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Guidance for Managing Authorities working within the Mental Capacity Act Deprivation of Liberty Safeguards

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Introduction

If you are the manager of a care home or hospital providing care or treatment for people then there may be occasions where you need to care or treat a person in a way that restricts their liberty and, in some cases this may amount to depriving them of their liberty. The UK Government has introduced safeguards in the Mental Capacity Act 2005 which are designed to protect people's rights in these circumstances – these safeguards are known as the Deprivation of Liberty Safeguards.

If it is absolutely necessary for you to deprive a person of their liberty and you do not have authority in the form of an order from the court then authorisation under the new safeguards must be obtained. If you do not have authorisation then by depriving a person of their liberty you may be acting unlawfully. In these circumstances it is the duty of the “**managing authority**” of the hospital or care home to make a request to the “**supervisory body**” for a standard authorisation – both terms are explained in the guidance.

This guidance has been prepared by the Welsh Assembly Government to assist managing authorities identify the key processes in the safe and effective use of the new safeguards. Similar guidance has also been produced for supervisory bodies.

The guidance does not explain when the care or treatment being given by a care home or hospital may amount to a deprivation of liberty or where a request for authorisation should be made. Further information about what is a deprivation of liberty may be found in Chapter 2 of the Code of Practice.

This guidance sits underneath the Mental Capacity Act 2005, the associated Regulations made by the Welsh Ministers and the Code of Practice made by the Lord Chancellor in respect of the safeguards. The guidance is not intended to replace the need to understand the legislation or the Code, but rather to help guide managing authorities through the relevant processes and signpost particular aspects of the legislation or the Code that they need to be aware of.

Presentation and terminology



This note is used to signpost other useful information, including the relevant parts of the legislation



This note is used to remind supervisory bodies of requirements placed upon them by the Code of Practice

Throughout this guidance the Mental Capacity Act 2005 is referred to as ‘the Act’. Where there are references to other statutes, the relevant Act is clearly indicated. A note on some of the other terms used in this guidance:

- The safeguards – unless noted otherwise this refers to the Mental Capacity Act Deprivation of Liberty Safeguards (as provided in Schedule A1 and 1A to the Act).
- The managing authority – this is the care home or hospital that may need to obtain an authorisation.

- The supervisory body – this is the body that is responsible for giving the standard authorisation
- The relevant person – this is the person who is being cared for or treated and may be deprived of their liberty
- The relevant person’s representative – this is the person appointed by the supervisory body to maintain contact with the relevant person, and to represent and support that person in all matters relating to the operation of the safeguards
- IMCA – this is an Independent Mental Capacity Advocate (established under the Act, and someone who provides support and representation for a person who lacks capacity to make specific decisions)
- The MCA Code of Practice – this is the main ‘*Mental Capacity Act 2005 Code of Practice*’ published in 2007
- The Code of Practice – unless noted otherwise this denotes the ‘*Deprivation of liberty safeguards: Code of Practice to supplement the main Mental Capacity Act 2005 Code of Practice*’ (published August 2008)
- Guidance for Supervisory Bodies – this is the Welsh Assembly Government’s “Guidance for Supervisory Bodies working with the Mental Capacity Act Deprivation of Liberty Safeguards”
- Guidance on Standard Forms and Letters – this is the Welsh Assembly Government’s “Standard Forms and Letters for the Mental Capacity Act Deprivation of Liberty Safeguards”
- The Assessment Regulations – this refers to the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*
- The Representative Regulations – this refers to the *Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person’s Representative) (Wales) Regulations 2009*

A list of key words and phrases used in this guidance is given at appendix A.

Suggested forms and letters

The Welsh Assembly Government has produced a range of standard forms and letters designed to support managing authorities, supervisory bodies and others to perform their respective roles under the deprivation of liberty safeguards. Whilst there is no legislative requirement to use these standard forms or letters they cover the record-keeping and notice-giving that is required by statute and therefore their use in unedited form will help managing authorities ensure compliance with the safeguards and also promote a consistent approach to record-keeping.

These forms and letters, together with a guide for completion, are available to download at:

www.mentalcapacityact.wales.nhs.uk

Separately the Welsh Assembly Government have also produced suggested information leaflets for presenting written information to the relevant person, their representative, and other interested persons. These can be downloaded from the same website.

Publishing information

The guidance booklets, the standard forms and letters, and the information leaflets are available in both English and in Welsh.

If you wish to suggest amendments for a future edition of the guidance booklets, forms, letter or leaflets, please email mentalhealthpolicymailbox@wales.gsi.gov.uk

Managing authorities and supervisory bodies

As set out in the introduction if it is absolutely necessary for a care home or hospital to provide care or treatment for a person in circumstances which amount to a deprivation of liberty, such a detention must be authorised. In these circumstances it is the duty of the “**managing authority**” of the hospital or care home to make a request to the “**supervisory body**” for a standard authorisation.

Identifying the ‘managing authority’

In the case of an NHS hospital, the managing authority is the NHS body (eg Local Health Board or NHS Trust) responsible for running the hospital in which the relevant person is (or is to be) resident.

In the case of a care home¹ or an independent hospital², the managing authority is the person registered, or required to be registered, under part 2 of the Care Standards Act 2000 in respect of the care home or hospital. This could be either the provider or the manager of the care home or hospital, depending on the registration arrangements for the facility.

Identifying the ‘supervisory body’

In respect of hospitals (NHS or independent) the supervisory body is the Local Health Board in the area where the hospital is situated, unless a Primary Care Trust commissions the relevant care or treatment for the relevant person (in which case the supervisory body is that Primary Care Trust).

In respect of care homes the supervisory body is the local authority³ for the area in which the relevant person is ordinarily resident; where a relevant person is not ordinarily resident within a local authority area, then the supervisory body is the local authority for the area in which the care home is situated.

