



Llywodraeth Cynulliad Cymru
Welsh Assembly Government

Guidance for Supervisory Bodies working within the *Mental Capacity Act* Deprivation of Liberty Safeguards

February 2009

Guidance for Supervisory Bodies working within the Mental Capacity Act Deprivation of Liberty Safeguards

Contents

Introduction	3
Presentation and terminology.....	3
Suggested forms and letters	4
Publishing information.....	4
Supervisory bodies	5
Identifying the ‘supervisory body’	5
Managing authorities.....	5
Same body is the managing authority and the supervisory body	5
Acting jointly.....	6
Changes in supervisory body.....	6
Changes in managing authority.....	6
Disputes about place of ordinary residence	6
Publishing contact information	6
Requests for a standard authorisation made by the managing authority	8
Duty to request an authorisation (basic cases)	8
Receiving a request from the managing authority.....	8
Proceeding with a request for standard authorisation from a managing authority	9
Record keeping.....	9
Request to consider a potential unauthorised deprivation of liberty.....	10
Receiving a request from a third party	10
Proceeding with a request from a third party.....	10
Record keeping.....	12
Assessments.....	13
What assessments are required.....	13
Order of completion of assessments.....	13
Communication needs for assessments	13
Access to records.....	14
Specific assessments.....	14
Equivalent assessments	16
Timescales for completion of assessments.....	17
Records of assessments	17
Assessors – appointment, selection, and instruction.....	19
Appointment of assessors (general requirements).....	19
Selection of assessors (general)	21
Selection of best interests assessor.....	22
Instruction of assessors.....	22
Standard authorisations	23
Duty to give a standard authorisation	23
Qualifying requirements not met.....	23
The authorisation	23
Further authorisation.....	24

Termination of a standard authorisation.....	25
Record keeping.....	25
Urgent authorisations.....	26
Granting an urgent authorisation.....	26
Duration of the authorisation	27
Requesting an extension to an urgent authorisation	27
Notification regarding the end of a urgent authorisation	27
Record keeping.....	28
Suspension of standard authorisation (Part 6 of Schedule A1 to the Mental Capacity Act 2005)	29
Notifications	29
Review of the standard authorisation (Part 8 of Schedule A1 to the Mental Capacity Act 2005).....	31
Grounds for review	31
Requesting a review.....	31
Notice of review	32
Stages of review	32
Outcome of review	33
Notice of outcome of review.....	33
Record keeping.....	33
Relevant person’s representative	34
Eligibility.....	34
Selection, approval and appointment of the representative.....	35
Duration of appointment of the representative	37
Termination of appointment.....	37
Payment to representatives.....	38
Independent Mental Capacity Advocates (IMCAs)	39
Circumstances when an IMCA will be appointed	39
Purpose of appointment	40
Appointment by the supervisory body	40
Monitoring	41
National monitoring.....	41
Local monitoring.....	41
Appendix A – Key words and phrases	43
Appendix B – Notices.....	45

Introduction

This guidance has been prepared by the Welsh Assembly Government to assist supervisory bodies identify the key processes in the safe and effective use of the Mental Capacity Act 2005 Deprivation of Liberty Safeguards (herein referred to as ‘the safeguards’). Similar guidance has also been produced for managing authorities.

The safeguards form part of the Mental Capacity Act 2005. These safeguards apply in respect of people who lack capacity specifically to consent to treatment or care in either a hospital or care home that, in their own best interests, can only be provided in circumstances that amount to a deprivation of liberty, and where detention under the Mental Health Act 1983 is not appropriate for the person at that time. 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 supervisory bodies 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 Managing Authorities – this is the Welsh Assembly Government’s “Guidance for Managing Authorities working within 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 supervisory bodies 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

Supervisory bodies

Identifying the 'supervisory body'

Hospitals

Regulation 3 of the Representative Regulations sets out the supervisory functions of Local Health Boards (LHBs) in respect of hospitals (NHS or independent), and this needs to be read in conjunction with paragraph 180 and 181 of Schedule A1. In essence this means the supervisory body is the Local Health Board in the area where the hospital where the relevant person is (or is to be) situated.

There are two occasions when this may not be the case:

- the first is where the relevant treatment or care in a hospital in the LHB's area is commissioned by a Primary Care Trust in England and, in that case the supervisory body is that Primary Care Trust;
- the second is where the Welsh Ministers or LHB commission relevant care and treatment in a hospital in England, in that case the supervisory body will be the LHB for the area in which the relevant person is usually resident.

Where Welsh Ministers or the LHB commission care and treatment in England, as set out above, the Assessment and Representative Regulations for Wales, including eligibility and appointment of assessors or representatives, will apply.

Care homes

Paragraph 182 of Schedule A1 sets out that the supervisory body is the local authority¹ 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.

Managing authorities

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 home² or an independent hospital³, 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.

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 there is potential for conflict of interests. It is therefore strongly recommended that as far as is practicable there should be a clear separation of the different functions within the management structures of the organisation. It is important that staff responsible for carrying out the supervisory function should operate entirely independently of staff responsible for managing the care homes and they should not be accountable to the same senior manager or operate from within the same budget.

¹ In Wales this means the council of a county or county borough

² As defined by section 3 of the Care Standards Act 2000

³ As defined by section 2 of the Care Standards Act 2000 which is not an NHS hospital

Acting jointly

Regulation 3(3)(b) of the Assessment Regulations provides that the supervisory functions of an LHB may be exercised jointly with another LHB. Local authorities also have statutory provisions that enable them to work jointly with other local authorities. However an LHB may not exercise the supervisory functions of a local authority, and neither may a local authority exercise the supervisory functions of an LHB.

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.

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.

Disputes 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. In such cases the supervisory body should write to:

Head of Older People & Long Term Care Policy Directorate
Welsh Assembly Government
Cathays Park
Cardiff CF10 3NQ

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. For example, if the first local authority has instructed assessors then the assessors may be instructed to provide their reports to the second local authority instead of the first.

Publishing contact information

The request for standard authorisation will contain highly personal and confidential information and it is therefore very important that it should not go astray. The managing authorities should know

⁴ See paragraphs 25 and 26 of Schedule A1

who in a supervisory body the request for authorisation should be addressed to, where that official is based and how to contact them. Supervisory bodies should clearly publish contact arrangements, and make this information available to all current and potential managing authorities within their area.

Requests for a standard authorisation made by the managing authority



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*

This part of the guidance applies when there is no standard or urgent authorisation in place.

Duty to request an authorisation (basic cases)

It is for the managing authority to decide whether there is, or is likely to be, an unauthorised deprivation of liberty and, if it concludes that there is such a deprivation of liberty, it must make a request for authorisation. A supervisory body can only give a standard authorisation where one has been requested by the managing authority or where a third party has requested consideration of whether an authorisation should be given (and initial investigations indicate it should be given).⁵ In the Guidance for Managing Authorities fuller information is given on this duty.



Chapter 2 of the Code of Practice gives guidance on what might be considered a deprivation of liberty, based on existing case law.

Receiving a request from the managing authority

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 decision⁶ made by the relevant person.

