

2009 No. 266 (W. 29)

MENTAL CAPACITY, WALES

**The Mental Capacity (Deprivation
of Liberty: Appointment of
Relevant Person's Representative)
(Wales) Regulations 2009**

EXPLANATORY NOTE

(This note is not part of the Regulations)

1. The Mental Capacity Act 2005 (“the Act”) provides that people who lack capacity to consent to arrangements proposed for their care or treatment in care homes and hospitals may be lawfully deprived of their liberty providing it is authorised in accordance with the Act. Authorisation is to be given by supervisory bodies. These regulations confer supervisory functions in relation to hospitals on Local Health Boards.

2. Where authorisation is given to deprive any person of their liberty the Act requires that the supervisory body must appoint a representative for that person. These regulations provide for the selection and appointment of representatives.

3. These regulations—

- (a) confer supervisory functions in relation to hospitals on Local Health Boards and provide for joint working arrangements (regulation 3);
- (b) make provisions about the circumstances in which a person will be eligible to be a representative (regulation 6);
- (c) provide for a relevant person to select a person as his or her representative (regulation 7);
- (d) provide that where a relevant person has a donee of a Lasting Power of Attorney or Court appoint deputy that donee or deputy may select a representative providing it is within the scope of his or her authority (regulation 8);

- (e) provide for the best interests assessor to approve a representative who is selected by the relevant person, donee or deputy or select a representative him or herself (regulations 9 and 10);
- (f) provide for the supervisory body to select a representative if one cannot be selected by other means (regulation 11);
- (g) provide for the supervisory body to appoint a representative who has been selected and for notice of the appointment to be given to interested persons (regulation 12 and 13);
- (h) provide for the termination of appointment of the representative (regulation 14);
- (i) require the managing authority to notify the supervisory body if the representative is not acting in the best interests of the relevant person or is not keeping in regular contact (regulation 15);
- (j) provide for representatives to be paid (regulation 17).

4. Regulations 18 and 19 are transitional provisions which amend the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007 (SI 2007/852 (W.77)). These regulations provide that Local Health Boards will also be responsible for making arrangements for Independent Mental Capacity Advocates to be available to act where the relevant person is, or may be subject to a standard authorisation and that person has no other person who may be consulted about what is in his or her best interests (regulation 18 and 19).

5. A full impact assessment has not been produced for this instrument as no significant impact on the private or voluntary sector is foreseen.

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of Liberty: Appointment of
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(Wales) Regulations 2009**

Made 11 February 2009

Laid before the National Assembly for Wales
13 February 2009

Coming into force 1 April 2009

The Welsh Ministers make these Regulations in exercise of the powers conferred by sections 35(2) and (3), 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⁾ and by sections 12 and 204 of the National Health Service (Wales) Act 2006⁽²⁾.

PART 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 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;

(1) 2005 c.9. Schedule A1 was inserted by section 50(5) of the Mental Health Act 2007 c.12.
(2) 2006 c.42.

“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;

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

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

PART 2

Supervisory functions

Supervisory functions exercisable by Local Health Boards

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

- (a) in relation to any person who is, or is likely to be, accommodated in a hospital (whether NHS or independent hospitals) in its area for the purposes of receiving relevant care or treatment⁽¹⁾; and
- (b) where the Local Health Board commissions relevant care or treatment for a person 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 for a person who is, or is likely to be, accommodated in a hospital (whether a NHS or independent hospital) in England the supervisory body will be the Local Health Board for the area in which that person is usually resident.

(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” (“*swyddogaethau goruchwyllo*”) has the same meaning as in Schedule A1, paragraph 165(3) of the Act.

(1) “relevant care or treatment” is defined in paragraph 7 of Schedule A1 to the Act.

PART 3

Appointment – general

Appointment procedure

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

(2) A person is to be appointed as a representative in accordance with Part 5.

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⁽¹⁾ for the purposes of a request for a standard authorisation⁽²⁾; or
- (b) a relevant person's representative's appointment terminates, or is to be terminated in accordance with regulation 14, 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⁽³⁾;
- (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⁽⁴⁾ or independent hospital⁽⁵⁾ where the relevant person is, or is to be, detained;
- (f) not a relative of a person who is financially interested in the care home or independent hospital where the relevant person is, or is to be, detained;

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- (1) The identity of the supervisory body is determined in accordance with paragraphs 128, 180, 181 and 182 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 178 of Schedule A1 to the Act.
 - (5) "independent hospital" is defined in paragraph 175(3) of Schedule A1 of the Act.

- (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⁽¹⁾ 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 "relative" ("*perthynas agos*") means:

- (a) the father, mother, stepfather, stepmother, son, daughter, stepson, stepdaughter, 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—

- (a) "spouse" ("*priod*") 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 application for a standard authorisation.
- (c) "major shareholder" ("*prif gyfrannddaliwr*") 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.

(1) "hospital" is defined in paragraph 175(1) of Schedule A1 to the Act.

PART 4

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⁽¹⁾, 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—

- (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

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

- (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

- (a) that person must have appropriate training and experience, and
- (b) the supervisory body must be satisfied that there is in respect of that person—
 - (i) an enhanced criminal record certificate issued pursuant to section 113B of the Police Act 1997(1); or
 - (ii) 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.

(4) For the purposes of paragraph (3) a person acting in a professional capacity is a person selected by the best interests assessor or supervisory body who is not a family member, friend or carer of the relevant person.

PART 5

Appointment of representatives

Appointment of representative

12. A supervisory body will appoint in writing as a representative for the relevant person any person who is selected in accordance with Part 4.

(1) 1997 c.50. Sections 113A to 113D are inserted by section 163 of the Serious Organised Crime and Police Act 2005 (c.14).

Formalities of appointing a representative

13. 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⁽¹⁾ appointed in accordance with the Act; and
- (e) any person consulted by the best interest assessor.

PART 6

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 informs the supervisory body that he or she 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;
- (g) the supervisory body terminates the appointment because it is satisfied that the person is no longer eligible for the purposes of regulation 6(1) to be a representative; or
- (h) the supervisory body terminates the appointment because it is satisfied that the person is not acting in the best interests of the relevant person.

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

Monitoring of representatives

15. The managing authority must advise the supervisory body where it becomes aware the representative is not acting in the best interest of, or has not maintained regular contact with, the relevant person.

Formalities of termination of representative's appointment

16.—(1) Where the appointment of a representative is to be terminated in accordance with paragraphs (b) to (h) of regulation 14 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.

(2) Where the appointment of a representative is to be terminated in accordance with regulation 14 the supervisory body must notify—

- (a) the relevant person;
- (b) the managing authority;
- (c) any donee or deputy of the relevant person;
- (d) any independent mental capacity advocate appointed in accordance with the Act; and
- (e) any person consulted by the best interest assessor.

PART 7

Representatives - miscellaneous

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.

PART 8

Amendment to the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007

18.—(1) The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007⁽¹⁾ are amended in accordance with the following paragraph.

(1) SI 2007/852 (W.77).

(2) For the words “sections 37, 38 and 39 of the Act” in regulation 2(2) (interpretation) substitute the following words—

“sections 37, 38, 39, 39A, 39C and 39D of the Act”.

19. For the words “sections 37, 38 or 39 of the Act” in regulation 5(1) (appointment of independent mental capacity advocates) substitute the following words—

“sections 37, 38, 39, 39A, 39C or 39D of the Act”.

Edwina Hart

Minister for Health and Social Services, one of the
Welsh Ministers

11 February 2009