



Llywodraeth Cynulliad Cymru  
Welsh Assembly Government

# **Mental Capacity Act 2005: Deprivation of Liberty Safeguards**

Consultation by the Welsh Assembly  
Government on secondary legislation

Published: 5th of November 2007  
Consultation will end: 28th January 2008



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## ***Explanatory Notes***

- i. This consultation relates to the Deprivation of Liberty Safeguards of the Mental Capacity Act 2005. It covers the use of regulation-making powers included in the safeguards legislation, and is being led by the Welsh Assembly Government.
  
- ii. The Ministry of Justice commenced a consultation exercise on the Code of Practice guidance relating to these safeguards on 10 September 2007. This consultation is in respect of the Lord Chancellor's obligation under section 42 of the Mental Capacity Act 2005 to prepare and issue a code and his obligation under section 43 to consult such persons as he considered appropriate in the preparation of the a code. This consultation covers England and Wales and will conclude on 2 December 2007. Further information on this consultation can be found on the Department of Health's website at [www.dh.gov.uk/en/Consultations](http://www.dh.gov.uk/en/Consultations).
  
- iii. The Welsh Assembly Government are also running consultation exercises on:-
  - Secondary legislation prepared under the Mental Health Act 1983; and
  - the Mental Health Act Code of Practice for Wales.
  
- iv. Further information on these consultations can be found on the Welsh Assembly Government's website at [www.wales.gov.uk/consultation](http://www.wales.gov.uk/consultation) or by telephoning 029 2082 5164.



## ***Background***

### ***Deprivation of Liberty Safeguards***

1.1 The Mental Capacity Act 2005 introduced a number of protections for people who may lack the capacity to make decisions for themselves.

1.2 The Mental Health Act 2007 amends the Mental Capacity Act 2005 by introduced the deprivation of liberty safeguards. These additional safeguards provide important protection for people who lack capacity to consent to arrangements made for their care and treatment and who need to be deprived of their liberty in their own interests in order to keep them safe.

1.3 The provisions for the deprivation of liberty safeguards within the primary legislation contain detailed requirements about when and how deprivation of liberty may be lawfully authorised. Within these provisions there are a number of regulation-making powers. It is these regulation-making powers that are the subject of this consultation.

1.4 If we are to gain the maximum benefit from the legislative provisions for deprivation of liberty safeguards, it is most important that we put these regulation-making powers to best use.

### ***Background to consultation***

1.5 This paper is a consultation carried out by the Welsh Assembly Government on the use of the regulation-making powers relating to the deprivation of liberty safeguards in the Mental Capacity Act 2005, as amended by the Mental Health Act 2007.

1.6 The consultation concerns how the powers should be used in relation to Wales. It is being led by the Welsh Assembly Government on behalf of the Welsh Ministers.

1.7 The consultation is aimed at anyone who will have an interest in the deprivation of liberty safeguards process, whether in a professional capacity, as somebody who may themselves be deprived of liberty, or as a friend, relative or carer of a person who may be deprived of liberty.

1.8 A full Regulatory Impact Assessment (RIA) was carried out by the Department of Health covering Wales and England on the Mental Health Bill (now the Mental Health Act 2007), of which the introduction of the deprivation of liberty safeguards into the Mental Capacity Act 2005 forms part, and this is available on the Department of Health website at:

[www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Regulatoryimpactassessment/DH\\_076477](http://www.dh.gov.uk/en/Publicationsandstatistics/Legislation/Regulatoryimpactassessment/DH_076477). In relation to these safeguards, the Department of Health has also

prepared an Impact Assessment. This is available at:

[www.dh.gov.uk/en/Consultations/Liveconsultations/DH\\_078052](http://www.dh.gov.uk/en/Consultations/Liveconsultations/DH_078052). Respondents are welcome to comment on whether the Impact Assessment has identified the potential impact fully.

# ***Development of the regulations***

## ***The proposals***

2.1 Although this document introduces the formal consultation on these regulations, there has been informal consultation before now to inform the drafting of the regulations.

2.2 Following introduction of the Mental Health Bill into Parliament in November 2006, officials in the Welsh Assembly Government began developing the policy behind the regulations. This has taken account of the changes to the Bill as it was considered by Parliament.