⁵ Paragraph 22 of Schedule A1

⁶ Guidance on advance decisions to refuse treatment is given in Chapter 9 of the *Mental Capacity Act 2005 Code of Practice*

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

Proceeding with a request for standard authorisation from a managing authority

If a supervisory body is requested to give a standard authorisation by the managing authority time is of the essence and it must do all that it can to ensure that the request is dealt with as quickly as possible. Paragraph 3.17 of the Code sets out that a supervisory body must “...*consider whether the request is appropriate and should be pursued...*” In practice this will mean that unless it is very apparent from the information provided by the managing authority that the person does not meet the qualifying requirements the supervisory body should instruct assessors to undertake the six required assessments, or obtain copies of equivalent assessments (see below).

As all six assessments must report that the relevant person meets the qualifying requirements before the standard authorisation can be given, if the supervisory body receives an assessment which reports that the relevant person does not meet the qualifying requirement there is no need to continue with the other assessments.

If there is no one interested in the welfare of the relevant person, and no one with whom the best interests assessor may consult (other than people acting in a professional capacity), then the managing authority is under a duty to inform the supervisory body who must then instruct an IMCA to support and represent the relevant person during the assessment process. Further guidance is given on this in the IMCA section of this booklet below.



Paragraph 3.18 of the Code of Practice requires supervisory bodies to establish procedures that identify the actions to be taken when a request is made, who should take the actions and within what timescales.

Guidance on assessments and selection and instruction of assessors is given later in this booklet.

Record keeping

The supervisory body must⁷ keep a written record of each request made to them for a standard authorisation. The form of such record keeping is a matter for the supervisory body to determine. The managing authority will keep similar records.

⁷ Paragraph 32(2) of Schedule A1

Request to consider a potential unauthorised deprivation of liberty



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.

Receiving a request from a third party

If there is, or is likely to be an unauthorised deprivation of liberty the managing authority must make a request for authorisation. However if it does not do so Chapter 9 of the Code of Practice explains the process for a person to report their concerns to the supervisory body that the relevant person may be deprived of their liberty without authorisation. Any person (except for the managing authority) has the right to report their concerns but normally it will be 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).

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 emphasises⁸ that “...a managing authority must respond within a reasonable time to the request. This would normally mean 24 hours.”

If the managing authority does not apply for a standard authorisation, the concerned person can ask the supervisory body to decide whether there is an unauthorised deprivation of liberty. Standard Form SA2 provides a suggested template 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.

Proceeding with a request from a third party

The supervisory body is under a duty to select and instruct a best interests assessor to consider whether the person is deprived of their liberty, if asked to do so by a third party.

This duty is however qualified. The supervisory body need not instruct a best interests assessor if it appears to them that the request is frivolous or vexatious, or where the question of whether or not an unauthorised deprivation of liberty has already been decided and no change of circumstances merits fresh consideration. Further guidance is given at paragraph 9.5 of the Code of Practice.

If appointed, the best interests assessor must complete their assessment within five days of instruction. If the best interests assessor finds that there is an unauthorised deprivation of liberty, paragraph 9.12 of the Code of Practice makes clear that the managing authority may 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 should give an urgent authorisation (see below), and provide the supervisory body with the information it would have provided had it made the request for a standard authorisation. Standard Form SA3 provides a template for providing this information to the supervisory body.

The supervisory body will then proceed with the process as though the managing authority had made the request (see above).

⁸ Paragraph 9.1 of the Code of Practice

Notifications (third party requests)

When a third party request is received, the supervisory body must notify⁹ the following:

- a) the person to whom the request relates;
- b) the relevant managing authority;
- c) any IMCA appointed under section 39A; and
- d) the person who made the request.

The above persons must also be notified of whether or not the supervisory body has decided to appoint an assessor, the name of that assessor and his or her findings. Standard Letter 2 provides a suggested template for the supervisory body to use in giving notice of the request and its decision.

The findings of the assessment must be notified as follows:

- where there is no deprivation of liberty
- where there is a deprivation of liberty, but this is authorised, (or where the authorisation is because of an order of the Court of Protection, this must also be set out)
- where there is a deprivation of liberty but this is found to be unlawful,

Standard Letter 3 provides a suggested template for the supervisory body to use in giving notice of a finding of this kind.

At the same time as giving a notice, or as soon as possible thereafter, the supervisory body must also provide all of the above persons (except for the person who made the request) with a copy of the best interests assessment¹⁰. If a standard authorisation is later given (by following the process for authorisation set out elsewhere) and a relevant person representative appointed, the copy of the best interests assessment must also be copied to that representative.

This is summarised in the following table.

Circumstances notice to be sent	Notification request made, and decision re best interests assessor	Outcome –not detained	Outcome -unlawful deprivation of liberty	Outcome –detained but authorised	Copy of best interests assessor 's report
Person to whom notice must be given					
Relevant person	✓	✓	✓	✓	✓
Managing authority	✓	✓	✓	✓	✓
Any IMCA	✓	✓	✓	✓	✓
Third party requesting the assessment	✓	✓	✓	✓	-
Any interested person consulted by the best interests assessor	-	-	✓	-	✓
Relevant person's representative (if appointed)	-	-	-	-	✓

⁹ Paragraph 68(7) and (8) of Schedule A1

¹⁰ Paragraph 136(4) of Schedule A1

Record keeping

The supervisory body must¹¹ keep a written record of each request made to them for a standard authorisation. This should include holding a record of requests to consider an unauthorised deprivation of liberty. The form of such record keeping is a matter for the supervisory body to determine.

¹¹ Paragraph 32(2) of Schedule A1

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

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. Guidance on the matters which need to be considered in each assessment is given in the Guidance to Standard Forms and Letters (see Forms AS1 to AS6).

Order of completion of assessments

This is a matter for supervisory bodies, and paragraph 4.21 of the Code of Practice gives guidance on some of the issues supervisory bodies and assessors will wish to consider.

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 must be informed immediately it is found that a qualifying requirement has not been met, so that they may give notice to any other assessors to cease assessment. Such notice must be given in writing¹². Standard Letter 5 provides a suggested template for the supervisory body to use to give this notice.

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 should, where reasonably practicable or appropriate in the circumstances, be given the option of assessment through the medium of Welsh. Supervisory bodies must 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.

¹² See paragraphs 133(3) and 169 of Schedule A1

Access to records

All assessors may, at any reasonable time, examine and take copies of records which they consider may be relevant to their assessment, provided that the 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

Assessors should list in their assessment report the records which they examined.

In carrying out their assessment, an assessor must also take into account any information, or submission made, by:

- the relevant person's representative
- any IMCA appointed under sections 39A, 39C or 39D



Guidance on consultation with, and submissions by, an IMCA are covered in Paragraphs 3.23 to 3.25 of the Code of Practice. Particular attention is drawn to the requirement in paragraph 3.25 that the supervisory body be informed if resolution of any disagreement between an assessor and an IMCA has not been achieved prior to completion of the assessment.

