

# Mental Capacity Act 2005

## 2005 CHAPTER 9

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An Act to make new provision relating to persons who lack capacity; to establish a superior court of record called the Court of Protection in place of the office of the Supreme Court called by that name; to make provision in connection with the Convention on the International Protection of Adults signed at the Hague on 13th January 2000; and for connected purposes.

[7th April 2005]

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

### PART 1

#### PERSONS WHO LACK CAPACITY

##### *The principles*

#### **1 The principles**

- (1) The following principles apply for the purposes of this Act.
- (2) A person must be assumed to have capacity unless it is established that he lacks capacity.
- (3) A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- (4) A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- (5) An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- (6) Before the act is done, or the decision is made, regard must be had to whether the purpose for which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

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#### **Commencement**

Pt 1 s. 1(1)-(6): April 1, 2007 in relation to England for the purpose specified in SI 2007/563 art.2(2); April 1, 2007 for the purpose specified in SI 2007/563 art.2(3); October 1, 2007 otherwise (SI 2007/563 art. 2(2)(a), art. 2(3); SI 2007/1897 art. 2(2)(a))

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## Preliminary

### 2 People who lack capacity

- (1) For the purposes of this Act, a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.
- (2) It does not matter whether the impairment or disturbance is permanent or temporary.
- (3) A lack of capacity cannot be established merely by reference to—
  - (a) a person's age or appearance, or
  - (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.
- (4) In proceedings under this Act or any other enactment, any question whether a person lacks capacity within the meaning of this Act must be decided on the balance of probabilities.
- (5) No power which a person (“D”) may exercise under this Act—
  - (a) in relation to a person who lacks capacity, or
  - (b) where D reasonably thinks that a person lacks capacity,is exercisable in relation to a person under 16.
- (6) Subsection (5) is subject to section 18(3).

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#### Commencement

Pt 1 s. 2(1)-(6): April 1, 2007 in relation to England for the purpose specified in SI 2007/563 art.2(2); April 1, 2007 for the purpose specified in SI 2007/563 art.2(3); October 1, 2007 otherwise (SI 2007/563 art. 2(2)(b), art. 2(3); SI 2007/1897 art. 2(2)(b))

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### 3 Inability to make decisions

- (1) For the purposes of section 2, a person is unable to make a decision for himself if he is unable—
  - (a) to understand the information relevant to the decision,
  - (b) to retain that information,
  - (c) to use or weigh that information as part of the process of making the decision, or
  - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).
- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
  - (a) deciding one way or another, or
  - (b) failing to make the decision.

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**Commencement**

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Pt 1 s. 3(1)-(4)(b): April 1, 2007 in relation to England for the purpose specified in SI 2007/563 art.2(2); April 1, 2007 for the purpose specified in SI 2007/563 art.2(3); October 1, 2007 otherwise (SI 2007/563 art. 2(2)(c), art. 2(3); SI 2007/1897 art. 2(2)(c))

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**4 Best interests**

(1) In determining for the purposes of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of–

- (a) the person's age or appearance, or
- (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.

(2) The person making the determination must consider all the relevant circumstances and, in particular, take the following steps.

(3) He must consider–

- (a) whether it is likely that the person will at some time have capacity in relation to the matter in question, and
- (b) if it appears likely that he will, when that is likely to be.

(4) He must, 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.

(5) Where the determination relates to life-sustaining treatment he must not, in considering whether the treatment is in the best interests of the person concerned, be motivated by a desire to bring about his death.

(6) He must consider, so far as is reasonably ascertainable–

- (a) the person's past and present wishes and feelings (and, in particular, any relevant written statement made by him when he had capacity),
- (b) the beliefs and values that would be likely to influence his decision if he had capacity, and
- (c) the other factors that he would be likely to consider if he were able to do so.

(7) He must take into account, if it is practicable and appropriate to consult them, the views of–

- (a) anyone named by the person as someone to be consulted on the matter in question or on matters of that kind,
- (b) anyone engaged in caring for the person or interested in his welfare,
- (c) any donee of a lasting power of attorney granted by the person, and
- (d) any deputy appointed for the person by the court,

as to what would be in the person's best interests and, in particular, as to the matters mentioned in subsection (6).

(8) The duties imposed by subsections (1) to (7) also apply in relation to the exercise of any powers which–

- (a) are exercisable under a lasting power of attorney, or
- (b) are exercisable by a person under this Act where he reasonably believes that another person lacks capacity.

(9) In the case of an act done, or a decision made, by a person other than the court, there is sufficient compliance with this section if (having complied with the requirements of subsections (1) to (7)) he reasonably believes that what he does or decides is in the best interests of the person concerned.

(10) “Life-sustaining treatment” means treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

(11) “Relevant circumstances” are those–

- (a) of which the person making the determination is aware, and
- (b) which it would be reasonable to regard as relevant.

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#### **Commencement**

Pt 1 s. 4(1)-(11)(b): April 1, 2007 in relation to England for the purpose specified in SI 2007/563 art.2(2); April 1, 2007 for the purpose specified in SI 2007/563 art.2(3); October 1, 2007 otherwise (SI 2007/563 art. 2(2)(d), art. 2(3); SI 2007/1897 art. 2(2)(d))

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#### **[4A Restriction on deprivation of liberty**

(1) This Act does not authorise any person (“D”) to deprive any other person (“P”) of his liberty.

(2) But that is subject to–

- (a) the following provisions of this section, and
- (b) section 4B.

(3) D may deprive P of his liberty if, by doing so, D is giving effect to a relevant decision of the court.

(4) A relevant decision of the court is a decision made by an order under section 16(2)(a) in relation to a matter concerning P’s personal welfare.

(5) D may deprive P of his liberty if the deprivation is authorised by Schedule A1 (hospital and care home residents: deprivation of liberty).

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#### **[4B Deprivation of liberty necessary for life-sustaining treatment etc**

(1) If the following conditions are met, D is authorised to deprive P of his liberty while a decision as respects any relevant issue is sought from the court.

(2) The first condition is that there is a question about whether D is authorised to deprive P of his liberty under section 4A.

(3) The second condition is that the deprivation of liberty–

- (a) is wholly or partly for the purpose of–
  - (i) giving P life-sustaining treatment, or
  - (ii) doing any vital act, or
- (b) consists wholly or partly of–
  - (i) giving P life-sustaining treatment, or
  - (ii) doing any vital act.

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¹ Added by Mental Health Act 2007 c. 12 Pt 2 c.2 s.50(2) (April 1, 2009)

- (4) The third condition is that the deprivation of liberty is necessary in order to–
- (a) give the life-sustaining treatment, or
  - (b) do the vital act.
- (5) A vital act is any act which the person doing it reasonably believes to be necessary to prevent a serious deterioration in P's condition.
- ]<sup>2</sup>

## 5 Acts in connection with care or treatment

- (1) If a person (“D”) does an act in connection with the care or treatment of another person (“P”), the act is one to which this section applies if–
- (a) before doing the act, D takes reasonable steps to establish whether P lacks capacity in relation to the matter in question, and
  - (b) when doing the act, D reasonably believes–
    - (i) that P lacks capacity in relation to the matter, and
    - (ii) that it will be in P's best interests for the act to be done.
- (2) D does not incur any liability in relation to the act that he would not have incurred if P–
- (a) had had capacity to consent in relation to the matter, and
  - (b) had consented to D's doing the act.
- (3) Nothing in this section excludes a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing the act.
- (4) Nothing in this section affects the operation of sections 24 to 26 (advance decisions to refuse treatment).

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### Commencement

Pt 1 s. 5(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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## 6 Section 5 acts: limitations

- (1) If D does an act that is intended to restrain P, it is not an act to which section 5 applies unless two further conditions are satisfied.
- (2) The first condition is that D reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (3) The second is that the act is a proportionate response to–
- (a) the likelihood of P's suffering harm, and
  - (b) the seriousness of that harm.
- (4) For the purposes of this section D restrains P if he–
- (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
  - (b) restricts P's liberty of movement, whether or not P resists.
- (5) [...]<sup>3</sup>

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<sup>2</sup> Added by Mental Health Act 2007 c. 12 Pt 2 c.2 s.50(2) (April 1, 2009)

<sup>3</sup> Repealed by Mental Health Act 2007 c. 12 Sch.11(10) para.1 (April 1, 2009)

(6) Section 5 does not authorise a person to do an act which conflicts with a decision made, within the scope of his authority and in accordance with this Part, by–

- (a) a donee of a lasting power of attorney granted by P, or
- (b) a deputy appointed for P by the court.

(7) But nothing in subsection (6) stops a person–

- (a) providing life-sustaining treatment, or
- (b) doing any act which he reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a decision as respects any relevant issue is sought from the court.

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**Commencement**

Pt 1 s. 6(1)-(7)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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**7 Payment for necessary goods and services**

(1) If necessary goods or services are supplied to a person who lacks capacity to contract for the supply, he must pay a reasonable price for them.

(2) “Necessary” means suitable to a person's condition in life and to his actual requirements at the time when the goods or services are supplied.

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**Commencement**

Pt 1 s. 7(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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**8 Expenditure**

(1) If an act to which section 5 applies involves expenditure, it is lawful for D–

- (a) to pledge P's credit for the purpose of the expenditure, and
- (b) to apply money in P's possession for meeting the expenditure.

(2) If the expenditure is borne for P by D, it is lawful for D–

- (a) to reimburse himself out of money in P's possession, or
- (b) to be otherwise indemnified by P.

(3) Subsections (1) and (2) do not affect any power under which (apart from those subsections) a person–

- (a) has lawful control of P's money or other property, and
- (b) has power to spend money for P's benefit.

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**Commencement**

Pt 1 s. 8(1)-(3)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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*Lasting powers of attorney***9 Lasting powers of attorney**

- (1) A lasting power of attorney is a power of attorney under which the donor (“P”) confers on the donee (or donees) authority to make decisions about all or any of the following—
- (a) P's personal welfare or specified matters concerning P's personal welfare, and
  - (b) P's property and affairs or specified matters concerning P's property and affairs,
- and which includes authority to make such decisions in circumstances where P no longer has capacity.
- (2) A lasting power of attorney is not created unless—
- (a) section 10 is complied with,
  - (b) an instrument conferring authority of the kind mentioned in subsection (1) is made and registered in accordance with Schedule 1, and
  - (c) at the time when P executes the instrument, P has reached 18 and has capacity to execute it.
- (3) An instrument which—
- (a) purports to create a lasting power of attorney, but
  - (b) does not comply with this section, section 10 or Schedule 1,
- confers no authority.
- (4) The authority conferred by a lasting power of attorney is subject to—
- (a) the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests), and
  - (b) any conditions or restrictions specified in the instrument.

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**Commencement**

Pt 1 s. 9(1)-(4)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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**10 Appointment of donees**

- (1) A donee of a lasting power of attorney must be—
- (a) an individual who has reached 18, or
  - (b) if the power relates only to P's property and affairs, either such an individual or a trust corporation.
- (2) An individual who is bankrupt may not be appointed as donee of a lasting power of attorney in relation to P's property and affairs.
- (3) Subsections (4) to (7) apply in relation to an instrument under which two or more persons are to act as donees of a lasting power of attorney.
- (4) The instrument may appoint them to act—
- (a) jointly,
  - (b) jointly and severally, or
  - (c) jointly in respect of some matters and jointly and severally in respect of others.

- (5) To the extent to which it does not specify whether they are to act jointly or jointly and severally, the instrument is to be assumed to appoint them to act jointly.
- (6) If they are to act jointly, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1 prevents a lasting power of attorney from being created.
- (7) If they are to act jointly and severally, a failure, as respects one of them, to comply with the requirements of subsection (1) or (2) or Part 1 or 2 of Schedule 1—
- (a) prevents the appointment taking effect in his case, but
  - (b) does not prevent a lasting power of attorney from being created in the case of the other or others.
- (8) An instrument used to create a lasting power of attorney—
- (a) cannot give the donee (or, if more than one, any of them) power to appoint a substitute or successor, but
  - (b) may itself appoint a person to replace the donee (or, if more than one, any of them) on the occurrence of an event mentioned in section 13(6)(a) to (d) which has the effect of terminating the donee's appointment.

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#### Commencement

Pt 1 s. 10(1)-(8)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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### 11 Lasting powers of attorney: restrictions

- (1) A lasting power of attorney does not authorise the donee (or, if more than one, any of them) to do an act that is intended to restrain P, unless three conditions are satisfied.
- (2) The first condition is that P lacks, or the donee reasonably believes that P lacks, capacity in relation to the matter in question.
- (3) The second is that the donee reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (4) The third is that the act is a proportionate response to—
- (a) the likelihood of P's suffering harm, and
  - (b) the seriousness of that harm.
- (5) For the purposes of this section, the donee restrains P if he—
- (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
  - (b) restricts P's liberty of movement, whether or not P resists,
- or if he authorises another person to do any of those things.
- (6) [...] <sup>4</sup>
- (7) Where a lasting power of attorney authorises the donee (or, if more than one, any of them) to make decisions about P's personal welfare, the authority—
- (a) does not extend to making such decisions in circumstances other than those where P lacks, or the donee reasonably believes that P lacks, capacity,
  - (b) is subject to sections 24 to 26 (advance decisions to refuse treatment), and

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<sup>4</sup> Repealed by Mental Health Act 2007 c. 12 Sch.11(10) para.1 (April 1, 2009)



(c) extends to giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P.

(8) But subsection (7)(c)–

(a) does not authorise the giving or refusing of consent to the carrying out or continuation of life-sustaining treatment, unless the instrument contains express provision to that effect, and

(b) is subject to any conditions or restrictions in the instrument.

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#### Commencement

Pt 1 s. 11(1)-(8)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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### 12 Scope of lasting powers of attorney: gifts

(1) Where a lasting power of attorney confers authority to make decisions about P's property and affairs, it does not authorise a donee (or, if more than one, any of them) to dispose of the donor's property by making gifts except to the extent permitted by subsection (2).

(2) The donee may make gifts–

(a) on customary occasions to persons (including himself) who are related to or connected with the donor, or

(b) to any charity to whom the donor made or might have been expected to make gifts, if the value of each such gift is not unreasonable having regard to all the circumstances and, in particular, the size of the donor's estate.

(3) “Customary occasion” means–

(a) the occasion or anniversary of a birth, a marriage or the formation of a civil partnership, or

(b) any other occasion on which presents are customarily given within families or among friends or associates.

(4) Subsection (2) is subject to any conditions or restrictions in the instrument.

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#### Commencement

Pt 1 s. 12(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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### 13 Revocation of lasting powers of attorney etc.

(1) This section applies if–

(a) P has executed an instrument with a view to creating a lasting power of attorney, or

(b) a lasting power of attorney is registered as having been conferred by P,

and in this section references to revoking the power include revoking the instrument.

(2) P may, at any time when he has capacity to do so, revoke the power.

(3) P's bankruptcy revokes the power so far as it relates to P's property and affairs.

(4) But where P is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the power is suspended, so far as it relates to P's property and affairs, for so long as the order has effect.

- (5) The occurrence in relation to a donee of an event mentioned in subsection (6)–
- (a) terminates his appointment, and
  - (b) except in the cases given in subsection (7), revokes the power.
- (6) The events are–
- (a) the disclaimer of the appointment by the donee in accordance with such requirements as may be prescribed for the purposes of this section in regulations made by the Lord Chancellor,
  - (b) subject to subsections (8) and (9), the death or bankruptcy of the donee or, if the donee is a trust corporation, its winding-up or dissolution,
  - (c) subject to subsection (11), the dissolution or annulment of a marriage or civil partnership between the donor and the donee,
  - (d) the lack of capacity of the donee.
- (7) The cases are–
- (a) the donee is replaced under the terms of the instrument,
  - (b) he is one of two or more persons appointed to act as donees jointly and severally in respect of any matter and, after the event, there is at least one remaining donee.
- (8) The bankruptcy of a donee does not terminate his appointment, or revoke the power, in so far as his authority relates to P's personal welfare.
- (9) Where the donee is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, his appointment and the power are suspended, so far as they relate to P's property and affairs, for so long as the order has effect.
- (10) Where the donee is one of two or more appointed to act jointly and severally under the power in respect of any matter, the reference in subsection (9) to the suspension of the power is to its suspension in so far as it relates to that donee.
- (11) The dissolution or annulment of a marriage or civil partnership does not terminate the appointment of a donee, or revoke the power, if the instrument provided that it was not to do so.

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#### Commencement

Pt 1 s. 13(1)-(11): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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### **14 Protection of donee and others if no power created or power revoked**

- (1) Subsections (2) and (3) apply if–
- (a) an instrument has been registered under Schedule 1 as a lasting power of attorney, but
  - (b) a lasting power of attorney was not created,
- whether or not the registration has been cancelled at the time of the act or transaction in question.
- (2) A donee who acts in purported exercise of the power does not incur any liability (to P or any other person) because of the non-existence of the power unless at the time of acting he–
- (a) knows that a lasting power of attorney was not created, or
  - (b) is aware of circumstances which, if a lasting power of attorney had been created, would have terminated his authority to act as a donee.

(3) Any transaction between the donee and another person is, in favour of that person, as valid as if the power had been in existence, unless at the time of the transaction that person has knowledge of a matter referred to in subsection (2).

(4) If the interest of a purchaser depends on whether a transaction between the donee and the other person was valid by virtue of subsection (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if—

- (a) the transaction was completed within 12 months of the date on which the instrument was registered, or
- (b) the other person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the donee had authority to dispose of the property which was the subject of the transaction.

(5) In its application to a lasting power of attorney which relates to matters in addition to P's property and affairs, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power is revoked) has effect as if references to revocation included the cessation of the power in relation to P's property and affairs.

(6) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

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#### **Commencement**

Pt 1 s. 14(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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### *General powers of the court and appointment of deputies*

#### **15 Power to make declarations**

(1) The court may make declarations as to—

- (a) whether a person has or lacks capacity to make a decision specified in the declaration;
- (b) whether a person has or lacks capacity to make decisions on such matters as are described in the declaration;
- (c) the lawfulness or otherwise of any act done, or yet to be done, in relation to that person.

(2) “Act” includes an omission and a course of conduct.

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#### **Commencement**

Pt 1 s. 15(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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#### **16 Powers to make decisions and appoint deputies: general**

(1) This section applies if a person (“P”) lacks capacity in relation to a matter or matters concerning—

- (a) P's personal welfare, or
- (b) P's property and affairs.

(2) The court may—

- (a) by making an order, make the decision or decisions on P's behalf in relation to the matter or matters, or
  - (b) appoint a person (a "deputy") to make decisions on P's behalf in relation to the matter or matters.
- (3) The powers of the court under this section are subject to the provisions of this Act and, in particular, to sections 1 (the principles) and 4 (best interests).
- (4) When deciding whether it is in P's best interests to appoint a deputy, the court must have regard (in addition to the matters mentioned in section 4) to the principles that—
- (a) a decision by the court is to be preferred to the appointment of a deputy to make a decision, and
  - (b) the powers conferred on a deputy should be as limited in scope and duration as is reasonably practicable in the circumstances.
- (5) The court may make such further orders or give such directions, and confer on a deputy such powers or impose on him such duties, as it thinks necessary or expedient for giving effect to, or otherwise in connection with, an order or appointment made by it under subsection (2).
- (6) Without prejudice to section 4, the court may make the order, give the directions or make the appointment on such terms as it considers are in P's best interests, even though no application is before the court for an order, directions or an appointment on those terms.
- (7) An order of the court may be varied or discharged by a subsequent order.
- (8) The court may, in particular, revoke the appointment of a deputy or vary the powers conferred on him if it is satisfied that the deputy—
- (a) has behaved, or is behaving, in a way that contravenes the authority conferred on him by the court or is not in P's best interests, or
  - (b) proposes to behave in a way that would contravene that authority or would not be in P's best interests.

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**Commencement**

Pt 1 s. 16(1)-(8)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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**[16A Section 16 powers: Mental Health Act patients etc**

- (1) If a person is ineligible to be deprived of liberty by this Act, the court may not include in a welfare order provision which authorises the person to be deprived of his liberty.
- (2) If—
- (a) a welfare order includes provision which authorises a person to be deprived of his liberty, and
  - (b) that person becomes ineligible to be deprived of liberty by this Act,
- the provision ceases to have effect for as long as the person remains ineligible.
- (3) Nothing in subsection (2) affects the power of the court under section 16(7) to vary or discharge the welfare order.
- (4) For the purposes of this section—
- (a) Schedule 1A applies for determining whether or not P is ineligible to be deprived of liberty by this Act;

- (b) “welfare order” means an order under section 16(2)(a).  
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### **17 Section 16 powers: personal welfare**

- (1) The powers under section 16 as respects P's personal welfare extend in particular to—
- (a) deciding where P is to live;
  - (b) deciding what contact, if any, P is to have with any specified persons;
  - (c) making an order prohibiting a named person from having contact with P;
  - (d) giving or refusing consent to the carrying out or continuation of a treatment by a person providing health care for P;
  - (e) giving a direction that a person responsible for P's health care allow a different person to take over that responsibility.
- (2) Subsection (1) is subject to section 20 (restrictions on deputies).

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#### **Commencement**

Pt 1 s. 17(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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### **18 Section 16 powers: property and affairs**

- (1) The powers under section 16 as respects P's property and affairs extend in particular to—
- (a) the control and management of P's property;
  - (b) the sale, exchange, charging, gift or other disposition of P's property;
  - (c) the acquisition of property in P's name or on P's behalf;
  - (d) the carrying on, on P's behalf, of any profession, trade or business;
  - (e) the taking of a decision which will have the effect of dissolving a partnership of which P is a member;
  - (f) the carrying out of any contract entered into by P;
  - (g) the discharge of P's debts and of any of P's obligations, whether legally enforceable or not;
  - (h) the settlement of any of P's property, whether for P's benefit or for the benefit of others;
  - (i) the execution for P of a will;
  - (j) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise;
  - (k) the conduct of legal proceedings in P's name or on P's behalf.
- (2) No will may be made under subsection (1)(i) at a time when P has not reached 18.
- (3) The powers under section 16 as respects any other matter relating to P's property and affairs may be exercised even though P has not reached 16, if the court considers it likely that P will still lack capacity to make decisions in respect of that matter when he reaches 18.
- (4) Schedule 2 supplements the provisions of this section.
- (5) Section 16(7) (variation and discharge of court orders) is subject to paragraph 6 of Schedule 2.

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<sup>5</sup> Added by Mental Health Act 2007 c. 12 Pt 2 c.2 s.50(3) (April 1, 2009)

(6) Subsection (1) is subject to section 20 (restrictions on deputies).

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**Commencement**

Pt 1 s. 18(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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**19 Appointment of deputies**

- (1) A deputy appointed by the court must be—
- (a) an individual who has reached 18, or
  - (b) as respects powers in relation to property and affairs, an individual who has reached 18 or a trust corporation.
- (2) The court may appoint an individual by appointing the holder for the time being of a specified office or position.
- (3) A person may not be appointed as a deputy without his consent.
- (4) The court may appoint two or more deputies to act—
- (a) jointly,
  - (b) jointly and severally, or
  - (c) jointly in respect of some matters and jointly and severally in respect of others.
- (5) When appointing a deputy or deputies, the court may at the same time appoint one or more other persons to succeed the existing deputy or those deputies—
- (a) in such circumstances, or on the happening of such events, as may be specified by the court;
  - (b) for such period as may be so specified.
- (6) A deputy is to be treated as P's agent in relation to anything done or decided by him within the scope of his appointment and in accordance with this Part.
- (7) The deputy is entitled—
- (a) to be reimbursed out of P's property for his reasonable expenses in discharging his functions, and
  - (b) if the court so directs when appointing him, to remuneration out of P's property for discharging them.
- (8) The court may confer on a deputy powers to—
- (a) take possession or control of all or any specified part of P's property;
  - (b) exercise all or any specified powers in respect of it, including such powers of investment as the court may determine.
- (9) The court may require a deputy—
- (a) to give to the Public Guardian such security as the court thinks fit for the due discharge of his functions, and
  - (b) to submit to the Public Guardian such reports at such times or at such intervals as the court may direct.