2.3 The draft policy has been developed in consultation with members of the Welsh Assembly Government's Mental Health Act Implementation Reference Group. The Mental Health Act Implementation Reference Group is representative of the main mental health stakeholders in Wales. In addition a wider group of stakeholders were brought together into the Deprivation of Liberty Safeguards Advisory Group. This second group provided comments and proposals for the development of the policy for these regulations.



## ***The scope of the regulations***

3.1 The deprivation of liberty safeguards regulation-making powers embraced within this consultation covers the following issues:-

- the information to be included in requests for standard authorisations of deprivation of liberty;
- the eligibility and selection of people to undertake assessments for the purpose of the deprivation of liberty authorisation process;
- the eligibility and appointment of people to be the Relevant Person's Representatives, i.e. to become an independent representative of a person in respect of whom deprivation of liberty is authorised; and
- the need to ensure that any dispute, about which local authority should be the supervisory body for the purpose of the deprivation of liberty safeguards process, should not delay any decision making about whether the deprivation of liberty should be authorised.

3.2 There are, in addition, regulation-making powers relating to monitoring of these safeguards which remain the subject of discussion with potential inspection bodies. These regulations do not form part of this consultation process but will be the subject of a separate consultation exercise at a later date.

3.3 The draft regulations come in two attached documents; the first containing regulations subject to affirmative resolution by the National Assembly for Wales, and the second, regulations for negative resolution. These are, in respective order:-

- Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2008; and
- Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2008.

3.4 Specific questions on which views are sought are highlighted in bold text within section 4 of this document. These questions address the main issues to be resolved through the consultation process. The questions are there to assist your response. You are invited to respond on all or some of these questions. Responses on any other points relating to these regulations will also be welcomed.

# ***Consultation questionnaire***

## ***Consultation process***

4.1 This consultation commences on 5 November 2007, and will run until 28 January 2008.

4.2 Following consultation, officials will compile a report on the comments received, and publish all comments received, unless authors have asked for them to be treated as confidential. The report will indicate the changes made to the regulations as a result of comments received.

4.3 A revised version of the regulations, including the comments made, will then be laid before the National Assembly for Wales. If the Assembly is content, the regulations will then be published and made available.

4.4 The planned date for the coming into force of both sets of regulations in Wales is October 2008.

## ***Consultation events***

4.5 The Welsh Assembly Government is holding two consultation events in Wales to consider these regulations and the addendum to the Mental Capacity Act Code of Practice on the Deprivation of Liberty Safeguards (currently subject to consultation by the Ministry of Justice). These events are being held on:-

- 5 November 2007 at the Millennium Stadium, Cardiff; and
- 20 November 2007 at Venue Cymru, Llandudno.

4.6 The Welsh Assembly Government is holding a further five events on the Mental Health Act Code of Practice for Wales and the secondary legislation prepared under the Mental Health Act and the Deprivation of Liberty Safeguards of the Mental Capacity Act. These events are being held on:-

- 15 November 2007 at the Hilton Hotel, Newport (South Wales);
- 19 November 2007 at the Halliwell Centre, Carmarthen;
- 27 November 2007 at The Celtic Royal Hotel, Caernarfon;
- 5 December 2007 at The Angel Hotel, Cardiff; and
- 10 December 2007 at the Talardy Hotel, St Asaph.

4.7 For further information on how to attend any of these events please contact Sarah Richards on 029 2080 1470 or [Sarah.Richards@wales.gsi.gov.uk](mailto:Sarah.Richards@wales.gsi.gov.uk).

4.8 The Welsh Assembly Government has given Learning Disability Wales grant funding to hold four events across Wales for service users and carers. For further information on these events please contact Learning Disability Wales on 029 2068 1160.

***Consultation questions – ‘Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations & Disputes about Residence)(Wales) Regulations 2008***

4.9 This part of the consultation document refers to the *‘Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence)(Wales) Regulations 2008’*. These regulations concern application to the supervisory body for a deprivation of liberty authorisation and the process of assessment as to whether the criteria are met for an authorisation to be granted. They also cover how disputes should be handled about the identification of the supervisory body in respect of people in care homes. These regulations will be made by Welsh Ministers but subject to approval by the National Assembly for Wales.