Specific assessments

Each assessment must be recorded in writing, and Standard Forms AS1 to AS6 provide suggested templates for these. The accompanying guidance for each of those Standard Forms also provides more detail on what should be recorded on the assessment. Below is guidance on the assessment process for the age, mental health, eligibility, best interests and no refusals assessment.

Age assessment

The person carrying out this assessment should normally meet the relevant person and it is recommended that the best interests assessor should also carry out this assessment. If the relevant person's date of birth is not known it will be obvious, in most cases, from the person's appearance that they are 18 years or over. However if the assessor does not meet the relevant person then it is advised that confirmation that this requirement has been met should only be given if the assessor has seen a copy of the relevant person's birth certificate or other similar evidence (such as a passport).

Mental health assessment

When carrying out the mental health assessment, in addition to considering whether or not the relevant person meets the mental health requirement, the assessor must also consider how (if at all) the relevant person's mental health is likely to be affected by being a detained resident. The conclusions of the mental health assessor on this matter must be notified to the best interests assessor. Such notification can be through a discussion, and may be through providing a copy of their written assessment. See also the Guidance to Standard Forms and Letters (particularly Form AS2).

Eligibility assessment

The eligibility assessment is set out in Part 2 of Schedule 1A to the Act and assesses the person in relation to any potential overlap or conflict with the Mental Health Act 1983. A relevant person may be eligible if he or she is subject to provisions in the Mental Health Act 1983 but only in prescribed circumstances. For example a relevant person is not eligible if he or she is detained in hospital under the Mental Health Act 1983.

Guidance on when the relevant person would be ineligible for a standard authorisation is given in the Guidance for Standard Forms and Letters (against Forms AS5), and also in paragraphs 4.41 to 4.51 of the Code of Practice.

Where the eligibility assessor and the best interests assessor are not the same person, the eligibility assessor must request¹³ that the best interests assessor provides them with any relevant eligibility information they have. As soon as they are instructed to undertake an assessment, the eligibility assessor should contact the best interests assessor to make their request for this information.

Best interests assessment

As set out in the Code of Practice (paragraph 4.58), the purpose of the best interests assessment is firstly to determine whether the deprivation of liberty is occurring. If it is, the best interests assessor must then consider whether:

- it is in the best interests of the relevant person to be deprived of liberty;
- it is necessary for them to be deprived of liberty in order to prevent harm to themselves; and
- deprivation of liberty is a proportionate response to the likelihood of the relevant person suffering harm and the seriousness of that harm.

The best interests assessor must consult with the managing authority of the relevant care home or hospital. During their assessment they must have regard to:

- 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 body¹⁴. 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 body¹⁵. The managing authority and the supervisory body have a duty to provide the best interests assessor with a copy of any such care plan;
- the conclusions which the mental health assessor has notified to them regarding how the relevant person’s mental health may be affected by their detention in the hospital/care home (see above).

In addition to consulting with the managing authority, the best interests assessor must also follow 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. The best interests assessor is required¹⁶ to record in their assessment the name and address of every interested person who was consulted during the assessment. If Form AS4 is used for this purpose, space is provided on that form for recording this information.



Guidance on the process of consultation is given at paragraphs 4.65 to 4.68 (plus scenario) of the Code of Practice.

¹³ Regulation 12(2) of the Assessment Regulations

¹⁴ Paragraph 39(4) of Schedule A1

¹⁵ Paragraph 39(5) of Schedule A1

¹⁶ Paragraph 40(2) of Schedule A1

During the course of the assessment, the best interests assessor may establish relevant information relating to the eligibility assessment. Where the eligibility assessor is not the same person as the best interests assessor, they must ask the best interests assessor for any such information and the best interests assessor must comply with any such request.

If the best interests assessor concludes that the relevant person meets the best interests requirement, there are three additional matters which the best interests assessor must then consider:

- maximum period of authorisation¹⁷ – the best interests assessor must state in their assessment the maximum authorisation period, which must be the shortest appropriate period for the relevant person to be detained. The maximum period that can be given in the best interests assessor assessment is 12 months (see paragraph 4.71 of the Code of Practice for further information);
- conditions to be attached to the standard authorisation¹⁸ – the best interests assessor may make recommendations to the supervisory body about conditions to which the standard authorisation will be subject. Paragraphs 4.74 and 4.75 of the Code of Practice gives examples of the types of conditions that the best interests assessor may recommend;
- relevant person’s representative – the best interests assessor may select, approve or recommend an eligible person to act as the relevant person’s representative (further guidance is given in the Relevant Person’s Representative section of this booklet below)

If the best interests assessor concludes that the relevant person does not meet the best interests requirement, but they believe that the person is subject to an unauthorised deprivation of liberty¹⁹ a statement to that effect must be included in the report of the assessment.



Guidance on the report of the best interests assessor where they do not support a deprivation of liberty is given at paragraphs 4.72 and 4.73 of the Code of Practice.

Equivalent assessments

Paragraph 49 of Schedule A1 to the Act provides that where an ‘equivalent assessment’ to any of the required assessments has already been obtained, the supervisory body may rely upon that instead of obtaining a fresh assessment. An equivalent assessment may, for example, have been carried out as part of the relevant person’s care plan. Such an assessment may only be used if it:

- a) is in writing; and
- b) complies with the requirements of the assessment for which it is standing;
- c) has been carried out within the previous 12 months (unless it is an age assessment); and
- d) satisfies the supervisory body that it remains accurate and up-to-date.

If the equivalent assessment is being used in respect of a best interests assessment, then for the supervisory body to be satisfied that it remains accurate they should take account of representations made by any person who has an interest in the relevant person’s care but, in particular, must take account of any information received from the relevant person’s representative or any IMCA.

¹⁷ Paragraph 42 of Schedule A1

¹⁸ Paragraph 43 of Schedule A1

¹⁹ An unauthorised deprivation of liberty would be one which is not authorised by the Court of Protection, an urgent authorisation under the safeguards, or an applicable detention under the Mental Health Act 1983

Guidance on when an equivalent assessment may be used is given at paragraphs 4.4 to 4.7 of the Code of Practice.

Please note that although the supervisory body must ensure it has a written copy of the equivalent assessment, the guidance at paragraph 4.8 of the Code of Practice for recording reasons on a standard form does not apply in Wales.

Timescales for completion of assessments

In respect of a request for standard authorisation, the assessor must complete the assessment within 21 days of being instructed by the supervisory body. For completion of review assessments, the timescale is also within 21 days of instruction.

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

In all cases the timescales given above are the maximum period, and every effort should be made to complete assessments in as timely a manner as possible, whilst giving due regard to the thoroughness required and the legislative requirements of the Act. For example, the best interests assessor must ensure that they comply with section 4(4) of the Act and “...so far as reasonably practicable, permit and encourage the person to participate, or to improve his ability to participate, as fully as possible in any act done for him and any decision affecting him.”

If for any reason a new assessor has to be appointed, although the same statutory deadlines will apply, the supervisory body must be mindful of the need to minimise any delays in giving the standard authorisation and should, so far as is practicable, arrange with that assessor for the assessment to be completed as a matter of urgency.