Same body is the managing authority and the supervisory body

Paragraph 184(2) of Schedule A1 makes clear that the “...*fact that a single body are acting in both capacities does not prevent the body from carrying out functions under this Schedule in each capacity.*”

However, where an organisation is both a managing authority and a supervisory body it is strongly recommended that there is a clear separation of the different functions within the management structures of the organisation. For example, the local management, supervision and budgetary control in relation to a care home managed by a local authority are not the same as the management, supervision and budgetary controls in place in relation to the officers of the local authority undertaking the functions of the supervisory body.

Changes in managing authority

Patients and residents who are subject to a standard authorisation may, as part of their care and treatment plan, move to a new hospital or care home. Where such a move will result in a continued deprivation of liberty, the managing authority of the new hospital or care home is under a duty to request a standard authorisation⁴. Where the managing authority remains unchanged as a result of the proposed change in the place of detention, that managing authority is also under a duty to request a standard authorisation.

¹ As defined by section 3 of the Care Standards Act 2000

² As defined by section 2 of the Care Standards Act 2000 which is not an NHS hospital

³ In Wales this means the council of a county or county borough

⁴ See paragraphs 25 and 26 of Schedule A1

Guidance on requesting a standard authorisation is given below.

Changes in supervisory body

Because of organisational changes or perhaps geographical boundaries changing, a supervisory body may change over time. Paragraph 100 of Schedule A1 makes clear that anything done by or in relation to the original supervisory body in connection with an authorisation, will continue to have effect after the change as if it had been done by or in relation to the new supervisory body.

Similarly if at the point of change actions in connection with an authorisation are being undertaken by the original supervisory body, then these actions may be continued by or in relation to the new supervisory body.

Dispute about place of ordinary residence

If a local authority receives a request for authorisation from a care home but it appears to them that they are not the correct supervisory body then, while the question of who is the correct supervisory body is resolved, the supervisory body who has received the request must continue to act as supervisory body without any delay until the matter can be resolved. If it is not clear who the supervisory body should be or another local authority disputes that it is the appropriate supervisory body then the matter should be referred to the Welsh Ministers for determination (see Guidance for Supervisory Bodies).

When the correct supervisory body has been identified then the transfer from one local authority to another should be carried out as smoothly as possible and this should not cause any delay in dealing with the request. Where a local authority takes over as supervisory body then the authorisation process does not need to start from the beginning if the first local authority has already started the process.

Requests for a standard authorisation



See also Chapter 3 of the Code of Practice, Part 4 of Schedule A1 (paragraphs 21 to 73 inclusive), and the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*

When must a request be made

If it appears to a managing authority that a person in its care is, or is likely to be, provided with care or treatment in circumstances which may amount to a deprivation of liberty, then it must consider whether there are alternative and suitable arrangements that may be made for care or treatment that would not deprive the person of their liberty.

Paragraph 2.7 of the Code of Practice sets out some practical steps that may be taken to reduce the risk of a deprivation of liberty occurring.

If there is no alternative then the managing authority must make a request for a standard authorisation otherwise the deprivation of liberty may be unlawful.

A request must be made if the relevant person

- will be accommodated within their hospital or care home and the managing authority believe that the care or treatment will be such that the relevant person will be a detained resident;
- is already accommodated within their hospital or care home but their care or treatment results in, or at some time in the next 28 day is likely to result in, the relevant person being a detained resident.

Before making a request the managing authority must consider whether the person meets the qualifying requirements. When a request for a standard authorisation is made the relevant person will be assessed to determine whether they meet these qualifying requirements and if they do not meet all of the requirements the standard authorisation may not be given. The qualifying requirements are set out below. A supervisory body may not give a standard authorisation unless the relevant person meets all of the qualifying requirements.

A supervisory body can only give a standard authorisation where one has been requested by the managing authority or where a third party has made a request (see Requests by third parties below).⁵



Paragraph 3.6 of the Code of Practice requires managing authorities to establish procedures that identify (amongst other matters) whether a deprivation of liberty is necessary, the steps to assess whether to seek an authorisation, or the actions that may be taken to avoid a deprivation of liberty.

“Detained resident”

This means a person “...detained in a hospital or care home – for the purpose of being given care or treatment – in circumstances which amount to a deprivation of the person’s liberty.”⁶

⁵ Paragraph 22 of Schedule A1

⁶ Paragraph 6 of Schedule A1

“Qualifying requirements”

There are six qualifying requirements. A relevant person qualifies under

- i. the age requirement if they have reached 18;
- ii. the mental health requirement, if they have a mental disorder within the meaning of the Mental Health Act 1983 (but not excluding any learning disability);
- iii. the mental capacity requirement, if they lack capacity to make any decisions in relation to the question of whether or not he or she should be accommodated in the relevant hospital or care home for the purpose of being given care or treatment;
- iv. the best interests requirement, if
 - a. it is in the best interests of the relevant person to be deprived of liberty
 - b. it is necessary for them to be deprived of liberty in order to prevent harm to themselves, and
 - c. the deprivation of liberty is a proportionate response to the likelihood of the relevant person suffering harm and the seriousness of that harm.;
- v. the eligibility requirement, if the relevant person’s status, or potential status under the Mental Health Act 1983 precludes them from being subject to a standard authorisation;
- vi. the no refusals requirement, if an authorisation would conflict with other existing authority for decision-making for that person ie. where the authorisation would conflict with an advance decision made by the relevant person or the decision taken by a donee under authority of a lasting power of attorney or by a deputy of the Court.



Guidance on the assessments which must be undertaken to determine if the relevant person meets the qualifying requirements is given at paragraphs 4.23 to 4.76 of the Code of Practice. Guidance is also given in the Guidance for Supervisory Bodies and the Guidance on Standard Forms and Letters, both published by the Welsh Assembly Government.

Other circumstances where a request for authorisation should be made

There are two other occasions when a managing authority is under a duty to make a request for a standard authorisation.

The first is that a standard authorisation is already in place, but the place of detention of the relevant person is set to change. If the relevant person is to be moved to another hospital or care home then even if it is the same managing authority the circumstances of their detention will have changed and another standard authorisation is required.