4.10 We would welcome all comments on these regulations, but are asking specific questions about them as follows:-

- a. **Regulation 3: Do you support the general eligibility requirements for assessors?** If not what changes would you propose? These eligibility requirements need to be read in the light of paragraph 129(2) of schedule A1 to the Mental Capacity Act 2005, which requires the supervisory body to select an assessor who is both eligible to carry out that assessment and suitable to carry out the assessment having regard to the type of assessment and the person to be assessed.
- b. **Regulations 4, 5 and 6: Do you support the professional qualifications and experience required for mental health, best interests and mental capacity assessors?** If not, what changes would you propose?
- c. **Regulations 4, 5 and 6: Given the types of groups assessors would be expected to be drawn from, do you have any views about the availability of individuals in sufficient numbers to carry out these assessments?**
- d. **Regulations 7 and 8: Do you support the exclusions as to who can and cannot be an assessor?** If not, what changes would you propose?
- e. **Regulations 7 and 8: Given these exclusions, and any others you wish to propose, what are your views on whether there are broader issues for supervisory bodies in identifying suitable assessors?**
- f. **Regulations 9 and 10: Are the time-frames in regulations 9 and 10 appropriate and practicable given the nature and type of assessments to be carried out?** If not, what changes would you propose?

- g. Regulation 12: Does this regulation cover all the information reasonably expected to be provided in a request form?** The aim of regulation 12 is to promote both the quality and the timeliness of the assessment process by ensuring that the supervisory body has the necessary information to appoint the right assessors and that the assessors have the information that they need to carry out the assessment. **Do you agree with the proposed information to be provided with an application? Would you suggest any changes?**
- h. Regulations 13, 14 and 15:** These regulations cover what should happen if the local authority that receives an authorisation disputes that it should be the supervisory body. The aim of the regulations is to ensure that this does not delay the assessment process. **Do you consider that the arrangements in these regulations will work in practice? If not, what changes would you propose?**
- i. Allocation of funding:** it is the Welsh Assembly Government's intention, as far as possible, that the assessors chosen to carry out the assessments will be based in the same vicinity as the relevant person. This will mean in some cases that a supervisory body uses assessors from another area, rather than sending assessors to travel to the place where the person is receiving care. Therefore, the assessment workload will need to be reflected in the allocation of funding. We are currently considering how the allocations should be made and would welcome views on the formula to be used.

***Consultation questions – ‘Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative)(Wales) Regulations 2008***

4.11 This part of the consultation document refers to the *‘Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative)(Wales) Regulations 2008’*. When a standard authorisation for the deprivation of liberty is granted, a representative will be appointed to maintain contact with and to support

and represent the relevant person for the duration of the authorisation. These regulations concern the selection and appointment of such representatives, as well as including directions to Local Health Boards to exercise supervisory functions. These regulations will be made by Welsh Ministers but subject to annulment by the National Assembly for Wales.

4.12 We would welcome all comments on these regulations, but are asking specific questions about them as follows:-

- a. **Regulation 3: Do you support the directions to Local Health Boards that they will exercise the supervisory functions for hospitals (private or NHS) in their area, and similarly for hospitals in England where the Local Health Board has commissioned the care or treatment? If not, what changes would you propose?**
- b. **Regulation 3: Do you support the directions to Powys Local Health Board that it will exercise the supervisory functions where Health Commission Wales, on behalf of Welsh Ministers, has commissioned care or treatment in a hospital (private or NHS) in England. If not, what changes would you propose?**
- c. **Regulation 6: Do you support the eligibility criteria of a person for appointment as the relevant person's representative? If not, what changes would you propose?**
- d. **Regulation 6: Do you support the definition of "close relative" for the purpose of these regulations? If not, what changes would you propose?**
- e. **Regulations 8 to 13: Do you support the requirements for appointing the representative in these regulations, when read in conjunction with the guidance in Chapter 4 of the draft Addendum to the Mental Capacity Act 2005 Code of Practice? If not what changes would you propose?**

- f. Regulation 14: Do you support the circumstances in regulation 14 for terminating the appointment of a representative?**

***Consultation questions – additional matters***

4.13 The Welsh Assembly Government would also wish to receive your view on the following questions:-

- a. Has the Welsh Assembly Government covered all of the significant areas of impact of the deprivation of liberty safeguards?**
- b. Do you have additional evidence to submit?**
- c. Would you propose changes which would have a positive impact on equality or which would reduce burdens?**

4.14 In addition we would be particularly interested in any comments on ways in which the draft statutory instruments could impact adversely on people because of their age, disability, race, religion and belief, gender or sexual orientation, and on any ways in which they could be used positively to promote equality.

