conditions in paragraph 19 are met.
- 18 The conditions in this paragraph are that—
  - (a) the responsible body is satisfied that this Schedule applies to the arrangements,
  - (b) the responsible body is satisfied, on the basis of the determinations required by paragraphs 21 and 22, that the authorisation conditions are met,
  - (c) the responsible body has carried out consultation under paragraph 23,
  - (d) the responsible body is satisfied that any requirement under paragraph 42 or 43, that arises in relation to the arrangements before they are authorised, has been complied with,
  - (e) a pre-authorisation review, arranged by the responsible body, has been carried out in accordance with paragraphs 24 to 26,
  - (f) the person carrying out the review has determined—
    - (i) under paragraph 25, that the authorisation conditions are met, or
    - (ii) under paragraph 26, that it is reasonable for the responsible body to conclude that those conditions are met, and
  - (g) a draft authorisation record has been prepared in accordance with paragraph 27.
- 19 The conditions in this paragraph are that—
  - (a) the care home manager has provided the responsible body with a statement in accordance with paragraph 20,
  - (b) having regard to the statement (and the accompanying material), the responsible body is satisfied—
    - (i) that this Schedule applies to the arrangements,
    - (ii) that the authorisation conditions are met, and
    - (iii) that the care home manager has carried out consultation under paragraph 23,
  - (c) the responsible body is satisfied that any requirement under paragraph 42 or 43, that arises in relation to the arrangements before they are authorised, has been complied with,
  - (d) a pre-authorisation review, arranged by the responsible body, has been carried out in accordance with paragraphs 24 to 26, and
  - (e) the person carrying out the review has determined—
    - (i) under paragraph 25, that the authorisation conditions are met, or
    - (ii) under paragraph 26, that it is reasonable for the responsible body to conclude that those conditions are met.
- 20 (1) A statement for the purposes of paragraph 19(a) is a statement in writing by the care home manager—
  - (a) that the cared-for person is aged 18 or over,
  - (b) that the arrangements give rise to a deprivation of the cared-for person's liberty,
  - (c) that the arrangements are not excluded by Part 7,
  - (d) that the determinations required by paragraphs 21 and 22 have been made,
  - (e) that the care home manager has carried out consultation under paragraph 23, and

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- (f) that the care home manager—
  - (i) is satisfied that paragraph 24(2)(a) or (b) applies,
  - (ii) is satisfied that neither applies, or
  - (iii) is not satisfied that a decision can be made as to whether either applies.
- (2) The statement—
  - (a) must include the reasons for what is stated under sub-paragraph (1)(b) and (f);
  - (b) must be accompanied by—
    - (i) a record of the assessments on which the determinations required by paragraphs 21 and 22 were made,
    - (ii) evidence of the consultation mentioned in sub-paragraph (1)(e), and
    - (iii) a draft authorisation record prepared in accordance with paragraph 27.

*Determinations made on capacity and medical assessments*

- 21 (1) The determinations required by this paragraph are—
- (a) a determination made on an assessment in respect of the cared-for person, that the person lacks capacity to consent to the arrangements, and
  - (b) a determination made on an assessment in respect of the cared-for person, that the person has a mental disorder.
- (2) The person who makes the determination need not be the same as the person who carries out the assessment.
- (3) The appropriate authority may by regulations make provision for requirements which must be met by a person—
- (a) making a determination, or
  - (b) carrying out an assessment,
- under this paragraph.
- (4) Regulations under sub-paragraph (3) may make different provision—
- (a) for determinations and assessments, and
  - (b) for determinations and assessments required under sub-paragraph (1)(a) and determinations and assessments required under sub-paragraph (1)(b).
- (5) But if the arrangements are care home arrangements and authorisation is being determined under paragraph 19, an assessment may not be carried out by a person who has a connection, of a kind prescribed by regulations, with a care home.
- (6) Regulations made by the appropriate authority under sub-paragraph (5)—
- (a) may make provision about a connection of any kind (financial or otherwise), and
  - (b) may make different provision for assessments under sub-paragraph (1)(a) and sub-paragraph (1)(b).
- (7) The “appropriate authority” means—
- (a) where the determination or assessment is in relation to an authorisation by an English responsible body, the Secretary of State, and
  - (b) where the determination or assessment is in relation to an authorisation by a Welsh responsible body, the Welsh Ministers.

