Draft Regulations laid before Parliament under section 65(4B) of the Mental Capacity Act 2005, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2008 No. 000

MENTAL CAPACITY, ENGLAND

The Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008

Made - - - -	*2008*
Coming into force - -	*3rd November 2008*

The Secretary of State for Health makes these Regulations in exercise of the powers conferred by section 65(1) of, and paragraphs 31, 33(4), 47, 70, 129(3), 130 and 183(6) and (7) of Schedule A1 to, the Mental Capacity Act 2005(**1**).

A draft of this instrument has been laid before Parliament in accordance with section 65(4B)(**2**) of that Act, and approved by resolution of each House of Parliament.

PART 1

Preliminary

Citation, commencement and application

1.—(1) These Regulations may be cited as the Mental Capacity (Deprivation of Liberty: Standard Authorisations, Assessments and Ordinary Residence) Regulations 2008 and shall come into force on 3rd November 2008.

(2) These Regulations apply in relation to England only.

Interpretation

2. In these Regulations—

(**1**) 2005 (c.9). Schedule A1 was inserted by section 50(5) of and Schedule 7 to the Mental Health Act 2007 (c.12).
(**2**) Section 65(4B) was inserted by section 50(7) of and Schedule 9 to the Mental Health Act 2007.

"approved mental health professional" means a person approved under section 114(1) of the Mental Health Act 1983(**3**) to act as an approved mental health professional for the purposes of that Act;

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

"General Social Care Council" has the meaning given by section 54(1) of the Care Standards Act 2000(**4**); and

"the Act" means the Mental Capacity Act 2005.

PART 2

Eligibility to carry out assessments

Eligibility – general

3.—(1) In addition to any requirement in regulations 4 to 9, a person is eligible to carry out an assessment where paragraphs (2) to (4) are met.

(2) The person must—

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

(b) satisfy the supervisory body(**5**) that he or she has such insurance.

(3) The supervisory body must be satisfied that the person has the skills and experience appropriate to the assessment to be carried out which must include, but are not limited to, the following—

(a) an applied knowledge of the Mental Capacity Act 2005 and related Code of Practice(**6**); and

(b) the ability to keep appropriate records and to provide clear and reasoned reports in accordance with legal requirements and good practice.

(4) 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(**7**) (enhanced criminal record certificates); 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(**8**) (criminal record certificates).

Eligibility to carry out a mental health assessment

4.—(1) A person is eligible to carry out a mental health assessment(**9**) if paragraphs (2) and (3) are met.

(2) The person must be—

(**3**) 1983 (c.20). Section 114 was substituted by section 18 of the Mental Health Act 2007.
(**4**) 2000 (c.14).
(**5**) The identity of the supervisory body is determined in accordance with paragraphs 128, 180 and 182 of Schedule A1 to the Mental Capacity Act 2005.
(**6**) Published by The Stationery Office, ISBN 978 0 11 7037465. The current Code of Practice can also be found at www.publicguardian.gov.uk/mca/code-of-practice.htm.
(**7**) 1997 (c.50). Section 113B was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005 (c.15).
(**8**) Section 113A was inserted by section 163(2) of the Serious Organised Crime and Police Act 2005.
(**9**) A mental health assessment is an assessment carried out under paragraph 35 of Schedule A1 to the Act.

(a) approved under section 12 of the Mental Health Act 1983(**10**); or

(b) a registered medical practitioner who the supervisory body is satisfied has at least three years post registration experience in the diagnosis or treatment of mental disorder.

(3) The supervisory body must be satisfied that the person has successfully completed the Deprivation of Liberty Safeguards Mental Health Assessors training programme made available by the Royal College of Psychiatrists(**11**).

(4) Except in the 12 month period beginning with the date the person has successfully completed the programme referred to in paragraph (3), the supervisory body must be satisfied that the person has, in the 12 months prior to selection, completed further training relevant to their role as a mental health assessor.

Eligibility to carry out a best interests assessment

5.—(1) A person is eligible to carry out a best interests assessment(**12**) if paragraphs (2) and (3) are met.

(2) The person must be one of the following—

(a) an approved mental health professional;

(b) a social worker registered with the General Social Care Council;

(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(**13**);

(d) an occupational therapist registered in Part 6 of the register maintained under article 5 of the Health Professions Order 2001(**14**); or

(e) a chartered psychologist who is listed in the British Psychological Society's Register of Chartered Psychologists and who holds a relevant practising certificate issued by that Society(**15**).

(3) The supervisory body must be satisfied that the person—

(a) is not suspended from the register or list relevant to the person's profession mentioned in paragraph (2);

(b) has at least two years post registration experience in one of the professions mentioned in paragraph (2);

(c) has successfully completed training that has been approved by the Secretary of State(**16**) to be a best interests assessor;

(d) except in the 12 month period beginning with the date the person has successfully completed the training referred to in sub-paragraph (c), the supervisory body must be satisfied that the person has, in the 12 months prior to selection, completed further training relevant to their role as a best interests assessor; and

(e) has the skills necessary to obtain, evaluate and analyse complex evidence and differing views and to weigh them appropriately in decision making.