The second occasion is that a decision of the court has authorised that a person be lawfully detained but that authority is due to expire. In this case a managing authority must make a request for a standard authorisation if, when the authority expires, the relevant person will continue to be detained and it appears that they will meet the qualifying requirements.

Making a request – the managing authority

When making a request for a standard authorisation to a supervisory body, the managing authority should ensure that they send the request (via the post, fax or other electronic means) to a designated person within the supervisory body. This is to ensure that confidential information about the relevant person, including their name and personal circumstances, are not sent to a general mail

address which could result in a breach of confidence. If there is any doubt about where to send the request the managing authority should check with the supervisory body before sending it.

Regulation 13 of the Assessment Regulations contains requirements regarding the information to be provided in a request for a standard authorisation of a deprivation of liberty. This is in addition to information required by Schedule A1 to the Act.

The managing authority must include in their request:

- 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.

Where the following information is available or can reasonably be obtained by the managing authority, the request must also include:

- a) any information or documents in support of the reasons why the managing authority believes the relevant person satisfies the qualifying requirements;
- 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 decision⁷ made by the relevant person.



Paragraph 3.15 of the Code of Practice sets out that the managing authority should inform the relevant person's family, friends and carers, and any IMCA, of any request for a standard authorisation that they have made. This part of the Code also gives guidance on involving the relevant person in determining who should be informed and consulted.

Standard Form SA1 provides a suggested template for the managing authority to use in requesting a standard authorisation of a deprivation of liberty.

Record keeping

The managing authority must⁸ keep a written record of each request made for a standard authorisation, and the reasons for making the request. The form of such record keeping is a matter for the managing authority to determine. The supervisory body will keep similar records.

Requests by third parties

Where someone believes that the relevant person is, or is likely to be, deprived of their liberty and the managing authority has not made a request for a standard authorisation, he or she may ask the supervisory body to decide whether or not there is an unauthorised deprivation of liberty. Any person may make a request but normally such a matter may be raised by the relevant person themselves, any relative, friend or carer, or any other third party (such as a person carrying out an inspection visit or a member of an advocacy organisation). The supervisory body may only investigate the suspected unauthorised deprivation of liberty and other concerns about the care the relevant person is receiving should be directed to the appropriate body.

⁷ Guidance on advance decisions to refuse treatment is given in Chapter 9 of the *Mental Capacity Act 2005 Code of Practice*

⁸ Paragraph 32(1) of Schedule A1



Chapter 9 of the Code of Practice gives guidance on what should happen if a someone thinks a person is being deprived of their liberty without authorisation

In the first instance the concerned person should raise the matter with the managing authority, and ask the managing authority to request a standard authorisation or to change the care regime. The Code of Practice emphasises that “...a managing authority must respond within a reasonable time to the request. This would normally mean 24 hours.”⁹



Paragraph 2.7 of the Code of Practice gives guidance on practical steps that can be taken to reduce the risk of a deprivation of liberty occurring

If any person raises concerns that there is an unauthorised deprivation of liberty the managing authority should draw this procedure to the attention of that person. Standard Form SA2 provides a suggested template¹⁰ for the request by the concerned person to the supervisory body to be made, but the supervisory body may accept such a request in any format.

If the concerned person (i.e. the third party) does make a request, the supervisory body will consider this but if the supervisory body believes the request is frivolous or vexatious, or the question of whether an unauthorised deprivation of liberty exists has already been decided, they need not proceed with the request. In all other circumstances the supervisory body will arrange for an assessment to be undertaken. This will be undertaken by a person eligible to carry out a best interests assessment.

The managing authority will be notified that the supervisory body has been asked to consider the matter, whether or not an assessment will be undertaken and if so by whom.

Where an assessment is undertaken the managing authority must comply with the assessment process (see below for general information on assessments), and they will be notified of the outcome of the assessment by the supervisory body and provided with a copy of the assessment.

If the findings of the assessment indicate that there is an unauthorised deprivation of liberty the managing authority must take immediate steps to ensure that this does not continue. The managing authority may either change the care arrangements so that it is clear there is no longer any deprivation of liberty. If however the need to continue with the care regime remains, the managing authority must provide the supervisory body with the information it would have provided had it made the request for a standard authorisation. In the meantime the managing authority may give an urgent authorisation (see below) for the deprivation of liberty to continue for up to 7 days. Standard Form SA3 provides a template for providing this information to the supervisory body.

⁹ Paragraph 9.1 of the Code of Practice

¹⁰ Note that the Code of Practice (at paragraph 9.3) indicates that the template is a letter, but it is in fact a form in Wales

Assessments



See also Chapter 4 of the Code of Practice (paragraphs 4.4 to 4.8 and 4.23 to 4.78 inclusive) and Part 3 and 9 of Schedule A1 to the Act.

What assessments are required

Following a request for a standard authorisation the supervisory body will arrange for assessors to consider whether or not the relevant person meets the qualifying requirements. Therefore there are six assessments that must be undertaken before the supervisory body can give an authorisation:

- i. assessment of the age requirement ('age assessment')
- ii. assessment of the mental health requirement ('mental health assessment')
- iii. assessment of the mental capacity requirement ('mental capacity assessment')
- iv. assessment of the best interests requirement ('best interests assessment')
- v. assessment of the eligibility requirement ('eligibility assessment')
- vi. assessment of the no refusals requirement ('no refusals assessment')

The criteria for each of the six requirements are set out in Part 3 of Schedule A1 to the Act.

If at any point in the assessment process it becomes apparent that one or more of the qualifying requirements are not met, then all assessments must come to stop and should not be completed. The supervisory body will inform the managing authority if this happens, and provide copies of the assessments undertaken up to that point (if any).

Communication needs for assessments

All those who are involved in the assessment process should ensure that everything possible is done to overcome any barriers to communication that may exist.

If managing authorities use Standard Form SA1 to request a standard authorisation, this includes a space to set out any particular communication needs of the relevant person, and also includes a box for recording the preferred language of communication. The supervisory body should take account of this when identifying suitable and appropriate assessors.