## ***How to respond***

5.1 Please send your response by 28 January 2008 to:-

**Mental Health, Vulnerable Groups & Offenders Policy Branch  
Welsh Assembly Government  
Cathays Park  
Cardiff  
CF10 3NQ**

Or by e-mail to [MentalHealthPolicyMailbox@Wales.GSI.gov.uk](mailto:MentalHealthPolicyMailbox@Wales.GSI.gov.uk).

Please mark the subject of your letter/email 'Consultation on the Deprivation of Liberty Safeguards regulations'. We would be grateful if all responses could include information about you in your response; a sample pro-forma is attached at Annex A of this document.

## ***Extra copies***

5.2 Further paper copies of this consultation can be obtained from this address and it is also available on line at [www.wales.gov.uk/consultation](http://www.wales.gov.uk/consultation).

## ***Publication of response***

5.3 A paper summarising the responses to this consultation will be published within three months of the closing date for the consultation.

## ***Representative groups***

5.4 Representative groups are asked to give a summary of the people and organisations they represent when they respond.

## ***Confidentiality***

5.5 Information provided in response to this consultation, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the Data Protection Act 1998 (DPA) and the Environmental Information Regulations 2004).

5.6 If you want the information that provide to be treated as confidential, please be aware that under the FOIA there is a statutory Code of Practice with which public authorities must comply. This deals with, amongst other things, obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT systems will not, of itself, be regarded as binding on the Welsh Assembly Government.

5.7 The Welsh Assembly Government will process your personal data in accordance with the DPA and in the majority of circumstances this will mean that your personal data will not be disclosed to third parties.

## **Annex A: About you**

Please use this section to tell us about yourself

|   |  |
|---|--|
| <b>Full name</b>  |  |
| <b>Job title</b> or capacity in which you are responding to this consultation exercise (e.g. member of the public, etc) |  |
| <b>Date</b>   |  |
| <b>Organisation/company name</b> (if applicable)  |  |
| <b>Address</b>  |  |
| <b>Postcode</b>   |  |

**If you are a representative of a group**, please tell us the name of the group and give a summary of the people or organisations that you represent:

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If you would like us to acknowledge receipt of your response please tick this box:

Address to which acknowledgement should be sent, if different from above

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Post code:

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**2008 No. (W.)**

**MENTAL CAPACITY, WALES**

Mental Capacity (Deprivation of  
Liberty: Assessments, Standard  
Authorisations and Disputes about  
Residence) (Wales) Regulations  
2008

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

**2007 No. (W.)**

**MENTAL CAPACITY, WALES**

**Mental Capacity (Deprivation of  
Liberty: Assessments, Standard  
Authorisations and Disputes about  
Residence) (Wales) Regulations  
2008**

*Made* 2008

*Laid before that National Assembly for Wales  
[ ] 2008*

*Coming into force* 2008

The Welsh Ministers make these Regulations in exercise of the powers conferred by section 65(1) of, and paragraphs 31, 33(4), 47(1), 70, 129(3), 130 (2), (3) and (5) and 183(6) and (7) of Schedule A1 to, the Mental Capacity Act 2005<sup>(1)</sup>.

A draft of this instrument, has been laid before the National Assembly for Wales in accordance with section 50(11) of the Mental Health Act 2007<sup>(2)</sup>, and approved by resolution of the National Assembly for Wales.

**Title, commencement and application**

**1.**—(1) These Regulations are called the Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2008 and come into force on [ ] 2008.

(2) These Regulations apply in relation to Wales.

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<sup>(1)</sup> 2005 (c.9). Schedule A1 was inserted by section 50(5) of the Mental Health Act 2007.  
<sup>(2)</sup> 2007 (c.12).