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- (8) An assessment may be one carried out for an earlier authorisation or for any other purpose, provided that it appears to the relevant person that it is reasonable to rely on the assessment.
- (9) The relevant person must have regard to—
- (a) the length of time since the assessment was carried out;
  - (b) the purpose for which the assessment was carried out;
  - (c) whether there has been a change in the cared-for person's condition that is likely to affect the determination made on the assessment.
- (10) In this paragraph “relevant person” means—
- (a) the care home manager, if the arrangements are care home arrangements and authorisation is being determined under paragraph 19, or
  - (b) the responsible body, in any other case.

*Determination that arrangements are necessary and proportionate*

- 22 (1) The determination required by this paragraph is a determination by a person, who meets requirements prescribed by regulations made by the appropriate authority, made on an assessment by that person that the arrangements are necessary to prevent harm to the cared-for person and proportionate in relation to the likelihood and seriousness of harm to the cared-for person.
- (2) When making a determination under this paragraph regard must be had (amongst other matters) to the cared-for person's wishes and feelings in relation to the arrangements.
- (3) If the arrangements are care home arrangements and authorisation is being determined under paragraph 19, a determination may not be made by a person who has a connection, of a kind prescribed by regulations, with a care home.
- (4) Regulations made by the appropriate authority under sub-paragraph (3) may make provision about a connection of any kind (financial or otherwise).
- (5) The “appropriate authority” means—
- (a) where the determination is in relation to an authorisation by an English responsible body, the Secretary of State, and
  - (b) where the determination is in relation to an authorisation by a Welsh responsible body, the Welsh Ministers.

*Consultation*

- 23 (1) Consultation under this paragraph must be carried out—
- (a) if the arrangements are care home arrangements and—
    - (i) authorisation is being determined under paragraph 19, or
    - (ii) renewal is being determined under paragraph 35,by the care home manager;
  - (b) otherwise, by the responsible body.
- (2) The following must be consulted—
- (a) the cared-for person,
  - (b) anyone named by the cared-for person as someone to be consulted about arrangements of the kind in question,

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- (c) anyone engaged in caring for the cared-for person or interested in the cared-for person's welfare,
  - (d) any donee of a lasting power of attorney or an enduring power of attorney (within the meaning of Schedule 4) granted by the cared-for person,
  - (e) any deputy appointed for the cared-for person by the court, and
  - (f) any appropriate person and any independent mental capacity advocate concerned (see Part 5).
- (3) The main purpose of the consultation required by sub-paragraph (2) is to try to ascertain the cared-for person's wishes or feelings in relation to the arrangements.
- (4) If it is not practicable or appropriate to consult a particular person falling within sub-paragraph (2) the duty to consult that person does not apply.

*Pre-authorisation review*

- 24 (1) A pre-authorisation review for the purposes of paragraph 18(e) or 19(d) must not be by—
- (a) a person who is involved—
    - (i) in the day-to-day care of the cared-for person, or
    - (ii) in providing any treatment to the cared-for person, or
  - (b) a person who has a connection, of a kind prescribed by regulations, with a care home.
- (2) The review must be by an Approved Mental Capacity Professional if—
- (a) the arrangements provide for the cared-for person to reside in a particular place, and it is reasonable to believe that the cared-for person does not wish to reside in that place,
  - (b) the arrangements provide for the cared-for person to receive care or treatment at a particular place, and it is reasonable to believe that the cared-for person does not wish to receive care or treatment at that place,
  - (c) the arrangements provide for the cared-for person to receive care or treatment mainly in an independent hospital, or
  - (d) the case is referred by the responsible body to an Approved Mental Capacity Professional and that person accepts the referral.
- (3) In determining whether either of paragraph (a) or (b) of sub-paragraph (2) applies, the responsible body must consider the views of any relevant person about the wishes of the cared-for person that are brought to the responsible body's attention.
- (4) In sub-paragraph (3) “relevant person” means a person engaged in caring for the cared-for person or a person interested in the cared-for person's welfare.
- (5) Regulations made by the appropriate authority under sub-paragraph (1)(b) may make provision about a connection of any kind (financial or otherwise).
- (6) The “appropriate authority” means—
- (a) where the pre-authorisation review is in relation to an authorisation by an English responsible body, the Secretary of State, and
  - (b) where the pre-authorisation review is in relation to an authorisation by a Welsh responsible body, the Welsh Ministers.