Welsh speakers will, where reasonably practicable or appropriate in the circumstances, be given the option of assessment through the medium of Welsh. Supervisory bodies are required to act in accordance with their Welsh language schemes.



Guidance on appropriate means of communication is given at paragraphs 3.10 and 3.11 of the Mental Capacity Act Code of Practice, and helping to put a person at ease (to receive information and aid in understanding) at paragraphs 3.12 to 3.15 inclusive.

Accommodating the work of the assessor

Managing authorities should co-operate with the assessors in enabling them to carry out their assessments. They should ensure that they provide the relevant information and records to assessors, as required. All assessors may, at any reasonable time, examine and take copies of records which they consider may be relevant to their assessment, provided that is record is

- a health record
- a record of, or held by, a local authority that was compiled in accordance with a social services function, and
- a record held by a care home

The best interests assessor will consult with the managing authority.. During their assessment they will consider:

- any relevant needs assessment – this is an assessment of the relevant person’s needs which was carried out in connection with the relevant person being accommodated in the hospital/care home, and was carried out by or on behalf of the managing authority or the supervisory body¹¹. The managing authority and the supervisory body have a duty to provide the best interests assessor with a copy of any such assessment;
- any relevant care plan – this is a care plan which sets out how the relevant person’s needs are to be met whilst accommodated in the hospital/care home, and was drawn up by or on behalf of the managing authority or the supervisory body¹². The managing authority and the supervisory body have a duty to provide the best interests assessor with a copy of any such care plan.

In addition to consulting with the managing authority, the best interests assessor will also comply with section 4(7) of the Act which involves seeking the views of a range of people connected to the relevant person to determine whether they believe that depriving the relevant person of their liberty is, or would be, in that person’s best interests. This will include members of the care and treatment team within the care home or hospital.

If the best interests assessor concludes that a standard authorisation should be given, they will also make recommendations to the supervisory body regarding the proposed relevant person’s representative. If members of the care team have views on this, they should ensure that this information is shared with the best interests assessor.

Timescales for completion of assessments

Assessments are required to be undertaken in accordance with strict deadlines and managing authorities should do everything they can to assist the assessors to comply with these deadlines. In respect of a request for standard authorisation, the assessor is required to complete the assessment within 21 days of being instructed by the supervisory body. Where the assessment is for the purpose of completing a review (see Review of the Standard Authorisation below), the timescale is also 21 days of instruction.

Where an urgent authorisation is in place and a request has been made for a standard authorisation, the assessor is required to complete their assessment within 5 days of being instructed by the supervisory body.

Where a request for consideration of an unauthorised deprivation of liberty has been received, the best interests assessor is required to complete their assessment within 5 days of being instructed by the supervisory body.

Managing authorities should ensure that they work with the assessors to help them meet these legislative requirements.

Records of assessments

The Act requires¹³ the assessor to keep a written record of the assessment and to provide a copy of their assessment to the supervisory body as soon as practicable after carrying out the assessment. The supervisory body must give copies of the assessments to:

¹¹ Paragraph 39(4) of Schedule A1

¹² Paragraph 39(5) of Schedule A1

¹³ Paragraphs 134(2) and (3) of Schedule 1

- the managing authority;
- the relevant person;
- any section 39A IMCA; and
- the relevant person's representative.

The supervisory body must provide these copies when it gives the relevant notice of an authorisation being given or not being given. Where a supervisory body has elected to use Standard Form SA4 to authorise the deprivation of liberty, this indicates that copies of the assessments are attached to the authorisation. Where a supervisory body uses Standard Letter 4 to indicate that an authorisation has not been given, again this indicates copies of the assessments are attached to the notice.

Urgent Authorisations



See also Chapter 6 of the Code of Practice and Part 5 of Schedule A1 (paragraphs 74 to 90 inclusive)

Wherever there is the possibility that a relevant person may need to be detained the managing authority should plan ahead. If the detention is likely to be unavoidable, then, if possible, the managing authority should make a request for a standard authorisation in advance so that the standard authorisation is in place at the beginning of the detention. If this is not possible and the relevant person needs to be detained as a matter of urgency then the managing authority can give itself an urgent authorisation for up to 7 days which will enable it to lawfully detain the person while the standard authorisation is pending.

Chapter 6 of the Code of Practice makes clear that wherever possible applications for deprivation of liberty authorisations should be made before the deprivation of liberty begins. Where the *“...deprivation of liberty unavoidable needs to commence before a standard authorisation can be obtained, an urgent authorisation can be given which will make the deprivation of liberty lawful for a short period of time.”*

Granting an urgent authorisation

In the first instance only a managing authority can give itself an urgent authorisation for a deprivation of liberty, and only in the circumstances set out in paragraph 76 of Schedule A1 to the Act, namely:

- a) where the managing authority is required to make a request for a standard authorisation and they believe that the need for the relevant person to be a detained resident is so urgent that the deprivation of liberty needs to begin before the request is made; or
- b) where the managing authority has made a request for a standard authorisation and they believe the need is so urgent that it is appropriate for the detention to begin before that request is dealt with by the supervisory body.

Paragraph 6.1 of the Code of Practice makes clear that the net effect of this is that *“... an urgent authorisation can never be given without a request for a standard authorisation being made simultaneously.”*

If a request for a standard authorisation has already been made, the managing authority should make immediate contact with the supervisory body to advise them it has become necessary to make an urgent authorisation. A copy of the urgent authorisation should also be provided to the supervisory body.

The Code gives guidance on the circumstances when an urgent authorisation should not be made or it may not be appropriate to make such an authorisation – see paragraphs 6.2 to 6.5, and also paragraphs 6.11 to 6.13 inclusive.



Paragraph 6.7 of the Code of Practice requires supervisory bodies and managing authorities to establish procedures that identify the actions to be taken when an urgent authorisation needs to be given, who should take those actions, and within what timescales.

Who should grant the authorisation within the managing authority?