## Interpretation

2.—(1) In these Regulations—

“the Act” (“”) means the Mental Capacity Act 2005

“assessor” (“”) has the meaning given by paragraph 128 of Schedule A1 to the Act;

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

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

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

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

(2) For the purpose of these Regulations “supervisory body” includes a Local Health Board exercising supervisory functions in accordance with regulation 3 of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Representative) (Wales) Regulations 2008(2).

## PART 1

### Eligibility to carry out assessments

#### Eligibility – general

3.—(1) Subject to additional requirements in regulations 4, 5, 6 and 8 a person is only eligible to carry out an assessment, other than an age assessment, where—

- (a) that person is insured in respect of any liabilities that might arise in connection with carrying out the assessment; and
- (b) the supervisory body<sup>(3)</sup> is satisfied that he or she has appropriate training, and
- (c) the supervisory body is satisfied that the person has the skills and experience appropriate to the assessment he or she is to carry out which must include, but is not limited to, the following skills—

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<sup>(1)</sup> 2000 c. 14.

<sup>(2)</sup>

<sup>(3)</sup> The identity of the supervisory body is determined in accordance with paragraphs 179 and 181 of Schedule A1 to the Mental Capacity Act 2005 (“the Act”).

- (i) the ability to communicate effectively with a view to identifying characteristic and attributes of a person that are relevant to that person's needs, and
- (ii) the ability to act independently of any person who appoints him or her to carry out an assessment and of any person who is providing care or treatment to the person he or she is to assess.

(2) In determining whether a person has appropriate training in paragraph (b) regard must be had to standards in guidance that may be issued by Welsh Ministers.

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

4. A person is eligible to carry out a mental health assessment<sup>(1)</sup> if that person is —

- (a) approved under section 12 of the Mental Health Act 1983<sup>(2)</sup>; or
- (b) a registered medical practitioner who the supervisory body is satisfied has special experience in the diagnosis and treatment of mental disorder.

#### **Eligibility to carry out best interests assessments**

5.—(1) A person is eligible to carry out a best interests assessment<sup>(3)</sup> if that person is—

- (a) a social worker registered with the General Social Care Council or Care Council for Wales;
- (b) 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;
- (c) an occupational therapist registered in Part 6 of the register maintained under article 5 of the Health Professions Order 2001; or
- (d) a chartered psychologist who is registered with the British Psychological Society and who holds a practising certificate issued by that Society.

(2) The supervisory body must also be satisfied that a person has the ability to take account of the views of any person who is interested in the welfare of the person to be assessed and the ability to assess the

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(1) A mental health assessment is an assessment carried out under paragraph 35 of Schedule A1 to the Act.  
 (2) 1983 (c.20). Section 12 was amended by section 16 of the Mental Health Act 2007.  
 (3) A best interests assessment is an assessment carried out under paragraph 38 of Schedule A1 to the Act.

relevance and importance of those views in making an assessment.

**Eligibility to carry out mental capacity assessment**

6. A person is eligible to carry out a mental capacity assessment<sup>(1)</sup> if they are eligible to carry out —

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

**PART 2**

**Selection of Assessors**

**Selection of assessors - general**

7.—(1) A supervisory body may only select a person to carry out an assessment in any individual case where the person is—

- (a) not financially interested in the care of the relevant person;
- (b) not a close relative of the relevant person; and
- (c) not a close relative of a person who is financially interested in the care of the relevant person.

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

- (a) a spouse or civil partner;
- (b) a parent or child,
- (c) a brother or sister;
- (d) a grandparent or grandchild;
- (e) a child of a person falling with sub-paragraphs (a) or (c);
- (f) a stepfather or stepmother; or
- (g) a half-brother or half-sister.

(3) “Spouse” or “civil partner” includes a person who is not married to or in a civil partnership with a person but is living with that person as if they were.

**Selection of best interests assessors**

8.—(1) A supervisory body may only select a person to carry out a best interests assessment where—

- (a) that person is not involved in the care or treatment, or making decisions about the care or treatment, of the relevant person;

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<sup>(1)</sup> A mental capacity assessment is an assessment carried out under paragraph 37 of Schedule A1 to the Act.

