

202X No. xxxx

MENTAL CAPACITY, ENGLAND

**The Mental Capacity (Deprivation of Liberty: Assessments,
Determinations and Pre-Authorisation Reviews) (England)
Regulations 202X**

<i>Made</i>	- - - -	***
<i>Laid before Parliament</i>		***
<i>Coming into force</i>	- -	***

The Secretary of State makes the following Regulations in exercise of the powers conferred by paragraphs 21(3) and (4), 22(1) and 24(1)(b) of Schedule AA1 to the Mental Capacity Act 2005(a).

PART 1

General

Citation, commencement, and application

1.—(1) These Regulations may be cited as the Mental Capacity (Deprivation of Liberty: Assessments, Determinations and Pre-Authorisation Reviews) (England) Regulations 202X and come into force on [].

(2) These Regulations extend to England and Wales.

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

Interpretation

2. In these Regulations—

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

“the 2001 Order” means the Health Professions Order 2001(b);

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

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

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

“Schedule AA1” means Schedule AA1 to the 2005 Act.

(a) 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)(a), 22(5)(a) and 24(6)(a) of that Schedule.

(b) S.I. 2002/254.

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 in regulation 8 are satisfied.

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

(5) The conditions to be satisfied for the purposes of paragraphs (1) to (3) are that an English 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,
- (b) has the skills and experience appropriate to the assessment to be carried out which must include—
 - (i) an applied knowledge of the 2005 Act and the code of practice prepared or revised under section 42 of that Act,
 - (ii) the ability to keep appropriate records and to provide clear and reasoned reports in accordance with legal requirements and good practice,
- (c) is not a relative of the person subject to the assessment;
- (d) does not have a financial interest in the outcome of the assessment,
- (e) is not a relative of a person who has a financial interest in the outcome of the assessment, and
- (f) has issued in respect of them an enhanced criminal record certificate issued under section 113B of the Police Act 1997^(a).

(6) For the purposes of this regulation—

- (a) a person has a financial interest in the outcome of the assessment where that person is a partner, director, other office holder or major shareholder of—
 - (i) the care home or other care or treatment provider which will carry out the arrangements in respect of the person subject to the assessment, or
 - (ii) a company connected with that care home or other care or treatment provider (“connected company”);
- (b) “a major shareholder” means—
 - (i) where the care home or other care or treatment provider, or connected company, is a company limited by shares, a person who holds one tenth or more of the total shareholding in that care home or connected company;

(a) 1997 c. 50. Section 113B was inserted by the Serious Organised Crime and Police Act 2005 (c. 15). It was amended by the Armed Forces Act 2006 (c. 52) and by the Crimes and Courts Act 2013 (c. 22). It was amended in relation to England, Wales and Northern Ireland by the Safeguarding Vulnerable Groups Act 2006 (c. 47) and the Policing and Crime Act 2009 (c. 26) and in relation to England and Wales by the Protection of Freedoms Act 2012 (c. 9) and by S.I. 2009/203, S.I. 2010/1146 and S.I. 2012/3006. It was amended in relation to Scotland by the Protection of Vulnerable Groups (Scotland) Act 2007 (asp 14), the Criminal Justice and Licensing (Scotland) Act 2010 (asp 13) and by SSI 2015/423.

- (ii) in all other cases, any of the owners of that care home or other care or treatment provider;
- (c) “other care or treatment provider” means a provider of care or treatment, that is not a care home, that will carry out arrangements in respect of the person subject to the assessment;
- (d) “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 sub-paragraphs (i), (ii) or (iv);
 - (vi) a grandparent or grandchild;
 - (vii) a grandparent-in-law or grandchild-in-law;
 - (viii) an uncle or aunt;
 - (ix) a brother-in-law or a sister-in-law;
 - (x) a son-in-law or a daughter-in-law;
 - (xi) a first cousin;
 - (xii) a half-brother or half-sister.
- (7) For the purposes of this regulation—
 - (a) the relationships in paragraph (6)(d)(iii) to (xi) include step relationships;
 - (b) references to step relationships and in-laws in paragraph (6) are to be read in accordance with section 246 of the Civil Partnerships Act 2004(a).