Records of assessments

The Act requires²⁰ 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. Because the supervisory body cannot provide an authorisation without receipt of written copies of all the assessments, it is essential that on completion an assessment is immediately copied to the supervisory body by the assessor.

The supervisory body must give copies of the assessments to:

- 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

²⁰ Paragraphs 134(2) and (3) of Schedule 1

authorisation has not been given, again this indicates copies of the assessments are attached to the notice.

Assessors – appointment, selection, and instruction



See also Chapter 4 of the Code of Practice (paragraphs 4.13 to 4.18 inclusive); the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*.

In the context of this guidance, appointment refers to the eligibility of an individual to be an assessor (which professions, what skills and experience are required, etc). Selection is concerned with the individual selection of an assessor in relation to a request for standard authorisation for a particular relevant person. Instruction is the process by which an assessor is asked by the supervisory body to undertake an assessment.

Paragraph 4.16 of the Code of Practice states: “Assessors act as individual professionals and are personally responsible for their decisions. Managing authorities and supervisory bodies must not dictate or seek to influence their decisions.”

Appointment of assessors (general requirements)

Regulation 3 of the Assessment Regulations sets out that a supervisory body may only appoint an assessor (other than a person undertaking an age assessment) where they are satisfied that the person:

- a) is insured in respect of any liabilities that might arise in connection with carrying out the assessment; and
- b) has the skills and experience appropriate to the assessment he or she is to carry out.

In terms of skills this must include:

- a) the ability to communicate effectively with a view to identifying characteristics and attributes of a person that are relevant to that person’s needs, and
- b) the ability to act independently of any person who appoints them to carry out an assessment and independently of any person who is providing care or treatment to the person he or she is to assess.

In determining whether a person has suitable skills the supervisory body must be satisfied that the person has the necessary interpersonal skills that will enable him or her to gather all of the relevant information needed to carry out the assessment and is likely to make an objective assessment based on that information. The supervisory body must be satisfied that whilst the person is capable of taking account of the views of persons who have an interest in the relevant person he or she is not likely to be unduly influenced in carrying out his or her assessment.

The supervisory body must also be satisfied that an assessor has an enhanced criminal record certificate issued under section 113B of the Police Act 1975, or where relevant a criminal record certificate issued pursuant to section 113A of that Act²¹.

²¹ See Regulation 3(2) of the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*

In respect of best interests assessors only, the supervisory body must be additionally satisfied that the person has the ability to take account of the views of any person to be assessed and the ability to assess the relevance and importance of those views in making an assessment.

It is recommended that supervisory bodies maintain a register of suitable assessors within their area. There is nothing to prevent an assessor from also being an employee of the supervisory body but particular care should be taken to ensure that they meet the relevant requirements particularly in relation to the requirement of independence. An assessor may undertake assessments for more than one supervisory body.

Mental health assessor

The Regulations²² set out that only a doctor may be appointed to be a mental health assessor but only if that doctor is either:

- a) approved under section 12 of the Mental Health Act 1983, or
- b) has, to the satisfaction of the supervisory body, relevant experience in the diagnosis or treatment or mental disorder.

Please note that the Code of Practice (second bullet of paragraph 4.35) does not state the position correctly in relation to Wales. There is no requirement in Wales that a doctor must have three years post-registration experience in the diagnosis or treatment of mental disorder. Also, where the Code of Practice (paragraph 4.36) states that doctors will have to have completed appropriate training, this is a matter for local determination and supervisory bodies may set out what training (if any) they require potential mental health assessors to have undertaken.

Best interest assessor

The Regulations²³ set out that only the following are eligible to undertake a best interests assessment:

- a) an approved mental health professional (this is a person approved under section 114(1) of the Mental Health Act 1983);
- b) a social worker registered with the Care Council for Wales;
- c) a first level nurse (this is a nurse who is registered in Sub-Part 1 of the register maintained by the Nursing and Midwifery Council, and is not limited to a nurse who is trained in mental health or learning disabilities);
- d) an occupational therapist registered in Part 6 of the register maintained under article 5 of the Health Professions Order 2001;
- e) a chartered psychologist listed in the British Psychological Society's Registered of Chartered Psychologists and who holds a practising certificate issued by that Society.

This means that the following, amongst others may not undertake a best interests assessment are:

- a) a doctor;
- b) a social worker registered with the General Social Care Council (ie the approving body for social workers in England);
- c) a second-level nurse, even if that nurse is trained in mental health or learning disabilities.

²² See Regulation 4 of the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*

²³ See Regulation 5 of the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*

Please note that the Code of Practice (second sentence onwards of paragraph 4.60) sets out additional requirements in relation to best interests assessors within England. This does not apply in Wales. With regard to training for best interests assessors, this is a matter for local determination and supervisory bodies may set out what training (if any) they require potential best interests assessors to have undertaken.

Separate provisions relate to the selection of best interests assessors (see below).

Mental capacity assessor

The Regulations²⁴ set out that if a person is eligible to carry out a best interests or a mental health assessment, they are also eligible to carry out a mental capacity assessment. No other persons are eligible to carry out a mental capacity assessment.

Eligibility assessor

The Regulations²⁵ set out that if a person can be appointed to carry out a best interests or a mental health assessment, they can also be appointed to carry out the eligibility assessment. No other persons can conduct an eligibility assessment. Please note that paragraphs 4.52 and 4.53 of the Code of Practice do not apply in relation to Wales.

No refusals assessor

Provided that a person meets the general requirements regarding assessors (see above), then they may be appointed to carry out a no refusals assessment. Please note that paragraph 4.28 of the Code of Practice does not apply in relation to Wales.

Age assessor

Provided that a person meets the relevant general requirements regarding assessors (see above), then they may be appointed to carry out an age assessment. Please note that paragraph 4.24 of the Code of Practice does not apply in relation to Wales.

Selection of assessors (general)

As set out above the selection of the assessor differs from general eligibility and appointment of assessors; in respect of an individual assessment a supervisory body can only select an assessor²⁶ where that person is:

- a) not financially interested in the care and treatment of the relevant person;
- b) not a relative of the relevant person;
- c) not a relative of a person who is financially interested in the care of the relevant person.

The Regulations set out the nature of the personal relationships in view, a relative is:

- a) the father, mother, stepfather, stepmother, son, daughter, grandmother, grandfather, grandson or granddaughter of that person or of that person's spouse, former spouse, civil partner or former civil partner
- b) the brother, sister, uncle, aunt, niece, nephew or first cousin (whether of the full blood or of the half blood or by marriage or civil partnership) of that person or of that person's spouse, former spouse, civil partner or former civil partner.

²⁴ See Regulation 6 of the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*. Persons in regulations 4 and 5(1) of the Regulations are eligible to carry out the mental capacity assessment.

²⁵ See Regulation 6 of the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*

²⁶ See Regulation 7 of the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*

A spouse or civil partner includes a person who is not married to or in a civil partnership with a person but is living with that person as if they were.

The Regulation also set out what is meant by financial interest: *“where that person is a partner, director, other office-holder or major shareholder of the care home or independent hospitals that has made the application for a standard authorisation”*.

Supervisory bodies should also take account of the communication needs of the relevant person – see guidance in assessments section above.