- (b) the assessment relates to detention of the relevant person in a care home and the person is not employed to work in the care home;
- (c) the assessment relates to detention of the relevant person in a hospital and the person is not employed to work at the hospital.

(2) Where the relevant person is to be detained in a care home or hospital which is owned or managed by the supervisory body, a best interests assessment must not be carried out by a person who is employed by that supervisory body.

## PART 3

### Assessment

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

9.—(1) Subject to paragraph (2), the assessor must complete the assessment within 21 days from the date he or she is instructed by the supervisory body.

(2) Where the managing authority has given an urgent authorisation under paragraph 76 of Schedule A1 to the Act and makes a request for a standard authorisation, the assessor must complete the assessment within 5 days from the date on which he or she is instructed by the supervisory body.

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

10. Subject to paragraph 69(4) and (5) of Schedule A1 to the Act, an assessment required under paragraph 69 of Schedule A1 to the Act must be completed within 5 days from the date on which he or she is instructed by the supervisory body.

#### **Relevant eligibility information**

11.—(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 provide him or her with 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.

## PART 4

### Request for a standard authorisation

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

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

- (a) the name of the relevant person;
- (b) the name, address and telephone number of the managing authority;
- (c) the reasons why the managing authority consider that the relevant person is being or will be detained in circumstances which amount to a deprivation of liberty;
- (d) the reasons why the managing authority consider that the relevant person satisfies the qualifying requirements under paragraph 12 of Schedule A1 of the Act;
- (e) details of any urgent authorisation given in accordance with paragraph 76 of Schedule A1 to the Act;

(2) Subject to paragraph (3), a request for a standard authorisation must include the following information if available or can reasonably be obtained—

- (a) any information or documents in support of the reasons given in paragraphs (1)(d);
- (b) the name, address and telephone number of any person who has an interest in the welfare of the relevant person;
- (c) details of any relevant valid and applicable advance decision made by the relevant person.

(3) Where—

- (a) there is an existing standard authorisation in force in relation to the detention of the relevant person, and
- (b) the managing authority makes a request in accordance with paragraph 29 of Schedule A1 to the Act for a further standard authorisation in relation to the same relevant person,

the request does not have to include any of the information mentioned in paragraph (2) if that information remains the same as stated in the request for the existing standard authorisation.

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

## PART 5

### Supervisory bodies: care homes

#### Dispute about the Place of Ordinary Residence

##### **Application of Part 5**

**13.** This Part applies where —

- (a) a local authority (“local authority A”) (1) receives a request —
  - (i) from a care home for a standard authorisation under paragraphs 24, 25 or 30 of Schedule A1 to the Act;
  - (ii) under paragraph 68 of Schedule A1 to the Act from an eligible person to decide whether or not there is an unauthorised deprivation of liberty in a care home.
- (b) local authority A wishes to dispute that it is the appropriate supervisory body; and
- (c) a question as to the ordinary residence of the relevant person is to be determined by Welsh Ministers.

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

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

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

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

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

**15.—**(1) Where the identity of the supervisory body is determined in accordance with paragraph 183(3) of Schedule A1 to the Act, and a local authority (“local authority B”) becomes the supervisory body in place

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

of the local authority A, the following paragraphs apply.

(2) The time limit required by —

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

apply, as the case may be, as if local authority B was the supervisory body that received a request in accordance with regulation 13.

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

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

(5) But—

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

*[Name]*

Date

**2008 No. (W.)**

**MENTAL CAPACITY, WALES**

Mental Capacity (Deprivation of  
Liberty: Appointment of Relevant  
Person's Representative) (Wales)  
Regulations 2008

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

**2008 No. (W.)**

**MENTAL CAPACITY, WALES**

Mental Capacity (Deprivation of  
Liberty: Appointment of Relevant  
Person’s Representative) (Wales)  
Regulations 2008

*Made* 2008

*Laid before the National Assembly for Wales*  
2008

*Coming into force* 2008

The Welsh Ministers make these Regulations in exercise of the powers conferred by section 65(1) of, and paragraphs 138(1), 142 to 144, 145, 147, 148, 165, 166 and 182(6) and (7) of Schedule A1 to, the Mental Capacity Act 2005(1).

