

Explanatory Memorandum

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

This Explanatory Memorandum has been prepared by the Mental Health, Vulnerable Groups and Offenders Branch of the Department for Health and Social Services and is laid before the National Assembly for Wales in accordance with Standing Order 24.1

- i. **Description** – These Regulations deal with the appointment of a relevant person's representative for a person whose deprivation of liberty has been authorised under the Mental Capacity Act 2005. These Regulations also provide that the functions of a supervisory body will be conferred on Local Health Boards by the Welsh Ministers. Finally these Regulations contain provisions which amend previous Regulations in respect of Independent Mental Capacity Advocates.
- ii. **Matters of special interest to the Subordinate Legislation Committee** – None
- iii. **Legislative Background** – The Welsh Ministers have the required powers under sections 35(2) and (3), 65(1) of, and paragraphs 138(1), 142 to 145, 147, 148, 165, 166 and 182(6) and (7) of Schedule A1 to, the Mental Capacity Act 2005 and under sections 12 and 204 of the National Health Service (Wales) Act 2006. This Statutory Instrument is being made under the negative resolution procedure.
- iv. **Purpose and intended effect of legislation** – These Regulations set out the circumstances in which a person will be eligible to be a representative, when a standard authorisation under the Deprivation of Liberty Safeguards of the Mental Capacity Act 2005 is given. They provide for the relevant person, a donee of a Lasting Power of Attorney or a deputy of the Court of Protection to select such a representative (as applicable), or where such selection is not made for the best interests assessor to undertake this function. The Regulations also provide the circumstances when such an appointment may be terminated.

The Regulations require a managing authority to notify the supervisory body if a representative is not maintaining regular contact with the person, or where the representative is not acting in that person's best interest. Such matters are grounds for termination of the appointment.

The Regulations also confer the supervisory functions of Welsh Ministers in relation to hospitals on Local Health Boards.

The circumstances when an Independent Mental Capacity Advocate may be required to support a person who lacks capacity have been extended by the Deprivation of Liberty Safeguards. These Regulations amend earlier Regulations (Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007) to provide that Local Health Boards will also be responsible for making arrangements for such Advocates to be available to act in relation to the new safeguards.

- v. **Implementation** – It is intended these Regulations should come into force on 1 April 2009. Parallel legislation has also been made in respect of England which will come into force on the same day.
- vi. **Consultation** – These regulations were subject to consultation between the 5 of November 2007 and the 28 of January 2008, alongside a wider consultation on six statutory instruments made under the Mental Health Act 1983 (as amended by the Mental Health Act 2007).

During these period workshops, study days and consultation events were held, and support was also given to Learning Disability Wales to run workshops with service users and carers.

23 written responses to the consultation document were received, from a variety of stakeholders, including service user representative bodies, NHS organisations, local authorities and professional bodies.

- vii. **Regulatory Impact Assessment** – A full impact assessment has not been produced for this instrument as no significant impact on the private or voluntary sector is foreseen. Also a full Regulatory Impact Assessment for the Mental Health Bill (later the Mental Health Act 2007) was prepared by the Department of Health (June 2007). The 2007 Act introduced the Deprivation of Liberty Safeguards into the Mental Capacity Act 2005.