Selection of best interests assessor

A supervisory body may only select a best interests assessor where that person is not involved in the care or treatment, or making decisions about the care or treatment, of the relevant person.

The best interests assessor may be employed by or contracted to work in the managing authority or the supervisory body (including where the managing authority and supervisory body are the same organisation), but must be outside the decision making or care or treatment delivery of the relevant person. Please note that the Code of Practice (penultimate bullet point of paragraph 4.13) does not state the position correctly in relation to Wales. Where the supervisory body and the managing authority are the same organisation, the best interests assessor may be a person employed by them or providing services to them.

Instruction of assessors

As noted in the Code of Practice (see paragraph 4.13) the six assessments do not have to be completed by six different assessors and it is desirable to minimise the burden on the individual being assessed. The Act sets out ²⁷that the mental health and the best interests assessments must not be completed by the same person and as such there will always be at least two assessors in every case.

Guidance is given in the Code of Practice at paragraphs 4.13 and 4.14 on issues for consideration in selecting and instructing assessors. However please note that the penultimate bullet point of paragraph 4.13 (regarding the best interests assessor) is not correct for Wales – see above.

The supervisory body must instruct assessors to undertake assessments as swiftly as practicable after receiving a request for a standard authorisation. Any instruction should clearly set out the assessment(s) that are being sought by the supervisory body, the name and contact details of the other assessors (particularly important for the eligibility assessor where they are not also the best interests assessor) and the timescale for completion of the assessments. The maximum timescales for assessments are set out above.

²⁷ See paragraph 129(5) of Schedule A1

Standard authorisations



See also Chapter 5 of the Code of Practice and Paragraphs 50 to 60 of Schedule A1

Duty to give a standard authorisation

The supervisory body must²⁸ give a standard authorisation if all of the six assessments are positive (ie the relevant person meets all of the qualifying requirements) and the supervisory body has received written copies of all of those assessments.

Such authorisation should be given as soon as all of the written assessments are received – supervisory bodies should be proactive in ensuring that they have copies of the assessments as soon as they are completed. There should be no delay between the assessments being received and the authorisation granted (if all qualifying requirements are met).

Qualifying requirements not met

If any of the assessments conclude that one (or more) of the qualifying requirements are not met, the assessment process should halt immediately (see above) and the authorisation cannot be given.

In these circumstances the supervisory body must²⁹ notify the following that they cannot give an authorisation:

- the managing authority
- the relevant person
- any section 39A IMCA
- every interested person consulted by the best interests assessor

Such notice must be given as soon as practicable after it is found the authorisation cannot be given. At the same time copies of the written assessments that have been received must³⁰ also be given to the managing authority, the relevant person and any section 39A IMCA and relevant person's representative (if applicable), (but not the interested persons consulted by the best interests assessor).

Standard Letter 4 provides a sample template for the supervisory body to use to give such notification.

The authorisation

A standard authorisation must be given in writing, and must state:

- a) the name of the relevant person;
- b) the name of the relevant hospital or care home;
- c) the period during which the authorisation is to be in force;
- d) the purpose for which the authorisation is given;
- e) any conditions subject to which the authorisation is given; and
- f) the reason why each qualifying requirement is met.

²⁸ Paragraph 50 of Schedule A1

²⁹ Paragraph 58 of Schedule A1

³⁰ Paragraphs 135(2) and (4) of Schedule A1

The standard authorisation may come into force on a date later than it is given, but the supervisory body must decide the period during which the standard authorisation is to be in force; this cannot exceed the maximum authorisation period stated in the best interests assessment.

The supervisory body must also decide whether to give the authorisation subject to any conditions; in reaching its decision the supervisory body must have regard to any recommendations about conditions made in the best interests assessment.

Standard Form SA4 provides a suggested template the supervisory body to use when giving a standard deprivation of liberty authorisation.

The authorisation is given to the managing authority. The supervisory body must also copy this, as soon as practicable after giving the authorisation, to:

- the relevant person
- the relevant person's representative
- any section 39A IMCA;
- every interested person consulted by the best interests assessor

When an authorisation has been given the managing authority must take “...such steps as are practicable...” to ensure that the relevant person understands the effect of the authorisation and their rights under the safeguards³¹.

Further authorisation

If a standard authorisation has been given, and has not ceased to be in force, a managing authority may request a further authorisation if it considers that such authorisation would be required at the expiry of the current standard authorisation. Such a request may be made even if a review of the current standard authorisation is being undertaken under Part 8 of Schedule A1 (see below).

The supervisory body should treat a request for a further authorisation in the same way that they treat a request for an original authorisation:

- instruct assessors to undertake assessments, considering first whether any equivalent assessments may be required;
- if all qualifying requirements are met, making a standard authorisation;
- attaching conditions to the authorisation if necessary, these may be different conditions to the original authorisation if appropriate
- supervisory bodies must ensure that the duration of the further authorisation is for the least time required, in line with the recommendation of the best interests assessor;
- appointing the relevant person's representative (note this does not automatically carry forward, and the best interests assessor is required to consider afresh the suitability of persons to act in this capacity);

Where a further authorisation is given, Standard Form SA4 should be used to record the authorisation and the usual notices and copies of assessments made.

If the further authorisation commences before the expiry of the current authorisation, the current authorisation ends and the new authorisation comes into force³².

³¹ Paragraph 59 of Schedule A1

³² Paragraph 62(2) of Schedule A1

If during the assessments of the qualifying requirements it is found that the relevant person does not meet a qualifying requirement, the assessment process will stop, but there is no effect on the current standard authorisation.

Termination of a standard authorisation

A standard authorisation will cease to be in force at the expiry date recorded in the authorisation, but it will end before then if:

- a further authorisation is made which comes into force before the expiry of the original authorisation;
- a review of the authorisation (under Part 8 of Schedule A1) determines that one, or more, of the qualifying requirements are not met

When the authorisation ceases to be in force, the supervisory body must give notice of this to:

- the managing authority
- the relevant person
- the relevant person's representative
- every interested person consulted by the best interests assessor

Such notice should be given as soon as practicable after the authorisation has ceased to be in force, and it would be appropriate for the notice to explain why the authorisation has ended.

Standard Form SA11 provides a sample template for the supervisory body to use to record the termination of the standard authorisation; Standard Letter 9 may also be used to accompany the issuing of the Form.

Record keeping

The Act requires the supervisory body to keep written records in relation to standard authorisations³³, namely:

- the standard authorisations that have been given;
- for each standard authorisation the following matters
 - 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
 - the purpose for which the authorisation is given
 - any conditions subject to which the authorisation is given, and
 - the reason why each qualifying requirement is met
- the requests for standard authorisations which have resulted in an authorisation not being given.

It would be appropriate the supervisory body to also keep records relating to the termination of a standard authorisation.

³³ Paragraph 60 of Schedule A1

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 unavoidably 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.



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.

If for any reason the managing authority decides to cease the urgent authorisation they should notify the supervisory body – there are notification requirements placed on the supervisory body in these circumstances (see below).

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. 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). The supervisory body has certain duties about notification in this respect (see below).