Different arrangements will apply within different managing authorities, however the decision is an important one – the issue at hand is whether a person is deprived of their liberty, and if so, the authorisation of that without (at this stage) the full deprivation of liberty safeguards assessments. Therefore in each case the guidance in the Code should be followed, namely that “...the decision should...be taken at a senior level within the managing authority.”¹⁴

The decision making process should be seen within the context of the Unified Assessment Process, and where applicable the Care Programme Approach, and as such it will be appropriate to consult members of the care team within the care home or hospital, as well as those who have an interest in the welfare of the relevant person (including family, friends and carers).

Duration of the authorisation

The managing authority must decide the period during which the urgent authorisation is given, **but this must not exceed seven days**.

A further urgent authorisation cannot be given by the managing authority at the end of the period of authorisation, but the managing authority may request the supervisory body to extend the duration of the authorisation (see below).

If before the end of the period of the urgent authorisation, the supervisory body makes a standard authorisation or determines that there is no deprivation of liberty and notifies the managing authority of this, the urgent authorisation will come to an end at that time (rather than its expiry time).

If for any reason the managing authority decides to cease the urgent authorisation they should notify the supervisory body.

Form of the authorisation

An urgent authorisation must be made in writing, and must state certain information¹⁵:

- the name of the relevant person;
- the name of the relevant hospital or care home;
- the period during which the authorisation is to be in force; and
- the purpose for which the authorisation is given.

The purpose of the authorisation will be the steps that the managing authority consider necessary to deprive the relevant person of their liberty, for example, restricting their movements. The managing authority must also keep a written record of why they have given an urgent authorisation. This will include details about why the managing authority considers it necessary to take steps to deprive the relevant person of their liberty, for example, for their personal safety.

A copy of the written authorisation must be given to the relevant person and any section 39A IMCA¹⁶.

Standard Form UA1 provides a suggested template for the managing authority to use in making an urgent authorisation. Where this form is used it should be copied to the relevant person and any section 39A IMCA, and Standard Letter 10 may be used to assist this process.

¹⁴ Paragraph 6.13 of the Code of Practice

¹⁵ See paragraphs 79 and 80 of Schedule A1

¹⁶ Paragraph 83(3) of Schedule A1



Paragraph 3.26 of the Code of Practice makes clear that an IMCA will need to “...consider whether they have any concerns about the giving of an urgent authorisation ...and, whether it would be appropriate to challenge the giving of such an authorisation via the Court of Protection.”

Providing information about the authorisation

Managing authorities are also under a duty to “...take such steps as are practicable...” to ensure that the relevant person understands the effect of the authorisation and of their right to make an application to the Court of Protection. Appropriate information must be given orally and in writing. Simply giving the person a copy of the urgent authorisation would not be sufficient to meet this duty, and therefore the managing authority should ensure that they have suitable information leaflets for the relevant person to retain, which can be used to assist in the information sharing and discussion process.

At the same time managing authorities should consider how they give effect to the guidance in the Code of Practice (see paragraph 6.9) which requires that they should also notify the relevant person’s friends, family and carers that an urgent authorisation has been given.

The Welsh Assembly Government has prepared a range of information leaflets, including one on urgent authorisation which managing authorities may find suitable for assisting in providing information to the relevant person, and to others.



Guidance on appropriate means of communication is given at paragraphs 3.10 and 3.11 of the Mental Capacity Act Code of Practice, and helping to put a person at ease (to receive information and aid in understanding) at paragraphs 3.12 to 3.15 inclusive.

Requesting an extension to an urgent authorisation

The Act makes clear¹⁷ that only one urgent authorisation can apply in respect of the detained person at any one time, but the managing authority may request (if necessary) the supervisory body to extend the duration of the authorisation. The managing authority may only make one request of this kind.

Standard Form UA2 provides a suggested template for the managing authority to use in making such a request.

Where the managing authority makes a request to the supervisory body, they must notify the relevant person of this fact. Standard Letter 11 provides a suggested template for this.

The supervisory body may only extend the duration of the urgent authorisation if it appears to them that:

- the managing authority have made the required request for an standard authorisation;
- there are exceptional reasons why it has not yet been possible for that request to be disposed of; and
- it is essential for the existing detention (ie the urgent authorisation) to continue until the request is disposed of.

On receipt of the request the supervisory body will consider whether the grounds for extending the duration are met, and if they are satisfied they may extend the duration of the authorisation but not for more than seven days. The supervisory body will notify the managing authority of any extension (this may be on Standard Form UA3). On receipt of the notice the managing authority must then

¹⁷ Paragraph 77 of Schedule A1

vary the original authorisation so that it states the extended duration – if Standard Form UA1 is used, there is a space for this variation to be recorded. The managing authority must provide a copy of the amended authorisation to the relevant person and any IMCA, and must again take such steps as practicable to ensure that the relevant person understands the extension and its effect.

If the supervisory body declines to extend the original authorisation, the supervisory body will give notice of this fact (with reasons) to the managing authority. They will also copy that notice to the relevant person and any section 39A IMCA. Standard Letter 13 is available to supervisory bodies for this purpose.

Record keeping

Paragraph 82 of Schedule A1 places a duty on managing authorities to keep records of why they have given an urgent authorisation.

A managing authority must¹⁸ also keep records of why it requested a supervisory body to extend the duration of the original urgent authorisation.

¹⁸ Paragraph 84(2) of Schedule A1

Review of the standard authorisation (Part 8 of Schedule A1 to the Mental Capacity Act 2005)



See also Chapter 9 of the Code of Practice and Part 8 of Schedule A1 (paragraphs 101 to 125 inclusive).

The review procedure is a safeguard to ensure that the relevant person is detained only for so long as they continue to meet the qualifying requirements. Where it appears that the relevant person no longer meets the qualifying requirements the managing authority is under a duty to ask the supervisory body to review the standard authorisation. A review may also be requested by the relevant person or by their representative. The purpose of the Part 8 review procedure is essentially to assess whether:

- a) a person still meets the qualifying requirements for being deprived of their liberty, or whether the reasons why they do have changed; and
- b) any conditions attached to the standard authorisation need to be varied.