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**Commencement**

Pt 1 s. 19(1)-(9)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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## 20 Restrictions on deputies

- (1) A deputy does not have power to make a decision on behalf of P in relation to a matter if he knows or has reasonable grounds for believing that P has capacity in relation to the matter.
- (2) Nothing in section 16(5) or 17 permits a deputy to be given power–
- (a) to prohibit a named person from having contact with P;
  - (b) to direct a person responsible for P's health care to allow a different person to take over that responsibility.
- (3) A deputy may not be given powers with respect to–
- (a) the settlement of any of P's property, whether for P's benefit or for the benefit of others,
  - (b) the execution for P of a will, or
  - (c) the exercise of any power (including a power to consent) vested in P whether beneficially or as trustee or otherwise.
- (4) A deputy may not be given power to make a decision on behalf of P which is inconsistent with a decision made, within the scope of his authority and in accordance with this Act, by the donee of a lasting power of attorney granted by P (or, if there is more than one donee, by any of them).
- (5) A deputy may not refuse consent to the carrying out or continuation of life-sustaining treatment in relation to P.
- (6) The authority conferred on a deputy is subject to the provisions of this Act and, in particular, sections 1 (the principles) and 4 (best interests).
- (7) A deputy may not do an act that is intended to restrain P unless four conditions are satisfied.
- (8) The first condition is that, in doing the act, the deputy is acting within the scope of an authority expressly conferred on him by the court.
- (9) The second is that P lacks, or the deputy reasonably believes that P lacks, capacity in relation to the matter in question.
- (10) The third is that the deputy reasonably believes that it is necessary to do the act in order to prevent harm to P.
- (11) The fourth is that the act is a proportionate response to–
- (a) the likelihood of P's suffering harm, [and]<sup>6</sup>
  - (b) the seriousness of that harm.
- (12) For the purposes of this section, a deputy restrains P if he–
- (a) uses, or threatens to use, force to secure the doing of an act which P resists, or
  - (b) restricts P's liberty of movement, whether or not P resists,
- or if he authorises another person to do any of those things.
- (13) [...]<sup>7</sup>

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### Commencement

Pt 1 s. 20(1)-(13): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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<sup>6</sup> Word substituted by Mental Health Act 2007 c. 12 Pt 2 c.2 s.51 (October 1, 2007)

<sup>7</sup> Repealed by Mental Health Act 2007 c. 12 Sch.11(10) para.1 (April 1, 2009)

## 21 Transfer of proceedings relating to people under 18

[ (1) The Lord Chief Justice, with the concurrence of the Lord Chancellor, may by order make provision as to the transfer of proceedings relating to a person under 18, in such circumstances as are specified in the order—

- (a) from the Court of Protection to a court having jurisdiction under the Children Act 1989 (c. 41), or
- (b) from a court having jurisdiction under that Act to the Court of Protection.

(2) The Lord Chief Justice may nominate any of the following to exercise his functions under this section—

- (a) the President of the Court of Protection;
- (b) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).

] <sup>8</sup>

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### Commencement

Pt 1 s. 21(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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### *[Powers of the court in relation to Schedule A1]* <sup>9</sup>

#### **[21A Powers of court in relation to Schedule A1**

(1) This section applies if either of the following has been given under Schedule A1—

- (a) a standard authorisation;
- (b) an urgent authorisation.

(2) Where a standard authorisation has been given, the court may determine any question relating to any of the following matters—

- (a) whether the relevant person meets one or more of the qualifying requirements;
- (b) the period during which the standard authorisation is to be in force;
- (c) the purpose for which the standard authorisation is given;
- (d) the conditions subject to which the standard authorisation is given.

(3) If the court determines any question under subsection (2), the court may make an order—

- (a) varying or terminating the standard authorisation, or
- (b) directing the supervisory body to vary or terminate the standard authorisation.

(4) Where an urgent authorisation has been given, the court may determine any question relating to any of the following matters—

- (a) whether the urgent authorisation should have been given;
- (b) the period during which the urgent authorisation is to be in force;
- (c) the purpose for which the urgent authorisation is given.

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<sup>8</sup> Existing text renumbered as s.21(1), words substituted in that subsection and (2) is inserted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.31 (October 1, 2007: substitution came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.21 on October 1, 2007)

<sup>9</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.2 (April 1, 2009)



- (5) Where the court determines any question under subsection (4), the court may make an order—
- (a) varying or terminating the urgent authorisation, or
  - (b) directing the managing authority of the relevant hospital or care home to vary or terminate the urgent authorisation.
- (6) Where the court makes an order under subsection (3) or (5), the court may make an order about a person's liability for any act done in connection with the standard or urgent authorisation before its variation or termination.
- (7) An order under subsection (6) may, in particular, exclude a person from liability.
- ]<sup>10</sup>

*Powers of the court in relation to lasting powers of attorney*

**22 Powers of court in relation to validity of lasting powers of attorney**

- (1) This section and section 23 apply if—
- (a) a person (“P”) has executed or purported to execute an instrument with a view to creating a lasting power of attorney, or
  - (b) an instrument has been registered as a lasting power of attorney conferred by P.
- (2) The court may determine any question relating to—
- (a) whether one or more of the requirements for the creation of a lasting power of attorney have been met;
  - (b) whether the power has been revoked or has otherwise come to an end.
- (3) Subsection (4) applies if the court is satisfied—
- (a) that fraud or undue pressure was used to induce P—
    - (i) to execute an instrument for the purpose of creating a lasting power of attorney, or
    - (ii) to create a lasting power of attorney, or
  - (b) that the donee (or, if more than one, any of them) of a lasting power of attorney—
    - (i) has behaved, or is behaving, in a way that contravenes his authority or is not in P's best interests, or
    - (ii) proposes to behave in a way that would contravene his authority or would not be in P's best interests.
- (4) The court may—
- (a) direct that an instrument purporting to create the lasting power of attorney is not to be registered, or
  - (b) if P lacks capacity to do so, revoke the instrument or the lasting power of attorney.
- (5) If there is more than one donee, the court may under subsection (4)(b) revoke the instrument or the lasting power of attorney so far as it relates to any of them.
- (6) “Donee” includes an intended donee.

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<sup>10</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.2 (April 1, 2009)

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**Commencement**

Pt 1 s. 22(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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**23 Powers of court in relation to operation of lasting powers of attorney**

- (1) The court may determine any question as to the meaning or effect of a lasting power of attorney or an instrument purporting to create one.
- (2) The court may—
  - (a) give directions with respect to decisions—
    - (i) which the donee of a lasting power of attorney has authority to make, and
    - (ii) which P lacks capacity to make;
  - (b) give any consent or authorisation to act which the donee would have to obtain from P if P had capacity to give it.
- (3) The court may, if P lacks capacity to do so—
  - (a) give directions to the donee with respect to the rendering by him of reports or accounts and the production of records kept by him for that purpose;
  - (b) require the donee to supply information or produce documents or things in his possession as donee;
  - (c) give directions with respect to the remuneration or expenses of the donee;
  - (d) relieve the donee wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as donee.
- (4) The court may authorise the making of gifts which are not within section 12(2) (permitted gifts).
- (5) Where two or more donees are appointed under a lasting power of attorney, this section applies as if references to the donee were to all or any of them.

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**Commencement**

Pt 1 s. 23(1)-(5): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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*Advance decisions to refuse treatment***24 Advance decisions to refuse treatment: general**

- (1) “Advance decision” means a decision made by a person (“P”), after he has reached 18 and when he has capacity to do so, that if—
  - (a) at a later time and in such circumstances as he may specify, a specified treatment is proposed to be carried out or continued by a person providing health care for him, and
  - (b) at that time he lacks capacity to consent to the carrying out or continuation of the treatment,the specified treatment is not to be carried out or continued.
- (2) For the purposes of subsection (1)(a), a decision may be regarded as specifying a treatment or circumstances even though expressed in layman's terms.

- (3) P may withdraw or alter an advance decision at any time when he has capacity to do so.
- (4) A withdrawal (including a partial withdrawal) need not be in writing.
- (5) An alteration of an advance decision need not be in writing (unless section 25(5) applies in relation to the decision resulting from the alteration).

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**Commencement**

Pt 1 s. 24(1)-(5): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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**25 Validity and applicability of advance decisions**

- (1) An advance decision does not affect the liability which a person may incur for carrying out or continuing a treatment in relation to P unless the decision is at the material time—
  - (a) valid, and
  - (b) applicable to the treatment.
- (2) An advance decision is not valid if P—
  - (a) has withdrawn the decision at a time when he had capacity to do so,
  - (b) has, under a lasting power of attorney created after the advance decision was made, conferred authority on the donee (or, if more than one, any of them) to give or refuse consent to the treatment to which the advance decision relates, or
  - (c) has done anything else clearly inconsistent with the advance decision remaining his fixed decision.
- (3) An advance decision is not applicable to the treatment in question if at the material time P has capacity to give or refuse consent to it.
- (4) An advance decision is not applicable to the treatment in question if—
  - (a) that treatment is not the treatment specified in the advance decision,
  - (b) any circumstances specified in the advance decision are absent, or
  - (c) there are reasonable grounds for believing that circumstances exist which P did not anticipate at the time of the advance decision and which would have affected his decision had he anticipated them.
- (5) An advance decision is not applicable to life-sustaining treatment unless—
  - (a) the decision is verified by a statement by P to the effect that it is to apply to that treatment even if life is at risk, and
  - (b) the decision and statement comply with subsection (6).
- (6) A decision or statement complies with this subsection only if—
  - (a) it is in writing,
  - (b) it is signed by P or by another person in P's presence and by P's direction,
  - (c) the signature is made or acknowledged by P in the presence of a witness, and
  - (d) the witness signs it, or acknowledges his signature, in P's presence.
- (7) The existence of any lasting power of attorney other than one of a description mentioned in subsection (2)(b) does not prevent the advance decision from being regarded as valid and applicable.

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**Commencement**

Pt 1 s. 25(1)-(7): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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**26 Effect of advance decisions**

(1) If P has made an advance decision which is—

- (a) valid, and
- (b) applicable to a treatment,

the decision has effect as if he had made it, and had had capacity to make it, at the time when the question arises whether the treatment should be carried out or continued.

(2) A person does not incur liability for carrying out or continuing the treatment unless, at the time, he is satisfied that an advance decision exists which is valid and applicable to the treatment.

(3) A person does not incur liability for the consequences of withholding or withdrawing a treatment from P if, at the time, he reasonably believes that an advance decision exists which is valid and applicable to the treatment.

(4) The court may make a declaration as to whether an advance decision—

- (a) exists;
- (b) is valid;
- (c) is applicable to a treatment.

(5) Nothing in an apparent advance decision stops a person—

- (a) providing life-sustaining treatment, or
- (b) doing any act he reasonably believes to be necessary to prevent a serious deterioration in P's condition,

while a decision as respects any relevant issue is sought from the court.

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**Commencement**

Pt 1 s. 26(1)-(5)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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*Excluded decisions***27 Family relationships etc.**

(1) Nothing in this Act permits a decision on any of the following matters to be made on behalf of a person—

- (a) consenting to marriage or a civil partnership,
- (b) consenting to have sexual relations,
- (c) consenting to a decree of divorce being granted on the basis of two years' separation,
- (d) consenting to a dissolution order being made in relation to a civil partnership on the basis of two years' separation,
- (e) consenting to a child's being placed for adoption by an adoption agency,
- (f) consenting to the making of an adoption order,
- (g) discharging parental responsibilities in matters not relating to a child's property,

(h) giving a consent under the Human Fertilisation and Embryology Act 1990 (c. 37) [,]<sup>11</sup>  
 [(i) giving a consent under the Human Fertilisation and Embryology Act 2008. ]<sup>11</sup>

(2) “Adoption order” means–

- (a) an adoption order within the meaning of the Adoption and Children Act 2002 (c. 38) (including a future adoption order), and
- (b) an order under section 84 of that Act (parental responsibility prior to adoption abroad).

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#### Commencement

Pt 1 s. 27(1)-(2)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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## 28 Mental Health Act matters

(1) Nothing in this Act authorises anyone–

- (a) to give a patient medical treatment for mental disorder, or
- (b) to consent to a patient's being given medical treatment for mental disorder,

if, at the time when it is proposed to treat the patient, his treatment is regulated by Part 4 of the Mental Health Act.

[ (1A) Subsection (1) does not apply in relation to any form of treatment to which section 58A of that Act (electro-convulsive therapy, etc.) applies if the patient comes within subsection (7) of that section (informal patient under 18 who cannot give consent). ]<sup>12</sup>

[ (1B) Section 5 does not apply to an act to which section 64B of the Mental Health Act applies (treatment of community patients not recalled to hospital). ]<sup>13</sup>

(2) “Medical treatment”, “mental disorder” and “patient” have the same meaning as in that Act.

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#### Commencement

Pt 1 s. 28(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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## 29 Voting rights

(1) Nothing in this Act permits a decision on voting at an election for any public office, or at a referendum, to be made on behalf of a person.

(2) “Referendum” has the same meaning as in section 101 of the Political Parties, Elections and Referendums Act 2000 (c. 41).

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#### Commencement

Pt 1 s. 29(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(a))

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<sup>11</sup> Added by Human Fertilisation and Embryology Act 2008 c. 22 Sch.6(1) para.40 (April 6, 2009)

<sup>12</sup> Inserted subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.3 by Mental Health Act 2007 c. 12 Pt 1 c.3 s.28(10) (November 3, 2008: insertion has effect subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.3)

<sup>13</sup> Added by Mental Health Act 2007 c. 12 Pt 1 c.4 s.35(5) (November 3, 2008 as SI 2008/1900)

## *Research*

### **30 Research**

(1) Intrusive research carried out on, or in relation to, a person who lacks capacity to consent to it is unlawful unless it is carried out—

- (a) as part of a research project which is for the time being approved by the appropriate body for the purposes of this Act in accordance with section 31, and
- (b) in accordance with sections 32 and 33.

(2) Research is intrusive if it is of a kind that would be unlawful if it was carried out—

- (a) on or in relation to a person who had capacity to consent to it, but
- (b) without his consent.

(3) A clinical trial which is subject to the provisions of clinical trials regulations is not to be treated as research for the purposes of this section.

[ (3A) Research is not intrusive to the extent that it consists of the use of a person's human cells to bring about the creation *in vitro* of an embryo or human admixed embryo, or the subsequent storage or use of an embryo or human admixed embryo so created.

(3B) Expressions used in subsection (3A) and in Schedule 3 to the Human Fertilisation and Embryology Act 1990 (consents to use or storage of gametes, embryos or human admixed embryos etc.) have the same meaning in that subsection as in that Schedule. ]<sup>14</sup>

(4) “Appropriate body”, in relation to a research project, means the person, committee or other body specified in regulations made by the appropriate authority as the appropriate body in relation to a project of the kind in question.

(5) “Clinical trials regulations” means—

- (a) the Medicines for Human Use (Clinical Trials) Regulations 2004 (S.I. 2004/1031) and any other regulations replacing those regulations or amending them, and
- (b) any other regulations relating to clinical trials and designated by the Secretary of State as clinical trials regulations for the purposes of this section.

(6) In this section, section 32 and section 34, “appropriate authority” means—

- (a) in relation to the carrying out of research in England, the Secretary of State, and
- (b) in relation to the carrying out of research in Wales, the National Assembly for Wales.

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#### **Commencement**

Pt 1 s. 30(1)-(6)(b): July 1, 2007 in relation to England for purposes specified in SI 2006/2814 art.3 as amended by SI 2006/3473 art.2(a); October 1, 2007 in relation to England except for purposes specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(a); October 1, 2008 in relation to England otherwise, as specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(c)-(e); July 1, 2007 in relation to Wales for purposes specified in SI 2007/856 art.3; October 1, 2007 in relation to Wales except for purposes specified in SI 2007/856 art.4; October 1, 2008 in relation to Wales otherwise (SI 2006/2814 art. 2, art. 3; SI 2006/2814 art. 4; SI 2006/3473 art. 2; SI 2007/856 art. 2, art. 3; SI 2007/856 art. 4)

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<sup>14</sup> Added by Human Fertilisation and Embryology Act 2008 c. 22 Sch.7 para.25 (October 1, 2009)

### **31 Requirements for approval**

- (1) The appropriate body may not approve a research project for the purposes of this Act unless satisfied that the following requirements will be met in relation to research carried out as part of the project on, or in relation to, a person who lacks capacity to consent to taking part in the project (“P”).
- (2) The research must be connected with—
  - (a) an impairing condition affecting P, or
  - (b) its treatment.
- (3) “Impairing condition” means a condition which is (or may be) attributable to, or which causes or contributes to (or may cause or contribute to), the impairment of, or disturbance in the functioning of, the mind or brain.
- (4) There must be reasonable grounds for believing that research of comparable effectiveness cannot be carried out if the project has to be confined to, or relate only to, persons who have capacity to consent to taking part in it.
- (5) The research must—
  - (a) have the potential to benefit P without imposing on P a burden that is disproportionate to the potential benefit to P, or
  - (b) be intended to provide knowledge of the causes or treatment of, or of the care of persons affected by, the same or a similar condition.
- (6) If the research falls within paragraph (b) of subsection (5) but not within paragraph (a), there must be reasonable grounds for believing—
  - (a) that the risk to P from taking part in the project is likely to be negligible, and
  - (b) that anything done to, or in relation to, P will not—
    - (i) interfere with P’s freedom of action or privacy in a significant way, or
    - (ii) be unduly invasive or restrictive.
- (7) There must be reasonable arrangements in place for ensuring that the requirements of sections 32 and 33 will be met.

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#### **Commencement**

Pt 1 s. 31(1)-(7): July 1, 2007 in relation to England for purposes specified in SI 2006/2814 art.3 as amended by SI 2006/3473 art.2(a); October 1, 2007 in relation to England except for purposes specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(a); October 1, 2008 in relation to England otherwise, as specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(c)-(e); July 1, 2007 in relation to Wales for purposes specified in SI 2007/856 art.3; October 1, 2007 in relation to Wales except for purposes specified in SI 2007/856 art.4; October 1, 2008 in relation to Wales otherwise (SI 2006/2814 art. 2, art. 3; SI 2006/2814 art. 4; SI 2006/3473 art. 2; SI 2007/856 art. 2, art. 3; SI 2007/856 art. 4)

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### **32 Consulting carers etc.**

- (1) This section applies if a person (“R”)—
  - (a) is conducting an approved research project, and
  - (b) wishes to carry out research, as part of the project, on or in relation to a person (“P”) who lacks capacity to consent to taking part in the project.
- (2) R must take reasonable steps to identify a person who—

- (a) otherwise than in a professional capacity or for remuneration, is engaged in caring for P or is interested in P's welfare, and
  - (b) is prepared to be consulted by R under this section.
- (3) If R is unable to identify such a person he must, in accordance with guidance issued by the appropriate authority, nominate a person who—
  - (a) is prepared to be consulted by R under this section, but
  - (b) has no connection with the project.
- (4) R must provide the person identified under subsection (2), or nominated under subsection (3), with information about the project and ask him—
  - (a) for advice as to whether P should take part in the project, and
  - (b) what, in his opinion, P's wishes and feelings about taking part in the project would be likely to be if P had capacity in relation to the matter.
- (5) If, at any time, the person consulted advises R that in his opinion P's wishes and feelings would be likely to lead him to decline to take part in the project (or to wish to withdraw from it) if he had capacity in relation to the matter, R must ensure—
  - (a) if P is not already taking part in the project, that he does not take part in it;
  - (b) if P is taking part in the project, that he is withdrawn from it.
- (6) But subsection (5)(b) does not require treatment that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued.
- (7) The fact that a person is the donee of a lasting power of attorney given by P, or is P's deputy, does not prevent him from being the person consulted under this section.
- (8) Subsection (9) applies if treatment is being, or is about to be, provided for P as a matter of urgency and R considers that, having regard to the nature of the research and of the particular circumstances of the case—
  - (a) it is also necessary to take action for the purposes of the research as a matter of urgency, but
  - (b) it is not reasonably practicable to consult under the previous provisions of this section.
- (9) R may take the action if—
  - (a) he has the agreement of a registered medical practitioner who is not involved in the organisation or conduct of the research project, or
  - (b) where it is not reasonably practicable in the time available to obtain that agreement, he acts in accordance with a procedure approved by the appropriate body at the time when the research project was approved under section 31.
- (10) But R may not continue to act in reliance on subsection (9) if he has reasonable grounds for believing that it is no longer necessary to take the action as a matter of urgency.

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### Commencement

Pt 1 s. 32(1)-(10): July 1, 2007 in relation to England for purposes specified in SI 2006/2814 art.3 as amended by SI 2006/3473 art.2(a); October 1, 2007 in relation to England except for purposes specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(a); October 1, 2008 in relation to England otherwise, as specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(c)-(e); July 1, 2007 in relation to Wales for purposes specified in SI 2007/856 art.3; October 1, 2007 in relation to Wales except for purposes specified in SI 2007/856 art.4; October 1, 2008 in



relation to Wales otherwise (SI 2006/2814 art. 2, art. 3; SI 2006/2814 art. 4; SI 2006/3473 art. 2; SI 2007/856 art. 2, art. 3; SI 2007/856 art. 4)

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### **33 Additional safeguards**

- (1) This section applies in relation to a person who is taking part in an approved research project even though he lacks capacity to consent to taking part.
- (2) Nothing may be done to, or in relation to, him in the course of the research—
  - (a) to which he appears to object (whether by showing signs of resistance or otherwise) except where what is being done is intended to protect him from harm or to reduce or prevent pain or discomfort, or
  - (b) which would be contrary to—
    - (i) an advance decision of his which has effect, or
    - (ii) any other form of statement made by him and not subsequently withdrawn, of which R is aware.
- (3) The interests of the person must be assumed to outweigh those of science and society.
- (4) If he indicates (in any way) that he wishes to be withdrawn from the project he must be withdrawn without delay.
- (5) P must be withdrawn from the project, without delay, if at any time the person conducting the research has reasonable grounds for believing that one or more of the requirements set out in section 31(2) to (7) is no longer met in relation to research being carried out on, or in relation to, P.
- (6) But neither subsection (4) nor subsection (5) requires treatment that P has been receiving as part of the project to be discontinued if R has reasonable grounds for believing that there would be a significant risk to P's health if it were discontinued.

