

2022 No. (W.)

MENTAL CAPACITY, WALES

The Mental Capacity (Deprivation of Liberty: Eligibility to Carry Out Assessments, Make Determinations and Carry Out Pre-Authorisation Reviews) (Wales) Regulations 2022

EXPLANATORY NOTE

(This note is not part of the Regulations)

The Mental Capacity (Amendment) Act 2019 (c. 18) (“the 2019 Act”) amended the Mental Capacity Act 2005 (c. 9) (“the 2005 Act”) to provide for a new process for authorising arrangements enabling the care or treatment of persons who lack capacity to consent to the arrangements, which give rise to a deprivation of their liberty (“the arrangements”). In particular, the 2019 Act inserts a new Schedule AA1 into the 2005 Act, which contains the new administrative scheme for the authorisation of those arrangements (“Liberty Protection Safeguards”). The Liberty Protection Safeguards will replace the scheme set out in Schedule A1 to the 2005 Act (“Deprivation of Liberty Safeguards Scheme”).

Under Schedule AA1 to the 2005 Act, three conditions must be met before the arrangements can be authorised: the person in respect of whom those arrangements are proposed must lack capacity to consent to the arrangements, the person must have a mental disorder and the arrangements must be necessary to prevent harm to the person and proportionate in relation to the likelihood and seriousness of harm to them.

These Regulations prescribe the requirements a person must satisfy in order to be eligible to carry out an assessment as to whether a person lacks capacity to consent to the arrangements (“a capacity assessment”), an assessment as to whether a person has a mental disorder (“a medical assessment”), or an assessment that the arrangements are necessary to prevent harm to the person and are proportionate in relation to the likelihood and seriousness of harm to the person (“a

necessary and proportionate assessment”). The Regulations also prescribe the requirements that must be satisfied for a person to be eligible to make a determination on such an assessment.

Once all three assessments are complete, a person who is not involved in the day-to-day care of, or in providing any treatment to, the person, and who does not have a prescribed connection with a care home, must carry out a pre-authorisation review. A pre-authorisation review is a review that must be carried out to determine whether the authorisation conditions are met in respect of proposed arrangements or whether it is reasonable for a responsible body to conclude that the authorisation conditions are met. These Regulations also prescribe the circumstances in which a person will have a connection to a care home for the purpose of determining whether that person is eligible to undertake a pre-authorisation review.

Regulation 3(5) sets out the general eligibility requirements a person must satisfy in order to be eligible to undertake a capacity assessment, a medical assessment and a necessary and proportionate assessment.

Regulation 4 specifies further eligibility conditions a person must satisfy in order to be eligible to carry out a capacity assessment. Regulation 5 provides that a person is eligible to make a determination on a capacity assessment if they are eligible to carry out a capacity assessment.

Regulation 6 specifies further eligibility conditions a person must satisfy in order to be eligible to carry out a medical assessment. Regulation 7 provides that a person is eligible to make a determination on a medical assessment if they are eligible to carry out a medical assessment.

Regulation 8 specifies further conditions that a person must satisfy to be eligible to carry out a necessary and proportionate assessment.

Regulation 9 provides that it is only the person who carried out the necessary and proportionate assessment who may make a determination on that assessment.

Regulation 10 prescribes the circumstances in which a person will have a connection with a care home for the purposes of paragraph 24(1)(b) of Schedule AA1 to the 2005 Act (a pre-authorisation review). A person who has a prescribed connection with a care home is not eligible to carry out the pre-authorisation review.

The Welsh Ministers’ Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result, a regulatory impact assessment has been prepared as to the likely costs and benefits of complying with these

Regulations. A copy can be obtained from the Department of Health and Social Services, Welsh Government, Cathays Park, Cardiff, CF10 3NQ.

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Made ***

Laid before Senedd Cymru ***

Coming into force ***

The Welsh Ministers make the following Regulations in exercise of the powers conferred by paragraphs 21(3), (4) and (5), 22(1) and (3) and 24(1)(b) of Schedule AA1 to the Mental Capacity Act 2005(1).

PART 1

General

Title, commencement and application

1.—(1) The title of these Regulations is the Mental Capacity (Deprivation of Liberty: Eligibility to Carry Out Assessments, Make Determinations and Carry Out Pre-Authorisation Reviews) (Wales) Regulations 2022.