The managing authority must request a Part 8 review if they consider that one or more of the qualifying requirements appears to be reviewable. The supervisory body must undertake a review if requested to do so by the managing authority. The supervisory body must also undertake a review if asked to do so by either the relevant person or their representative. The supervisory body may itself decide to carry out a review without receiving a request for review.

Standard Form SA6 provides a suggested template for use by the managing authority (or any other person). The request for review may also be made orally, or in any other way that the requesting person wishes.

Notice of review

If the supervisory body is to carry out a review they will give notice to the managing authority and the relevant person and their representative. This notice should be given before they begin the review, but where that is not practicable they must give notice as soon as practicable after the review has begun.

The notice will be in writing. This notice to the managing authority should be held with the records relating to the standard authorisation.

Review of qualifying requirements

Having given notice of the review, the supervisory body must then decide whether any qualifying requirements are reviewable. If none of the grounds for review are met, the supervisory body is not required to undertake a review of the authorisation.

Review assessments

Where one of the grounds for review is met, the supervisory body must arrange for fresh assessments to be carried out for each qualifying requirement that appears to be reviewable. Such assessments are called 'review assessments'.

Where a review assessment is to be undertaken, this will be carried out in the same way as assessments following a request for a standard authorisation. Managing authorities should ensure the appropriate information is available to assessors when they visit.

Outcome of review

Having received the relevant review assessments, the supervisory body will decide whether the person still meets the qualifying requirements for being deprived of their liberty:

- If the person does not continue to meet the qualifying requirements, the standard authorisation will be terminated immediately¹⁹.
- If the person still meets the qualifying requirements, the supervisory body must decide whether the reasons have changed, and whether any conditions attached to the standard authorisation need to be varied.

If the reason(s) for meeting a qualifying requirement has changed or the conditions of it are to be varied, the standard authorisation itself will be varied, and the variation will be made in writing and provided to the managing authority. If neither the reason nor the conditions have changed, no variation will be made to the standard authorisation, but the supervisory body will notify the managing authority of the outcome of the review. The supervisory body will also notify the relevant person, their representative and any IMCA of the outcome of the review.

The notice of the outcome of the review received by the managing authority, and where relevant any variation to the standard authorisation, should be held with the records relating to the standard authorisation.

¹⁹ Paragraph 117 of Schedule A1

Relevant person's representative



See also Chapter 7 of the Code of Practice, Part 10 of Schedule A1 (paragraphs 137 to 153 inclusive) and the *Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009*

When a standard authorisation is given, at the same time the supervisory body will appoint someone to represent and support the relevant person. The representative will be someone who has been recommended by the best interests assessor and in most cases will be someone the relevant person knows, such as a relative or friend. The process for choosing and appointing the representative is set out below. The role²⁰ of the representative is:

- a) to maintain contact with the relevant person, and
- b) to represent and support that person in all matters relating to the deprivation of liberty safeguards, including, if appropriate, triggering a review, using an organisation's complaints procedure on the person's behalf, or making an application to the Court of Protection.

Selection and appointment

The representative will be selected by the best interests assessor based on the choice of the relevant person (if they have capacity to make this decision) or their donee or deputy (if the relevant person lacks capacity and it is within the authority of the donee or deputy). If the relevant person, donee or deputy has not made a choice as to the representative, the best interests assessor may recommend to the supervisory body a suitable person to act.

The supervisory body will appoint the representative, in writing, at the time a standard authorisation is given, or as soon as possible and practicable thereafter. When the appointment is made the supervisory body will notify the managing authority and the relevant person, amongst others, of the appointment of the representative. Such notification will be given in writing.

Termination of appointment

A person ceases to be a representative²¹ 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) the relevant person objects to the person continuing to be the representative, where they were chosen by the relevant person;
- e) the donee or deputy objects to the person continuing to be the representative, where they were chosen by that donee or deputy;
- 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 representative is no longer eligible to be a representative; or
- h) the supervisory body terminates the appointment because it is satisfied that the representative is not acting in the best interests of the relevant person.

²⁰ See paragraph 7.2 of the Code of Practice

²¹ See Regulation 14 of the *Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009*

In the same way that notice was given of an appointment being made, the supervisory body will also give notice of the termination of an appointment.

If the appointment of the representative is terminated, but the standard authorisation remains in force, a fresh appointment of an alternative representative must be made as soon as it is practicable and possible to do so.

Duty of managing authority to monitor representatives

Regulation 15 of the Representative Regulations places a duty on managing authorities to advise the supervisory body where it becomes aware the representative is not acting in the best interests of the relevant person. The managing authority must also notify the supervisory body if they become aware that the representative is not maintaining sufficient contact with the relevant person.

Guidance on what is meant by ‘best interests’ is given in Chapter 5 of the *Mental Capacity Act 2005 Code of Practice*. If a managing authority is concerned that a representative appears not to be acting in the relevant person’s best interests, it may be appropriate to raise this matter with the representative in the first instance. Paragraph 5.68 of *Mental Capacity Act 2005 Code of Practice* gives guidance on settling disputes about best interests.

‘Sufficient contact’ is not defined in the Regulations, and is therefore a matter for the managing authority to decide. Again it may be appropriate for the managing authority to discuss their concerns regarding contact with the representative in the first instance.

Where a managing authority wishes to advise the supervisory body of their concerns in accordance with Regulation 15, they should do so promptly and provide full details of the reasons for their concerns, in order to aid the supervisory body to reach a considered decision. It would be appropriate for these concerns to be given to the supervisory body in writing. The managing authority is not obliged to copy this correspondence to the representative, the relevant person, or the best interests assessor who originally selected the representative.



Guidance on supporting and monitoring the work of the representative is given in paragraphs 7.25 to 7.28 of the Code of Practice

Independent Mental Capacity Advocates (IMCAs)



See also paragraphs 3.22 to 3.28 and 7.37 to 7.41 of the Code of Practice, Part 11 of Schedule A1, and sections 39A, 39B, 39C, 39D, 39E and 40 of the Act for further information on IMCAs in relation to these safeguards. Chapter 10 of the MCA Code of Practice describes the wider rights and role of an IMCA.