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#### **Commencement**

Pt 1 s. 33(1)-(6): July 1, 2007 in relation to England for purposes specified in SI 2006/2814 art.3 as amended by SI 2006/3473 art.2(a); October 1, 2007 in relation to England except for purposes specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(a); October 1, 2008 in relation to England otherwise, as specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(c)-(e); July 1, 2007 in relation to Wales for purposes specified in SI 2007/856 art.3; October 1, 2007 in relation to Wales except for purposes specified in SI 2007/856 art.4; October 1, 2008 in relation to Wales otherwise (SI 2006/2814 art. 2, art. 3; SI 2006/2814 art. 4; SI 2006/3473 art. 2; SI 2007/856 art. 2, art. 3; SI 2007/856 art. 4)

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### **34 Loss of capacity during research project**

- (1) This section applies where a person (“P”)—
  - (a) has consented to take part in a research project begun before the commencement of section 30, but
  - (b) before the conclusion of the project, loses capacity to consent to continue to take part in it.
- (2) The appropriate authority may by regulations provide that, despite P's loss of capacity, research of a prescribed kind may be carried out on, or in relation to, P if—
  - (a) the project satisfies prescribed requirements,

- (b) any information or material relating to P which is used in the research is of a prescribed description and was obtained before P's loss of capacity, and
  - (c) the person conducting the project takes in relation to P such steps as may be prescribed for the purpose of protecting him.
- (3) The regulations may, in particular,—
- (a) make provision about when, for the purposes of the regulations, a project is to be treated as having begun;
  - (b) include provision similar to any made by section 31, 32 or 33.

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#### Commencement

Pt 1 s. 34(1)-(3)(b): July 1, 2007 in relation to England for purposes specified in SI 2006/2814 art.3 as amended by SI 2006/3473 art.2(a); October 1, 2007 in relation to England except for purposes specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(a); October 1, 2008 in relation to England otherwise, as specified in SI 2006/2814 art.4 as amended by SI 2006/3473 art.2(c)-(e); July 1, 2007 in relation to Wales for purposes specified in SI 2007/856 art.3; October 1, 2007 in relation to Wales except for purposes specified in SI 2007/856 art.4; October 1, 2008 in relation to Wales otherwise (SI 2006/2814 art. 2, art. 3; SI 2006/2814 art. 4; SI 2006/3473 art. 2; SI 2007/856 art. 2, art. 3; SI 2007/856 art. 4)

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### *Independent mental capacity advocate service*

## **35 Appointment of independent mental capacity advocates**

- (1) The appropriate authority must make such arrangements as it considers reasonable to enable persons (“independent mental capacity advocates”) to be available to represent and support persons to whom acts or decisions proposed under sections 37, 38 and 39 relate [ or persons who fall within section 39A, 39C or 39D]<sup>15</sup> .
- (2) The appropriate authority may make regulations as to the appointment of independent mental capacity advocates.
- (3) The regulations may, in particular, provide—
- (a) that a person may act as an independent mental capacity advocate only in such circumstances, or only subject to such conditions, as may be prescribed;
  - (b) for the appointment of a person as an independent mental capacity advocate to be subject to approval in accordance with the regulations.
- (4) In making arrangements under subsection (1), the appropriate authority must have regard to the principle that a person to whom a proposed act or decision relates should, so far as practicable, be represented and supported by a person who is independent of any person who will be responsible for the act or decision.
- (5) The arrangements may include provision for payments to be made to, or in relation to, persons carrying out functions in accordance with the arrangements.
- (6) For the purpose of enabling him to carry out his functions, an independent mental capacity advocate—
- (a) may interview in private the person whom he has been instructed to represent, and

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<sup>15</sup> Words inserted by Mental Health Act 2007 c. 12 Sch.9(1) para.3 (April 1, 2009)

- (b) may, at all reasonable times, examine and take copies of–
  - (i) any health record,
  - (ii) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (iii) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14),

which the person holding the record considers may be relevant to the independent mental capacity advocate's investigation.

- (7) In this section, section 36 and section 37, “the appropriate authority” means–
  - (a) in relation to the provision of the services of independent mental capacity advocates in England, the Secretary of State, and
  - (b) in relation to the provision of the services of independent mental capacity advocates in Wales, the National Assembly for Wales.

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#### **Commencement**

Pt 1 s. 35(1)-(7)(b): November 1, 2006 in relation to England for purposes specified in SI 2006/2814 art.5(a); April 1, 2007 in relation to England otherwise; October 1, 2007 in relation to Wales (SI 2006/2814 art. 5; SI 2007/856 art. 5)

#### **Amendments Pending**

Pt 1 s. 35(6)(b)(iii): words inserted by Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010/813, art. 17(2) (October 1, 2010)

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### **36 Functions of independent mental capacity advocates**

- (1) The appropriate authority may make regulations as to the functions of independent mental capacity advocates.
- (2) The regulations may, in particular, make provision requiring an advocate to take such steps as may be prescribed for the purpose of–
  - (a) providing support to the person whom he has been instructed to represent (“P”) so that P may participate as fully as possible in any relevant decision;
  - (b) obtaining and evaluating relevant information;
  - (c) ascertaining what P's wishes and feelings would be likely to be, and the beliefs and values that would be likely to influence P, if he had capacity;
  - (d) ascertaining what alternative courses of action are available in relation to P;
  - (e) obtaining a further medical opinion where treatment is proposed and the advocate thinks that one should be obtained.
- (3) The regulations may also make provision as to circumstances in which the advocate may challenge, or provide assistance for the purpose of challenging, any relevant decision.

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#### **Commencement**

Pt 1 s. 36(1)-(3): November 1, 2006 in relation to England for purposes specified in SI 2006/2814 art.5(a); April 1, 2007 in relation to England otherwise; October 1, 2007 in relation to Wales (SI 2006/2814 art. 5; SI 2007/856 art. 5)

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### **37 Provision of serious medical treatment by NHS body**

- (1) This section applies if an NHS body–
- (a) is proposing to provide, or secure the provision of, serious medical treatment for a person (“P”) who lacks capacity to consent to the treatment, and
  - (b) is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests.
- (2) But this section does not apply if P's treatment is regulated by [Part 4 or 4A]<sup>16</sup> of the Mental Health Act.
- (3) Before the treatment is provided, the NHS body must instruct an independent mental capacity advocate to represent P.
- (4) If the treatment needs to be provided as a matter of urgency, it may be provided even though the NHS body has not been able to comply with subsection (3).
- (5) The NHS body must, in providing or securing the provision of treatment for P, take into account any information given, or submissions made, by the independent mental capacity advocate.
- (6) “Serious medical treatment” means treatment which involves providing, withholding or withdrawing treatment of a kind prescribed by regulations made by the appropriate authority.
- (7) “NHS body” has such meaning as may be prescribed by regulations made for the purposes of this section by–
- (a) the Secretary of State, in relation to bodies in England, or
  - (b) the National Assembly for Wales, in relation to bodies in Wales.

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#### **Commencement**

Pt 1 s. 37(1)-(7)(b): November 1, 2006 in relation to England for purposes specified in SI 2006/2814 art.5(a); April 1, 2007 in relation to England otherwise; October 1, 2007 in relation to Wales (SI 2006/2814 art. 5; SI 2007/856 art. 5)

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### **38 Provision of accommodation by NHS body**

- (1) This section applies if an NHS body proposes to make arrangements–
- (a) for the provision of accommodation in a hospital or care home for a person (“P”) who lacks capacity to agree to the arrangements, or
  - (b) for a change in P's accommodation to another hospital or care home,
- and is satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate for it to consult in determining what would be in P's best interests.
- (2) But this section does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act.
- [ (2A) And this section does not apply if–
- (a) an independent mental capacity advocate must be appointed under section 39A or 39C (whether or not by the NHS body) to represent P, and

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<sup>16</sup> Words inserted by Mental Health Act 2007 c. 12 Pt 1 c.4 s.35(6) (November 3, 2008 as SI 2008/1900)

(b) the hospital or care home in which P is to be accommodated under the arrangements referred to in this section is the relevant hospital or care home under the authorisation referred to in that section.

] <sup>17</sup>

(3) Before making the arrangements, the NHS body must instruct an independent mental capacity advocate to represent P unless it is satisfied that—

- (a) the accommodation is likely to be provided for a continuous period which is less than the applicable period, or
- (b) the arrangements need to be made as a matter of urgency.

(4) If the NHS body—

- (a) did not instruct an independent mental capacity advocate to represent P before making the arrangements because it was satisfied that subsection (3)(a) or (b) applied, but
- (b) subsequently has reason to believe that the accommodation is likely to be provided for a continuous period—
  - (i) beginning with the day on which accommodation was first provided in accordance with the arrangements, and
  - (ii) ending on or after the expiry of the applicable period,

it must instruct an independent mental capacity advocate to represent P.

(5) The NHS body must, in deciding what arrangements to make for P, take into account any information given, or submissions made, by the independent mental capacity advocate.

(6) “Care home” has the meaning given in section 3 of the Care Standards Act 2000 (c. 14).

(7) “Hospital” means—

- (a) a health service hospital as defined by [section 275 of the National Health Service Act 2006 or section 206 of the National Health Service (Wales) Act 2006] <sup>18</sup>, or
- (b) an independent hospital as defined by section 2 of the Care Standards Act 2000.

(8) “NHS body” has such meaning as may be prescribed by regulations made for the purposes of this section by—

- (a) the Secretary of State, in relation to bodies in England, or
- (b) the National Assembly for Wales, in relation to bodies in Wales.

(9) “Applicable period” means—

- (a) in relation to accommodation in a hospital, 28 days, and
- (b) in relation to accommodation in a care home, 8 weeks.

[ (10) For the purposes of subsection (1), a person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, engaged in providing care or treatment for P in a professional capacity or for remuneration. ] <sup>19</sup>

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<sup>17</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.4(2) (April 1, 2009)

<sup>18</sup> Words substituted by National Health Service (Consequential Provisions) Act 2006 c. 43 Sch.1 para.278 (March 1, 2007)

<sup>19</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.4(3) (April 1, 2009)

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### Commencement

Pt 1 s. 38(1)-(9)(b): November 1, 2006 in relation to England for purposes specified in SI 2006/2814 art.5(a); April 1, 2007 in relation to England otherwise; October 1, 2007 in relation to Wales (SI 2006/2814 art. 5; SI 2007/856 art. 5)

### Amendments Pending

Pt 1 s. 38(7): substituted by Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010/813, art. 17(3) (October 1, 2010)

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## 39 Provision of accommodation by local authority

- (1) This section applies if a local authority propose to make arrangements—
- (a) for the provision of residential accommodation for a person (“P”) who lacks capacity to agree to the arrangements, or
  - (b) for a change in P's residential accommodation,
- and are satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate for them to consult in determining what would be in P's best interests.
- (2) But this section applies only if the accommodation is to be provided in accordance with—
- (a) section 21 or 29 of the National Assistance Act 1948 (c. 29), or
  - (b) section 117 of the Mental Health Act,
- as the result of a decision taken by the local authority under section 47 of the National Health Service and Community Care Act 1990 (c. 19).
- (3) This section does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act.
- [ (3A) And this section does not apply if—
- (a) an independent mental capacity advocate must be appointed under section 39A or 39C (whether or not by the local authority) to represent P, and
  - (b) the place in which P is to be accommodated under the arrangements referred to in this section is the relevant hospital or care home under the authorisation referred to in that section.
- ]<sup>20</sup>
- (4) Before making the arrangements, the local authority must instruct an independent mental capacity advocate to represent P unless they are satisfied that—
- (a) the accommodation is likely to be provided for a continuous period of less than 8 weeks, or
  - (b) the arrangements need to be made as a matter of urgency.
- (5) If the local authority—
- (a) did not instruct an independent mental capacity advocate to represent P before making the arrangements because they were satisfied that subsection (4)(a) or (b) applied, but

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<sup>20</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.5(2) (April 1, 2009)

(b) subsequently have reason to believe that the accommodation is likely to be provided for a continuous period that will end 8 weeks or more after the day on which accommodation was first provided in accordance with the arrangements, they must instruct an independent mental capacity advocate to represent P.

(6) The local authority must, in deciding what arrangements to make for P, take into account any information given, or submissions made, by the independent mental capacity advocate.

[ (7) For the purposes of subsection (1), a person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, engaged in providing care or treatment for P in a professional capacity or for remuneration. ]<sup>21</sup>

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#### Commencement

Pt 1 s. 39(1)-(6): November 1, 2006 in relation to England for purposes specified in SI 2006/2814 art.5(a); April 1, 2007 in relation to England otherwise; October 1, 2007 in relation to Wales (SI 2006/2814 art. 5; SI 2007/856 art. 5)

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### [39A Person becomes subject to Schedule A1

(1) This section applies if–

(a) a person (“P”) becomes subject to Schedule A1, and

(b) the managing authority of the relevant hospital or care home are satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests.

(2) The managing authority must notify the supervisory body that this section applies.

(3) The supervisory body must instruct an independent mental capacity advocate to represent P.

(4) Schedule A1 makes provision about the role of an independent mental capacity advocate appointed under this section.

(5) This section is subject to paragraph 161 of Schedule A1.

(6) For the purposes of subsection (1), a person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, engaged in providing care or treatment for P in a professional capacity or for remuneration.

] <sup>22</sup>

### [39B Section 39A: supplementary provision

(1) This section applies for the purposes of section 39A.

(2) P becomes subject to Schedule A1 in any of the following cases.

(3) The first case is where an urgent authorisation is given in relation to P under paragraph 76(2) of Schedule A1 (urgent authorisation given before request made for standard authorisation).

(4) The second case is where the following conditions are met.

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<sup>21</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.5(3) (April 1, 2009)

<sup>22</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.6 (April 1, 2009)

- (5) The first condition is that a request is made under Schedule A1 for a standard authorisation to be given in relation to P (“the requested authorisation”).
- (6) The second condition is that no urgent authorisation was given under paragraph 76(2) of Schedule A1 before that request was made.
- (7) The third condition is that the requested authorisation will not be in force on or before, or immediately after, the expiry of an existing standard authorisation.
- (8) The expiry of a standard authorisation is the date when the authorisation is expected to cease to be in force.
- (9) The third case is where, under paragraph 69 of Schedule A1, the supervisory body select a person to carry out an assessment of whether or not the relevant person is a detained resident.

] <sup>23</sup>

### **[39C Person unrepresented whilst subject to Schedule A1**

- (1) This section applies if—
  - (a) an authorisation under Schedule A1 is in force in relation to a person (“P”),
  - (b) the appointment of a person as P's representative ends in accordance with regulations made under Part 10 of Schedule A1, and
  - (c) the managing authority of the relevant hospital or care home are satisfied that there is no person, other than one engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests.
- (2) The managing authority must notify the supervisory body that this section applies.
- (3) The supervisory body must instruct an independent mental capacity advocate to represent P.
- (4) Paragraph 159 of Schedule A1 makes provision about the role of an independent mental capacity advocate appointed under this section.
- (5) The appointment of an independent mental capacity advocate under this section ends when a new appointment of a person as P's representative is made in accordance with Part 10 of Schedule A1.
- (6) For the purposes of subsection (1), a person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, engaged in providing care or treatment for P in a professional capacity or for remuneration.

] <sup>24</sup>

### **[39D Person subject to Schedule A1 without paid representative**

- (1) This section applies if—
  - (a) an authorisation under Schedule A1 is in force in relation to a person (“P”),
  - (b) P has a representative (“R”) appointed under Part 10 of Schedule A1, and

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<sup>23</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.6 (April 1, 2009)

<sup>24</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.6 (April 1, 2009)



- (c) R is not being paid under regulations under Part 10 of Schedule A1 for acting as P's representative.
- (2) The supervisory body must instruct an independent mental capacity advocate to represent P in any of the following cases.
- (3) The first case is where P makes a request to the supervisory body to instruct an advocate.
- (4) The second case is where R makes a request to the supervisory body to instruct an advocate.
- (5) The third case is where the supervisory body have reason to believe one or more of the following—
- (a) that, without the help of an advocate, P and R would be unable to exercise one or both of the relevant rights;
  - (b) that P and R have each failed to exercise a relevant right when it would have been reasonable to exercise it;
  - (c) that P and R are each unlikely to exercise a relevant right when it would be reasonable to exercise it.
- (6) The duty in subsection (2) is subject to section 39E.
- (7) If an advocate is appointed under this section, the advocate is, in particular, to take such steps as are practicable to help P and R to understand the following matters—
- (a) the effect of the authorisation;
  - (b) the purpose of the authorisation;
  - (c) the duration of the authorisation;
  - (d) any conditions to which the authorisation is subject;
  - (e) the reasons why each assessor who carried out an assessment in connection with the request for the authorisation, or in connection with a review of the authorisation, decided that P met the qualifying requirement in question;
  - (f) the relevant rights;
  - (g) how to exercise the relevant rights.
- (8) The advocate is, in particular, to take such steps as are practicable to help P or R—
- (a) to exercise the right to apply to court, if it appears to the advocate that P or R wishes to exercise that right, or
  - (b) to exercise the right of review, if it appears to the advocate that P or R wishes to exercise that right.
- (9) If the advocate helps P or R to exercise the right of review—
- (a) the advocate may make submissions to the supervisory body on the question of whether a qualifying requirement is reviewable;
  - (b) the advocate may give information, or make submissions, to any assessor carrying out a review assessment.
- (10) In this section—
- “relevant rights” means—
    - (a) the right to apply to court, and
    - (b) the right of review;
  - “right to apply to court” means the right to make an application to the court to exercise its jurisdiction under section 21A;
  - “right of review” means the right under Part 8 of Schedule A1 to request a review.

]<sup>25</sup>

### **[39E Limitation on duty to instruct advocate under section 39D**

- (1) This section applies if an advocate is already representing P in accordance with an instruction under section 39D.
- (2) Section 39D(2) does not require another advocate to be instructed, unless the following conditions are met.
- (3) The first condition is that the existing advocate was instructed—
  - (a) because of a request by R, or
  - (b) because the supervisory body had reason to believe one or more of the things in section 39D(5).
- (4) The second condition is that the other advocate would be instructed because of a request by P.

]<sup>26</sup>

### **[40 Exceptions**

- [ (1) The duty imposed by section 37(3), 38(3) or (4), 39(4) or (5), 39A(3), 39C(3) or 39D(2) does not apply where there is—
- (a) a person nominated by P (in whatever manner) as a person to be consulted on matters to which that duty relates,
  - (b) a donee of a lasting power of attorney created by P who is authorised to make decisions in relation to those matters, or
  - (c) a deputy appointed by the court for P with power to make decisions in relation to those matters.
- (2) A person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, a person nominated by P as a person to be consulted in matters to which a duty mentioned in subsection (1) relates. ]<sup>27</sup>

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#### **Commencement**

Pt 1 s. 40(a)-(d): November 1, 2006 in relation to England for purposes specified in SI 2006/2814 art.5(a); April 1, 2007 in relation to England otherwise; October 1, 2007 in relation to Wales (SI 2006/2814 art. 5; SI 2007/856 art. 5)

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### **41 Power to adjust role of independent mental capacity advocate**

- (1) The appropriate authority may make regulations—
  - (a) expanding the role of independent mental capacity advocates in relation to persons who lack capacity, and

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<sup>25</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.6 (April 1, 2009)

<sup>26</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.6 (April 1, 2009)

<sup>27</sup> Existing words renumbered as s.40(1), words substituted and s.40(2) inserted by Mental Health Act 2007 c. 12 Sch.9(1) para.7 (April 1, 2009)

<sup>28</sup> Substituted by Mental Health Act 2007 c. 12 Pt 2 c.2 s.49 (October 1, 2007)

- (b) adjusting the obligation to make arrangements imposed by section 35.
- (2) The regulations may, in particular–
  - (a) prescribe circumstances (different to those set out in sections 37, 38 and 39) in which an independent mental capacity advocate must, or circumstances in which one may, be instructed by a person of a prescribed description to represent a person who lacks capacity, and
  - (b) include provision similar to any made by section 37, 38, 39 or 40.
- (3) “Appropriate authority” has the same meaning as in section 35.

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#### Commencement

Pt 1 s. 41(1)-(3): November 1, 2006 in relation to England for purposes specified in SI 2006/2814 art.5(a); April 1, 2007 in relation to England otherwise; October 1, 2007 in relation to Wales (SI 2006/2814 art. 5; SI 2007/856 art. 5)

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### *Miscellaneous and supplementary*

#### 42 Codes of practice

- (1) The Lord Chancellor must prepare and issue one or more codes of practice–
  - (a) for the guidance of persons assessing whether a person has capacity in relation to any matter,
  - (b) for the guidance of persons acting in connection with the care or treatment of another person (see section 5),
  - (c) for the guidance of donees of lasting powers of attorney,
  - (d) for the guidance of deputies appointed by the court,
  - (e) for the guidance of persons carrying out research in reliance on any provision made by or under this Act (and otherwise with respect to sections 30 to 34),
  - (f) for the guidance of independent mental capacity advocates,
  - [ (fa) for the guidance of persons exercising functions under Schedule A1,
  - (fb) for the guidance of representatives appointed under Part 10 of Schedule A1, ]<sup>29</sup>
  - (g) with respect to the provisions of sections 24 to 26 (advance decisions and apparent advance decisions), and
  - (h) with respect to such other matters concerned with this Act as he thinks fit.
- (2) The Lord Chancellor may from time to time revise a code.
- (3) The Lord Chancellor may delegate the preparation or revision of the whole or any part of a code so far as he considers expedient.
- (4) It is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity and is doing so in one or more of the following ways–
  - (a) as the donee of a lasting power of attorney,
  - (b) as a deputy appointed by the court,
  - (c) as a person carrying out research in reliance on any provision made by or under this Act (see sections 30 to 34),
  - (d) as an independent mental capacity advocate,

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<sup>29</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.8(2) (April 1, 2008)

- [ (da) in the exercise of functions under Schedule A1,
- (db) as a representative appointed under Part 10 of Schedule A1, ]<sup>30</sup>
- (e) in a professional capacity,
- (f) for remuneration.

- (5) If it appears to a court or tribunal conducting any criminal or civil proceedings that—
- (a) a provision of a code, or
  - (b) a failure to comply with a code,

is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question.

(6) A code under subsection (1)(d) may contain separate guidance for deputies appointed by virtue of paragraph 1(2) of Schedule 5 (functions of deputy conferred on receiver appointed under the Mental Health Act).

(7) In this section and in section 43, “code” means a code prepared or revised under this section.

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#### Commencement

Pt 1 s. 42(1)-(3), (6)-(7): April 1, 2007 (SI 2007/563 art. 2(1)(a))

Pt 1 s. 42(4)-(5)(b): April 1, 2007 in relation to England for the purpose specified in SI 2007/563 art.2(2); April 1, 2007 for the purpose specified in SI 2007/563 art.2(3); October 1, 2007 otherwise (SI 2007/563 art. 2(2)(e), art. 2(3); SI 2007/1897 art. 2(2)(e))

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### 43 Codes of practice: procedure

- (1) Before preparing or revising a code, the Lord Chancellor must consult—
- (a) the National Assembly for Wales, and
  - (b) such other persons as he considers appropriate.
- (2) The Lord Chancellor may not issue a code unless—
- (a) a draft of the code has been laid by him before both Houses of Parliament, and
  - (b) the 40 day period has elapsed without either House resolving not to approve the draft.
- (3) The Lord Chancellor must arrange for any code that he has issued to be published in such a way as he considers appropriate for bringing it to the attention of persons likely to be concerned with its provisions.
- (4) “40 day period”, in relation to the draft of a proposed code, means—
- (a) if the draft is laid before one House on a day later than the day on which it is laid before the other House, the period of 40 days beginning with the later of the two days;
  - (b) in any other case, the period of 40 days beginning with the day on which it is laid before each House.
- (5) In calculating the period of 40 days, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days.

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<sup>30</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.8(3) (April 1, 2008)

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**Commencement**

Pt 1 s. 43(1)-(5): April 1, 2007 (SI 2007/563 art. 2(1)(a))

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**44 Ill-treatment or neglect**

- (1) Subsection (2) applies if a person (“D”)–
- (a) has the care of a person (“P”) who lacks, or whom D reasonably believes to lack, capacity,
  - (b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or
  - (c) is a deputy appointed by the court for P.
- (2) D is guilty of an offence if he ill-treats or wilfully neglects P.
- (3) A person guilty of an offence under this section is liable–
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.

