

Draft Order laid before the National Assembly for Wales under section 50 of the Mental Health Act 2007, for approval by a resolution of the Assembly.

DRAFT WELSH
STATUTORY INSTRUMENTS

2009 No. (W.)

MENTAL CAPACITY, WALES

**Mental Capacity (Deprivation of
Liberty: Assessments, Standard
Authorisations and Disputes about
Residence) (Wales) Regulations
2009**

EXPLANATORY NOTE

(This note is not part of the Regulations)

1. 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.

2. 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 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 Local Health Board for the area in which the hospital is situated or the Local Health Board that commissions the care or treatment.

3. On receiving a request for standard authorisation a supervisory body is required to arrange for various assessments to be 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.

4. Regulations 3 to 8, together with the Act, provide the eligibility requirements for people who carry out the assessments. These Regulations require that—

- (a) the supervisory body is satisfied that all assessors are insured, have appropriate skills and have undergone a Criminal Record Bureau check (regulation 3);
- (b) mental health assessments may only be carried out by a person approved under section 12 of the Mental Health Act 1983 (“the Mental Health Act”) or registered medical practitioners who have relevant experience in diagnosis or treatment of mental disorder (regulation 4);
- (c) best interests assessments can only be carried out by a social worker, nurse, occupational therapist or psychologist and the supervisory body must be satisfied that they have the skills required to make such assessments (regulation 5);
- (d) mental capacity assessments and eligibility assessments may only be carried out by people who are eligible to carry out a mental health assessment or a best interests assessment (regulation 6);
- (e) the assessor does not have a financial interest in the care of the person they are assessing or a relative of that person. (regulation 7);
- (f) the best interests assessor must not be involved in the care or treatment, or in making decisions about the care or treatment, of the person he or she is assessing (regulation 8).

5. Regulations 9, 10 and 11 contain provisions about the time limits in which assessments must be completed. Where a request for a standard authorisation is received—

- (a) except in the case where the assessor is instructed before 30 April 2009, an assessor must complete the assessment within 21 days of being instructed, except that where there is an urgent authorisation it must be completed within 5 days (regulation 9);
- (b) in the case of an assessment to decide whether there is an unauthorised deprivation of liberty, the assessment must be completed within 5 days (regulation 10);
- (c) where the assessment is carried out before 30 April 2009 the assessment must be completed within 42 days (regulation 11).

6. Regulation 12 provides that where the eligibility assessor and best interests assessor are not the same person the eligibility assessor must request relevant information from the best interests assessor.

7. Regulation 13 specifies the information that must be provided by the managing authority when making a request for a standard authorisation.

8. Regulations 14, 15 and 16 make provisions authorising local authorities to act as supervisory body in cases where there is dispute about the residence of the person who is the subject of the request for standard authorisation. Paragraph 183(3) of Schedule A1 to the Act provides that any question about ordinary residence in such cases is to be determined by Welsh Ministers.

9. Regulation 15 provides that where a local authority disputes that it is the appropriate supervisory body the local authority who receives the request for standard authorisation must act as supervisory body until the question about the ordinary residence is determined. However if another local authority agrees to act as supervisory body then that local authority will be the supervisory body until the question is determined. When the question has been determined then the local authority identified as the supervisory body will become the supervisory body.

10. Regulation 16 sets out the arrangements and where liability lies where the request for standard authorisation is transferred from one local authority to another.

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Residence) (Wales) Regulations
2009

Made 2009

Laid before that National Assembly for Wales
[]2009

Coming into force 1 April 2009

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(1).

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(2), and approved by resolution of the National Assembly for Wales.

PART 1

General

Title, commencement and application

1.—(1) These Regulations are called the Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about

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

Residence) (Wales) Regulations 2009 and come into force on 1 April 2009.

(2) These Regulations apply in relation to Wales.

Interpretation

2.—(1) In these Regulations—

“the Act” (“*y Ddeddf*”) means the Mental Capacity Act 2005;

“approved mental health professional” (“*gweithiwr proffesiynol iechyd meddwl a gymeradwywyd*”) means a person approved under section 114(1) of the Mental Health Act 1983⁽¹⁾

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

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

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

(2) For the purpose of these Regulations “supervisory body” (“*corff goruchwyllo*”) 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 2009⁽²⁾.

PART 2

Eligibility to carry out assessments

Eligibility – general

3.—(1) Subject to additional requirements in regulations 4 to 8 a person is only eligible to carry out an assessment, other than an age assessment, where the supervisory body is satisfied that the person—

- (a) is insured in respect of any liabilities that might arise in connection with carrying out the assessment; and
- (b) 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—

⁽¹⁾ 1983 (c.20). Section 114 was substituted by section 18 of the Mental Health Act 2007.

⁽²⁾ S.I. 2009/ (W.).