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- 25 (1) If the review is by an Approved Mental Capacity Professional, the Approved Mental Capacity Professional must—
- (a) review the information on which the responsible body relies, and
  - (b) determine whether the authorisation conditions are met.
- (2) Before making the determination the Approved Mental Capacity Professional must—
- (a) meet with the cared-for person, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so, and
  - (b) consult any other person listed in paragraph 23(2), or take any other action, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so.
- 26 If the review is not by an Approved Mental Capacity Professional, the person carrying out the review must—
- (a) review the information on which the responsible body relies, and
  - (b) determine whether it is reasonable for the responsible body to conclude that the authorisation conditions are met.

#### *Authorisation record*

- 27 (1) An authorisation record is a record relating to a cared-for person, specifying all arrangements authorised for the time being, and the responsible body for the time being, for that person, and specifying in relation to any arrangements—
- (a) the time from which the authorisation has effect, and when it is to cease to have effect under paragraph 29(1), (2) or (3),
  - (b) the programme for reviewing the authorisation,
  - (c) how the requirements of Part 5 are complied with, and
  - (d) anything else this Schedule requires to be specified.
- (2) An authorisation record may include any other information.
- (3) When the responsible body authorises arrangements the draft authorisation record required by paragraph 18(g) or 20(2)(b)(iii)—
- (a) becomes the authorisation record, and
  - (b) supersedes any earlier authorisation record.
- (4) The responsible body must revise the authorisation record if there is any change in any of the matters that are specified or required to be specified in it.

### **PART 3**

#### **DURATION, RENEWAL, VARIATION AND REVIEW OF AUTHORISATION**

##### *Time for which authorisation has effect*

- 28 (1) An authorisation has effect from the time at which the responsible body gives the authorisation, unless at that time the responsible body specifies a later time.
- (2) The time specified must not be later than the end of the period of 28 days beginning with the day on which the responsible body gives the authorisation.
- 29 (1) An authorisation ceases to have effect (if not renewed)—

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- (a) at the end of the period of 12 months beginning with the day it first has effect, or
  - (b) at the end of any shorter period specified by the responsible body at the time it gives the authorisation.
- (2) If the authorisation is renewed in accordance with paragraph 32, it ceases to have effect at the end of the renewal period.
- (3) If the responsible body at any time determines that an authorisation is to cease to have effect from any earlier day, it ceases to have effect from that day.
- (4) An authorisation ceases to have effect if, at any time, the responsible body believes or ought reasonably to suspect that any of the authorisation conditions are not met.
- (5) An authorisation ceases to have effect in relation to arrangements so far as at any time they are not in accordance with mental health requirements.

*Notification that arrangements have ceased to have effect*

- 30 If an authorisation of arrangements ceases to have effect (in whole or in part) under paragraph 29(4) or (5), the responsible body must take reasonable steps to ensure any person likely to be carrying out the arrangements is notified.

*Authorisation coming to an end early: arrangements to be treated as authorised*

- 31 (1) This paragraph applies if an authorisation ceases to have effect (in whole or in part) under paragraph 29(4) or (5).
- (2) For the purposes of section 4C (carrying out of authorised arrangements: restriction of liability) the arrangements are to be treated as authorised unless the person carrying out the arrangements knows or ought to know that—
- (a) the arrangements are no longer authorised,
  - (b) any of the authorisation conditions are not met, or
  - (c) the arrangements are not in accordance with mental health requirements.

*Renewal*

- 32 (1) The responsible body may, on one or more occasions, renew an authorisation in accordance with paragraph 34 or 35 for a specified period (“the renewal period”) of—
- (a) 12 months or less, on the first renewal, and
  - (b) 3 years or less, on any subsequent renewal.
- (2) An authorisation which has ceased to have effect cannot be renewed.
- 33 The responsible body may renew an authorisation—
- (a) under paragraph 34, if the conditions in that paragraph are met, or
  - (b) under paragraph 35 if—
    - (i) the authorisation relates to care home arrangements,
    - (ii) the responsible body decides that renewal should be determined under that paragraph instead of under paragraph 34, and
    - (iii) the conditions in paragraph 35 are met.
- 34 The conditions in this paragraph are that—
- (a) the responsible body is satisfied—