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**Commencement**

Pt 1 s. 44(1)-(3)(b): April 1, 2007 (SI 2007/563 art. 2(1)(b))

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**PART 2**

**THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN**

*The Court of Protection*

**45 The Court of Protection**

- (1) There is to be a superior court of record known as the Court of Protection.
- (2) The court is to have an official seal.
- (3) The court may sit at any place in England and Wales, on any day and at any time.
- (4) The court is to have a central office and registry at a place appointed by the Lord Chancellor [ , after consulting the Lord Chief Justice]<sup>31</sup> .

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<sup>31</sup> Words inserted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.32(2) (October 1, 2007: insertion came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.45(4) on October 1, 2007)

(5) The Lord Chancellor may [, after consulting the Lord Chief Justice,]<sup>32</sup> designate as additional registries of the court any district registry of the High Court and any county court office.

[ (5A) The Lord Chief Justice may nominate any of the following to exercise his functions under this section—

- (a) the President of the Court of Protection;
- (b) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).

] <sup>33</sup>

(6) The office of the Supreme Court called the Court of Protection ceases to exist.

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#### Commencement

Pt 2 s. 45(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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### 46 The judges of the Court of Protection

(1) Subject to Court of Protection Rules under section 51(2)(d), the jurisdiction of the court is exercisable by a judge nominated for that purpose by—

- (a) the [Lord Chief Justice]<sup>34</sup> , or
- [ (b) where nominated by the Lord Chief Justice to act on his behalf under this subsection—
  - (i) the President of the Court of Protection; or
  - (ii) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).

] <sup>35</sup>

(2) To be nominated, a judge must be—

- (a) the President of the Family Division,
- (b) the Vice-Chancellor,
- (c) a puisne judge of the High Court,
- (d) a circuit judge, or
- (e) a district judge.

(3) The [Lord Chief Justice, after consulting the Lord Chancellor,]<sup>36</sup> must—

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<sup>32</sup> Words inserted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.32(3) (October 1, 2007: insertion came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.45(5) on October 1, 2007)

<sup>33</sup> Added by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.32(4) (October 1, 2007: insertion came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.45 on October 1, 2007)

<sup>34</sup> Words substituted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.33(2) (October 1, 2007: substitution came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.46(1)(a) on October 1, 2007)

<sup>35</sup> Substituted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.33(3) (October 1, 2007: substitution came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.46(1)(b) on October 1, 2007)

<sup>36</sup> Words substituted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.33(4) (October 1, 2007: substitution came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.46(3) on October 1, 2007)

- (a) appoint one of the judges nominated by virtue of subsection (2)(a) to (c) to be President of the Court of Protection, and
- (b) appoint another of those judges to be Vice-President of the Court of Protection.

(4) The [Lord Chief Justice, after consulting the Lord Chancellor,]<sup>37</sup> must appoint one of the judges nominated by virtue of subsection (2)(d) or (e) to be Senior Judge of the Court of Protection, having such administrative functions in relation to the court as the Lord Chancellor [, after consulting the Lord Chief Justice,]<sup>38</sup> may direct.

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#### Commencement

Pt 2 s. 46(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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### *Supplementary powers*

#### **47 General powers and effect of orders etc.**

- (1) The court has in connection with its jurisdiction the same powers, rights, privileges and authority as the High Court.
- (2) Section 204 of the Law of Property Act 1925 (c. 20) (orders of High Court conclusive in favour of purchasers) applies in relation to orders and directions of the court as it applies to orders of the High Court.
- (3) Office copies of orders made, directions given or other instruments issued by the court and sealed with its official seal are admissible in all legal proceedings as evidence of the originals without any further proof.

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#### Commencement

Pt 2 s. 47(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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#### **48 Interim orders and directions**

The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if–

- (a) there is reason to believe that P lacks capacity in relation to the matter,
- (b) the matter is one to which its powers under this Act extend, and
- (c) it is in P's best interests to make the order, or give the directions, without delay.

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#### Commencement

Pt 2 s. 48(a)-(c): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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<sup>37</sup> Words substituted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.33(5)(a) (October 1, 2007: substitution came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.46(4) on October 1, 2007)

<sup>38</sup> Words inserted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.33(5)(b) (October 1, 2007: insertion came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.46(4) on October 1, 2007)

## **49 Power to call for reports**

- (1) This section applies where, in proceedings brought in respect of a person (“P”) under Part 1, the court is considering a question relating to P.
- (2) The court may require a report to be made to it by the Public Guardian or by a Court of Protection Visitor.
- (3) The court may require a local authority, or an NHS body, to arrange for a report to be made—
  - (a) by one of its officers or employees, or
  - (b) by such other person (other than the Public Guardian or a Court of Protection Visitor) as the authority, or the NHS body, considers appropriate.
- (4) The report must deal with such matters relating to P as the court may direct.
- (5) Court of Protection Rules may specify matters which, unless the court directs otherwise, must also be dealt with in the report.
- (6) The report may be made in writing or orally, as the court may direct.
- (7) In complying with a requirement, the Public Guardian or a Court of Protection Visitor may, at all reasonable times, examine and take copies of—
  - (a) any health record,
  - (b) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14),so far as the record relates to P.
- (8) If the Public Guardian or a Court of Protection Visitor is making a visit in the course of complying with a requirement, he may interview P in private.
- (9) If a Court of Protection Visitor who is a Special Visitor is making a visit in the course of complying with a requirement, he may if the court so directs carry out in private a medical, psychiatric or psychological examination of P's capacity and condition.
- (10) “NHS body” has the meaning given in section 148 of the Health and Social Care (Community Health and Standards) Act 2003 (c. 43).
- (11) “Requirement” means a requirement imposed under subsection (2) or (3).

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### **Commencement**

Pt 2 s. 49(1)-(11): October 1, 2007 (SI 2007/1897 art. 2(1)(b))



**Amendments Pending**

Pt 2 s. 49(7)(c): words inserted by Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010/813, art. 17(4) (October 1, 2010)

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*Practice and procedure*

**50 Applications to the Court of Protection**

(1) No permission is required for an application to the court for the exercise of any of its powers under this Act—

- (a) by a person who lacks, or is alleged to lack, capacity,
- (b) if such a person has not reached 18, by anyone with parental responsibility for him,
- (c) by the donor or a donee of a lasting power of attorney to which the application relates,
- (d) by a deputy appointed by the court for a person to whom the application relates, or
- (e) by a person named in an existing order of the court, if the application relates to the order.

[ (1A) Nor is permission required for an application to the court under section 21A by the relevant person's representative. ]<sup>39</sup>

(2) But, subject to Court of Protection Rules and to paragraph 20(2) of Schedule 3 (declarations relating to private international law), permission is required for any other application to the court.

(3) In deciding whether to grant permission the court must, in particular, have regard to—

- (a) the applicant's connection with the person to whom the application relates,
- (b) the reasons for the application,
- (c) the benefit to the person to whom the application relates of a proposed order or directions, and
- (d) whether the benefit can be achieved in any other way.

(4) “Parental responsibility” has the same meaning as in the Children Act 1989 (c. 41).

**Commencement**

Pt 2 s. 50(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

**51 Court of Protection Rules**

[ (1) Rules of court with respect to the practice and procedure of the court (to be called “Court of Protection Rules”) may be made in accordance with Part 1 of Schedule 1 to the Constitutional Reform Act 2005. ]<sup>40</sup>

(2) Court of Protection Rules may, in particular, make provision—

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<sup>39</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.9 (April 1, 2009)

<sup>40</sup> Substituted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.34 (October 1, 2007: substitution came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.51(1) on October 1, 2007)

- (a) as to the manner and form in which proceedings are to be commenced;
  - (b) as to the persons entitled to be notified of, and be made parties to, the proceedings;
  - (c) for the allocation, in such circumstances as may be specified, of any specified description of proceedings to a specified judge or to specified descriptions of judges;
  - (d) for the exercise of the jurisdiction of the court, in such circumstances as may be specified, by its officers or other staff;
  - (e) for enabling the court to appoint a suitable person (who may, with his consent, be the Official Solicitor) to act in the name of, or on behalf of, or to represent the person to whom the proceedings relate;
  - (f) for enabling an application to the court to be disposed of without a hearing;
  - (g) for enabling the court to proceed with, or with any part of, a hearing in the absence of the person to whom the proceedings relate;
  - (h) for enabling or requiring the proceedings or any part of them to be conducted in private and for enabling the court to determine who is to be admitted when the court sits in private and to exclude specified persons when it sits in public;
  - (i) as to what may be received as evidence (whether or not admissible apart from the rules) and the manner in which it is to be presented;
  - (j) for the enforcement of orders made and directions given in the proceedings.
- (3) Court of Protection Rules may, instead of providing for any matter, refer to provision made or to be made about that matter by directions.
- (4) Court of Protection Rules may make different provision for different areas.

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#### Commencement

Pt 2 s. 51(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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### [52 Practice directions

- (1) Directions as to the practice and procedure of the court may be given in accordance with Part 1 of Schedule 2 to the Constitutional Reform Act 2005.
- (2) Practice directions given otherwise than under subsection (1) may not be given without the approval of—
- (a) the Lord Chancellor, and
  - (b) the Lord Chief Justice.
- (3) The Lord Chief Justice may nominate any of the following to exercise his functions under this section—
- (a) the President of the Court of Protection;
  - (b) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).

] <sup>41</sup>

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<sup>41</sup> Substituted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.35 (October 1, 2007: substitution came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.52 on October 1, 2007)

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**Commencement**

Pt 2 s. 52(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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**53 Rights of appeal**

(1) Subject to the provisions of this section, an appeal lies to the Court of Appeal from any decision of the court.

(2) Court of Protection Rules may provide that where a decision of the court is made by—  
(a) a person exercising the jurisdiction of the court by virtue of rules made under section 51(2)(d),  
(b) a district judge, or  
(c) a circuit judge,

an appeal from that decision lies to a prescribed higher judge of the court and not to the Court of Appeal.

(3) For the purposes of this section the higher judges of the court are—  
(a) in relation to a person mentioned in subsection (2)(a), a circuit judge or a district judge;  
(b) in relation to a person mentioned in subsection (2)(b), a circuit judge;  
(c) in relation to any person mentioned in subsection (2), one of the judges nominated by virtue of section 46(2)(a) to (c).

(4) Court of Protection Rules may make provision—  
(a) that, in such cases as may be specified, an appeal from a decision of the court may not be made without permission;  
(b) as to the person or persons entitled to grant permission to appeal;  
(c) as to any requirements to be satisfied before permission is granted;  
(d) that where a higher judge of the court makes a decision on an appeal, no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that—  
(i) the appeal would raise an important point of principle or practice, or  
(ii) there is some other compelling reason for the Court of Appeal to hear it;  
(e) as to any considerations to be taken into account in relation to granting or refusing permission to appeal.

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**Commencement**

Pt 2 s. 53(1)-(4)(e): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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*Fees and costs***54 Fees**

(1) The Lord Chancellor may with the consent of the Treasury by order prescribe fees payable in respect of anything dealt with by the court.

(2) An order under this section may in particular contain provision as to—

- (a) scales or rates of fees;
  - (b) exemptions from and reductions in fees;
  - (c) remission of fees in whole or in part.
- (3) Before making an order under this section, the Lord Chancellor must consult—
- (a) the President of the Court of Protection,
  - (b) the Vice-President of the Court of Protection, and
  - (c) the Senior Judge of the Court of Protection.
- (4) The Lord Chancellor must take such steps as are reasonably practicable to bring information about fees to the attention of persons likely to have to pay them.
- (5) Fees payable under this section are recoverable summarily as a civil debt.

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**Commencement**

Pt 2 s. 54(1)-(5): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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**55 Costs**

- (1) Subject to Court of Protection Rules, the costs of and incidental to all proceedings in the court are in its discretion.
- (2) The rules may in particular make provision for regulating matters relating to the costs of those proceedings, including prescribing scales of costs to be paid to legal or other representatives.
- (3) The court has full power to determine by whom and to what extent the costs are to be paid.
- (4) The court may, in any proceedings—
- (a) disallow, or
  - (b) order the legal or other representatives concerned to meet,
- the whole of any wasted costs or such part of them as may be determined in accordance with the rules.
- (5) “Legal or other representative”, in relation to a party to proceedings, means any person exercising a right of audience or right to conduct litigation on his behalf.
- (6) “Wasted costs” means any costs incurred by a party—
- (a) as a result of any improper, unreasonable or negligent act or omission on the part of any legal or other representative or any employee of such a representative, or
  - (b) which, in the light of any such act or omission occurring after they were incurred, the court considers it is unreasonable to expect that party to pay.

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**Commencement**

Pt 2 s. 55(1)-(6)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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**56 Fees and costs: supplementary**

- (1) Court of Protection Rules may make provision—
- (a) as to the way in which, and funds from which, fees and costs are to be paid;

- (b) for charging fees and costs upon the estate of the person to whom the proceedings relate;
- (c) for the payment of fees and costs within a specified time of the death of the person to whom the proceedings relate or the conclusion of the proceedings.

(2) A charge on the estate of a person created by virtue of subsection (1)(b) does not cause any interest of the person in any property to fail or determine or to be prevented from recommencing.

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#### **Commencement**

Pt 2 s. 56(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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### *The Public Guardian*

#### **57 The Public Guardian**

- (1) For the purposes of this Act, there is to be an officer, to be known as the Public Guardian.
- (2) The Public Guardian is to be appointed by the Lord Chancellor.
- (3) There is to be paid to the Public Guardian out of money provided by Parliament such salary as the Lord Chancellor may determine.
- (4) The Lord Chancellor may, after consulting the Public Guardian—
  - (a) provide him with such officers and staff, or
  - (b) enter into such contracts with other persons for the provision (by them or their sub-contractors) of officers, staff or services,
 as the Lord Chancellor thinks necessary for the proper discharge of the Public Guardian's functions.
- (5) Any functions of the Public Guardian may, to the extent authorised by him, be performed by any of his officers.

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#### **Commencement**

Pt 2 s. 57(1)-(5): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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#### **58 Functions of the Public Guardian**

- (1) The Public Guardian has the following functions—
  - (a) establishing and maintaining a register of lasting powers of attorney,
  - (b) establishing and maintaining a register of orders appointing deputies,
  - (c) supervising deputies appointed by the court,
  - (d) directing a Court of Protection Visitor to visit—
    - (i) a donee of a lasting power of attorney,
    - (ii) a deputy appointed by the court, or
    - (iii) the person granting the power of attorney or for whom the deputy is appointed (“P”),
 and to make a report to the Public Guardian on such matters as he may direct,
  - (e) receiving security which the court requires a person to give for the discharge of his functions,

- (f) receiving reports from donees of lasting powers of attorney and deputies appointed by the court,
  - (g) reporting to the court on such matters relating to proceedings under this Act as the court requires,
  - (h) dealing with representations (including complaints) about the way in which a donee of a lasting power of attorney or a deputy appointed by the court is exercising his powers,
  - (i) publishing, in any manner the Public Guardian thinks appropriate, any information he thinks appropriate about the discharge of his functions.
- (2) The functions conferred by subsection (1)(c) and (h) may be discharged in co-operation with any other person who has functions in relation to the care or treatment of P.
- (3) The Lord Chancellor may by regulations make provision—
- (a) conferring on the Public Guardian other functions in connection with this Act;
  - (b) in connection with the discharge by the Public Guardian of his functions.
- (4) Regulations made under subsection (3)(b) may in particular make provision as to—
- (a) the giving of security by deputies appointed by the court and the enforcement and discharge of security so given;
  - (b) the fees which may be charged by the Public Guardian;
  - (c) the way in which, and funds from which, such fees are to be paid;
  - (d) exemptions from and reductions in such fees;
  - (e) remission of such fees in whole or in part;
  - (f) the making of reports to the Public Guardian by deputies appointed by the court and others who are directed by the court to carry out any transaction for a person who lacks capacity.
- (5) For the purpose of enabling him to carry out his functions, the Public Guardian may, at all reasonable times, examine and take copies of—
- (a) any health record,
  - (b) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14),
- so far as the record relates to P.
- (6) The Public Guardian may also for that purpose interview P in private.

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#### **Commencement**

Pt 2 s. 58(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

#### **Amendments Pending**

Pt 2 s. 58(5)(c): words inserted by Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010/813, art. 17(5) (October 1, 2010)

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## **59 Public Guardian Board**

- (1) There is to be a body, to be known as the Public Guardian Board.

(2) The Board's duty is to scrutinise and review the way in which the Public Guardian discharges his functions and to make such recommendations to the Lord Chancellor about that matter as it thinks appropriate.

(3) The Lord Chancellor must, in discharging his functions under sections 57 and 58, give due consideration to recommendations made by the Board.

(4) [...] <sup>42</sup>

(5) The Board must have—

- (a) at least one member who is a judge of the court, and
- (b) at least four members who are persons appearing to the Lord Chancellor to have appropriate knowledge or experience of the work of the Public Guardian.

[ (5A) Where a person to be appointed as a member of the Board is a judge of the court, the appointment is to be made by the Lord Chief Justice after consulting the Lord Chancellor.

(5B) In any other case, the appointment of a person as a member of the Board is to be made by the Lord Chancellor. ] <sup>43</sup>

(6) The Lord Chancellor may by regulations make provision as to—

- (a) the appointment of members of the Board (and, in particular, the procedures to be followed in connection with appointments);
- (b) the selection of one of the members to be the chairman;
- (c) the term of office of the chairman and members;
- (d) their resignation, suspension or removal;
- (e) the procedure of the Board (including quorum);
- (f) the validation of proceedings in the event of a vacancy among the members or a defect in the appointment of a member.

(7) Subject to any provision made in reliance on subsection (6)(c) or (d), a person is to hold and vacate office as a member of the Board in accordance with the terms of the instrument appointing him.

(8) The Lord Chancellor may make such payments to or in respect of members of the Board by way of reimbursement of expenses, allowances and remuneration as he may determine.

(9) The Board must make an annual report to the Lord Chancellor about the discharge of its functions.

[ (10) The Lord Chief Justice may nominate any of the following to exercise his functions under this section—

- (a) the President of the Court of Protection;
- (b) a judicial office holder (as defined in section 109(4) of the Constitutional Reform Act 2005).

] <sup>44</sup>

<sup>42</sup> Repealed by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.36(2) (October 1, 2007: repeal came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.59(4) on October 1, 2007)

<sup>43</sup> Added by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.36(3) (October 1, 2007: insertion came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.59 on October 1, 2007)

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**Commencement**

Pt 2 s. 59(1)-(9): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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**60 Annual report**

- (1) The Public Guardian must make an annual report to the Lord Chancellor about the discharge of his functions.
- (2) The Lord Chancellor must, within one month of receiving the report, lay a copy of it before Parliament.

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**Commencement**

Pt 2 s. 60(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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*Court of Protection Visitors***61 Court of Protection Visitors**

- (1) A Court of Protection Visitor is a person who is appointed by the Lord Chancellor to—
  - (a) a panel of Special Visitors, or
  - (b) a panel of General Visitors.
- (2) A person is not qualified to be a Special Visitor unless he—
  - (a) is a registered medical practitioner or appears to the Lord Chancellor to have other suitable qualifications or training, and
  - (b) appears to the Lord Chancellor to have special knowledge of and experience in cases of impairment of or disturbance in the functioning of the mind or brain.
- (3) A General Visitor need not have a medical qualification.
- (4) A Court of Protection Visitor—
  - (a) may be appointed for such term and subject to such conditions, and
  - (b) may be paid such remuneration and allowances,as the Lord Chancellor may determine.
- (5) For the purpose of carrying out his functions under this Act in relation to a person who lacks capacity (“P”), a Court of Protection Visitor may, at all reasonable times, examine and take copies of—
  - (a) any health record,
  - (b) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (c) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14),

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<sup>44</sup> Added by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.36(4) (October 1, 2007: insertion came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.59(10) on October 1, 2007)



so far as the record relates to P.

(6) A Court of Protection Visitor may also for that purpose interview P in private.

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**Commencement**

Pt 2 s. 61(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

**Amendments Pending**

Pt 2 s. 61(5)(c): words inserted by Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010/813, art. 17(6) (October 1, 2010)

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**PART 3**

**MISCELLANEOUS AND GENERAL**

*Declaratory provision*

**62 Scope of the Act**

For the avoidance of doubt, it is hereby declared that nothing in this Act is to be taken to affect the law relating to murder or manslaughter or the operation of section 2 of the Suicide Act 1961 (c. 60) (assisting suicide).

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**Commencement**

Pt 3 s. 62: October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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*Private international law*

**63 International protection of adults**

Schedule 3–

- (a) gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2000 (Cm. 5881) (in so far as this Act does not otherwise do so), and
- (b) makes related provision as to the private international law of England and Wales.

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**Commencement**

Pt 3 s. 63(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(b))

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*General*

## 64 Interpretation

(1) In this Act—

“the 1985 Act” means the Enduring Powers of Attorney Act 1985 (c. 29),

“advance decision” has the meaning given in section 24(1),

[ “authorisation under Schedule A1” means either—

(a) a standard authorisation under that Schedule, or

(b) an urgent authorisation under that Schedule,

] <sup>45</sup>

“the court” means the Court of Protection established by section 45,

“Court of Protection Rules” has the meaning given in section 51(1),

“Court of Protection Visitor” has the meaning given in section 61,

“deputy” has the meaning given in section 16(2)(b),

“enactment” includes a provision of subordinate legislation (within the meaning of the Interpretation Act 1978 (c. 30)),

“health record” has the meaning given in section 68 of the Data Protection Act 1998 (c. 29) (as read with section 69 of that Act),

“the Human Rights Convention” has the same meaning as “the Convention” in the Human Rights Act 1998 (c. 42),

“independent mental capacity advocate” has the meaning given in section 35(1),

“lasting power of attorney” has the meaning given in section 9,

“life-sustaining treatment” has the meaning given in section 4(10),

“local authority” [ , except in Schedule A1, ] <sup>46</sup> means—

(a) the council of a county in England in which there are no district councils,

(b) the council of a district in England,

(c) the council of a county or county borough in Wales,

(d) the council of a London borough,

(e) the Common Council of the City of London, or

(f) the Council of the Isles of Scilly,

“Mental Health Act” means the Mental Health Act 1983 (c. 20),

“prescribed”, in relation to regulations made under this Act, means prescribed by those regulations,

“property” includes any thing in action and any interest in real or personal property,

“public authority” has the same meaning as in the Human Rights Act 1998,

“Public Guardian” has the meaning given in section 57,

“purchaser” and “purchase” have the meaning given in section 205(1) of the Law of Property Act 1925 (c. 20),

“social services function” has the meaning given in section 1A of the Local Authority Social Services Act 1970 (c. 42),

“treatment” includes a diagnostic or other procedure,

“trust corporation” has the meaning given in section 68(1) of the Trustee Act 1925 (c. 19), and

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<sup>45</sup> Definition inserted by Mental Health Act 2007 c. 12 Sch.9(1) para.10(2) (April 1, 2008)

<sup>46</sup> Words inserted by Mental Health Act 2007 c. 12 Sch.9(1) para.10(3) (April 1, 2008)

“will” includes codicil.

(2) In this Act, references to making decisions, in relation to a donee of a lasting power of attorney or a deputy appointed by the court, include, where appropriate, acting on decisions made.

(3) In this Act, references to the bankruptcy of an individual include a case where a bankruptcy restrictions order under the Insolvency Act 1986 (c. 45) has effect in respect of him.

