

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—

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- (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.