Requesting an extension to an urgent authorisation

The Act makes clear³⁴ 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.

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 must consider whether the grounds for extending the duration are met:

- if the supervisory body is satisfied, they may extend the duration of the authorisation but not for more than seven days. The supervisory body must notify the managing authority of any extension in writing.
- if the supervisory body declines to extend the original authorisation, it must give notice of this fact (with reasons) to the managing authority. The supervisory body must also copy this notice to the relevant person and any section 39A IMCA.

Standard Form UA3 provides a sample template for notifying the managing authority of an extension to the duration of the authorisation, and the reasons for the decision taken.

Standard Letter 13 is available to supervisory bodies to notify the managing authority (copying in the relevant person and any IMCA) that the request has been declined.

Notification regarding the end of a urgent authorisation

An urgent authorisation may end because:

- the detention is no longer required
- the period of the detention has come to an end
- a standard authorisation has been made
- an order by the Court of Protection has been made
- the relevant person does not meet one or more of the qualifying requirements

³⁴ Paragraph 77 of Schedule A1

In any case the supervisory body has a duty³⁵ to notify the relevant person and any section 39A IMCA that the authorisation has come to an end. It would be appropriate to also explain the reason for the authorisation ending.

Standard Letter 14 provides a suggested template for this notice.

Record keeping

The Act requires the supervisory body to keep various records in relation to urgent authorisations:

- a written record that the request for an extension to the duration has been made to them;
- a written record of the outcome of the request;
- where the extension is agreed, a written record of the period of extension.

³⁵ Paragraph 90(2) of Schedule A1

Suspension of standard authorisation (Part 6 of Schedule A1 to the Mental Capacity Act 2005)



See also Paragraphs 8.19 to 8.21 of the Code of Practice and Part 6 of Schedule A1 (paragraphs 91 to 97 inclusive). The eligibility assessment is in Paragraphs 4.40 to 4.57 of the Code of Practice.

There may be occasions where the relevant person does not meet the eligibility requirement but only for a short period of time, for example, where the relevant person is detained in hospital for treatment under the Mental Health Act 1983. If the intention is that the relevant person should return to the care home or hospital to which the standard authorisation applies within 28 days then the standard authorisation may be suspended for that time.

To suspend the authorisation the managing authority must give notice to the supervisory body that the relevant person does not meet the eligibility requirement³⁶. The standard authorisation is then suspended from the time when the notice is given. The effect of suspending the standard authorisation in this way is that there is no authorisation under the Mental Capacity Act to deprive the person of their liberty.

Suspension does not affect the duration of the authorisation. For example, if a standard authorisation is made on 16 June for a period of three months, but is suspended on 1 August for 15 days, the authorisation will still expire at midnight on 15 September (rather than midnight 30 September).

A standard authorisation can only be suspended for up to 28 days, and if the suspension has not been lifted by the end of that period the authorisation will cease to be in force. The period of 28 days begins on the day on which the standard authorisation is suspended.

If, prior to the end of the 28th day, the managing authority notify the supervisory body that the person once again meets the eligibility requirement the suspension of the authorisation ceases. The effect of this is that there is once more an authorisation under the Mental Capacity Act to deprive the relevant person of their liberty.

Notifications

The managing authority must notify the supervisory body (in writing) that the relevant person has ceased to meet the eligibility requirement. Standard Form SA8 provides a template for this purpose.

If the standard authorisation is suspended, the supervisory body notify:

- the relevant person
- the relevant person's representative
- the managing authority

Standard Form SA9 provides a template for this purpose.

³⁶ Note that Part 6 does not apply where the relevant person meets the grounds for detention under section 2 or 3 of the Mental Health Act 1983 Act, and they object to being given some or all of the medical treatment for mental disorder in hospital, and no donee or deputy has made a valid decision to consent to the matters to which they object. In this circumstance a review under Part 8 should be sought, on the non-qualification ground (as set out in Paragraphs 91(4) and 105(2) of Schedule A1)

The managing authority must also notify the supervisory body (in writing) if the eligibility requirement is once more met (provided this is within 28 days of the suspension commencing). Part 2 of Standard Form SA8 may be used for this purpose.

If the authorisation has ceased to be suspended (and is again in force) the supervisory body must notify:

- the relevant person
- the relevant person's representative
- the managing authority
- any section 39D IMCA

Standard Form SA10 provides a template for this purpose.

If no notification is received from the managing authority that the eligibility requirement is again met (by the 28th day of suspension), the authorisation ceases to be in force and the normal duties of notification of an authorisation ceasing apply to the supervisory body – see above.

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 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.

Grounds for review

The grounds for review are³⁷:

- ‘non-qualification’ – in other words it would appear that the person does not meet the age, mental health, mental capacity, best interests or no refusals requirement, or is ineligible because they are now objecting to mental health treatment in hospital or they meet the criteria for admission to hospital under section 2 or 3 of the Mental Health Act 1983³⁸; or
- ‘change of reason’ – in other words the reason why the person meets the qualifying requirements (with the exception of age) has changed; or
- ‘variation of conditions’ – in other words the best interests requirement is reviewable because there has been a change in the patient’s case and because of that change, it would be appropriate to vary the conditions of the standard authorisation. Varying can be amending, adding or omitting conditions.

Requesting a review

The supervisory body must carry out a Part 8 review if requested to do so by:

- the relevant person;
- the relevant person’s representative; or
- the managing authority.

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

If a person other than the managing authority is requesting the review they do not have to say why they are making the request - however if that person does not say why they think the review is necessary it is likely that the grounds for review will not be met. Supervisory bodies should be alert to a concerned person not asking directly for a review but appearing to have genuine concerns. In such a case the person should be assisted in expressing those concerns and, if it is not possible to address these concerns by other means, this should be treated as a request for a review.

The supervisory body may itself decide to carry out a review without receiving a request for review. This may be necessary if matters have been brought to the attention of the supervisory body which suggest that the relevant person does not meet the qualifying requirements.

³⁷ See paragraphs 104 to 107 of Schedule A1

³⁸ If a person has become subject to detention under the Mental Health Act 1983 different arrangements apply – see ‘suspending an authorisation’

Notice of review

If the supervisory body is to carry out a review they must give notice³⁹ before they begin the review (and where that is not practicable as soon as practicable after the review has begun) to:

- the relevant person;
- the relevant person's representative; and
- the managing authority.

Such notice must be given in writing. Standard Letter 7 provides a suggested template for the supervisory body to use in giving notice of the intended review.

Stages of review

Having given notice of the review, there are two stages of the review:

- the supervisory body will decide whether the qualifying requirements are reviewable (ie consider the grounds for review);
- if they are reviewable, the supervisory body will arrange for the relevant assessment to be carried out.

Review of qualifying requirements

For the first stage the supervisory body does not need to instruct assessors but it is recommended that the decision as to whether the qualifying requirements are reviewable is taken by a suitably qualified person. This decision may be taken on the basis of information in support of the request, the standard authorisation and assessor's reports. Only where there is no doubt that the relevant person continues to meet all of the qualifying requirements and there is no reason why the conditions should be varied should the decision be taken that the qualifying requirements are not reviewable.