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- (i) that the authorisation conditions continue to be met, and
    - (ii) that it is unlikely that there will be any significant change in the cared-for person's condition during the renewal period which would affect whether those conditions are met, and
  - (b) the responsible body has carried out consultation under paragraph 23.
- 35 The conditions in this paragraph are that—
  - (a) the care home manager has provided the responsible body with a statement in accordance with paragraph 36, and
  - (b) having regard to the statement (and the accompanying material), the responsible body is satisfied—
    - (i) that the authorisation conditions continue to be met,
    - (ii) that it is unlikely that there will be any significant change in the cared-for person's condition during the renewal period which would affect whether those conditions are met, and
    - (iii) that the care home manager has carried out consultation under paragraph 23.
- 36 (1) A statement for the purposes of paragraph 35(a) is a statement in writing by the care home manager—
  - (a) that the authorisation conditions continue to be met,
  - (b) that it is unlikely that there will be any significant change in the cared-for person's condition during the renewal period which would affect whether those conditions are met, and
  - (c) that the care home manager has carried out consultation under paragraph 23.
- (2) The statement must be accompanied by evidence of the consultation.

#### *Variation*

- 37 The responsible body may vary an authorisation if the responsible body is satisfied—
  - (a) that consultation under paragraph 23 has been carried out, and
  - (b) that it is reasonable to make the variation.

#### *Reviews*

- 38 (1) In this paragraph “the reviewer” means the responsible body unless, in relation to care home arrangements, the responsible body decides the care home manager should be the reviewer for the purposes of this paragraph.
- (2) For any authorisation the responsible body must specify a programme of regular reviews that the reviewer must carry out.
- (3) The reviewer must also carry out a review—
  - (a) on a variation under paragraph 37;
  - (b) if a reasonable request is made by a person with an interest in the arrangements;
  - (c) if the cared-for person becomes subject to mental health arrangements;
  - (d) if the cared-for person becomes subject to mental health requirements;
  - (e) if sub-paragraph (5) or (7) applies;
  - (f) if (in any other case) the reviewer becomes aware of a significant change in the cared-for person's condition or circumstances.

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- (4) A review under sub-paragraph (3)(a) must be carried out before the authorisation is varied or, if that is not practicable or appropriate, as soon as practicable afterwards.
- (5) This sub-paragraph applies where—
  - (a) the arrangements provide for the cared-for person to reside in, or to receive care or treatment at, a specified place,
  - (b) the reviewer becomes aware that the cared-for person does not wish to reside in, or to receive care or treatment at, that place, and
  - (c) the pre-authorisation review under paragraph 24—
    - (i) was not by an Approved Mental Capacity Professional, or
    - (ii) was by an Approved Mental Capacity Professional solely because paragraph 24(2)(c) or (d) applied.
- (6) For the purposes of sub-paragraph (5)(b)—
  - (a) the reviewer must consider all the circumstances so far as they are reasonably ascertainable, including the cared-for person's behaviour, wishes, feelings, views, beliefs and values, but
  - (b) circumstances from the past are to be considered only so far as it is still appropriate to consider them.
- (7) This sub-paragraph applies where sub-paragraph (5) does not apply and—
  - (a) the arrangements provide for the cared-for person to reside in, or to receive care or treatment at, a specified place,
  - (b) a relevant person informs the reviewer or (if the reviewer is not the responsible body) the responsible body that they believe that the cared-for person does not wish to reside in, or to receive care or treatment at, that place, and
  - (c) the relevant person makes a reasonable request to the person informed under paragraph (b) for a review to be carried out.
- (8) In sub-paragraph (7) “relevant person” means a person engaged in caring for the cared-for person or a person interested in the cared-for person's welfare.
- (9) The care home manager must report to the responsible body on any review the manager carries out.
- (10) On any review where sub-paragraph (5) applies, the reviewer must refer the authorisation to an Approved Mental Capacity Professional for a determination as to whether the authorisation conditions are met.
- (11) On any review where sub-paragraph (7) applies, the reviewer or (if the reviewer is not the responsible body) the responsible body may refer the authorisation to an Approved Mental Capacity Professional and, if the Approved Mental Capacity Professional accepts the referral, the Approved Mental Capacity Professional must determine whether the authorisation conditions are met.
- (12) Before making the determination mentioned in sub-paragraph (10) or (11), the Approved Mental Capacity Professional must—
  - (a) review the authorisation,
  - (b) meet with the cared-for person, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so, and
  - (c) consult any other person listed in paragraph 23(2), or take any other action, if it appears to the Approved Mental Capacity Professional to be appropriate and practicable to do so.