(**10**) 1983 (c.20). Section 12 was amended by section 16 of the Mental Health Act 2007.
(**11**) The Royal College of Psychiatrists is at 17 Belgrave Square, London SW1X 8PG.
(**12**) A best interests assessment is an assessment carried out under paragraph 38 of Schedule A1 to the Act.
(**13**) S.I. 2002/253. The register is divided into parts in accordance with articles 2 and 3 of and Schedule 1 to the Nurses and Midwives (Parts of and Entries in the Register) Order of Council 2004 (S.I. 2004/1765).
(**14**) S.I. 2002/254. The register is divided into parts in accordance with articles 2 and 3 of and Schedule 1 to the Health Professions (Parts of and Entries in the Register) Order in Council 2003 (S.I. 2003/1571).
(**15**) The British Psychological Society is at St Andrews House, 48 Princess Road East, Leicester, LE1 7DR.
(**16**) Approved courses can be found at http://www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/MentalCapacityActDeprivationofLibertySafeguards/index.htm.

Eligibility to carry out a mental capacity assessment

6. A person is eligible to carry out a mental capacity assessment(**17**) if that person is eligible to carry out—

(a) a mental health assessment; or

(b) a best interests assessment.

Eligibility to carry out an eligibility assessment

7. A person is eligible to carry out an eligibility assessment(**18**) if that person is—

(a) approved under section 12 of the Mental Health Act 1983 and is eligible to carry out a mental health assessment; or

(b) an approved mental health professional and is eligible to carry out a best interests assessment.

Eligibility to carry out an age assessment

8. A person is eligible to carry out an age assessment(**19**) if that person is eligible to carry out a best interests assessment.

Eligibility to carry out a no refusals assessment

9. A person is eligible to carry out a no refusals assessment(**20**) if that person is eligible to carry out a best interests assessment.

PART 3

Selection of Assessors

Selection of assessors – relatives

10.—(1) A supervisory body must not select a person to carry out an assessment if the person is—

(a) a relative of the relevant person(**21**); or

(b) 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" means—

(a) a spouse, ex-spouse, civil partner or ex-civil partner;

(b) a person living with the relevant person as if they were a spouse or a civil partner;

(c) a parent or child;

(d) a brother or sister;

(e) a child of a person falling within sub-paragraphs (a), (b) or (d);

(f) a grandparent or grandchild;

(g) a grandparent-in-law or grandchild-in-law;

(h) an uncle or aunt;

(**17**) A mental capacity assessment is an assessment carried out under paragraph 37 of Schedule A1 to the Act.
(**18**) An eligibility assessment is an assessment carried out under paragraph 46 of Schedule A1 to the Act.
(**19**) An age assessment is an assessment carried out under paragraph 34 of Schedule A1 to the Act.
(**20**) A no refusals assessment is an assessment carried out under paragraph 48 of Schedule A1 to the Act.
(**21**) "relevant person" is defined in paragraph 7 of Schedule A1 to the Act.

(i) a brother-in-law or sister-in-law;

(j) a son-in-law or daughter-in-law;

(k) a first cousin; or

(l) a half-brother or half-sister.

(3) For the purposes of this regulation—

(a) the relationships in paragraph (2)(c) to (k) include step relationships;

(b) references to step relationships and in-laws in paragraph (2) are to be read in accordance with section 246 of the Civil Partnership Act 2004(**22**); and

(c) financial interest has the meaning given in regulation 11.

Selection of assessors – financial interest

11.—(1) A supervisory body must not select a person to carry out an assessment where the person has a financial interest in the case.

(2) A person has a financial interest in a case where—

(a) that person is a partner, director, other office-holder or major shareholder of the managing authority that has made the application for a standard authorisation(**23**); and

(b) the managing authority is a care home(**24**) or independent hospital(**25**).

(3) A major shareholder means—

(a) any person holding one tenth or more of the issued shares in the managing authority, where the managing authority is a company limited by shares; and

(b) in all other cases, any of the owners of the managing authority.

Selection of best interests assessors

12.—(1) A supervisory body must not select a person to carry out a best interests assessment if that person is involved in the care, or making decisions about the care, of the relevant person.

(2) Where the managing authority and supervisory body are both the same body, the supervisory body must not select a person to carry out a best interests assessment who is employed by it or who is providing services to it.

PART 4

Assessments

Time frame for assessments

13.—(1) Except as provided in paragraph (2), all assessments required for a standard authorisation must be completed within the period of 21 days beginning with the date that the supervisory body receives a request for such an authorisation.

(2) Where a supervisory body receives a request for a standard authorisation and the managing authority has given an urgent authorisation under paragraph 76 of Schedule A1 to the Act, the

(**22**) 2004 (c.33).
(**23**) A standard authorisation is defined in paragraph 8 of Schedule A1 to the Act.
(**24**) "care home" is defined in paragraph 178 of Schedule A1 to the Act.
(**25**) "independent hospital" is defined in paragraph 175(3) of Schedule A1 to the Act.