If the supervisory body concludes that none of the grounds for review are met, no further action is required except to notify the managing authority, the relevant person, the relevant person's representative and any section 39D IMCA.

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 the supervisory body has elected to use the Standard Forms published by the Welsh Assembly Government, the Assessment Forms (AS1 to AS6) may also be used for review assessments.

The only time when a review assessment would not be required is when the supervisory body has decided that the review only relates to the variation to conditions ground, and the change in the relevant person's case is not significant. In this circumstance the supervisory body may vary the conditions of the authorisation without requesting a best interests review assessment.⁴⁰

Review assessments should be undertaken in the same way as assessments following a request for a standard authorisation. Where a review assessment in respect of the best interest requirement is being undertaken, the assessor should include recommendations about whether (and if applicable, how) the conditions of the standard authorisation should be varied.

³⁹ See paragraph 108 of Schedule A1

⁴⁰ See paragraphs 111(3), (4) and (5) and 114 of Schedule A1; also paragraph 8.14 of the Code of Practice

Outcome of review

Having received the relevant review assessments that have been commissioned, the supervisory body must make a decision. It must 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 must be terminated immediately⁴¹.
- 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 should be varied. In just the same way that standard authorisations must be in writing, so must any variations to the standard authorisation⁴². If neither the reason nor the conditions have changed, no action need be taken in respect of the standard authorisation.

Standard Form SA7 provides a suggested template for the supervisory body to record a variation in the standard authorisation. Standard Form SA11 provides a suggested template for the supervisory body to terminate the standard authorisation.

If the reason that the person does not meeting the qualifying requirements is because the best interests requirement is not met, and the best interests assessor has found that the person is unlawfully deprived of their liberty, this must be drawn to the attention of the managing authority, the relevant person, any section 39A IMCA and any interested persons consulted by the best interests assessor. Standard Letter 1 provides a suggested template for this.

Notice of outcome of review

The supervisory body must notify (in writing) the outcome of the review, and any variation to the standard authorisation, to:

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

When the notice is given the supervisory body must also provide copies of the relevant review assessments (but not to the section 39D IMCA). Standard Letter 8 provides a template for providing this notification, which should be attached to any applicable variation (SA7 for example) and copies of the review assessments.

Record keeping

Paragraph 121 of Schedule A1 (and paragraph 8.7 of the Code of Practice) requires the supervisory body to keep records of any Part 8 reviews. The records must include:

- a) each request for a review that is made to the supervisory body;
- b) the outcome of each request;
- c) each review which is carried out;
- d) the outcome of each review;
- e) any variation of an authorisation made as a consequence of a review.

⁴¹ Paragraph 117 of Schedule A1

⁴² Paragraph 119 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 role⁴³ of the representative is:

- to maintain contact with the relevant person, and
- 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.

Eligibility

The representative may not be someone who is directly connected with the managing authority of the hospital or care home where the relevant person is detained.

The eligibility of a person to be the representative must comply with the requirements set out in Regulation 6 of the Representative Regulations, namely that the person is:

- a) 18 years of age or over;
- b) able to keep in contact with the relevant person;
- c) not prevented by ill-health from carrying out the role of the representative;
- d) willing to be the relevant person's representative;
- e) not financially interested in the care home or independent hospital where the relevant person is, or is to be, detained;
- f) not a relative of a person who is financially interested in the care home or independent hospital where the relevant person is, or is to be, detained;
- g) not providing services to, or not employed to work in the care home where the relevant person is, or is to be, detained;
- h) not employed to work in the hospital where the relevant person is, or is to be, detained in a role that is, or could be, related to the relevant person's case; and
- i) not employed to work in the relevant person's supervisory body in a role that is, or could be, related to the relevant person's case.

The same meanings given to 'relative' and 'financial interest' that apply to assessors apply in this case also⁴⁴.

The role of the representative will also be a 'regulated activity' for the purposes of the Safeguarding Vulnerable Groups Act 2006, and as such the supervisory body must ensure compliance with this legislation in respect of representatives.

⁴³ See paragraph 7.2 of the Code of Practice

⁴⁴ See also Regulation 6(2) and (3) of *Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009*

In some cases there will not be a suitable person identified through the assessment process to be the representative, in which case the supervisory body will appoint a representative who will be acting in a professional capacity⁴⁵. In this case the supervisory body must be satisfied that:

- a) the person has appropriate training and experience, and
- b) the person has an enhanced criminal record certificate issued under section 113B of the Police Act 1975, or where relevant a criminal record certificate issued pursuant to section 113A of that Act⁴⁶.

Where the supervisory body appoints a representative in these circumstances, it has discretion to determine for itself what 'appropriate training and experience' should be.

Selection, approval and appointment of the representative

The representative is appointed by the supervisory body following a recommendation from the best interests assessor. The best interests assessor will recommend someone, providing they are eligible, who has been chosen by the relevant person or by any person who is the donee of a Lasting Power of Attorney or a deputy appointed by the court⁴⁷.

Representative chosen by the relevant person

The relevant person may choose someone to be their representative if they have capacity to do so. If the best interests assessor approves⁴⁸ the choice they may recommend to the supervisory body that that person is appointed. If the best interests assessor does not approve the choice then they can ask the relevant person to choose someone else. If the best interests assessor does not approve of any of the choices made by the relevant person they may make their own recommendation to the supervisory body.

The assessment of whether the relevant person lacks capacity to decide who their representative must be made in accordance with the Mental Capacity Act 2005. Further guidance on this is given in Chapter 4 of the Mental Capacity Act 2005 Code of Practice. If the relevant person does not have capacity to make a choice the best interests must still take into account their views when recommending a representative.

Representative chosen by a donee or deputy

If the relevant person does not have capacity to make this choice but has appointed a person who has authority under a Lasting Power of Attorney or is a deputy appointed by the court, that donee or deputy may choose someone to act as the relevant person's representative (provided it is within the scope of their authority to do so). There is nothing to prevent a donee or deputy from choosing themselves to be the representative.

As in the case of a choice by the relevant person, if the best interests assessor is satisfied that the person chosen is eligible to act they may recommend the choice or any subsequent choices to the supervisory body. Alternatively the best interests assessor may make their own recommendation. When acting on the basis of a choice made by a donee or deputy the best interests assessor should ensure that they have authority to make that choice.

⁴⁵ For this purpose this would exclude a family member, friend or carer of the relevant person

⁴⁶ See Regulation 3(2) of the *Mental Capacity (Deprivation of Liberty: Assessments, Standard Authorisations and Disputes about Residence) (Wales) Regulations 2009*

⁴⁷ For information about donees and deputies see Mental Capacity Act 2005 Code of Practice.

⁴⁸ Approval, in this context, is the process by which the best interests assessor confirms the proposed person is eligible and appropriate to be the representative

Best interests assessors' recommendation

Guidance is given at paragraphs 7.16 and 7.21 of the Code of Practice on the factors which the best interests assessor should consider in identifying a suitable person to be the representative. It should be noted that the position established at paragraph 7.18 of the Code of Practice is not correct in relation to Wales⁴⁹.