(2) These Regulations come into force on [] 2022.

(3) These Regulations apply in relation to Wales.

Interpretation

2. In these Regulations—

(1) 2005 c. 9. Schedule AA1 was inserted by section 1(4) of the Mental Capacity (Amendment) Act 2019 (c. 18). See the definition of “appropriate authority” in paragraphs 21(7)(b), 22(5)(b) and 24(6)(b) of that Schedule.

“the 2001 Order” (“*Gorchymyn 2001*”) means the Health Professions Order 2001⁽¹⁾;

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

“arrangements” (“*trefniadau*”), “authorisation” (“*awdurdodiad*”), “care home” (“*cartref gofal*”), “independent hospital” (“*ysbyty annibynnol*”) and “Welsh responsible body” (“*corff cyfrifol Cymreig*”) have the meanings given in paragraph 3 of Schedule AA1;

“capacity assessment” (“*asesiad galluedd*”) means an assessment carried out pursuant to paragraph 21(1)(a) of Schedule AA1;

“medical assessment” (“*asesiad meddygol*”) means an assessment carried out pursuant to paragraph 21(1)(b) of Schedule AA1;

“necessary and proportionate assessment” (“*asesiad angenrheidrwydd a chymesuredd*”) means an assessment carried out pursuant to paragraph 22(1) of Schedule AA1;

“Schedule AA1” (“*Atodlen AA1*”) means Schedule AA1 to the 2005 Act.

PART 2

Eligibility to carry out assessments

Eligibility – general

3.—(1) A person is eligible to carry out a capacity assessment if the conditions specified in paragraph (5) and in regulation 4 are satisfied.

(2) A person is eligible to carry out a medical assessment if the conditions specified in paragraph (5) and in regulation 6 are satisfied.

(3) A person is eligible to carry out a necessary and proportionate assessment if the conditions specified in paragraph (5) and those specified in regulation 8 are satisfied.

(4) The assessments mentioned in paragraphs (1) to (3) are assessments in relation to an authorisation by a Welsh responsible body only.

(5) The conditions to be satisfied for the purposes of paragraphs (1) to (3) are that a Welsh responsible body is satisfied that the person who will carry out the assessment—

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

(1) S.I. 2002/254.

- (b) has the skills and experience appropriate to the assessment to be carried out which must include, but is not limited to—
 - (i) an applied knowledge of the 2005 Act and the related Code of Practice issued pursuant to section 42 of the 2005 Act,
 - (ii) the ability to keep appropriate records and to provide clear and reasoned reports in accordance with legal requirements and good practice,
 - (iii) the ability to communicate effectively with a view to identifying characteristics and attributes of a person (“P”) that are relevant to P’s needs, and
 - (iv) the ability to act independently of any person who appoints them to carry out an assessment and of any person who is providing care or treatment to P;
- (c) has issued in respect of them—
 - (i) an enhanced criminal record certificate issued under 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⁽²⁾;
- (d) is not—
 - (i) a relative of P in respect of whom the assessment is being carried out,
 - (ii) financially interested in the care of P, or
 - (iii) a relative of a person who is financially interested in the care of P.
- (6) For the purposes of this regulation—
 - (a) “relative” means—
 - (i) a spouse, ex-spouse, civil partner or ex-civil partner;
 - (ii) a person living with a person as if they were a spouse or civil partner;
 - (iii) a parent or child;
 - (iv) a brother or sister;
 - (v) a child of a person falling within paragraph (i), (ii) or (iv);
 - (vi) a grandparent or grandchild;

(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 Police Act 2005.

- (vii) a grandparent-in-law or grandchild-in-law;
- (viii) an uncle or aunt;
- (ix) a nephew or niece;
- (x) a brother-in-law or a sister-in-law;
- (xi) a son-in-law or a daughter-in-law;
- (xii) a first cousin;
- (xiii) a half-brother or half-sister;
- (b) the relationships in sub-paragraph (a)(iii) to (xi) include step relationships;
- (c) references to step relationships and in-laws in this paragraph are to be read in accordance with section 246 of the Civil Partnerships Act 2004⁽¹⁾;
- (d) “financially interested” includes where a person has a financial interest as a partner, director, other office-holder or shareholder of the care home, independent hospital or any company connected with the care or treatment of P as part of the authorised arrangements being carried out or for which authorisation by the Welsh responsible body is requested.