IMCAs work with and support people who lack capacity, and represent their views to those who are working out their best interests. IMCAs are independent of the managing authority and the supervisory body.

Duties on the managing authority in respect of IMCAs

There are two express duties on the managing authority in respect of IMCAs and these safeguards:

- if the managing authority is satisfied that there is no one other than those involved in providing care or treatment in a professional capacity²² to the relevant person, with whom the best interests assessor may consult, the managing authority must notify the supervisory body of this;
- where the appointment of the relevant person has ended in the circumstances set out in the Representative Regulations (see above), and the managing authority is satisfied that there is no one other than those involved in providing care or treatment in a professional capacity to the relevant person, with whom the best interests assessor may consult, the managing authority must notify the supervisory body of this.

In both cases the supervisory body will then instruct an IMCA to represent the relevant person – a section 39A or a section 39C IMCA respectively. The appointment of a section 39C IMCA will end on the appointment of a new representative.

Section 39D IMCAs

Where a standard authorisation is in place and the relevant person's representative is not acting as such in a professional capacity, the supervisory body may instruct an IMCA (known as a 'section 39D IMCA') if:

- they are requested to do so by the relevant person; or
- they are requested to do so by the relevant person's representative; or
- the supervisory body has reason to believe that without such an IMCA the relevant person or their representative would be unable to exercise their right to apply to the court or request a review of the authorisation should they wish to; or
- the supervisory body has reason to believe that the relevant person or their representative did not or would be unlikely to exercise their right to apply to the court or request a review of the authorisation when it would have been reasonable to do so.

As summarised in paragraph 7.37 of the Code of Practice: *“The intention is to provide extra support to the relevant person or a family member or friend acting as their representative if they need it, and to help them make use of the review process or access the Court of Protection safeguards.”*

²² A friend or family member is not considered to be acting in a professional capacity simply because they have been appointed as the person's representative for a previous authorisation

When the managing authority is taking such steps as are practicable to explain to the relevant person their rights under the safeguards, the role of the section 39D IMCA should also be explained.

Further information

The rights of IMCAs appointed in relation to the safeguards are summarised in paragraph 3.23 of the Code of Practice.

IMCA services in Wales are commissioned by Local Health Boards, but this does not prevent a referral from a supervisory body which is a local authority being made. Additional funding has been made available to Local Health Boards (as part of the general allocation from April 2009) for any increase in the IMCA service required to meet these safeguards.

Monitoring



See also Chapter 11 of the Code of Practice

Accurate and consistent monitoring will increasingly enable managing authorities and supervisory bodies in Wales to base their policies and practices on sound and relevant evidence, and for trends to be highlighted. From this can develop shared learning and ensure coherence within and across different service systems.

National monitoring

The Welsh Ministers have provided that the safeguards will be monitored by Healthcare Inspectorate Wales (HIW) and Care and Social Services Inspectorate Wales (CSSIW). These inspection bodies, as part of their regular inspection processes, will:

- monitor the manner in which the safeguards are being operated, and
- report annually to the Welsh Ministers summarising their activity and findings.

The monitoring will include visiting hospitals and care homes, interviewing people accommodated in hospital and care homes, and requiring the production of, and inspecting, relevant records. Similar activities will take place regarding supervisory bodies.

As set out in paragraph 11.6 of the Code of Practice, the inspection process of HIW and CSSIW “...does not constitute an alternative review or appeal process.”

Local monitoring

Paragraph 11.8 of the Code of Practice states that:

“Supervisory bodies and managing authorities should keep their protocols and procedures under review and supervisory bodies should assess the nature of the authorisations they are giving in light of their local population.”

Supervisory bodies and managing authorities should be satisfied that their governance structures include these safeguards.

The Code of Practice makes reference to monitoring and auditing of different parts of the process, for example paragraph 6.10 (in relation to urgent authorisations) states that the “...processes should be clearly recorded, and regularly monitored and audited, as part of a managing authority’s or supervisory body’s governance structure.”

Monitoring information could be used to highlight

- failure to access or use the safeguards
- blocks between supervisory bodies and managing authorities at the request, assessment or authorisation stages
- unsafe services or areas of practice.

Comparison between different requests could be one (crude) indicator of whether a consensus exists about the appropriate threshold for making requests under these safeguards. Interpreting these statistics is not straightforward and will rely on local knowledge and professional judgement.

Periodic audits of individual requests and authorisations could be made to identify strengths and weaknesses in current practice, including

- quality of record- keeping
- appropriateness of decisions made, and of the decision making process itself
- attention to, and respect for, the relevant person's wishes.

Appendix A – Key words and phrases

Assessor	A person who carries out an assessment under the deprivation of liberty safeguards
Care home	A care facility registered under the Care Standards Act 2000
Conditions	Requirements that a supervisory body may impose when giving a standard authorisation
Court of Protection	The specialist court for all issues relating to people who lack capacity to make specific decisions
Deprivation of liberty	Deprivation of liberty is a term used in the European Convention on Human Rights about circumstances when a person’s freedom is taken away. Its meaning in practice is being defined through case law
Deputy	Someone appointed by the Court of Protection with ongoing legal authority, as prescribed by the Court, to make decisions on behalf of a person who lacks capacity to make particular decisions
Donee	Someone appointed under a Lasting Power of Attorney who has the legal right to make decisions within the scope of their authority on behalf of the person (the donor) who made the Lasting Power of Attorney
Detained resident	A person detained in a hospital or care home – for the purpose of being given care or treatment – in circumstances which amount to a deprivation of the person’s liberty
Independent Mental Capacity Advocate (IMCA)	Someone who provides support and representation for a person who lacks capacity to make specific decisions, where the person has no-one else to support them. The IMCA service was established by the Mental Capacity Act 2005 and is not the same as an ordinary advocacy service
Lasting Power of Attorney	A Power of Attorney created under the Mental Capacity Act 2005 appointing an attorney (donee), or attorneys, to make decisions about the donor’s welfare, including healthcare, and/or deal with the donor’s property and affairs
Managing authority	The person or body with management responsibility for the hospital or care home in which a person is, or may become, deprived of their liberty
Mental Capacity Act 2005	Legislation that governs decision-making for people who lack capacity to make decisions for themselves or who have capacity and want to make preparations for a time when they may lack capacity in the future. It sets out who can take decisions, in which situations, and how they should go about this
Mental Health Act 1983	Legislation mainly about compulsory care and treatment of patients with mental health problems. It covers detention in hospital for treatment, supervised community treatment and guardianship
Qualifying requirement	Any one of six qualifying requirements (age, mental health, mental capacity, best interests, eligibility, and no refusals) that need to be assessed and met in order for a standard deprivation of liberty authorisation to be given
Relevant person	The person in question (ie the patient in a hospital, the resident in a care home)
Relevant person’s representative	A person, independent of the hospital or care home, appointed to maintain contact with the relevant person, and to represent and support the relevant person in all matters relating to the operation of the deprivation of liberty safeguards