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## PART 4

### APPROVED MENTAL CAPACITY PROFESSIONALS

- 39 Each local authority must make arrangements—
- (a) for persons to be approved as Approved Mental Capacity Professionals, and
  - (b) to ensure that enough Approved Mental Capacity Professionals are available for its area.
- 40 (1) The appropriate authority may by regulations—
- (a) prescribe the criteria which must be met for a person to be eligible for approval as an Approved Mental Capacity Professional;
  - (b) prescribe matters which a local authority must or may take into account when deciding whether to approve a person as an Approved Mental Capacity Professional;
  - (c) provide for a prescribed body to approve training for persons who are, or who wish to become, Approved Mental Capacity Professionals.
- (2) Regulations under sub-paragraph (1)(a) may include criteria relating to qualifications, training or experience.
- (3) If regulations made by the Secretary of State under sub-paragraph (1)(c) provide for Social Work England to approve training, the regulations may—
- (a) give Social Work England power to charge fees for approval;
  - (b) give Social Work England power to make rules in relation to the charging of fees;
  - (c) make provision in connection with the procedure for making those rules (including provision requiring Social Work England to obtain the Secretary of State's approval before making rules).
- (4) Section 50(2) to (7) of the Children and Social Work Act 2017 apply for the purposes of sub-paragraph (3) as they apply for the purposes of that section.
- (5) “Prescribed” means prescribed by the regulations.
- (6) The “appropriate authority” means—
- (a) the Secretary of State, in relation to the approval of a person by, or a person approved by, a local authority whose area is in England, and
  - (b) the Welsh Ministers, in relation to the approval of a person by, or a person approved by, a local authority whose area is in Wales.

## PART 5

### APPOINTMENT OF IMCA

#### *Appointment of Independent Mental Capacity Advocate*

- 41 (1) Paragraphs 42 and 43 apply to the responsible body at all times while arrangements are authorised or are being proposed.
- (2) In those paragraphs “IMCA” means an independent mental capacity advocate.
- 42 (1) The responsible body must take all reasonable steps to appoint an IMCA to represent and support the cared-for person if—

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- (a) sub-paragraph (2) or (3) provides that an IMCA should be appointed, and
  - (b) sub-paragraphs (4) and (5) do not apply.
- (2) An IMCA should be appointed if the cared-for person—
- (a) has capacity to consent to being represented and supported by an IMCA, and
  - (b) makes a request to the responsible body for an IMCA to be appointed.
- (3) An IMCA should be appointed if—
- (a) the cared-for person lacks capacity to consent to being represented and supported by an IMCA, unless
  - (b) the responsible body is satisfied that being represented and supported by an IMCA would not be in the cared-for person's best interests.
- (4) This paragraph does not apply if an IMCA has been appointed under this paragraph and the appointment has not ceased to have effect.
- (5) This paragraph does not apply if the responsible body is satisfied that there is a person (an “appropriate person”) who—
- (a) would be a suitable person to represent and support the cared-for person,
  - (b) consents to representing and supporting the cared-for person, and
  - (c) is not engaged in providing care or treatment for the cared-for person in a professional capacity.
- (6) A person is not to be regarded as a suitable person unless—
- (a) where the cared-for person has capacity to consent to being represented and supported by that person, the cared-for person does consent, or
  - (b) where the cared-for person lacks capacity to consent to being represented and supported by that person, the responsible body is satisfied that being represented and supported by that person would be in the cared-for person's best interests.
- 43 (1) If the cared-for person has an appropriate person, the responsible body must take all reasonable steps to appoint an IMCA to support the appropriate person if—
- (a) sub-paragraph (2) or (3) provides that an IMCA should be appointed, and
  - (b) sub-paragraph (4) does not apply.
- (2) An IMCA should be appointed if the appropriate person—
- (a) has capacity to consent to being supported by an IMCA, and
  - (b) makes a request to the responsible body for an IMCA to be appointed.
- (3) An IMCA should be appointed if—
- (a) the appropriate person lacks capacity to consent to being supported by an IMCA, and
  - (b) the responsible body is satisfied the appropriate person's being supported by an IMCA would be in the cared-for person's best interests.
- (4) This paragraph does not apply if an IMCA has been appointed under this paragraph and the appointment has not ceased to have effect.