Recording selection, approval and recommendation

Standard Form RP1 provides a suggested template for the best interests assessor to record the choice of representative, and their approval or recommendation as the case may be. Because the prospective representative must be willing to act, Standard Form RP1 also provides space for their agreement to be recorded.

Appointment by the supervisory body

Although the best interests assessor may select and approve the representative, the function of appointment is reserved to the supervisory body.

The supervisory body will appoint in writing the person who has been recommended by the best interests assessor. If the best interests assessor has not made a recommendation then the supervisory body will choose someone to act. Normally the best interests assessor will be unable to recommend someone to act because the relevant person has no family or friends who are suitable or eligible. In this case the supervisory body will usually appoint a representative who will act in a professional capacity.

The supervisory body must also appoint a representative if a vacancy arises while a standard authorisation is in force (for example, because the representative is no longer willing to act as such, or because they become ineligible for other reasons to be a representative). The supervisory body must make such an appointment as soon as is practicable after it is aware that a vacancy has arisen or will arise. Whilst a new representative is sought the supervisory body may need to appoint a section 39C IMCA – see below.

The appointment of the representative must be made in writing, and Standard Form RP2 provides a suggested template for this purpose. Supervisory bodies may also wish to provide the representative with information on the role, and the Welsh Assembly Government has developed an information booklet for this purpose.

When the representative is appointed, notice of that fact must be given to:

- the relevant person;
- the relevant managing authority;
- any donee or deputy of the relevant person;
- any independent mental capacity advocate appointed in relation to the relevant person;
- any persons consulted by the best interests assessor.

This notice must be given in writing, and Standard Letter 15 provides a suggested template for this purpose.

⁴⁹ Paragraph 7.18 of the Code of Practice states that the best interests assessor must not select a representative to which the relevant person, donee or deputy (as the case may be) objects. This is correct in relation to England, by virtue of the Regulations of that jurisdiction. Those Regulations do not apply in Wales.

Duration of appointment of the representative

A representative's appointment expires when the standard authorisation comes to an end. Therefore, the selection and appointment process must be done afresh if a further standard authorisation is given.

Termination of appointment

Regulation 14 provides that a person ceases to be a representative if:

- a) they die;
- b) they inform the supervisory body that they no longer are willing to continue in the role;
- c) the period of their appointment ends;
- d) 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 person is not acting in the best interests of the relevant person.

Managing authorities have a duty⁵⁰ to notify the supervisory body if they become aware that the representative is not acting in the best interests of the relevant person, or is not maintaining sufficient contact with the relevant person. It would be appropriate for the supervisory body to contact the representative to clarify the position, before deciding whether to terminate the appointment.

If the appointment is to be terminated in any of the circumstances other than the first circumstance above, the supervisory body must notify the representative of the termination and the reasons for it. Such notification must be in writing, and Standard Form RP3 provides a suggested template for this purpose.

Supervisory bodies have discretion as to the notice period, if any, which is given to representatives in respect of termination of the authorisation. For example, where a standard authorisation is due to terminate, it may be appropriate to give formal notice to the representative a few weeks before the termination date. In other situations, such as where the supervisory body is terminating the appointment because they are concerned that the representative is not acting in the relevant person's best interests, it may be appropriate to give a shorter period of notice.

When the supervisory body terminates the appointment of the representative, they must give notice of this fact to:

- the relevant person;
- the relevant managing authority;
- any donee or deputy of the relevant person;
- any independent mental capacity advocate appointed in relation to the relevant person;
- any persons consulted by the best interests assessor.

⁵⁰ Regulation 15 of *Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009*

This notice must be given in writing, and Standard Letter 16 provides a suggested template for this purpose.

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. Whilst a new representative is sought the supervisory body may need to appoint a section 39C IMCA – see below.

Payment to representatives

Regulation 17 of the Representative Regulations provides that the supervisory body may “...*make payments to, or in relation to, any person appointed [by it] and exercising the functions as the relevant person’s representative.*” Whilst payment of either fixed rate fees or expenses is a matter for local determination, it would be appropriate for supervisory bodies to have a consistent approach to this matter, perhaps by way of a policy or protocol.

Note: the first sentence of paragraph 7.20 of the Code of Practice does not entirely reflect the position in relation to Wales. Payment to a representative can be made where that representative has been selected by the relevant person, donee, deputy or the best interests assessor, and is not limited to the circumstances where the supervisory body selects a person acting in a professional capacity (as indicated in paragraph 7.20). Such arrangements provide that the supervisory body could make, for example, payments in respect of travel expenses and other out of pocket expenses.

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.

Circumstances when an IMCA will be appointed

The safeguards provide three circumstances when an IMCA must be appointed *in addition* to the existing circumstances⁵¹.

Section 39A IMCA

If the managing authority is satisfied that there is no one other than those involved in providing care or treatment in a professional capacity⁵² to the relevant person, with whom the best interests assessor may consult, the managing authority must notify the supervisory body of this. The supervisory body must then instruct an IMCA to represent the relevant person. Such an IMCA is referred to as a 'section 39A IMCA'.

Section 39C IMCA

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. The supervisory body must then instruct an IMCA to represent the relevant person. Such an IMCA is referred to as a 'section 39C IMCA'. The appointment of a section 39C IMCA will end on the appointment of a new representative.

Section 39D IMCA

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."*

⁵¹ For existing circumstances see pages 178 and 179 of the MCA Code of Practice

⁵² 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

Purpose of appointment

The role and purpose of the appointment of an IMCA depends on the circumstances of the appointment.

A section 39A and section 39C IMCA must be consulted by the best interests assessor.

A section 39D IMCA should take such steps as practicable to help the relevant person and/or their representative understand:

- the effect of the authorisation;
- the purpose of the authorisation;
- the duration of the authorisation;
- any conditions attached to the authorisation;
- the reasons why the qualifying requirements have each been met;
- the right to apply to the Court of Protection and to how exercise that right;
- the right to request a review under Part 8 of Schedule A1 and to how exercise that right.

A section 39D should also take such steps as practicable to help the relevant person or their representative exercise their right to apply to the court or request a review, if it appears to the IMCA that the relevant person or the representative wishes to do so.

If the section 39D IMCA does provide help in these circumstances, the IMCA may make submission to the supervisory body on the question of whether a qualifying requirement is reviewable, and may also give information (or make submissions) to any assessor undertaking a review assessment.



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

Appointment by the supervisory body

The Code of Practice makes clear⁵³ that any appointment made by the supervisory body must be done swiftly, and this is “...particularly important ...if an urgent authorisation as been given, so that they can make a meaningful input at a very early stage in the process.”

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.

⁵³ Paragraph 3.22

Monitoring



See also Chapter 11 of the Code of Practice

Accurate and consistent monitoring will increasingly enable supervisory bodies and managing authorities 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 ⁵⁴	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 ⁵⁵	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)

⁵⁴ Of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009

⁵⁵ Of the Mental Capacity (Deprivation of Liberty: Appointment of Relevant Person's Representative) (Wales) Regulations 2009