Restriction of liberty	An act imposed on a person that is not of such a degree or intensity as to amount to a deprivation of liberty
Review	A formal, fresh look at a relevant person's situation when there has been, or may have been, a change of circumstances that may necessitate an amendment to, or termination of, a standard deprivation of liberty authorisation
Standard authorisation	An authorisation given under Part 4 of Schedule A1. It is an authorisation given by a supervisory body after completing the assessment process, giving the lawful authority to deprive a relevant person of their liberty in the relevant care home or hospital
Supervisory body	A local authority or local health board that is responsible for considering a deprivation of liberty request received from a managing authority, commissioning the statutory assessments and, where all the assessments agree, authorising deprivation of liberty
Unauthorised deprivation of liberty	A situation in which a person is deprived of their liberty in a hospital or care home without the deprivation being authorised by either a standard or urgent deprivation of liberty authorisation
Urgent authorisation	An authorisation given under Part 5 of Schedule A1. It is an authorisation given by a managing authority, that provides the managing authority with lawful authority to deprive a person of their liberty in a hospital or care home while the standard deprivation of liberty authorisation process is undertaken

Appendix B – Notices

Paragraph 169 of Schedule A1 to the Act requires that: “Any notice under this Schedule must be in writing.”

Schedule A1 places a range of duties on managing authorities and supervisory bodies to give notices or provide copies of notices received to various individuals and bodies - see table below. Standard Letters have been developed to assist with this process, and where these apply these are also noted in the table.

Duties placed on a managing authority			
Paragraph	Requirement	Persons to be notified	Standard Letter
59(5) and 59(8)	Provide a copy of the written information given to the relevant person about the standard authorisation	Relevant person’s representative Any section 39D IMCA	Letter 6
82(3)	Provide a copy of the urgent authorisation	Relevant person Any section 39A IMCA	Letter 10
84(3)	Give notice to relevant person of request to extend duration of an urgent authorisation	Relevant person	Letter 11
85(6)	Provide a copy of the urgent authorisation if extended	Relevant person Any section 39A IMCA	Letter 12
86(3)	To copy any notice received from the supervisory body that declines to extend the urgent authorisation	Relevant person Any section 39A IMCA	Copy of Letter 13

Duties placed on a supervisory body			
Paragraph	Requirement	Persons to be notified	Standard Letter
58(2)	Give notice that the supervisory body is prohibited from giving a standard authorisation	Managing authority Relevant person Any section 39A IMCA Every interested person consulted by the best interests assessor	Letter 4
65(2)	Notice that the standard authorisation ceases to be in force	Managing authority Relevant person Relevant person’s representative Every interested person consulted by the best interests assessor	Form SA11 & Letter 9
69(7)	Notice of request to consider unauthorised deprivation of liberty, their decision, name of person appointed to undertake assessment	Eligible person who made request Person to whom request relates Managing authority Any section 39A IMCA	Letter 2
71(4)	Notice of outcome of assessment into third party request where there is an unauthorised deprivation of liberty	Eligible person who made request Person to whom request relates Managing authority Any section 39A IMCA	Letter 3

Duties placed on a supervisory body			
Paragraph	Requirement	Persons to be notified	Standard Letter
72(2)	Notice of outcome of assessment into third party request where there is no detention	Eligible person who made request Person to whom request relates Managing authority Any section 39A IMCA	Letter 3
73(2)	Notice of outcome of assessment into third party request where deprivation of liberty is authorised	Eligible person who made request Person to whom request relates Managing authority Any section 39A IMCA	Letter 3
86(2)	Notice to managing authority if decide not to extend urgent authorisation	Managing authority	Letter 13
90(2)	Notice that urgent authorisation has ceased to be in force	Relevant person Any section 39A IMCA	Letter 14
108(1)	Notice that review of standard authorisation will be carried out	Relevant person Relevant person's representative Managing authority	Letter 7
120	Notice that review has concluded and outcome and any variation	Managing authority Relevant person Relevant person's representative Any section 39D IMCA	Letter 8
133(3)	Notice to assessor(s) to cease assessment where it has been found a qualifying requirement is not met	Any assessor who is carrying out another assessment	Letter 5
136(2)	Notice that the best interests assessment states that there is an unauthorised deprivation of liberty	Managing authority Relevant person Any section 39A IMCA Any interested person consulted by the best interests assessor	Letter 1
Regulation 13 ²³	Notice of appointment of relevant person's representative	Relevant person Managing authority Any donee or deputy Any IMCA Any interested person consulted by the best interests assessor	Letter 15 (copy of Form RP2)
Regulation 16 ²⁴	Notice of termination of appointment of relevant person's representative	Representative Relevant person Managing authority Any donee or deputy Any IMCA Any interested person consulted by the best interests assessor	Letter 16 (copy of Form RP3)

²³ Of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009

²⁴ Of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009