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## PART 6

### MONITORING AND REPORTING

- 44 (1) The appropriate authority may by regulations make provision for, and in connection with, requiring one or more bodies prescribed by the regulations to monitor, and report on, the operation of this Schedule.
- (2) The regulations may include provision giving a prescribed body authority—
- (a) to visit any place where arrangements authorised under this Schedule are carried out;
  - (b) to meet with cared-for persons;
  - (c) to require the production of, and to inspect, records relating to the care or treatment of persons.
- (3) The “appropriate authority” means—
- (a) in relation to the operation of this Schedule in relation to England, the Secretary of State, and
  - (b) in relation to the operation of this Schedule in relation to Wales, the Welsh Ministers.

## PART 7

### EXCLUDED ARRANGEMENTS: MENTAL HEALTH

#### *Excluded arrangements*

- 45 This Schedule does not apply to arrangements if—
- (a) they are mental health arrangements (see paragraphs 46 to 56), or
  - (b) they are not in accordance with mental health requirements (see paragraph 57).

#### *Kinds of mental health arrangements*

- 46 For the purposes of this Schedule arrangements in relation to a person (“P”) are “mental health arrangements” if paragraph 47, 48, 49, 50 or 51 applies.
- 47 This paragraph applies if—
- (a) P is subject to the hospital treatment regime, and
  - (b) P is detained in a hospital under that regime.
- 48 This paragraph applies if—
- (a) P is subject to the hospital treatment regime,
  - (b) P is not detained in a hospital under that regime, and
  - (c) the arrangements are for enabling medical treatment for mental disorder in a hospital.
- 49 This paragraph applies if P is subject to—
- (a) a community treatment order under section 17A of the Mental Health Act, or
  - (b) anything which has the same effect, under another England and Wales enactment,

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and the arrangements are for enabling medical treatment for mental disorder in a hospital.

- 50 (1) This paragraph applies if the following conditions are met.
- (2) Condition 1 is that P is subject to—
- (a) a guardianship application under section 7 of the Mental Health Act,
  - (b) a guardianship order under section 37 of that Act, or
  - (c) anything which has the same effect as something within paragraph (a) or (b), under another England and Wales enactment.
- (3) Condition 2 is that the arrangements are or include arrangements for P to be accommodated in a hospital for the purpose of being given medical treatment for mental disorder.
- (4) Condition 3 is that P objects—
- (a) to being accommodated in a hospital for that purpose, or
  - (b) to being given some or all of that treatment.
- (5) Condition 4 is that a donee or deputy has not made a valid decision to consent to each matter to which P objects.
- (6) For provision about determining whether P objects see paragraph 52.
- 51 (1) This paragraph applies if the following conditions are met.
- (2) Condition 1 is that—
- (a) an application in respect of P could be made under section 2 or 3 of the Mental Health Act, and
  - (b) P could be detained in a hospital in pursuance of such an application, were one made.
- (3) Condition 2 is that P is not subject to any of these—
- (a) the hospital treatment regime;
  - (b) a community treatment order under section 17A of the Mental Health Act;
  - (c) a guardianship application under section 7 of the Mental Health Act;
  - (d) a guardianship order under section 37 of the Mental Health Act;
  - (e) anything which has the same effect as something within paragraph (b), (c) or (d), under another England and Wales enactment.
- (4) Condition 3 is that the arrangements are or include arrangements for P to be accommodated in a hospital for the purpose of being given medical treatment for mental disorder.
- (5) Condition 4 is that P objects—
- (a) to being accommodated in a hospital for that purpose, or
  - (b) to being given some or all of that treatment.
- (6) Condition 5 is that a donee or deputy has not made a valid decision to consent to each matter to which P objects.
- (7) For provision about determining whether P objects see paragraph 52.
- 52 (1) In determining whether P objects, regard must be had to all the circumstances (so far as they are reasonably ascertainable), including the following—

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- (a) P's behaviour;
- (b) P's wishes and feelings;
- (c) P's views, beliefs and values.

(2) But regard is to be had to circumstances from the past only so far as it is still appropriate to have regard to them.