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(b);
 - (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 Work England under section 39(1) of the Children and Social Work Act 2017(c);
 - (ii) maintained by the Northern Ireland Social Care Council under section 3(1) of the Health and Personal Social Services Act (Northern Ireland) 2001(d);
 - (iii) maintained by the Scottish Social Services Council under section 44(1) of the Regulation of Care (Scotland) Act 2001(e);
 - (iv) kept by Social Care Wales under section 80(1) of the Regulation and Inspection of Social Care (Wales) Act 2016(f);
 - (e) a psychologist registered in Part 14 of the register maintained under article 5 of the 2001 Order;

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- (a) 2004 c. 33.
 - (b) S.I. 2002/253.
 - (c) 2017 c. 16.
 - (d) 2001 c. 3 (N.I.).
 - (e) 2001 asp 8.
 - (f) 2016 anaw 2.

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

(3) The English 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 capacity assessment

5. A person is eligible to make a determination(a) 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 psychologist registered in Part 14 of the register maintained under article 5 of the 2001 Order.

(3) The English 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(b) 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).

(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 Work England under section 39(1) of the Children and Social Work Act 2017;
 - (ii) maintained by the Northern Ireland Social Care Council under section 3(1) of the Health and Personal Social Services Act (Northern Ireland) 2001;
 - (iii) maintained by the Scottish Social Services Council under section 44(1) of the Regulation of Care (Scotland) Act 2001;
 - (iv) kept by Social Care Wales under section 80(1) of the Regulation and Inspection of Social Care (Wales) Act 2016;
- (e) a psychologist registered in Part 14 of the register maintained under article 5 of the 2001 Order 2001;
- (f) a speech and language therapist registered in Part 12 of the register maintained under article 5 of the 2001 Order.

(a) "determination" means a determination pursuant to paragraph 21(1)(a) of Schedule AA1.

(b) "determination" means a determination pursuant to paragraph 21(1)(b) of Schedule AA1.

- (3) The English 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), and
 - (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^(a) on an assessment carried out pursuant to paragraph 22(1) of Schedule AA1 only if that person carried out that assessment.

Prescribed connection with a care home

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, other office holder or major shareholder of that care home or of a company connected to that care home.

(3) A major shareholder means—

- (a) where the care home or a company connected to that care home is a company limited by shares, a person who holds one tenth or more of the total shareholding in that care home or in a company connected to that care home;
- (b) in all other cases, any of the owners of that care home.

Date Minister of State
Department for Health and Social Care

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 to the 2005 Act which contains the new administrative scheme for the authorisation of those arrangements.

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 and have a mental disorder and the arrangements must be necessary to prevent harm to the person and be proportionate in relation to the likelihood and seriousness of harm to them.

These Regulations prescribe the qualifications and other requirements that a person must satisfy to be able to assess whether a person lacks capacity to consent to arrangements (“a capacity assessment”), whether a person has a mental disorder (“a medical assessment”) or whether 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”).

(a) “determination” means a determination pursuant to paragraph 22(1) of Schedule AA1.

These Regulations also prescribe the requirements that must be met for a person to be eligible to make a determination on such an assessment.

Regulation 3(5) sets out the general eligibility requirements.

Regulation 4 specifies the further conditions that a person must satisfy 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 the further conditions that a person must satisfy to be able 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 the further conditions that a person must satisfy to be able 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 can 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 a pre-authorisation review under paragraph 24(1)(b) of Schedule AA1 to the 2005 Act. 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 body to conclude that the authorisation conditions are met. A person who has a connection with a care home cannot carry out the pre-authorisation review.

An impact assessment was produced for the 2019 Act which can be found at []. An impact assessment has therefore not been produced for this instrument.