Eligibility to carry out a capacity assessment

4.—(1) The conditions to be satisfied for the purposes of regulation 3(1) are those specified in paragraphs (2) and (3).

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

- (a) a registered medical practitioner,
- (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⁽²⁾,
- (c) an occupational therapist registered in Part 6 of the register maintained under article 5 of the 2001 Order,
- (d) a social worker registered in the register—
 - (i) kept by Social Care Wales under section 80(1) of the Regulation and Inspection of Social Care (Wales) Act 2016⁽³⁾;
 - (ii) kept by Social Work England under section 39(1) of the Children and Social Work Act 2017⁽⁴⁾;
 - (iii) maintained by the Scottish Social Services Council under section 44(1) of

(1) 2004 c. 33.
 (2) S.I. 2002/253.
 (3) 2016 anaw 2.
 (4) 2017 c. 16.

the Regulation of Care (Scotland) Act 2001(1);

(iv) maintained by the Northern Ireland Social Care Council under section 3(1) of the Health and Personal Social Services Act (Northern Ireland) 2001(2),

(e) a practitioner psychologist registered in Part 14 of the register maintained under article 5 of the 2001 Order, or

(f) a speech and language therapist registered in Part 12 of the register maintained under article 5 of the 2001 Order.

(3) The Welsh responsible body must be satisfied the person is not suspended from the register relevant to the person's profession mentioned in paragraph (2).

Eligibility to make a determination on a capacity assessment

5. A person is eligible to make a determination on a capacity assessment if they are eligible to carry out a capacity assessment.

Eligibility to carry out a medical assessment

6.—(1) The conditions to be satisfied for the purposes of regulation 3(2) are those specified in paragraphs (2) and (3).

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

(a) a registered medical practitioner;

(b) a practitioner psychologist registered in Part 14 of the register maintained under article 5 of the 2001 Order.

(3) The Welsh responsible body must be satisfied that the person is not suspended from the register relevant to the person's profession mentioned in paragraph (2).

Eligibility to make a determination on a medical assessment

7. A person is eligible to make a determination on a medical assessment if they are eligible to carry out a medical assessment.

Eligibility to carry out an assessment that arrangements are necessary and proportionate

8.—(1) The conditions to be satisfied for the purposes of regulation 3(3) are those specified in paragraphs (2) and (3).

(1) 2001 asp 8.

(2) 2001 c. 3 (N.I.).

- (2) The person must be one of the following—
- (a) a registered medical practitioner,
 - (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 2001 Order,
 - (d) a social worker registered in the register of social workers—
 - (i) kept by Social Care Wales under section 80(1) of the Regulation and Inspection of Social Care (Wales) Act 2016;
 - (ii) kept by Social Work England under section 39(1) of the Children and Social Work Act 2017;
 - (iii) maintained by the Scottish Social Services Council under section 44(1) of the Regulation of Care (Scotland) Act 2001;
 - (iv) maintained by the Northern Ireland Social Care Council under section 3(1) of the Health and Personal Social Services Act (Northern Ireland) 2001,
 - (e) a practitioner psychologist registered in Part 14 of the register maintained under article 5 of the 2001 Order 2001, or
 - (f) a speech and language therapist registered in Part 12 of the register maintained under article 5 of the 2001 Order.
- (3) The Welsh responsible body must be satisfied that the person—
- (a) is not suspended from the register relevant to the person's profession mentioned in paragraph (2);
 - (b) has the skills necessary to obtain, evaluate and analyse complex evidence and differing views and to weigh them appropriately in decision making.

Eligibility to make a determination on an assessment that arrangements are necessary and proportionate

9. A person is eligible to make a determination on a necessary and proportionate assessment only if that person carried out that assessment.

Prescribed connection with a care home for the purpose of a pre-authorisation review

10.—(1) For the purposes of paragraph 24(1)(b) of Schedule AA1 (pre-authorisation review), a person has a connection with a care home if that person—

- (a) works at that care home, or for a company connected with that care home, whether under a contract of employment, under a contract for services or otherwise than under a contract;
- (b) is a member of the governing body of that care home;
- (c) has a financial interest in that care home.

(2) For the purposes of this regulation, a person has a financial interest in a care home where that person is a partner, director, or other office holder of that care home or of a company connected to that care home.

Name

Title of Minister, one of the Welsh Ministers

Date