(4) “Bankruptcy restrictions order” includes an interim bankruptcy restrictions order.

[ (5) In this Act, references to deprivation of a person's liberty have the same meaning as in Article 5(1) of the Human Rights Convention.

(6) For the purposes of such references, it does not matter whether a person is deprived of his liberty by a public authority or not. ]<sup>47</sup>

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### Commencement

Pt 3 s. 64(1)-(4): April 1, 2007 for purposes specified in SI 2007/563 art.2(4); October 1, 2007 otherwise (SI 2007/563 art. 2(4); SI 2007/1897 art. 2(2)(f))

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## 65 Rules, regulations and orders

(1) Any power to make rules, regulations or orders under this Act [, other than the power in section 21]<sup>48</sup> –

- (a) is exercisable by statutory instrument;
- (b) includes power to make supplementary, incidental, consequential, transitional or saving provision;
- (c) includes power to make different provision for different cases.

(2) Any statutory instrument containing rules, regulations or orders made by the Lord Chancellor or the Secretary of State under this Act, other than–

- (a) regulations under section 34 (loss of capacity during research project),
- (b) regulations under section 41 (adjusting role of independent mental capacity advocacy service),
- (c) regulations under paragraph 32(1)(b) of Schedule 3 (private international law relating to the protection of adults),
- (d) an order of the kind mentioned in section 67(6) (consequential amendments of primary legislation), or
- (e) an order under section 68 (commencement),

is subject to annulment in pursuance of a resolution of either House of Parliament.

(3) A statutory instrument containing an Order in Council under paragraph 31 of Schedule 3 (provision to give further effect to Hague Convention) is subject to annulment in pursuance of a resolution of either House of Parliament.

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<sup>47</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.10(4) (April 1, 2008)

<sup>48</sup> Words inserted by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.37(2) (October 1, 2007: insertion came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.65(1) on October 1, 2007)

(4) A statutory instrument containing regulations made by the Secretary of State under section 34 or 41 or by the Lord Chancellor under paragraph 32(1)(b) of Schedule 3 may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

[ (4A) Subsection (2) does not apply to a statutory instrument containing regulations made by the Secretary of State under Schedule A1.

(4B) If such a statutory instrument contains regulations under paragraph 42(2)(b), 129, 162 or 164 of Schedule A1 (whether or not it also contains other regulations), the instrument may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

(4C) Subject to that, such a statutory instrument is subject to annulment in pursuance of a resolution of either House of Parliament. ]<sup>49</sup>

[ (5) An order under section 21—

- (a) may include supplementary, incidental, consequential, transitional or saving provision;
- (b) may make different provision for different cases;
- (c) is to be made in the form of a statutory instrument to which the Statutory Instruments Act 1946 applies as if the order were made by a Minister of the Crown; and
- (d) is subject to annulment in pursuance of a resolution of either House of Parliament.

] <sup>50</sup>

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#### Commencement

Pt 3 s. 65(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(c))

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## 66 Existing receivers and enduring powers of attorney etc.

(1) The following provisions cease to have effect—

- (a) Part 7 of the Mental Health Act,
- (b) the Enduring Powers of Attorney Act 1985 (c. 29).

(2) No enduring power of attorney within the meaning of the 1985 Act is to be created after the commencement of subsection (1)(b).

(3) Schedule 4 has effect in place of the 1985 Act in relation to any enduring power of attorney created before the commencement of subsection (1)(b).

(4) Schedule 5 contains transitional provisions and savings in relation to Part 7 of the Mental Health Act and the 1985 Act.

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#### Commencement

Pt 3 s. 66(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(c))

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<sup>49</sup> Added by Mental Health Act 2007 c. 12 Sch.9(1) para.11(2) (April 1, 2008)

<sup>50</sup> Added by Lord Chancellor (Transfer of Functions and Supplementary Provisions) (No.2) Order 2006/1016 Sch.1 para.37(3) (October 1, 2007: insertion came into force on April 3, 2006 but could not take effect until the commencement of 2005 c.9 s.65(5) on October 1, 2007)

## **67 Minor and consequential amendments and repeals**

- (1) Schedule 6 contains minor and consequential amendments.
- (2) Schedule 7 contains repeals.
- (3) The Lord Chancellor may by order make supplementary, incidental, consequential, transitional or saving provision for the purposes of, in consequence of, or for giving full effect to a provision of this Act.
- (4) An order under subsection (3) may, in particular—
  - (a) provide for a provision of this Act which comes into force before another provision of this Act has come into force to have effect, until the other provision has come into force, with specified modifications;
  - (b) amend, repeal or revoke an enactment, other than one contained in an Act or Measure passed in a Session after the one in which this Act is passed.
- (5) The amendments that may be made under subsection (4)(b) are in addition to those made by or under any other provision of this Act.
- (6) An order under subsection (3) which amends or repeals a provision of an Act or Measure may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.

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### **Commencement**

Pt 3 s. 67(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(c))

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## **68 Commencement and extent**

- (1) This Act, other than sections 30 to 41, comes into force in accordance with provision made by order by the Lord Chancellor.
- (2) Sections 30 to 41 come into force in accordance with provision made by order by—
  - (a) the Secretary of State, in relation to England, and
  - (b) the National Assembly for Wales, in relation to Wales.
- (3) An order under this section may appoint different days for different provisions and different purposes.
- (4) Subject to subsections (5) and (6), this Act extends to England and Wales only.
- (5) The following provisions extend to the United Kingdom—
  - (a) paragraph 16(1) of Schedule 1 (evidence of instruments and of registration of lasting powers of attorney),
  - (b) paragraph 15(3) of Schedule 4 (evidence of instruments and of registration of enduring powers of attorney).
- (6) Subject to any provision made in Schedule 6, the amendments and repeals made by Schedules 6 and 7 have the same extent as the enactments to which they relate.

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### **Commencement**

Pt 3 s. 68(1)-(6): April 7, 2005

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**69 Short title**

This Act may be cited as the Mental Capacity Act 2005.

**Commencement**

Pt 3 s. 69: October 1, 2007 (SI 2007/1897 art. 2(1)(c))

**[SCHEDULE A1****HOSPITAL AND CARE HOME RESIDENTS: DEPRIVATION OF LIBERTY**

] <sup>51</sup>

**[ PART 1****AUTHORISATION TO DEPRIVE RESIDENTS OF LIBERTY ETC**

] <sup>52</sup>

*[Application of Part]*<sup>53</sup>

**[1**

- (1) This Part applies if the following conditions are met.
- (2) The first condition is that a person (“P”) is detained in a hospital or care home — for the purpose of being given care or treatment — in circumstances which amount to deprivation of the person's liberty.
- (3) The second condition is that a standard or urgent authorisation is in force.
- (4) The third condition is that the standard or urgent authorisation relates—
  - (a) to P, and
  - (b) to the hospital or care home in which P is detained.

] <sup>54</sup>

<sup>51</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>52</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>53</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>54</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Authorisation to deprive P of liberty]<sup>55</sup>***[2**

The managing authority of the hospital or care home may deprive P of his liberty by detaining him as mentioned in paragraph 1(2).

] <sup>56</sup>*[No liability for acts done for purpose of depriving P of liberty]<sup>57</sup>***[3**

(1) This paragraph applies to any act which a person (“D”) does for the purpose of detaining P as mentioned in paragraph 1(2).

(2) D does not incur any liability in relation to the act that he would not have incurred if P–

(a) had had capacity to consent in relation to D's doing the act, and

(b) had consented to D's doing the act.

] <sup>58</sup>*[No protection for negligent acts etc]<sup>59</sup>***[4**

(1) Paragraphs 2 and 3 do not exclude a person's civil liability for loss or damage, or his criminal liability, resulting from his negligence in doing any thing.

(2) Paragraphs 2 and 3 do not authorise a person to do anything otherwise than for the purpose of the standard or urgent authorisation that is in force.

(3) In a case where a standard authorisation is in force, paragraphs 2 and 3 do not authorise a person to do anything which does not comply with the conditions (if any) included in the authorisation.

] <sup>60</sup>


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<sup>55</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>56</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>57</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>58</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>59</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>60</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

## [ PART 2

## INTERPRETATION: MAIN TERMS

] <sup>61</sup>*[Introduction]* <sup>62</sup>

[5

This Part applies for the purposes of this Schedule.

] <sup>63</sup>*[Detained resident]* <sup>64</sup>

[6

“Detained resident” means a person detained in a hospital or care home — for the purpose of being given care or treatment — in circumstances which amount to deprivation of the person's liberty.

] <sup>65</sup>*[Relevant person etc]* <sup>66</sup>

[7

In relation to a person who is, or is to be, a detained resident—

“relevant person” means the person in question;

“relevant hospital or care home” means the hospital or care home in question;

“relevant care or treatment” means the care or treatment in question.

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<sup>61</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>62</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>63</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>64</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>65</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>66</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



] <sup>67</sup>

*[Authorisations]* <sup>68</sup>

[8

“Standard authorisation” means an authorisation given under Part 4.

] <sup>69</sup>

[9

“Urgent authorisation” means an authorisation given under Part 5.

] <sup>70</sup>

[10

“Authorisation under this Schedule” means either of the following—

- (a) a standard authorisation;
- (b) an urgent authorisation.

] <sup>71</sup>

[11

(1) The purpose of a standard authorisation is the purpose which is stated in the authorisation in accordance with paragraph 55(1)(d).

(2) The purpose of an urgent authorisation is the purpose which is stated in the authorisation in accordance with paragraph 80(d).

] <sup>72</sup>

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<sup>67</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>68</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>69</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>70</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>71</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>72</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

## [ PART 3

## THE QUALIFYING REQUIREMENTS

] <sup>73</sup>*[The qualifying requirements]* <sup>74</sup>

[12

- (1) These are the qualifying requirements referred to in this Schedule—
- (a) the age requirement;
  - (b) the mental health requirement;
  - (c) the mental capacity requirement;
  - (d) the best interests requirement;
  - (e) the eligibility requirement;
  - (f) the no refusals requirement.
- (2) Any question of whether a person who is, or is to be, a detained resident meets the qualifying requirements is to be determined in accordance with this Part.
- (3) In a case where—
- (a) the question of whether a person meets a particular qualifying requirement arises in relation to the giving of a standard authorisation, and
  - (b) any circumstances relevant to determining that question are expected to change between the time when the determination is made and the time when the authorisation is expected to come into force,
- those circumstances are to be taken into account as they are expected to be at the later time.

] <sup>75</sup>*[The age requirement]* <sup>76</sup>

[13

The relevant person meets the age requirement if he has reached 18.

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<sup>73</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>74</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>75</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>76</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>77</sup>*[The mental health requirement]*<sup>78</sup>**[14**

(1) The relevant person meets the mental health requirement if he is suffering from mental disorder (within the meaning of the Mental Health Act, but disregarding any exclusion for persons with learning disability).

(2) An exclusion for persons with learning disability is any provision of the Mental Health Act which provides for a person with learning disability not to be regarded as suffering from mental disorder for one or more purposes of that Act.

] <sup>79</sup>*[The mental capacity requirement]*<sup>80</sup>**[15**

The relevant person meets the mental capacity requirement if he lacks capacity in relation to the question whether or not he should be accommodated in the relevant hospital or care home for the purpose of being given the relevant care or treatment.

] <sup>81</sup>*[The best interests requirement]*<sup>82</sup>**[16**

(1) The relevant person meets the best interests requirement if all of the following conditions are met.

(2) The first condition is that the relevant person is, or is to be, a detained resident.

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<sup>77</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>78</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>79</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>80</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>81</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>82</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

- (3) The second condition is that it is in the best interests of the relevant person for him to be a detained resident.
- (4) The third condition is that, in order to prevent harm to the relevant person, it is necessary for him to be a detained resident.
- (5) The fourth condition is that it is a proportionate response to—
- (a) the likelihood of the relevant person suffering harm, and
  - (b) the seriousness of that harm,
- for him to be a detained resident.

] <sup>83</sup>

*[The eligibility requirement]*<sup>84</sup>

**[17**

- (1) The relevant person meets the eligibility requirement unless he is ineligible to be deprived of liberty by this Act.
- (2) Schedule 1A applies for the purpose of determining whether or not P is ineligible to be deprived of liberty by this Act.

] <sup>85</sup>

*[The no refusals requirement]*<sup>86</sup>

**[18**

The relevant person meets the no refusals requirement unless there is a refusal within the meaning of paragraph 19 or 20.

] <sup>87</sup>

**[19**

- (1) There is a refusal if these conditions are met—
- (a) the relevant person has made an advance decision;
  - (b) the advance decision is valid;

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<sup>83</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>84</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>85</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>86</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>87</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(c) the advance decision is applicable to some or all of the relevant treatment.

(2) Expressions used in this paragraph and any of sections 24, 25 or 26 have the same meaning in this paragraph as in that section.

] <sup>88</sup>

[20

(1) There is a refusal if it would be in conflict with a valid decision of a donee or deputy for the relevant person to be accommodated in the relevant hospital or care home for the purpose of receiving some or all of the relevant care or treatment—

- (a) in circumstances which amount to deprivation of the person's liberty, or
- (b) at all.

(2) A donee is a donee of a lasting power of attorney granted by the relevant person.

(3) A decision of a donee or deputy is valid if it is made—

- (a) within the scope of his authority as donee or deputy, and
- (b) in accordance with Part 1 of this Act.

] <sup>89</sup>

## [ PART 4

### STANDARD AUTHORISATIONS

] <sup>90</sup>

*[Supervisory body to give authorisation]*<sup>91</sup>

[21

Only the supervisory body may give a standard authorisation.

] <sup>92</sup>

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<sup>88</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>89</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>90</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>91</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>92</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

**[22**

The supervisory body may not give a standard authorisation unless—

- (a) the managing authority of the relevant hospital or care home have requested it, or
- (b) paragraph 71 applies (right of third party to require consideration of whether authorisation needed).

] <sup>93</sup>

**[23**

The managing authority may not make a request for a standard authorisation unless—

- (a) they are required to do so by paragraph 24 (as read with paragraphs 27 to 29),
- (b) they are required to do so by paragraph 25 (as read with paragraph 28), or
- (c) they are permitted to do so by paragraph 30.

] <sup>94</sup>

*[Duty to request authorisation: basic cases]* <sup>95</sup>

**[24**

- (1) The managing authority must request a standard authorisation in any of the following cases.
- (2) The first case is where it appears to the managing authority that the relevant person—
  - (a) is not yet accommodated in the relevant hospital or care home,
  - (b) is likely — at some time within the next 28 days — to be a detained resident in the relevant hospital or care home, and
  - (c) is likely—
    - (i) at that time, or
    - (ii) at some later time within the next 28 days,
 to meet all of the qualifying requirements.
- (3) The second case is where it appears to the managing authority that the relevant person—
  - (a) is already accommodated in the relevant hospital or care home,
  - (b) is likely — at some time within the next 28 days — to be a detained resident in the relevant hospital or care home, and
  - (c) is likely—
    - (i) at that time, or
    - (ii) at some later time within the next 28 days,
 to meet all of the qualifying requirements.
- (4) The third case is where it appears to the managing authority that the relevant person—
  - (a) is a detained resident in the relevant hospital or care home, and

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<sup>93</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>94</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>95</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(b) meets all of the qualifying requirements, or is likely to do so at some time within the next 28 days.

(5) This paragraph is subject to paragraphs 27 to 29.

] <sup>96</sup>

*[Duty to request authorisation: change in place of detention]*<sup>97</sup>

**[25**

(1) The relevant managing authority must request a standard authorisation if it appears to them that these conditions are met.

(2) The first condition is that a standard authorisation—

- (a) has been given, and
- (b) has not ceased to be in force.

(3) The second condition is that there is, or is to be, a change in the place of detention.

(4) This paragraph is subject to paragraph 28.

] <sup>98</sup>

**[26**

(1) This paragraph applies for the purposes of paragraph 25.

(2) There is a change in the place of detention if the relevant person—

- (a) ceases to be a detained resident in the stated hospital or care home, and
- (b) becomes a detained resident in a different hospital or care home (“the new hospital or care home”).

(3) The stated hospital or care home is the hospital or care home to which the standard authorisation relates.

(4) The relevant managing authority are the managing authority of the new hospital or care home.

] <sup>99</sup>

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<sup>96</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>97</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>98</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>99</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Other authority for detention: request for authorisation]<sup>100</sup>*

**[27**

- (1) This paragraph applies if, by virtue of section 4A(3), a decision of the court authorises the relevant person to be a detained resident.
- (2) Paragraph 24 does not require a request for a standard authorisation to be made in relation to that detention unless these conditions are met.
- (3) The first condition is that the standard authorisation would be in force at a time immediately after the expiry of the other authority.
- (4) The second condition is that the standard authorisation would not be in force at any time on or before the expiry of the other authority.
- (5) The third condition is that it would, in the managing authority's view, be unreasonable to delay making the request until a time nearer the expiry of the other authority.
- (6) In this paragraph–
  - (a) the other authority is–
    - (i) the decision mentioned in sub-paragraph (1), or
    - (ii) any further decision of the court which, by virtue of section 4A(3), authorises, or is expected to authorise, the relevant person to be a detained resident;
  - (b) the expiry of the other authority is the time when the other authority is expected to cease to authorise the relevant person to be a detained resident.

]

*[Request refused: no further request unless change of circumstances]<sup>102</sup>*

**[28**

- (1) This paragraph applies if–
  - (a) a managing authority request a standard authorisation under paragraph 24 or 25, and
  - (b) the supervisory body are prohibited by paragraph 50(2) from giving the authorisation.
- (2) Paragraph 24 or 25 does not require that managing authority to make a new request for a standard authorisation unless it appears to the managing authority that–
  - (a) there has been a change in the relevant person's case, and
  - (b) because of that change, the supervisory body are likely to give a standard authorisation if requested.

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<sup>100</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>101</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>102</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



] <sup>103</sup>*[Authorisation given: request for further authorisation]*<sup>104</sup>**[29**

- (1) This paragraph applies if a standard authorisation–
  - (a) has been given in relation to the detention of the relevant person, and
  - (b) that authorisation (“the existing authorisation”) has not ceased to be in force.
- (2) Paragraph 24 does not require a new request for a standard authorisation (“the new authorisation”) to be made unless these conditions are met.
- (3) The first condition is that the new authorisation would be in force at a time immediately after the expiry of the existing authorisation.
- (4) The second condition is that the new authorisation would not be in force at any time on or before the expiry of the existing authorisation.
- (5) The third condition is that it would, in the managing authority's view, be unreasonable to delay making the request until a time nearer the expiry of the existing authorisation.
- (6) The expiry of the existing authorisation is the time when it is expected to cease to be in force.

] <sup>105</sup>*[Power to request authorisation]*<sup>106</sup>**[30**

- (1) This paragraph applies if–
  - (a) a standard authorisation has been given in relation to the detention of the relevant person,
  - (b) that authorisation (“the existing authorisation”) has not ceased to be in force,
  - (c) the requirement under paragraph 24 to make a request for a new standard authorisation does not apply, because of paragraph 29, and
  - (d) a review of the existing authorisation has been requested, or is being carried out, in accordance with Part 8.

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<sup>103</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>104</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>105</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>106</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

- (2) The managing authority may request a new standard authorisation which would be in force on or before the expiry of the existing authorisation; but only if it would also be in force immediately after that expiry.
- (3) The expiry of the existing authorisation is the time when it is expected to cease to be in force.
- (4) Further provision relating to cases where a request is made under this paragraph can be found in–
- (a) paragraph 62 (effect of decision about request), and
  - (b) paragraph 124 (effect of request on Part 8 review).

]<sup>107</sup>

*[Information included in request]<sup>108</sup>*

**[31**

A request for a standard authorisation must include the information (if any) required by regulations.

]<sup>109</sup>

*[Records of requests]<sup>110</sup>*

**[32**

- (1) The managing authority of a hospital or care home must keep a written record of–
- (a) each request that they make for a standard authorisation, and
  - (b) the reasons for making each request.
- (2) A supervisory body must keep a written record of each request for a standard authorisation that is made to them.

]<sup>111</sup>

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<sup>107</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>108</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>109</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>110</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>111</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Relevant person must be assessed]*<sup>112</sup>**[33**

- (1) This paragraph applies if the supervisory body are requested to give a standard authorisation.
- (2) The supervisory body must secure that all of these assessments are carried out in relation to the relevant person—
- (a) an age assessment;
  - (b) a mental health assessment;
  - (c) a mental capacity assessment;
  - (d) a best interests assessment;
  - (e) an eligibility assessment;
  - (f) a no refusals assessment.
- (3) The person who carries out any such assessment is referred to as the assessor.
- (4) Regulations may be made about the period (or periods) within which assessors must carry out assessments.
- (5) This paragraph is subject to paragraphs 49 and 133.

] <sup>113</sup>*[Age assessment]*<sup>114</sup>**[34**

An age assessment is an assessment of whether the relevant person meets the age requirement.

] <sup>115</sup>*[Mental health assessment]*<sup>116</sup>**[35**

A mental health assessment is an assessment of whether the relevant person meets the mental health requirement.

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<sup>112</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>113</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>114</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>115</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>116</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>117</sup>**[36**

When carrying out a mental health assessment, the assessor must also—

(a) consider how (if at all) the relevant person's mental health is likely to be affected by his being a detained resident, and

(b) notify the best interests assessor of his conclusions.

] <sup>118</sup>*[Mental capacity assessment]* <sup>119</sup>**[37**

A mental capacity assessment is an assessment of whether the relevant person meets the mental capacity requirement.

] <sup>120</sup>*[Best interests assessment]* <sup>121</sup>**[38**

A best interests assessment is an assessment of whether the relevant person meets the best interests requirement.

] <sup>122</sup>**[39**

(1) In carrying out a best interests assessment, the assessor must comply with the duties in sub-paragraphs (2) and (3).

(2) The assessor must consult the managing authority of the relevant hospital or care home.

(3) The assessor must have regard to all of the following—

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<sup>117</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>118</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>119</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>120</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>121</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>122</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

- (a) the conclusions which the mental health assessor has notified to the best interests assessor in accordance with paragraph 36(b);
  - (b) any relevant needs assessment;
  - (c) any relevant care plan.
- (4) A relevant needs assessment is an assessment of the relevant person's needs which–
- (a) was carried out in connection with the relevant person being accommodated in the relevant hospital or care home, and
  - (b) was carried out by or on behalf of–
    - (i) the managing authority of the relevant hospital or care home, or
    - (ii) the supervisory body.
- (5) A relevant care plan is a care plan which–
- (a) sets out how the relevant person's needs are to be met whilst he is accommodated in the relevant hospital or care home, and
  - (b) was drawn up by or on behalf of–
    - (i) the managing authority of the relevant hospital or care home, or
    - (ii) the supervisory body.
- (6) The managing authority must give the assessor a copy of–
- (a) any relevant needs assessment carried out by them or on their behalf, or
  - (b) any relevant care plan drawn up by them or on their behalf.
- (7) The supervisory body must give the assessor a copy of–
- (a) any relevant needs assessment carried out by them or on their behalf, or
  - (b) any relevant care plan drawn up by them or on their behalf.
- (8) The duties in sub-paragraphs (2) and (3) do not affect any other duty to consult or to take the views of others into account.

]<sup>123</sup>

#### [40

- (1) This paragraph applies whatever conclusion the best interests assessment comes to.
- (2) The assessor must state in the best interests assessment the name and address of every interested person whom he has consulted in carrying out the assessment.