**Title, commencement and application**

1.—(1) These Regulations are called the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative) (Wales) Regulations 2008 and come into force on [ ] 2008.

(2) These Regulations apply in relation to Wales.

**Interpretation**

2.—(1) In these Regulations—

“the Act” (“”) means the Mental Capacity Act 2005;

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

“donee” (“”) is a person who has a lasting power of attorney or a registered enduring power of attorney conferred on them by the relevant person.

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

(2) For the purpose of these Regulations “supervisory body” includes a Local Health Board exercising supervisory functions in accordance with regulation 3.

## PART 1

### Supervisory functions

#### **Supervisory functions exercisable by Local Health Boards**

**3.**—(1) Each Local Health Board will exercise the supervisory functions—

- (a) in relation to hospitals (whether NHS or independent hospitals) in its area; and
- (b) where the Local Health Board commissions relevant care or treatment in a hospital (whether a NHS or independent hospital) in England in relation to that hospital.

(2) Where Welsh Ministers commission relevant care or treatment in a hospital (whether a NHS or independent hospital) in England the supervisory body will be Powys Local Health Board.

(3) Subject to any directions given by Welsh Ministers, the supervisory functions exercisable by a Local Health Board may, by arrangement with that Board, and subject to such restrictions and conditions as the Board may think fit, be exercised—

- (a) on behalf of that Board by a committee, sub-committee or officer of the Board;
- (b) jointly with another Local Health Board;

(4) “Supervisory functions” has the same meaning as in Schedule A1, paragraph 165(3) of the Act.

## PART 2

### Appointment – general

#### **Appointment procedure**

**4.**—(1) A person is to be selected for appointment as a representative in accordance with Part 3.

(2) A person is to be appointed as a representative in accordance with Part 4.

#### **Commencement of appointment procedure**

**5.** The procedure for appointing a representative must begin as soon as—

- (a) a best interests assessor is selected by the supervisory body<sup>(1)</sup> for the purposes of a request for a standard authorisation<sup>(2)</sup>; or
- (b) a relevant person's representative's appointment terminates, or is to be terminated in accordance with regulation 14(c) to (g), and the relevant person remains subject to a standard authorisation.

### **Eligibility of a person to be a representative**

**6.—(1)** A person is eligible to be appointed as a representative if they are—

- (a) 18 years of age or over;
- (b) able to keep in contact with the relevant person<sup>(3)</sup>;
- (c) not prevented by ill-health from carrying out the role of the representative;
- (d) willing to be the relevant person's representative;
- (e) not financially interested in the care home<sup>(4)</sup> where the relevant person is, or is to be, detained;
- (f) not a close relative of a person who is financially interested in the care home where the relevant person is, or is to be, detained;
- (g) not providing services to, or not employed to work in, the care home where the relevant person is, or is to be, detained;
- (h) not employed to work in the hospital<sup>(5)</sup> where the relevant person is, or is to be, detained in a role that is, or could be, related to the relevant person's case; and
- (i) not employed to work in the relevant person's supervisory body in a role that is, or could be, related to the relevant person's case.

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

- (b) a spouse or civil partner;
- (a) a parent or child,
- (b) a brother or sister;
- (c) a grandparent or grandchild;
- (d) a brother or sister of a parent or grandparent;

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- (1) The identity of the supervisory body is determined in accordance with paragraphs 179 and 181 of Schedule A1 to the Mental Capacity Act 2005 (“the Act”).
  - (2) “standard authorisation” is defined in paragraph 8 of Schedule A1 to the Act.
  - (3) “relevant person” is defined in paragraph 7 of Schedule A1 to the Act.
  - (4) “care home” is defined in paragraph 177 of Schedule A1 to the Act.
  - (5) “hospital” is defined in paragraph 174 of Schedule A1 to the Act.

- (e) a child of a person falling with sub-paragraphs (a) or (c);
- (f) a stepfather or stepmother; or
- (g) a half-brother or half-sister.

(3) “Spouse” or “civil partner” includes a person who is not married to or in a civil partnership with a person but is living with that person as if they were.