*Mental health arrangements: the hospital treatment regime*

- 53 (1) P is subject to the hospital treatment regime if P is subject to—
- (a) an application, order or direction listed in column 1 of the Table, under the section of the Mental Health Act listed in column 2, or
  - (b) anything that has the same effect as any of those, under another England and Wales enactment,
- subject to sub-paragraph (2).
- (2) P is not subject to the hospital treatment regime during any period for which P is subject to—
- (a) a community treatment order under section 17A of the Mental Health Act, or
  - (b) anything which has the same effect, under another England and Wales enactment.

*Mental health arrangements: other definitions*

- 54 In this Part—
- “donee” means a donee of a lasting power of attorney granted by P;
  - “England and Wales enactment” means an enactment, in the Mental Health Act or elsewhere, which extends to England and Wales (whether or not it also extends elsewhere);
  - “hospital” has the same meaning as in Part 2 of the Mental Health Act;
  - “learning disability” has the meaning given by section 1(4) of the Mental Health Act;
  - “medical treatment” is to be read in accordance with paragraph 55.
- 55 In “medical treatment for mental disorder”—
- (a) “medical treatment” has the same meaning as in the Mental Health Act (see section 145(1) and (4)), but
  - (b) in the case of a person with learning disability, the medical treatment is not to be considered by reason of that disability to be for mental disorder unless the disability is associated with abnormally aggressive or seriously irresponsible conduct by that person.
- 56 A decision of a donee or deputy is valid if it is made—
- (a) within the scope of the person's authority as donee or deputy, and
  - (b) in accordance with Part 1 of this Act.

*Mental health requirements*

- 57 (1) In this Schedule “mental health requirements” means any of the following—
- (a) a requirement imposed in respect of a person by a guardian exercising the power under section 8 of the Mental Health Act;

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- (b) a condition or direction imposed or given in respect of a person by a responsible clinician exercising the power under section 17 of the Mental Health Act (leave of absence from hospital);
  - (c) a condition specified by a responsible clinician in a community treatment order made in respect of a person under section 17A of the Mental Health Act (for the imposition of conditions, see section 17B of that Act);
  - (d) a requirement imposed by a guardian in respect of a person who is the subject of a guardianship order under section 37 of the Mental Health Act (see section 40 of and Part 1 of Schedule 1 to that Act);
  - (e) a condition imposed by the Secretary of State on the discharge from hospital of a person subject to a restriction order under section 42 of the Mental Health Act;
  - (f) a condition imposed by any of the persons or bodies listed in sub-paragraph (3) when a person is conditionally discharged under section 73 of the Mental Health Act;
  - (g) anything which has the same effect as something within any of paragraphs (a) to (f), under another England and Wales enactment.
- (2) And, for the purposes of this Schedule, arrangements which relate to a person are “not in accordance with mental health requirements” if the person is subject to mental health requirements and the arrangements are not in accordance with them.
- (3) The persons or bodies for the purpose of sub-paragraph (1)(f) are—
- (a) the First-tier Tribunal;
  - (b) the Mental Health Review Tribunal for Wales;
  - (c) the Secretary of State;
  - (d) the Welsh Ministers.

## PART 8

### TRANSITORY PROVISION

- 58 Until the repeal of section 324 of the Education Act 1996 made by paragraph 4(1) and (9) of Schedule 1 to the Additional Learning Needs and Education Tribunal (Wales) Act 2018 (anaw 2) comes fully into force—
- (a) paragraph 10(1)(b) has effect as if there were substituted—
    - “(b) if the cared-for person has an individual development plan or a statement of special educational needs—
      - (i) the local authority responsible for maintaining that plan or statement, or
      - (ii) in the case of an individual development plan which is not maintained by a local authority, the local authority whose area the cared-for person is in;”
  - (b) paragraph 10(5)(b) has effect as if there were substituted—
    - “(b) if the cared-for person has an individual development plan or a statement of special educational needs—
      - (i) the local authority responsible for maintaining that plan or statement, or

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- (ii) in the case of an individual development plan which is not maintained by a local authority, the local authority whose area the cared-for person is in;”, and
- (c) paragraph 10(8) has effect as if at the end there were inserted—
  - ““statement of special educational needs” means a statement within the meaning of section 324 of the Education Act 1996.”””

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