]<sup>124</sup>

#### [41

Paragraphs 42 and 43 apply if the best interests assessment comes to the conclusion that the relevant person meets the best interests requirement.

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<sup>123</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>124</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>125</sup>**[42**

- (1) The assessor must state in the assessment the maximum authorisation period.
- (2) The maximum authorisation period is the shorter of these periods—
  - (a) the period which, in the assessor's opinion, would be the appropriate maximum period for the relevant person to be a detained resident under the standard authorisation that has been requested;
  - (b) 1 year, or such shorter period as may be prescribed in regulations.
- (3) Regulations under sub-paragraph (2)(b)—
  - (a) need not provide for a shorter period to apply in relation to all standard authorisations;
  - (b) may provide for different periods to apply in relation to different kinds of standard authorisations.
- (4) Before making regulations under sub-paragraph (2)(b) the Secretary of State must consult all of the following—
  - (a) each body required by regulations under paragraph 162 to monitor and report on the operation of this Schedule in relation to England;
  - (b) such other persons as the Secretary of State considers it appropriate to consult.
- (5) Before making regulations under sub-paragraph (2)(b) the National Assembly for Wales must consult all of the following—
  - (a) each person or body directed under paragraph 163(2) to carry out any function of the Assembly of monitoring and reporting on the operation of this Schedule in relation to Wales;
  - (b) such other persons as the Assembly considers it appropriate to consult.

] <sup>126</sup>**[43**

The assessor may include in the assessment recommendations about conditions to which the standard authorisation is, or is not, to be subject in accordance with paragraph 53.

] <sup>127</sup>**[44**

- (1) This paragraph applies if the best interests assessment comes to the conclusion that the relevant person does not meet the best interests requirement.
- (2) If, on the basis of the information taken into account in carrying out the assessment, it appears to the assessor that there is an unauthorised deprivation of liberty, he must include a statement to that effect in the assessment.

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<sup>125</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>126</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>127</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(3) There is an unauthorised deprivation of liberty if the managing authority of the relevant hospital or care home are already depriving the relevant person of his liberty without authority of the kind mentioned in section 4A.

] <sup>128</sup>

[45

The duties with which the best interests assessor must comply are subject to the provision included in appointment regulations under Part 10 (in particular, provision made under paragraph 146).

] <sup>129</sup>

*[Eligibility assessment]*<sup>130</sup>

[46

An eligibility assessment is an assessment of whether the relevant person meets the eligibility requirement.

] <sup>131</sup>

[47

(1) Regulations may–

- (a) require an eligibility assessor to request a best interests assessor to provide relevant eligibility information, and
- (b) require the best interests assessor, if such a request is made, to provide such relevant eligibility information as he may have.

(2) In this paragraph–

“best interests assessor” means any person who is carrying out, or has carried out, a best interests assessment in relation to the relevant person;

“eligibility assessor” means a person carrying out an eligibility assessment in relation to the relevant person;

“relevant eligibility information” is information relevant to assessing whether or not the relevant person is ineligible by virtue of paragraph 5 of Schedule 1A.

] <sup>132</sup>

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<sup>128</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>129</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>130</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>131</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>132</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[No refusals assessment]*<sup>133</sup>**[48**

A no refusals assessment is an assessment of whether the relevant person meets the no refusals requirement.

]

<sup>134</sup>
*[Equivalent assessment already carried out]*<sup>135</sup>**[49**

(1) The supervisory body are not required by paragraph 33 to secure that a particular kind of assessment (“the required assessment”) is carried out in relation to the relevant person if the following conditions are met.

(2) The first condition is that the supervisory body have a written copy of an assessment of the relevant person (“the existing assessment”) that has already been carried out.

(3) The second condition is that the existing assessment complies with all requirements under this Schedule with which the required assessment would have to comply (if it were carried out).

(4) The third condition is that the existing assessment was carried out within the previous 12 months; but this condition need not be met if the required assessment is an age assessment.

(5) The fourth condition is that the supervisory body are satisfied that there is no reason why the existing assessment may no longer be accurate.

(6) If the required assessment is a best interests assessment, in satisfying themselves as mentioned in sub-paragraph (5), the supervisory body must take into account any information given, or submissions made, by–

- (a) the relevant person's representative,
- (b) any section 39C IMCA, or
- (c) any section 39D IMCA.

(7) It does not matter whether the existing assessment was carried out in connection with a request for a standard authorisation or for some other purpose.

(8) If, because of this paragraph, the supervisory body are not required by paragraph 33 to secure that the required assessment is carried out, the existing assessment is to be treated for the purposes of this Schedule–

- (a) as an assessment of the same kind as the required assessment, and

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<sup>133</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>134</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>135</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



(b) as having been carried out under paragraph 33 in connection with the request for the standard authorisation.

] <sup>136</sup>

*[Duty to give authorisation]*<sup>137</sup>

**[50**

(1) The supervisory body must give a standard authorisation if–

(a) all assessments are positive, and

(b) the supervisory body have written copies of all those assessments.

(2) The supervisory body must not give a standard authorisation except in accordance with sub-paragraph (1).

(3) All assessments are positive if each assessment carried out under paragraph 33 has come to the conclusion that the relevant person meets the qualifying requirement to which the assessment relates.

] <sup>138</sup>

*[Terms of authorisation]*<sup>139</sup>

**[51**

(1) If the supervisory body are required to give a standard authorisation, they must decide the period during which the authorisation is to be in force.

(2) That period must not exceed the maximum authorisation period stated in the best interests assessment.

] <sup>140</sup>

**[52**

A standard authorisation may provide for the authorisation to come into force at a time after it is given.

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<sup>136</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>137</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>138</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>139</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>140</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>141</sup>

**[53**

- (1) A standard authorisation may be given subject to conditions.
- (2) Before deciding whether to give the authorisation subject to conditions, the supervisory body must have regard to any recommendations in the best interests assessment about such conditions.
- (3) The managing authority of the relevant hospital or care home must ensure that any conditions are complied with.

] <sup>142</sup>

*[Form of authorisation]* <sup>143</sup>

**[54**

A standard authorisation must be in writing.

] <sup>144</sup>

**[55**

- (1) A standard authorisation must state the following things—
  - (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;
  - (f) the reason why each qualifying requirement is met.
- (2) The statement of the reason why the eligibility requirement is met must be framed by reference to the cases in the table in paragraph 2 of Schedule 1A.

] <sup>145</sup>

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<sup>141</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>142</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>143</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>144</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>145</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

**[56**

(1) If the name of the relevant hospital or care home changes, the standard authorisation is to be read as if it stated the current name of the hospital or care home.

(2) But sub-paragraph (1) is subject to any provision relating to the change of name which is made in any enactment or in any instrument made under an enactment.

] <sup>146</sup>

*[Duty to give information about decision]*<sup>147</sup>

**[57**

(1) This paragraph applies if–

- (a) a request is made for a standard authorisation, and
- (b) the supervisory body are required by paragraph 50(1) to give the standard authorisation.

(2) The supervisory body must give a copy of the authorisation to each of the following–

- (a) the relevant person's representative;
- (b) the managing authority of the relevant hospital or care home;
- (c) the relevant person;
- (d) any section 39A IMCA;
- (e) every interested person consulted by the best interests assessor.

(3) The supervisory body must comply with this paragraph as soon as practicable after they give the standard authorisation.

] <sup>148</sup>

**[58**

(1) This paragraph applies if–

- (a) a request is made for a standard authorisation, and
- (b) the supervisory body are prohibited by paragraph 50(2) from giving the standard authorisation.

(2) The supervisory body must give notice, stating that they are prohibited from giving the authorisation, to each of the following–

- (a) the managing authority of the relevant hospital or care home;
- (b) the relevant person;
- (c) any section 39A IMCA;
- (d) every interested person consulted by the best interests assessor.

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<sup>146</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>147</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>148</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(3) The supervisory body must comply with this paragraph as soon as practicable after it becomes apparent to them that they are prohibited from giving the authorisation.

]<sup>149</sup>

*[Duty to give information about effect of authorisation]*<sup>150</sup>

**[59**

(1) This paragraph applies if a standard authorisation is given.

(2) The managing authority of the relevant hospital or care home must take such steps as are practicable to ensure that the relevant person understands all of the following—

(a) the effect of the authorisation;

(b) the right to make an application to the court to exercise its jurisdiction under section 21A;

(c) the right under Part 8 to request a review;

(d) the right to have a section 39D IMCA appointed;

(e) how to have a section 39D IMCA appointed.

(3) Those steps must be taken as soon as is practicable after the authorisation is given.

(4) Those steps must include the giving of appropriate information both orally and in writing.

(5) Any written information given to the relevant person must also be given by the managing authority to the relevant person's representative.

(6) They must give the information to the representative as soon as is practicable after it is given to the relevant person.

(7) Sub-paragraph (8) applies if the managing authority is notified that a section 39D IMCA has been appointed.

(8) As soon as is practicable after being notified, the managing authority must give the section 39D IMCA a copy of the written information given in accordance with sub-paragraph (4).

]<sup>151</sup>

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<sup>149</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>150</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>151</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Records of authorisations]*<sup>152</sup>**[60**

A supervisory body must keep a written record of all of the following information—

- (a) the standard authorisations that they have given;
- (b) the requests for standard authorisations in response to which they have not given an authorisation;
- (c) in relation to each standard authorisation given: the matters stated in the authorisation in accordance with paragraph 55.

]

<sup>153</sup>
*[Variation of an authorisation]*<sup>154</sup>**[61**

- (1) A standard authorisation may not be varied except in accordance with Part 7 or 8.
- (2) This paragraph does not affect the powers of the Court of Protection or of any other court.

]

<sup>155</sup>
*[Effect of decision about request made under paragraph 25 or 30]*<sup>156</sup>**[62**

- (1) This paragraph applies where the managing authority request a new standard authorisation under either of the following—
  - (a) paragraph 25 (change in place of detention);
  - (b) paragraph 30 (existing authorisation subject to review).
- (2) If the supervisory body are required by paragraph 50(1) to give the new authorisation, the existing authorisation terminates at the time when the new authorisation comes into force.
- (3) If the supervisory body are prohibited by paragraph 50(2) from giving the new authorisation, there is no effect on the existing authorisation's continuation in force.

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<sup>152</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>153</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>154</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>155</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>156</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>157</sup>*[When an authorisation is in force]* <sup>158</sup>**[63**

- (1) A standard authorisation comes into force when it is given.
- (2) But if the authorisation provides for it to come into force at a later time, it comes into force at that time.

] <sup>159</sup>**[64**

- (1) A standard authorisation ceases to be in force at the end of the period stated in the authorisation in accordance with paragraph 55(1)(c).
- (2) But if the authorisation terminates before then in accordance with paragraph 62(2) or any other provision of this Schedule, it ceases to be in force when the termination takes effect.
- (3) This paragraph does not affect the powers of the Court of Protection or of any other court.

] <sup>160</sup>**[65**

- (1) This paragraph applies if a standard authorisation ceases to be in force.
- (2) The supervisory body must give notice that the authorisation has ceased to be in force.
- (3) The supervisory body must give that notice to all of the following—
  - (a) the managing authority of the relevant hospital or care home;
  - (b) the relevant person;
  - (c) the relevant person's representative;
  - (d) every interested person consulted by the best interests assessor.
- (4) The supervisory body must give that notice as soon as practicable after the authorisation ceases to be in force.

] <sup>161</sup>


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<sup>157</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>158</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>159</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>160</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>161</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[When a request for a standard authorisation is “disposed of”]*<sup>162</sup>

**[66**

A request for a standard authorisation is to be regarded for the purposes of this Schedule as disposed of if the supervisory body have given—

- (a) a copy of the authorisation in accordance with paragraph 57, or
- (b) notice in accordance with paragraph 58.

]

<sup>163</sup>

*[Right of third party to require consideration of whether authorisation needed]*<sup>164</sup>

**[67**

For the purposes of paragraphs 68 to 73 there is an unauthorised deprivation of liberty if—

- (a) a person is already a detained resident in a hospital or care home, and
- (b) the detention of the person is not authorised as mentioned in section 4A.

]

<sup>165</sup>

**[68**

(1) If the following conditions are met, an eligible person may request the supervisory body to decide whether or not there is an unauthorised deprivation of liberty.

(2) The first condition is that the eligible person has notified the managing authority of the relevant hospital or care home that it appears to the eligible person that there is an unauthorised deprivation of liberty.

(3) The second condition is that the eligible person has asked the managing authority to request a standard authorisation in relation to the detention of the relevant person.

(4) The third condition is that the managing authority has not requested a standard authorisation within a reasonable period after the eligible person asks it to do so.

(5) In this paragraph “eligible person” means any person other than the managing authority of the relevant hospital or care home.

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<sup>166</sup>


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<sup>162</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>163</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>164</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>165</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>166</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

**[69**

- (1) This paragraph applies if an eligible person requests the supervisory body to decide whether or not there is an unauthorised deprivation of liberty.
- (2) The supervisory body must select and appoint a person to carry out an assessment of whether or not the relevant person is a detained resident.
- (3) But the supervisory body need not select and appoint a person to carry out such an assessment in either of these cases.
- (4) The first case is where it appears to the supervisory body that the request by the eligible person is frivolous or vexatious.
- (5) The second case is where it appears to the supervisory body that—
  - (a) the question of whether or not there is an unauthorised deprivation of liberty has already been decided, and
  - (b) since that decision, there has been no change of circumstances which would merit the question being decided again.
- (6) The supervisory body must not select and appoint a person to carry out an assessment under this paragraph unless it appears to the supervisory body that the person would be—
  - (a) suitable to carry out a best interests assessment (if one were obtained in connection with a request for a standard authorisation relating to the relevant person), and
  - (b) eligible to carry out such a best interests assessment.
- (7) The supervisory body must notify the persons specified in sub-paragraph (8)—
  - (a) that the supervisory body have been requested to decide whether or not there is an unauthorised deprivation of liberty;
  - (b) of their decision whether or not to select and appoint a person to carry out an assessment under this paragraph;
  - (c) if their decision is to select and appoint a person, of the person appointed.
- (8) The persons referred to in sub-paragraph (7) are—
  - (a) the eligible person who made the request under paragraph 68;
  - (b) the person to whom the request relates;
  - (c) the managing authority of the relevant hospital or care home;
  - (d) any section 39A IMCA.

] <sup>167</sup>**[70**

- (1) Regulations may be made about the period within which an assessment under paragraph 69 must be carried out.
- (2) Regulations made under paragraph 129(3) apply in relation to the selection and appointment of a person under paragraph 69 as they apply to the selection of a person under paragraph 129 to carry out a best interests assessment.

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<sup>167</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



(3) The following provisions apply to an assessment under paragraph 69 as they apply to an assessment carried out in connection with a request for a standard authorisation—

- (a) paragraph 131 (examination and copying of records);
- (b) paragraph 132 (representations);
- (c) paragraphs 134 and 135(1) and (2) (duty to keep records and give copies).

(4) The copies of the assessment which the supervisory body are required to give under paragraph 135(2) must be given as soon as practicable after the supervisory body are themselves given a copy of the assessment.

]<sup>168</sup>

## [71

(1) This paragraph applies if—

- (a) the supervisory body obtain an assessment under paragraph 69,
- (b) the assessment comes to the conclusion that the relevant person is a detained resident, and
- (c) it appears to the supervisory body that the detention of the person is not authorised as mentioned in section 4A.

(2) This Schedule (including Part 5) applies as if the managing authority of the relevant hospital or care home had, in accordance with Part 4, requested the supervisory body to give a standard authorisation in relation to the relevant person.

(3) The managing authority of the relevant hospital or care home must supply the supervisory body with the information (if any) which the managing authority would, by virtue of paragraph 31, have had to include in a request for a standard authorisation.

(4) The supervisory body must notify the persons specified in paragraph 69(8)—

- (a) of the outcome of the assessment obtained under paragraph 69, and
- (b) that this Schedule applies as mentioned in sub-paragraph (2).

]<sup>169</sup>

## [72

(1) This paragraph applies if—

- (a) the supervisory body obtain an assessment under paragraph 69, and
- (b) the assessment comes to the conclusion that the relevant person is not a detained resident.

(2) The supervisory body must notify the persons specified in paragraph 69(8) of the outcome of the assessment.

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<sup>168</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>169</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>170</sup>**[73**

- (1) This paragraph applies if–
- (a) the supervisory body obtain an assessment under paragraph 69,
  - (b) the assessment comes to the conclusion that the relevant person is a detained resident, and
  - (c) it appears to the supervisory body that the detention of the person is authorised as mentioned in section 4A.
- (2) The supervisory body must notify the persons specified in paragraph 69(8)–
- (a) of the outcome of the assessment, and
  - (b) that it appears to the supervisory body that the detention is authorised.

] <sup>171</sup>**[ PART 5****URGENT AUTHORISATIONS**] <sup>172</sup>*[Managing authority to give authorisation]*<sup>173</sup>**[74**

Only the managing authority of the relevant hospital or care home may give an urgent authorisation.

] <sup>174</sup>**[75**

The managing authority may give an urgent authorisation only if they are required to do so by paragraph 76 (as read with paragraph 77).

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<sup>170</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>171</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>172</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>173</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>174</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>175</sup>*[Duty to give authorisation]* <sup>176</sup>**[76**

- (1) The managing authority must give an urgent authorisation in either of the following cases.
- (2) The first case is where—
  - (a) the managing authority are required to make a request under paragraph 24 or 25 for a standard authorisation, and
  - (b) they believe that the need for the relevant person to be a detained resident is so urgent that it is appropriate for the detention to begin before they make the request.
- (3) The second case is where—
  - (a) the managing authority have made a request under paragraph 24 or 25 for a standard authorisation, and
  - (b) they believe that the need for the relevant person to be a detained resident is so urgent that it is appropriate for the detention to begin before the request is disposed of.
- (4) References in this paragraph to the detention of the relevant person are references to the detention to which paragraph 24 or 25 relates.
- (5) This paragraph is subject to paragraph 77.

] <sup>177</sup>**[77**

- (1) This paragraph applies where the managing authority have given an urgent authorisation (“the original authorisation”) in connection with a case where a person is, or is to be, a detained resident (“the existing detention”).
- (2) No new urgent authorisation is to be given under paragraph 76 in connection with the existing detention.
- (3) But the managing authority may request the supervisory body to extend the duration of the original authorisation.
- (4) Only one request under sub-paragraph (3) may be made in relation to the original authorisation.
- (5) Paragraphs 84 to 86 apply to any request made under sub-paragraph (3).

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<sup>175</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>176</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>177</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>178</sup>

*[Terms of authorisation]*<sup>179</sup>

**[78**

(1) If the managing authority decide to give an urgent authorisation, they must decide the period during which the authorisation is to be in force.

(2) That period must not exceed 7 days.

] <sup>180</sup>

*[Form of authorisation]*<sup>181</sup>

**[79**

An urgent authorisation must be in writing.

] <sup>182</sup>

**[80**

An urgent authorisation must state the following things—

- (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.

] <sup>183</sup>

**[81**

(1) If the name of the relevant hospital or care home changes, the urgent authorisation is to be read as if it stated the current name of the hospital or care home.

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<sup>178</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>179</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>180</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>181</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>182</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>183</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(2) But sub-paragraph (1) is subject to any provision relating to the change of name which is made in any enactment or in any instrument made under an enactment.

]<sup>184</sup>

*[Duty to keep records and give copies]*<sup>185</sup>

[82

(1) This paragraph applies if an urgent authorisation is given.

(2) The managing authority must keep a written record of why they have given the urgent authorisation.

(3) As soon as practicable after giving the authorisation, the managing authority must give a copy of the authorisation to all of the following—

- (a) the relevant person;
- (b) any section 39A IMCA.

]<sup>186</sup>

*[Duty to give information about authorisation]*<sup>187</sup>

[83

(1) This paragraph applies if an urgent authorisation is given.

(2) The managing authority of the relevant hospital or care home must take such steps as are practicable to ensure that the relevant person understands all of the following—

- (a) the effect of the authorisation;
- (b) the right to make an application to the court to exercise its jurisdiction under section 21A.

(3) Those steps must be taken as soon as is practicable after the authorisation is given.

(4) Those steps must include the giving of appropriate information both orally and in writing.

]<sup>188</sup>

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<sup>184</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>185</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>186</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>187</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>188</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Request for extension of duration]*<sup>189</sup>**[84**

- (1) This paragraph applies if the managing authority make a request under paragraph 77 for the supervisory body to extend the duration of the original authorisation.
- (2) The managing authority must keep a written record of why they have made the request.
- (3) The managing authority must give the relevant person notice that they have made the request.
- (4) The supervisory body may extend the duration of the original authorisation if it appears to them that—
  - (a) the managing authority have made the required request for a standard authorisation,
  - (b) there are exceptional reasons why it has not yet been possible for that request to be disposed of, and
  - (c) it is essential for the existing detention to continue until the request is disposed of.
- (5) The supervisory body must keep a written record that the request has been made to them.
- (6) In this paragraph and paragraphs 85 and 86—
  - (a) “original authorisation” and “existing detention” have the same meaning as in paragraph 77;
  - (b) the required request for a standard authorisation is the request that is referred to in paragraph 76(2) or (3).

] <sup>190</sup>**[85**

- (1) This paragraph applies if, under paragraph 84, the supervisory body decide to extend the duration of the original authorisation.
- (2) The supervisory body must decide the period of the extension.
- (3) That period must not exceed 7 days.
- (4) The supervisory body must give the managing authority notice stating the period of the extension.
- (5) The managing authority must then vary the original authorisation so that it states the extended duration.
- (6) Paragraphs 82(3) and 83 apply (with the necessary modifications) to the variation of the original authorisation as they apply to the giving of an urgent authorisation.
- (7) The supervisory body must keep a written record of—
  - (a) the outcome of the request, and
  - (b) the period of the extension.

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<sup>189</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>190</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>191</sup>

**[86**

- (1) This paragraph applies if, under paragraph 84, the supervisory body decide not to extend the duration of the original authorisation.
- (2) The supervisory body must give the managing authority notice stating—
  - (a) the decision, and
  - (b) their reasons for making it.
- (3) The managing authority must give a copy of that notice to all of the following—
  - (a) the relevant person;
  - (b) any section 39A IMCA.
- (4) The supervisory body must keep a written record of the outcome of the request.

] <sup>192</sup>

*[No variation]* <sup>193</sup>

**[87**

- (1) An urgent authorisation may not be varied except in accordance with paragraph 85.
- (2) This paragraph does not affect the powers of the Court of Protection or of any other court.

] <sup>194</sup>

*[When an authorisation is in force]* <sup>195</sup>

**[88**

An urgent authorisation comes into force when it is given.

] <sup>196</sup>

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<sup>191</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>192</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>193</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>194</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>195</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>196</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

**[89**

(1) An urgent authorisation ceases to be in force at the end of the period stated in the authorisation in accordance with paragraph 80(c) (subject to any variation in accordance with paragraph 85).

(2) But if the required request is disposed of before the end of that period, the urgent authorisation ceases to be in force as follows.

(3) If the supervisory body are required by paragraph 50(1) to give the requested authorisation, the urgent authorisation ceases to be in force when the requested authorisation comes into force.

(4) If the supervisory body are prohibited by paragraph 50(2) from giving the requested authorisation, the urgent authorisation ceases to be in force when the managing authority receive notice under paragraph 58.

(5) In this paragraph–

“required request” means the request referred to in paragraph 76(2) or (3);

“requested authorisation” means the standard authorisation to which the required request relates.

(6) This paragraph does not affect the powers of the Court of Protection or of any other court.