## PART 3

### Selection

#### **Selection by the relevant person**

7.—(1) This regulation applies where the relevant person has capacity in relation to the question of which person should be his or her representative.

(2) The relevant person may select a person for appointment as his or her representative.

(3) Where the relevant person may select a person in accordance with paragraph (2) but does not do so, regulation 10 applies.

#### **Selection by a donee or deputy**

8.—(1) This regulation applies where the relevant person does not have capacity in relation to the question of which person should be his or her representative.

(2) Where—

- (a) the relevant person has a donee or deputy<sup>(1)</sup>, and
- (b) it is within the authority of the donee or deputy to do so,

the donee or deputy may select a person to be appointed as a representative.

(3) Where a donee or deputy may select a person in accordance with paragraph (2) but does not do so, regulation 10 applies.

#### **Approval by the best interests assessor or supervisory body**

9.—(1) A person selected in accordance with regulations 7(2) or 8(2) must be approved by the best interests assessor or the supervisory body.

(2) Where the best interests assessor or supervisory body does not approve a person selected—

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(1) “deputy” is defined in section 64(1) of the Act.

- (a) they may approve another person selected in accordance with regulations 7(2) or 8(2); or
- (b) the best interests assessor may select a person in accordance with regulation 10.

**Selection by the best interests assessor**

**10.**—(1) This regulation applies where—

- (a) a person has not been selected for appointment as representative in accordance with regulations 7(2) or 8(2), or
- (b) the best interests assessor or supervisory body has not approved a person in accordance with regulation 9.

(2) The best interests assessor may select a person to act as a representative for the relevant person.

(3) If the best interests assessor is unable to select a person for appointment as a representative, regulation 11 applies.

**Selection by the supervisory body**

**11.**—(1) This regulation applies where a person has not been selected in accordance with regulations 7(2), 8(2) or 10(2).

(2) The supervisory body must select a person to be appointed as a representative for the relevant person.

(3) Where a person who is selected in accordance with paragraph (2) will be acting in a professional capacity that person must have appropriate training and experience.

(4) In determining whether a person has appropriate training and experience for the purposes of paragraph (3) regard will be had to standards in guidance that may be issued by Welsh Ministers.

## PART 4

### Appointment of representatives

**Appointment of representative**

**12.** A supervisory body will appoint as a representative for the relevant person any person who is selected in accordance with Part 3.

**Formalities of appointing a representative**

**13.**—(1) Notice of the appointment of a representative must be given to the following persons—

- (a) the relevant person;
- (b) the relevant managing authority;

- (c) any donee or deputy of the relevant person;
- (d) any independent mental capacity advocate<sup>(1)</sup> appointed in accordance with the Act; and
- (e) any person consulted by the best interest assessor.

#### **Termination of representative's appointment**

**14.** A person ceases to be a representative if—

- (a) they die;
- (b) they inform the supervisory body that they no longer are willing to continue in the role;
- (c) the period of their appointment ends;
- (d) a representative has been appointed after having been selected in accordance with regulation 7(2) and the relevant person objects to that person continuing to be his or her representative;
- (e) a representative has been appointed after having been selected in accordance with regulation 8(2) and the donee or deputy objects to the person continuing to be the relevant person's representative;
- (f) the supervisory body terminates the appointment because it is satisfied that the representative is not maintaining sufficient contact with the relevant person in order to support and represent him or her; or
- (g) the supervisory body terminates the appointment because it is satisfied that the person is no longer eligible to be a representative.

#### **Formalities of termination of representative's appointment**

**15.** Where the appointment of a representative is to be terminated in accordance with regulations 14(c) to (g) the supervisory body must notify that person that the appointment is to be terminated and must give reasons why the appointment is to be terminated.

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<sup>(1)</sup> "independent mental capacity advocate" is defined in section 64(1) of the Act.

## PART 5

### Representatives - miscellaneous

#### **Monitoring of representatives**

**16.** The managing authority must advise the supervisory body where it becomes aware the representative has not maintained regular contact with the relevant person..

#### **Paid representatives**

**17.** A supervisory body may make payments to, or in relation to, any person appointed in accordance with regulation 12 and exercising functions as the relevant person's representative .

*[Name]*

Date