- (i) the ability to communicate effectively with a view to identifying characteristics 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) The supervisory body must be satisfied that there is in respect of the person—
- (a) an enhanced criminal record certificate issued under section 113B of the Police Act 1997(1); or
 - (b) if the purpose for which the certificate is required is not one prescribed under subsection (2) of that section, a criminal record certificate issued pursuant to section 113A of that Act(2).

Eligibility to carry out mental health assessment

- 4.** A person is eligible to carry out a mental health assessment(3) if that person is —
- (a) approved under section 12 of the Mental Health Act 1983(4); or
 - (b) a registered medical practitioner who the supervisory body is satisfied has relevant experience in the diagnosis or treatment of mental disorder.

Eligibility to carry out best interests assessments

- 5.—(1)** A person is eligible to carry out a best interests assessment(5) if that person is—
- (a) an approved mental health professional;
 - (b) a social worker registered with the Care Council for Wales;
 - (c) a first level nurse, registered in Sub-Part 1 of the Nurses' Part of the Register maintained under article 5 of the Nursing and Midwifery Order 2001;
 - (d) an occupational therapist registered in Part 6 of the register maintained under article 5 of the Health Professions Order 2001; or

(1) 1997 (c.50). Section 113B was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005 (c.15).

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

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

(4) 1983 (c.20). Section 12 was amended by section 16 of the Mental Health Act 2007.

(5) A best interests assessment is an assessment carried out under paragraph 38 of Schedule A1 to the Act.

- (e) a chartered psychologist listed in the British Psychological Society’s Register of Chartered Psychologists 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 relevance and importance of those views in making an assessment.

Eligibility to carry out mental capacity assessment or eligibility assessment

6. A person is eligible to carry out a mental capacity assessment⁽¹⁾ or an eligibility assessment⁽²⁾ if they are eligible to carry out —

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

PART 3

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

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

- (a) the father, mother, stepfather, stepmother, son, daughter, grandmother, grandfather, grandson or granddaughter of that person or of that person’s spouse, former spouse, civil partner or former civil partner; or
- (b) the brother, sister, uncle, aunt, niece, nephew or first cousin (whether of the full blood or of the half blood or by marriage or civil partnership) of that person or of that person’s spouse, former spouse, civil partner or former civil partner.

(3) For the purposes of this regulation—

⁽¹⁾ A mental capacity assessment is an assessment carried out under paragraph 37 of Schedule A1 to the Act.
⁽²⁾ An eligibility assessment is an assessment carried out under Schedule 1A to the Act.

- (a) “Spouse” (“*prïod*”) or “civil partner” (“*partner sifil*”) 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; and
- (b) a person has a financial interest in a care home or independent hospital where that person is a partner, director, other office-holder or major shareholder of the care home or independent hospital that has made the request for a standard authorisation.
- (c) “major shareholder” (“*cyfranddaliwr sylweddol*”) means—
 - (i) any person who holds one tenth or more of the issued shares in the care home or independent hospital, where the care home or independent hospital is a company limited by shares, and
 - (ii) in all other cases, any of the owners of the care home or independent hospital.

Selection of best interests assessors

8. A supervisory body may only select a person to carry out a best interests assessment where that person is not involved in the care or treatment, or in making decisions about the care or treatment, of the relevant person.

PART 4

Assessment

Time frame for assessments

9.—(1) Subject to paragraph (2) and to regulation 11, 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 the assessor is instructed by the supervisory body

Transitional Provisions for Standard Authorisations

11.—(1) This regulation applies where an assessor is instructed by the supervisory body on or before the 30 April 2009.

(2) The assessment must be completed within 42 days from the date of instruction.

Relevant eligibility information

12.—(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 5

Request for a standard authorisation

Information to be provided in a request for a standard authorisation

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

- (a) the name of the relevant person and the address at which that person is currently residing;
- (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” (“*awdurdodiad safonol presennol*”) has the same meaning as in paragraph 29 of Schedule A1 to the Act.

PART 6

Supervisory bodies: care homes

Dispute about the Place of Ordinary Residence

Application of Part 6

14. 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 the Welsh Ministers in accordance with paragraph 183(3) of Schedule A1 to the Act.

Arrangements where there is a question as to the ordinary residence

15.—(1) Local authority A must act as supervisory body in relation to the request for a standard

(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.

authorisation until the determination of any question as to the ordinary residence of the relevant person.

(2) But where another local authority agrees to act as the supervisory body in place of local authority A, that local authority 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 (“local authority B”) 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

16.—(1) This regulation applies where local authority B has been identified in accordance with regulation 14, and that local authority is the supervisory body in accordance with regulation 15(3).

(2) 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.

(3) 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.

(4) 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.

(5) Local authority A may recover expenditure incurred in connection with the authorisation or request from local authority B.

[Name]

Date