] <sup>197</sup>

**[90**

(1) This paragraph applies if an urgent authorisation ceases to be in force.

(2) The supervisory body must give notice that the authorisation has ceased to be in force.

(3) The supervisory body must give that notice to all of the following–

(a) the relevant person;

(b) any section 39A IMCA.

(4) The supervisory body must give that notice as soon as practicable after the authorisation ceases to be in force.

] <sup>198</sup>

**[ PART 6****ELIGIBILITY REQUIREMENT NOT MET: SUSPENSION OF STANDARD  
AUTHORISATION**

] <sup>199</sup>

<sup>197</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>198</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>199</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



**[91]**

- (1) This Part applies if the following conditions are met.
- (2) The first condition is that a standard authorisation–
  - (a) has been given, and
  - (b) has not ceased to be in force.
- (3) The second condition is that the managing authority of the relevant hospital or care home are satisfied that the relevant person has ceased to meet the eligibility requirement.
- (4) But this Part does not apply if the relevant person is ineligible by virtue of paragraph 5 of Schedule 1A (in which case see Part 8).

] <sup>200</sup>**[92]**

The managing authority of the relevant hospital or care home must give the supervisory body notice that the relevant person has ceased to meet the eligibility requirement.

] <sup>201</sup>**[93]**

- (1) This paragraph applies if the managing authority give the supervisory body notice under paragraph 92.
- (2) The standard authorisation is suspended from the time when the notice is given.
- (3) The supervisory body must give notice that the standard authorisation has been suspended to the following persons–
  - (a) the relevant person;
  - (b) the relevant person's representative;
  - (c) the managing authority of the relevant hospital or care home.

] <sup>202</sup>**[94]**

- (1) This paragraph applies if, whilst the standard authorisation is suspended, the managing authority are satisfied that the relevant person meets the eligibility requirement again.
- (2) The managing authority must give the supervisory body notice that the relevant person meets the eligibility requirement again.

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<sup>200</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>201</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>202</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>203</sup>**[95**

- (1) This paragraph applies if the managing authority give the supervisory body notice under paragraph 94.
- (2) The standard authorisation ceases to be suspended from the time when the notice is given.
- (3) The supervisory body must give notice that the standard authorisation has ceased to be suspended to the following persons—
  - (a) the relevant person;
  - (b) the relevant person's representative;
  - (c) any section 39D IMCA;
  - (d) the managing authority of the relevant hospital or care home.
- (4) The supervisory body must give notice under this paragraph as soon as practicable after they are given notice under paragraph 94.

] <sup>204</sup>**[96**

- (1) This paragraph applies if no notice is given under paragraph 94 before the end of the relevant 28 day period.
- (2) The standard authorisation ceases to have effect at the end of the relevant 28 day period.
- (3) The relevant 28 day period is the period of 28 days beginning with the day on which the standard authorisation is suspended under paragraph 93.

] <sup>205</sup>**[97**

The effect of suspending the standard authorisation is that Part 1 ceases to apply for as long as the authorisation is suspended.

] <sup>206</sup>

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<sup>203</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>204</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>205</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>206</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

## [ PART 7

**STANDARD AUTHORISATIONS: CHANGE IN SUPERVISORY RESPONSIBILITY**] <sup>207</sup>*[Application of this Part]*<sup>208</sup>**[98**

- (1) This Part applies if these conditions are met.
- (2) The first condition is that a standard authorisation—
  - (a) has been given, and
  - (b) has not ceased to be in force.
- (3) The second condition is that there is a change in supervisory responsibility.
- (4) The third condition is that there is not a change in the place of detention (within the meaning of paragraph 25).

] <sup>209</sup>**[99**

For the purposes of this Part there is a change in supervisory responsibility if—

- (a) one body (“the old supervisory body”) have ceased to be supervisory body in relation to the standard authorisation, and
- (b) a different body (“the new supervisory body”) have become supervisory body in relation to the standard authorisation.

] <sup>210</sup>*[Effect of change in supervisory responsibility]*<sup>211</sup>**[100**

- (1) The new supervisory body becomes the supervisory body in relation to the authorisation.

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<sup>207</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>208</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>209</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>210</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>211</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(2) Anything done by or in relation to the old supervisory body in connection with the authorisation has effect, so far as is necessary for continuing its effect after the change, as if done by or in relation to the new supervisory body.

(3) Anything which relates to the authorisation and which is in the process of being done by or in relation to the old supervisory body at the time of the change may be continued by or in relation to the new supervisory body.

(4) But—

(a) the old supervisory body do not, by virtue of this paragraph, cease to be liable for anything done by them in connection with the authorisation before the change; and

(b) the new supervisory body do not, by virtue of this paragraph, become liable for any such thing.

] <sup>212</sup>

## [ PART 8

### STANDARD AUTHORISATIONS: REVIEW

] <sup>213</sup>

#### *[Application of this Part]*<sup>214</sup>

#### [101

(1) This Part applies if a standard authorisation—

(a) has been given, and

(b) has not ceased to be in force.

(2) Paragraphs 102 to 122 are subject to paragraphs 123 to 125.

] <sup>215</sup>

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<sup>212</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>213</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>214</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>215</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Review by supervisory body]<sup>216</sup>***[102]**

- (1) The supervisory body may at any time carry out a review of the standard authorisation in accordance with this Part.
- (2) The supervisory body must carry out such a review if they are requested to do so by an eligible person.
- (3) Each of the following is an eligible person—
  - (a) the relevant person;
  - (b) the relevant person's representative;
  - (c) the managing authority of the relevant hospital or care home.

] <sup>217</sup>*[Request for review]<sup>218</sup>***[103]**

- (1) An eligible person may, at any time, request the supervisory body to carry out a review of the standard authorisation in accordance with this Part.
- (2) The managing authority of the relevant hospital or care home must make such a request if one or more of the qualifying requirements appear to them to be reviewable.

] <sup>219</sup>*[Grounds for review]<sup>220</sup>***[104]**

- (1) Paragraphs 105 to 107 set out the grounds on which the qualifying requirements are reviewable.
- (2) A qualifying requirement is not reviewable on any other ground.

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<sup>216</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>217</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>218</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>219</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>220</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>221</sup>*[Non-qualification ground]*<sup>222</sup>**[105]**

(1) Any of the following qualifying requirements is reviewable on the ground that the relevant person does not meet the requirement—

- (a) the age requirement;
- (b) the mental health requirement;
- (c) the mental capacity requirement;
- (d) the best interests requirement;
- (e) the no refusals requirement.

(2) The eligibility requirement is reviewable on the ground that the relevant person is ineligible by virtue of paragraph 5 of Schedule 1A.

(3) The ground in sub-paragraph (1) and the ground in sub-paragraph (2) are referred to as the non-qualification ground.

] <sup>223</sup>*[Change of reason ground]*<sup>224</sup>**[106]**

(1) Any of the following qualifying requirements is reviewable on the ground set out in sub-paragraph (2)—

- (a) the mental health requirement;
- (b) the mental capacity requirement;
- (c) the best interests requirement;
- (d) the eligibility requirement;
- (e) the no refusals requirement.

(2) The ground is that the reason why the relevant person meets the requirement is not the reason stated in the standard authorisation.

(3) This ground is referred to as the change of reason ground.

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<sup>221</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>222</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>223</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>224</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>225</sup>*[Variation of conditions ground]*<sup>226</sup>**[107**

- (1) The best interests requirement is reviewable on the ground that—
  - (a) there has been a change in the relevant person's case, and
  - (b) because of that change, it would be appropriate to vary the conditions to which the standard authorisation is subject.
- (2) This ground is referred to as the variation of conditions ground.
- (3) A reference to varying the conditions to which the standard authorisation is subject is a reference to—
  - (a) amendment of an existing condition,
  - (b) omission of an existing condition, or
  - (c) inclusion of a new condition (whether or not there are already any existing conditions).

] <sup>227</sup>*[Notice that review to be carried out]*<sup>228</sup>**[108**

- (1) If the supervisory body are to carry out a review of the standard authorisation, they must give notice of the review to the following persons—
  - (a) the relevant person;
  - (b) the relevant person's representative;
  - (c) the managing authority of the relevant hospital or care home.
- (2) The supervisory body must give the notice—
  - (a) before they begin the review, or
  - (b) if that is not practicable, as soon as practicable after they have begun it.
- (3) This paragraph does not require the supervisory body to give notice to any person who has requested the review.

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<sup>225</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>226</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>227</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>228</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

]<sup>229</sup>

*[Starting a review]<sup>230</sup>*

**[109]**

To start a review of the standard authorisation, the supervisory body must decide which, if any, of the qualifying requirements appear to be reviewable.

]<sup>231</sup>

*[No reviewable qualifying requirements]<sup>232</sup>*

**[110]**

(1) This paragraph applies if no qualifying requirements appear to be reviewable.

(2) This Part does not require the supervisory body to take any action in respect of the standard authorisation.

]<sup>233</sup>

*[One or more reviewable qualifying requirements]<sup>234</sup>*

**[111]**

(1) This paragraph applies if one or more qualifying requirements appear to be reviewable.

(2) The supervisory body must secure that a separate review assessment is carried out in relation to each qualifying requirement which appears to be reviewable.

(3) But sub-paragraph (2) does not require the supervisory body to secure that a best interests review assessment is carried out in a case where the best interests requirement appears to the supervisory body to be non-assessable.

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<sup>229</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>230</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>231</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>232</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>233</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>234</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



- (4) The best interests requirement is non-assessable if–
- (a) the requirement is reviewable only on the variation of conditions ground, and
  - (b) the change in the relevant person's case is not significant.
- (5) In making any decision whether the change in the relevant person's case is significant, regard must be had to–
- (a) the nature of the change, and
  - (b) the period that the change is likely to last for.
- ]<sup>235</sup>

*[Review assessments]*<sup>236</sup>

**[112**

- (1) A review assessment is an assessment of whether the relevant person meets a qualifying requirement.
- (2) In relation to a review assessment–
- (a) a negative conclusion is a conclusion that the relevant person does not meet the qualifying requirement to which the assessment relates;
  - (b) a positive conclusion is a conclusion that the relevant person meets the qualifying requirement to which the assessment relates.
- (3) An age review assessment is a review assessment carried out in relation to the age requirement.
- (4) A mental health review assessment is a review assessment carried out in relation to the mental health requirement.
- (5) A mental capacity review assessment is a review assessment carried out in relation to the mental capacity requirement.
- (6) A best interests review assessment is a review assessment carried out in relation to the best interests requirement.
- (7) An eligibility review assessment is a review assessment carried out in relation to the eligibility requirement.
- (8) A no refusals review assessment is a review assessment carried out in relation to the no refusals requirement.
- ]<sup>237</sup>

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<sup>235</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>236</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>237</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

**[113]**

- (1) In carrying out a review assessment, the assessor must comply with any duties which would be imposed upon him under Part 4 if the assessment were being carried out in connection with a request for a standard authorisation.
- (2) But in the case of a best interests review assessment, paragraphs 43 and 44 do not apply.
- (3) Instead of what is required by paragraph 43, the best interests review assessment must include recommendations about whether — and, if so, how — it would be appropriate to vary the conditions to which the standard authorisation is subject.
- ]<sup>238</sup>

*[Best interests requirement reviewable but non-assessable]*<sup>239</sup>**[114]**

- (1) This paragraph applies in a case where—
- (a) the best interests requirement appears to be reviewable, but
  - (b) in accordance with paragraph 111(3), the supervisory body are not required to secure that a best interests review assessment is carried out.
- (2) The supervisory body may vary the conditions to which the standard authorisation is subject in such ways (if any) as the supervisory body think are appropriate in the circumstances.
- ]<sup>240</sup>

*[Best interests review assessment positive]*<sup>241</sup>**[115]**

- (1) This paragraph applies in a case where—
- (a) a best interests review assessment is carried out, and
  - (b) the assessment comes to a positive conclusion.
- (2) The supervisory body must decide the following questions—
- (a) whether or not the best interests requirement is reviewable on the change of reason ground;

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<sup>238</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>239</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>240</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>241</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

- (b) whether or not the best interests requirement is reviewable on the variation of conditions ground;
  - (c) if so, whether or not the change in the person's case is significant.
- (3) If the supervisory body decide that the best interests requirement is reviewable on the change of reason ground, they must vary the standard authorisation so that it states the reason why the relevant person now meets that requirement.
- (4) If the supervisory body decide that–
- (a) the best interests requirement is reviewable on the variation of conditions ground, and
  - (b) the change in the relevant person's case is not significant,
- they may vary the conditions to which the standard authorisation is subject in such ways (if any) as they think are appropriate in the circumstances.
- (5) If the supervisory body decide that–
- (a) the best interests requirement is reviewable on the variation of conditions ground, and
  - (b) the change in the relevant person's case is significant,
- they must vary the conditions to which the standard authorisation is subject in such ways as they think are appropriate in the circumstances.
- (6) If the supervisory body decide that the best interests requirement is not reviewable on–
- (a) the change of reason ground, or
  - (b) the variation of conditions ground,
- this Part does not require the supervisory body to take any action in respect of the standard authorisation so far as the best interests requirement relates to it.
- ]<sup>242</sup>

*[Mental health, mental capacity, eligibility or no refusals review assessment positive]*<sup>243</sup>

## [116

- (1) This paragraph applies if the following conditions are met.
- (2) The first condition is that one or more of the following are carried out–
- (a) a mental health review assessment;
  - (b) a mental capacity review assessment;
  - (c) an eligibility review assessment;
  - (d) a no refusals review assessment.
- (3) The second condition is that each assessment carried out comes to a positive conclusion.
- (4) The supervisory body must decide whether or not each of the assessed qualifying requirements is reviewable on the change of reason ground.

<sup>242</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>243</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

- (5) If the supervisory body decide that any of the assessed qualifying requirements is reviewable on the change of reason ground, they must vary the standard authorisation so that it states the reason why the relevant person now meets the requirement or requirements in question.
- (6) If the supervisory body decide that none of the assessed qualifying requirements are reviewable on the change of reason ground, this Part does not require the supervisory body to take any action in respect of the standard authorisation so far as those requirements relate to it.
- (7) An assessed qualifying requirement is a qualifying requirement in relation to which a review assessment is carried out.

] <sup>244</sup>

*[One or more review assessments negative]*<sup>245</sup>

**[117**

(1) This paragraph applies if one or more of the review assessments carried out comes to a negative conclusion.

(2) The supervisory body must terminate the standard authorisation with immediate effect.

] <sup>246</sup>

*[Completion of a review]*<sup>247</sup>

**[118**

(1) The review of the standard authorisation is complete in any of the following cases.

(2) The first case is where paragraph 110 applies.

(3) The second case is where—

(a) paragraph 111 applies, and

(b) paragraph 117 requires the supervisory body to terminate the standard authorisation.

(4) In such a case, the supervisory body need not comply with any of the other provisions of paragraphs 114 to 116 which would be applicable to the review (were it not for this sub-paragraph).

(5) The third case is where—

(a) paragraph 111 applies,

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<sup>244</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>245</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>246</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>247</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

- (b) paragraph 117 does not require the supervisory body to terminate the standard authorisation, and
- (c) the supervisory body comply with all of the provisions of paragraphs 114 to 116 (so far as they are applicable to the review).

]<sup>248</sup>

*[Variations under this Part]<sup>249</sup>*

**[119**

Any variation of the standard authorisation made under this Part must be in writing.

]<sup>250</sup>

*[Notice of outcome of review]<sup>251</sup>*

**[120**

(1) When the review of the standard authorisation is complete, the supervisory body must give notice to all of the following—

- (a) the managing authority of the relevant hospital or care home;
- (b) the relevant person;
- (c) the relevant person's representative;
- (d) any section 39D IMCA.

(2) That notice must state—

- (a) the outcome of the review, and
- (b) what variation (if any) has been made to the authorisation under this Part.

]<sup>252</sup>

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<sup>248</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>249</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>250</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>251</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>252</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Records]*<sup>253</sup>**[121]**

A supervisory body must keep a written record of the following information—

- (a) each request for a review that is made to them;
- (b) the outcome of each request;
- (c) each review which they carry out;
- (d) the outcome of each review which they carry out;
- (e) any variation of an authorisation made in consequence of a review.

]

<sup>254</sup>
*[Relationship between review and suspension under Part 6]*<sup>255</sup>**[122]**

- (1) This paragraph applies if a standard authorisation is suspended in accordance with Part 6.
- (2) No review may be requested under this Part whilst the standard authorisation is suspended.
- (3) If a review has already been requested, or is being carried out, when the standard authorisation is suspended, no steps are to be taken in connection with that review whilst the authorisation is suspended.

]

<sup>256</sup>
*[Relationship between review and request for new authorisation]*<sup>257</sup>**[123]**

- (1) This paragraph applies if, in accordance with paragraph 24 (as read with paragraph 29), the managing authority of the relevant hospital or care home make a request for a new standard authorisation which would be in force after the expiry of the existing authorisation.
- (2) No review may be requested under this Part until the request for the new standard authorisation has been disposed of.

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<sup>253</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>254</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>255</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>256</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>257</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(3) If a review has already been requested, or is being carried out, when the new standard authorisation is requested, no steps are to be taken in connection with that review until the request for the new standard authorisation has been disposed of.

] <sup>258</sup>

#### [124

(1) This paragraph applies if–

- (a) a review under this Part has been requested, or is being carried out, and
- (b) the managing authority of the relevant hospital or care home make a request under paragraph 30 for a new standard authorisation which would be in force on or before, and after, the expiry of the existing authorisation.

(2) No steps are to be taken in connection with the review under this Part until the request for the new standard authorisation has been disposed of.

] <sup>259</sup>

#### [125

In paragraphs 123 and 124–

- (a) the existing authorisation is the authorisation referred to in paragraph 101;
- (b) the expiry of the existing authorisation is the time when it is expected to cease to be in force.

] <sup>260</sup>

## [ PART 9

### ASSESSMENTS UNDER THIS SCHEDULE

] <sup>261</sup>

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<sup>258</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>259</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>260</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>261</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Introduction]*<sup>262</sup>**[126]**

This Part contains provision about assessments under this Schedule.

] <sup>263</sup>

**[127]**

An assessment under this Schedule is either of the following—

- (a) an assessment carried out in connection with a request for a standard authorisation under Part 4;
- (b) a review assessment carried out in connection with a review of a standard authorisation under Part 8.

] <sup>264</sup>

**[128]**

In this Part, in relation to an assessment under this Schedule—

“assessor” means the person carrying out the assessment;

“relevant procedure” means—

- (a) the request for the standard authorisation, or
- (b) the review of the standard authorisation;

“supervisory body” means the supervisory body responsible for securing that the assessment is carried out.

] <sup>265</sup>

*[Supervisory body to select assessor]*<sup>266</sup>**[129]**

- (1) It is for the supervisory body to select a person to carry out an assessment under this Schedule.
- (2) The supervisory body must not select a person to carry out an assessment unless the person—
  - (a) appears to the supervisory body to be suitable to carry out the assessment (having regard, in particular, to the type of assessment and the person to be assessed), and
  - (b) is eligible to carry out the assessment.

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<sup>262</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>263</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>264</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>265</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>266</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



(3) Regulations may make provision about the selection, and eligibility, of persons to carry out assessments under this Schedule.

(4) Sub-paragraphs (5) and (6) apply if two or more assessments are to be obtained for the purposes of the relevant procedure.

(5) In a case where the assessments to be obtained include a mental health assessment and a best interests assessment, the supervisory body must not select the same person to carry out both assessments.

(6) Except as prohibited by sub-paragraph (5), the supervisory body may select the same person to carry out any number of the assessments which the person appears to be suitable, and is eligible, to carry out.

]<sup>267</sup>

### [130

(1) This paragraph applies to regulations under paragraph 129(3).

(2) The regulations may make provision relating to a person's—

- (a) qualifications,
- (b) skills,
- (c) training,
- (d) experience,
- (e) relationship to, or connection with, the relevant person or any other person,
- (f) involvement in the care or treatment of the relevant person,
- (g) connection with the supervisory body, or
- (h) connection with the relevant hospital or care home, or with any other establishment or undertaking.

(3) The provision that the regulations may make in relation to a person's training may provide for particular training to be specified by the appropriate authority otherwise than in the regulations.

(4) In sub-paragraph (3) the “appropriate authority” means—

- (a) in relation to England: the Secretary of State;
- (b) in relation to Wales: the National Assembly for Wales.

(5) The regulations may make provision requiring a person to be insured in respect of liabilities that may arise in connection with the carrying out of an assessment.

(6) In relation to cases where two or more assessments are to be obtained for the purposes of the relevant procedure, the regulations may limit the number, kind or combination of assessments which a particular person is eligible to carry out.

(7) Sub-paragraphs (2) to (6) do not limit the generality of the provision that may be made in the regulations.

]<sup>268</sup>

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<sup>267</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>268</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Examination and copying of records]*<sup>269</sup>**[131]**

An assessor may, at all reasonable times, examine and take copies of—

- (a) any health record,
- (b) any record of, or held by, a local authority and compiled in accordance with a social services function, and
- (c) any record held by a person registered under Part 2 of the Care Standards Act 2000,

which the assessor considers may be relevant to the assessment which is being carried out.

] <sup>270</sup>

**Amendments Pending**

Sch. A1(9) para. 131(c): words inserted by Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010/813, art. 17(7)(a) (October 1, 2010)

*[Representations]*<sup>271</sup>**[132]**

In carrying out an assessment under this Schedule, the assessor must take into account any information given, or submissions made, by any of the following—

- (a) the relevant person's representative;
- (b) any section 39A IMCA;
- (c) any section 39C IMCA;
- (d) any section 39D IMCA.

] <sup>272</sup>

<sup>269</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>270</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>271</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>272</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Assessments to stop if any comes to negative conclusion]*<sup>273</sup>**[133]**

- (1) This paragraph applies if an assessment under this Schedule comes to the conclusion that the relevant person does not meet one of the qualifying requirements.
- (2) This Schedule does not require the supervisory body to secure that any other assessments under this Schedule are carried out in relation to the relevant procedure.
- (3) The supervisory body must give notice to any assessor who is carrying out another assessment in connection with the relevant procedure that they are to cease carrying out that assessment.
- (4) If an assessor receives such notice, this Schedule does not require the assessor to continue carrying out that assessment.

] <sup>274</sup>*[Duty to keep records and give copies]*<sup>275</sup>**[134]**

- (1) This paragraph applies if an assessor has carried out an assessment under this Schedule (whatever conclusions the assessment has come to).
- (2) The assessor must keep a written record of the assessment.
- (3) As soon as practicable after carrying out the assessment, the assessor must give copies of the assessment to the supervisory body.

] <sup>276</sup>**[135]**

- (1) This paragraph applies to the supervisory body if they are given a copy of an assessment under this Schedule.
- (2) The supervisory body must give copies of the assessment to all of the following—
  - (a) the managing authority of the relevant hospital or care home;
  - (b) the relevant person;
  - (c) any section 39A IMCA;
  - (d) the relevant person's representative.

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<sup>273</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>274</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>275</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>276</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(3) If–

(a) the assessment is obtained in relation to a request for a standard authorisation, and  
(b) the supervisory body are required by paragraph 50(1) to give the standard authorisation,  
the supervisory body must give the copies of the assessment when they give copies of the authorisation in accordance with paragraph 57.

(4) If–

(a) the assessment is obtained in relation to a request for a standard authorisation, and  
(b) the supervisory body are prohibited by paragraph 50(2) from giving the standard authorisation,  
the supervisory body must give the copies of the assessment when they give notice in accordance with paragraph 58.

