

*Status: Point in time view as at 16/05/2019.*

*Changes to legislation: There are currently no known outstanding effects for the Mental Capacity Act 2005, Part 2. (See end of Document for details)*

## SCHEDULES

### [<sup>F1</sup>SCHEDULE AA1

#### DEPRIVATION OF LIBERTY: AUTHORISATION OF ARRANGEMENTS ENABLING CARE AND TREATMENT

##### Textual Amendments

- F1** Sch. AA1 inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 1](#)

### 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](#);

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- (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.
- (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

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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—
    - (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,

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- (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
  - (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

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- (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.
- (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—

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- (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,
  - (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

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- (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.
- 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

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- (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.]



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