(5) If the assessment is obtained in connection with the review of a standard authorisation, the supervisory body must give the copies of the assessment when they give notice in accordance with paragraph 120.

]<sup>277</sup>

### [136

(1) This paragraph applies to the supervisory body if–

- (a) they are given a copy of a best interests assessment, and
- (b) the assessment includes, in accordance with paragraph 44(2), a statement that it appears to the assessor that there is an unauthorised deprivation of liberty.

(2) The supervisory body must notify all of the persons listed in sub-paragraph (3) that the assessment includes such a statement.

(3) Those persons are–

- (a) the managing authority of the relevant hospital or care home;
- (b) the relevant person;
- (c) any section 39A IMCA;
- (d) any interested person consulted by the best interests assessor.

(4) The supervisory body must comply with this paragraph when (or at some time before) they comply with paragraph 135.

]<sup>278</sup>

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<sup>277</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>278</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

**[ PART 10****RELEVANT PERSON'S REPRESENTATIVE**] <sup>279</sup>*[The representative]* <sup>280</sup>**[137**

In this Schedule the relevant person's representative is the person appointed as such in accordance with this Part.

] <sup>281</sup>**[138**

(1) Regulations may make provision about the selection and appointment of representatives.

(2) In this Part such regulations are referred to as “appointment regulations”.

] <sup>282</sup>*[Supervisory body to appoint representative]* <sup>283</sup>**[139**

(1) The supervisory body must appoint a person to be the relevant person's representative as soon as practicable after a standard authorisation is given.

(2) The supervisory body must appoint a person to be the relevant person's representative if a vacancy arises whilst a standard authorisation is in force.

(3) Where a vacancy arises, the appointment under sub-paragraph (2) is to be made as soon as practicable after the supervisory body becomes aware of the vacancy.

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<sup>279</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>280</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>281</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>282</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>283</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

] <sup>284</sup>**[140]**

(1) The selection of a person for appointment under paragraph 139 must not be made unless it appears to the person making the selection that the prospective representative would, if appointed—

- (a) maintain contact with the relevant person,
- (b) represent the relevant person in matters relating to or connected with this Schedule, and
- (c) support the relevant person in matters relating to or connected with this Schedule.

] <sup>285</sup>**[141]**

(1) Any appointment of a representative for a relevant person is in addition to, and does not affect, any appointment of a donee or deputy.

(2) The functions of any representative are in addition to, and do not affect—

- (a) the authority of any donee,
- (b) the powers of any deputy, or
- (c) any powers of the court.

] <sup>286</sup>*[Appointment regulations]* <sup>287</sup>**[142]**

Appointment regulations may provide that the procedure for appointing a representative may begin at any time after a request for a standard authorisation is made (including a time before the request has been disposed of).

] <sup>288</sup>**[143]**

(1) Appointment regulations may make provision about who is to select a person for appointment as a representative.

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<sup>284</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>285</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>286</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>287</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>288</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

- (2) But regulations under this paragraph may only provide for the following to make a selection—
- (a) the relevant person, if he has capacity in relation to the question of which person should be his representative;
  - (b) a donee of a lasting power of attorney granted by the relevant person, if it is within the scope of his authority to select a person;
  - (c) a deputy, if it is within the scope of his authority to select a person;
  - (d) a best interests assessor;
  - (e) the supervisory body.
- (3) Regulations under this paragraph may provide that a selection by the relevant person, a donee or a deputy is subject to approval by a best interests assessor or the supervisory body.
- (4) Regulations under this paragraph may provide that, if more than one selection is necessary in connection with the appointment of a particular representative—
- (a) the same person may make more than one selection;
  - (b) different persons may make different selections.
- (5) For the purposes of this paragraph a best interests assessor is a person carrying out a best interests assessment in connection with the standard authorisation in question (including the giving of that authorisation).

]<sup>289</sup>

#### [144

- (1) Appointment regulations may make provision about who may, or may not, be—
- (a) selected for appointment as a representative, or
  - (b) appointed as a representative.
- (2) Regulations under this paragraph may relate to any of the following matters—
- (a) a person's age;
  - (b) a person's suitability;
  - (c) a person's independence;
  - (d) a person's willingness;
  - (e) a person's qualifications.

]<sup>290</sup>

#### [145

Appointment regulations may make provision about the formalities of appointing a person as a representative.

]<sup>291</sup>

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<sup>289</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>290</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>291</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

**[146]**

In a case where a best interests assessor is to select a person to be appointed as a representative, appointment regulations may provide for the variation of the assessor's duties in relation to the assessment which he is carrying out.

] <sup>292</sup>

*[Monitoring of representatives]*<sup>293</sup>

**[147]**

Regulations may make provision requiring the managing authority of the relevant hospital or care home to—

- (a) monitor, and
- (b) report to the supervisory body on,

the extent to which a representative is maintaining contact with the relevant person.

] <sup>294</sup>

*[Termination]*<sup>295</sup>

**[148]**

Regulations may make provision about the circumstances in which the appointment of a person as the relevant person's representative ends or may be ended.

] <sup>296</sup>

**[149]**

Regulations may make provision about the formalities of ending the appointment of a person as a representative.

] <sup>297</sup>

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<sup>292</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>293</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>294</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>295</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>296</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>297</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



*[Suspension of representative's functions]<sup>298</sup>***[150**

(1) Regulations may make provision about the circumstances in which functions exercisable by, or in relation to, the relevant person's representative (whether under this Schedule or not) may be—

- (a) suspended, and
- (b) if suspended, revived.

(2) The regulations may make provision about the formalities for giving effect to the suspension or revival of a function.

(3) The regulations may make provision about the effect of the suspension or revival of a function.

]

*[Payment of representative]<sup>300</sup>***[151**

Regulations may make provision for payments to be made to, or in relation to, persons exercising functions as the relevant person's representative.

]

*[Regulations under this Part]<sup>302</sup>***[152**

The provisions of this Part which specify provision that may be made in regulations under this Part do not affect the generality of the power to make such regulations.

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<sup>298</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>299</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>300</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>301</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>302</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>303</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Effect of appointment of section 39C IMCA]<sup>304</sup>***[153**

Paragraphs 159 and 160 make provision about the exercise of functions by, or towards, the relevant person's representative during periods when—

(a) no person is appointed as the relevant person's representative, but

(b) a person is appointed as a section 39C IMCA.

]

<sup>305</sup>
**[ PART 11****IMCAS**

]

<sup>306</sup>
*[Application of Part]<sup>307</sup>***[154**

This Part applies for the purposes of this Schedule.

]

<sup>308</sup>
*[The IMCAs]<sup>309</sup>***[155**

A section 39A IMCA is an independent mental capacity advocate appointed under section 39A.

]

<sup>310</sup>


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<sup>304</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>305</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>306</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>307</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>308</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>309</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>310</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

**[156]**

A section 39C IMCA is an independent mental capacity advocate appointed under section 39C.  
 ]<sup>311</sup>

**[157]**

A section 39D IMCA is an independent mental capacity advocate appointed under section 39D.  
 ]<sup>312</sup>

**[158]**

An IMCA is a section 39A IMCA or a section 39C IMCA or a section 39D IMCA.  
 ]<sup>313</sup>

*[Section 39C IMCA: functions]*<sup>314</sup>

**[159]**

- (1) This paragraph applies if, and for as long as, there is a section 39C IMCA.
- (2) In the application of the relevant provisions, references to the relevant person's representative are to be read as references to the section 39C IMCA.
- (3) But sub-paragraph (2) does not apply to any function under the relevant provisions for as long as the function is suspended in accordance with provision made under Part 10.
- (4) In this paragraph and paragraph 160 the relevant provisions are—
  - (a) paragraph 102(3)(b) (request for review under Part 8);
  - (b) paragraph 108(1)(b) (notice of review under Part 8);
  - (c) paragraph 120(1)(c) (notice of outcome of review under Part 8).

] <sup>315</sup>

**[160]**

- (1) This paragraph applies if—
  - (a) a person is appointed as the relevant person's representative, and
  - (b) a person accordingly ceases to hold an appointment as a section 39C IMCA.

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<sup>311</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>312</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>313</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>314</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>315</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(2) Where a function under a relevant provision has been exercised by, or towards, the section 39C IMCA, there is no requirement for that function to be exercised again by, or towards, the relevant person's representative.

]<sup>316</sup>

*[Section 39A IMCA: restriction of functions]*<sup>317</sup>

**[161**

(1) This paragraph applies if–

(a) there is a section 39A IMCA, and

(b) a person is appointed under Part 10 to be the relevant person's representative (whether or not that person, or any person subsequently appointed, is currently the relevant person's representative).

(2) The duties imposed on, and the powers exercisable by, the section 39A IMCA do not apply.

(3) The duties imposed on, and the powers exercisable by, any other person do not apply, so far as they fall to be performed or exercised towards the section 39A IMCA.

(4) But sub-paragraph (2) does not apply to any power of challenge exercisable by the section 39A IMCA.

(5) And sub-paragraph (3) does not apply to any duty or power of any other person so far as it relates to any power of challenge exercisable by the section 39A IMCA.

(6) Before exercising any power of challenge, the section 39A IMCA must take the views of the relevant person's representative into account.

(7) A power of challenge is a power to make an application to the court to exercise its jurisdiction under section 21A in connection with the giving of the standard authorisation.

]<sup>318</sup>

**[ PART 12**

**MISCELLANEOUS**

]<sup>319</sup>

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<sup>316</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>317</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>318</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>319</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Monitoring of operation of Schedule]*<sup>320</sup>**[162]**

- (1) Regulations may make provision for, and in connection with, requiring one or more prescribed bodies to monitor, and report on, the operation of this Schedule in relation to England.
- (2) The regulations may, in particular, give a prescribed body authority to do one or more of the following things—
- (a) to visit hospitals and care homes;
  - (b) to visit and interview persons accommodated in hospitals and care homes;
  - (c) to require the production of, and to inspect, records relating to the care or treatment of persons.
- (3) “Prescribed” means prescribed in regulations under this paragraph.

] <sup>321</sup>**[163]**

- (1) Regulations may make provision for, and in connection with, enabling the National Assembly for Wales to monitor, and report on, the operation of this Schedule in relation to Wales.
- (2) The National Assembly may direct one or more persons or bodies to carry out the Assembly's functions under regulations under this paragraph.

] <sup>322</sup>*[Disclosure of information]*<sup>323</sup>**[164]**

- (1) Regulations may require either or both of the following to disclose prescribed information to prescribed bodies—
- (a) supervisory bodies;
  - (b) managing authorities of hospitals or care homes.
- (2) “Prescribed” means prescribed in regulations under this paragraph.
- (3) Regulations under this paragraph may only prescribe information relating to matters with which this Schedule is concerned.

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<sup>320</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>321</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>322</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>323</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

]<sup>324</sup>

*[Directions by National Assembly in relation to supervisory functions]*<sup>325</sup>

**[165**

- (1) The National Assembly for Wales may direct a Local Health Board to exercise in relation to its area any supervisory functions which are specified in the direction.
- (2) Directions under this paragraph must not preclude the National Assembly from exercising the functions specified in the directions.
- (3) In this paragraph “supervisory functions” means functions which the National Assembly have as supervisory body, so far as they are exercisable in relation to hospitals (whether NHS or independent hospitals, and whether in Wales or England).

]<sup>326</sup>

**[166**

- (1) This paragraph applies where, under paragraph 165, a Local Health Board (“the specified LHB”) is directed to exercise supervisory functions (“delegated functions”).
- (2) The National Assembly for Wales may give directions to the specified LHB about the Board's exercise of delegated functions.
- (3) The National Assembly may give directions for any delegated functions to be exercised, on behalf of the specified LHB, by a committee, sub-committee or officer of that Board.
- (4) The National Assembly may give directions providing for any delegated functions to be exercised by the specified LHB jointly with one or more other Local Health Boards.
- (5) Where, under sub-paragraph (4), delegated functions are exercisable jointly, the National Assembly may give directions providing for the functions to be exercised, on behalf of the Local Health Boards in question, by a joint committee or joint sub-committee.

]<sup>327</sup>

**[167**

- (1) Directions under paragraph 165 must be given in regulations.
- (2) Directions under paragraph 166 may be given—

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<sup>324</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>325</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>326</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>327</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

- (a) in regulations, or
- (b) by instrument in writing.

]<sup>328</sup>

### [168

The power under paragraph 165 or paragraph 166 to give directions includes power to vary or revoke directions given under that paragraph.

]<sup>329</sup>

### *[Notices]*<sup>330</sup>

### [169

Any notice under this Schedule must be in writing.

]<sup>331</sup>

### *[Regulations]*<sup>332</sup>

### [170

(1) This paragraph applies to all regulations under this Schedule, except regulations under paragraph 162, 163, 167 or 183.

(2) It is for the Secretary of State to make such regulations in relation to authorisations under this Schedule which relate to hospitals and care homes situated in England.

(3) It is for the National Assembly for Wales to make such regulations in relation to authorisations under this Schedule which relate to hospitals and care homes situated in Wales.

]<sup>333</sup>

### [171

It is for the Secretary of State to make regulations under paragraph 162.

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<sup>328</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>329</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>330</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>331</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>332</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>333</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

]

<sup>334</sup>

**[172**

It is for the National Assembly for Wales to make regulations under paragraph 163 or 167.

]

<sup>335</sup>

**[173**

(1) This paragraph applies to regulations under paragraph 183.

(2) It is for the Secretary of State to make such regulations in relation to cases where a question as to the ordinary residence of a person is to be determined by the Secretary of State.

(3) It is for the National Assembly for Wales to make such regulations in relation to cases where a question as to the ordinary residence of a person is to be determined by the National Assembly.

]

<sup>336</sup>

**[ PART 13**

**INTERPRETATION**

]

<sup>337</sup>

*[Introduction]*<sup>338</sup>

**[174**

This Part applies for the purposes of this Schedule.

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<sup>339</sup>


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<sup>334</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>335</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>336</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>337</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>338</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>339</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



*[Hospitals and their managing authorities]*<sup>340</sup>**[175]**

- (1) “Hospital” means—
- (a) an NHS hospital, or
  - (b) an independent hospital.
- (2) “NHS hospital” means—
- (a) a health service hospital as defined by section 275 of the National Health Service Act 2006 or section 206 of the National Health Service (Wales) Act 2006, or
  - (b) a hospital as defined by section 206 of the National Health Service (Wales) Act 2006 vested in a Local Health Board.
- (3) “Independent hospital” means a hospital as defined by section 2 of the Care Standards Act 2000 which is not an NHS hospital.

]

<sup>341</sup>
**Amendments Pending**

Sch. A1(13) para. 175(3): substituted by Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010/813, art. 17(7)(b)(i) (October 1, 2010)

**[176]**

- (1) “Managing authority”, in relation to an NHS hospital, means—
- (a) if the hospital—
    - (i) is vested in the appropriate national authority for the purposes of its functions under the National Health Service Act 2006 or of the National Health Service (Wales) Act 2006, or
    - (ii) consists of any accommodation provided by a local authority and used as a hospital by or on behalf of the appropriate national authority under either of those Acts,
 the Primary Care Trust, Strategic Health Authority, Local Health Board or Special Health Authority responsible for the administration of the hospital;
  - (b) if the hospital is vested in a Primary Care Trust, National Health Service trust or NHS foundation trust, that trust;
  - (c) if the hospital is vested in a Local Health Board, that Board.
- (2) For this purpose the appropriate national authority is—
- (a) in relation to England: the Secretary of State;
  - (b) in relation to Wales: the National Assembly for Wales;

<sup>340</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>341</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(c) in relation to England and Wales: the Secretary of State and the National Assembly acting jointly.

] <sup>342</sup>

**[177**

“Managing authority”, in relation to an independent hospital, means the person registered, or required to be registered, under Part 2 of the Care Standards Act 2000 in respect of the hospital.

] <sup>343</sup>

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**Amendments Pending**

Sch. A1(13) para. 177: substituted by Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010/813, art. 17(7)(b)(ii) (October 1, 2010)

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*[Care homes and their managing authorities]*<sup>344</sup>

**[178**

“Care home” has the meaning given by section 3 of the Care Standards Act 2000.

] <sup>345</sup>

**[179**

“Managing authority”, in relation to a care home, means the person registered, or required to be registered, under Part 2 of the Care Standards Act 2000 in respect of the care home.

] <sup>346</sup>

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<sup>342</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>343</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>344</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>345</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>346</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

**Amendments Pending**

Sch. A1(13) para. 179: substituted by Health and Social Care Act 2008 (Consequential Amendments No.2) Order 2010/813, art. 17(7)(b)(iii) (October 1, 2010)

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*[Supervisory bodies: hospitals]*<sup>347</sup>

**[180**

(1) The identity of the supervisory body is determined under this paragraph in cases where the relevant hospital is situated in England.

(2) If a Primary Care Trust commissions the relevant care or treatment, that Trust is the supervisory body.

(3) If the National Assembly for Wales or a Local Health Board commission the relevant care or treatment, the National Assembly are the supervisory body.

(4) In any other case, the supervisory body are the Primary Care Trust for the area in which the relevant hospital is situated.

(5) If a hospital is situated in the areas of two (or more) Primary Care Trusts, it is to be regarded for the purposes of sub-paragraph (4) as situated in whichever of the areas the greater (or greatest) part of the hospital is situated.

]

**[181**

(1) The identity of the supervisory body is determined under this paragraph in cases where the relevant hospital is situated in Wales.

(2) The National Assembly for Wales are the supervisory body.

(3) But if a Primary Care Trust commissions the relevant care or treatment, that Trust is the supervisory body.

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<sup>347</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>348</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>349</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

*[Supervisory bodies: care homes]*<sup>350</sup>

**[182**

- (1) The identity of the supervisory body is determined under this paragraph in cases where the relevant care home is situated in England or in Wales.
- (2) The supervisory body are the local authority for the area in which the relevant person is ordinarily resident.
- (3) But if the relevant person is not ordinarily resident in the area of a local authority, the supervisory body are the local authority for the area in which the care home is situated.
- (4) In relation to England “local authority” means—
  - (a) the council of a county;
  - (b) the council of a district for which there is no county council;
  - (c) the council of a London borough;
  - (d) the Common Council of the City of London;
  - (e) the Council of the Isles of Scilly.
- (5) In relation to Wales “local authority” means the council of a county or county borough.
- (6) If a care home is situated in the areas of two (or more) local authorities, it is to be regarded for the purposes of sub-paragraph (3) as situated in whichever of the areas the greater (or greatest) part of the care home is situated.

]

**[183**

- (1) Subsections (5) and (6) of section 24 of the National Assistance Act 1948 (deemed place of ordinary residence) apply to any determination of where a person is ordinarily resident for the purposes of paragraph 182 as those subsections apply to such a determination for the purposes specified in those subsections.
- (2) In the application of section 24(6) of the 1948 Act by virtue of sub-paragraph (1), section 24(6) is to be read as if it referred to a hospital vested in a Local Health Board as well as to hospitals vested in the Secretary of State and the other bodies mentioned in section 24(6).
- (3) Any question arising as to the ordinary residence of a person is to be determined by the Secretary of State or by the National Assembly for Wales.
- (4) The Secretary of State and the National Assembly must make and publish arrangements for determining which cases are to be dealt with by the Secretary of State and which are to be dealt with by the National Assembly.
- (5) Those arrangements may include provision for the Secretary of State and the National Assembly to agree, in relation to any question that has arisen, which of them is to deal with the case.

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<sup>350</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>351</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

(6) Regulations may make provision about arrangements that are to have effect before, upon, or after the determination of any question as to the ordinary residence of a person.

(7) The regulations may, in particular, authorise or require a local authority to do any or all of the following things—

- (a) to act as supervisory body even though it may wish to dispute that it is the supervisory body;
- (b) to become the supervisory body in place of another local authority;
- (c) to recover from another local authority expenditure incurred in exercising functions as the supervisory body.

]<sup>352</sup>

*[Same body managing authority and supervisory body]*<sup>353</sup>

#### [184

(1) This paragraph applies if, in connection with a particular person's detention as a resident in a hospital or care home, the same body are both—

- (a) the managing authority of the relevant hospital or care home, and
- (b) the supervisory body.

(2) 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.

(3) But, in such a case, this Schedule has effect subject to any modifications contained in regulations that may be made for this purpose.

]<sup>354</sup>

*[Interested persons]*<sup>355</sup>

#### [185

Each of the following is an interested person—

- (a) the relevant person's spouse or civil partner;
- (b) where the relevant person and another person of the opposite sex are not married to each other but are living together as husband and wife: the other person;
- (c) where the relevant person and another person of the same sex are not civil partners of each other but are living together as if they were civil partners: the other person;

<sup>352</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>353</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>354</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>355</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

- (d) the relevant person's children and step-children;
- (e) the relevant person's parents and step-parents;
- (f) the relevant person's brothers and sisters, half-brothers and half-sisters, and stepbrothers and stepsisters;
- (g) the relevant person's grandparents;
- (h) a deputy appointed for the relevant person by the court;
- (i) a donee of a lasting power of attorney granted by the relevant person.

]<sup>356</sup>

## [186

(1) An interested person consulted by the best interests assessor is any person whose name is stated in the relevant best interests assessment in accordance with paragraph 40 (interested persons whom the assessor consulted in carrying out the assessment).

(2) The relevant best interests assessment is the most recent best interests assessment carried out in connection with the standard authorisation in question (whether the assessment was carried out under Part 4 or Part 8).

]<sup>357</sup>

## [187

Where this Schedule imposes on a person a duty towards an interested person, the duty does not apply if the person on whom the duty is imposed—

- (a) is not aware of the interested person's identity or of a way of contacting him, and
- (b) cannot reasonably ascertain it.

]<sup>358</sup>

## [188

The following table contains an index of provisions defining or otherwise explaining expressions used in this Schedule—

age assessment	paragraph 34
age requirement	paragraph 13
age review assessment	paragraph 112(3)
appointment regulations	paragraph 138
assessment under this Schedule	paragraph 127
assessor (except in Part 9)	paragraph 33
assessor (in Part 9)	paragraphs 33 and 128
authorisation under this Schedule	paragraph 10

<sup>356</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>357</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

<sup>358</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)

best interests (determination of)	section 4
best interests assessment	paragraph 38
best interests requirement	paragraph 16
best interests review assessment	paragraph 112(6)
care home	paragraph 178
change of reason ground	paragraph 106
complete (in relation to a review of a standard authorisation)	paragraph 118
deprivation of a person's liberty	section 64(5) and (6)
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disposed of (in relation to a request for a standard authorisation)	paragraph 66
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eligible person (in relation to paragraphs 68 to 73)	paragraph 68
eligible person (in relation to Part 8)	paragraph 102(3)
expiry (in relation to an existing authorisation)	paragraph 125(b)
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managing authority (in relation to a care home)	paragraph 179
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maximum authorisation period	paragraph 42
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mental health assessment	paragraph 35
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relevant person's representative	paragraph 137
relevant procedure	paragraph 128
review assessment	paragraph 112(1)
reviewable	paragraph 104
section 39A IMCA	paragraph 155
section 39C IMCA	paragraph 156
section 39D IMCA	paragraph 157
standard authorisation	paragraph 8
supervisory body (except in Part 9)	paragraph 180, 181 or 182
supervisory body (in Part 9)	paragraph 128 and paragraph 180, 181 or 182
unauthorised deprivation of liberty (in relation to paragraphs 68 to 73)	paragraph 67
urgent authorisation	paragraph 9
variation of conditions ground	paragraph 107

<sup>359</sup>

## SCHEDULE 1

### LASTING POWERS OF ATTORNEY: FORMALITIES

#### Section 9

#### PART 1

#### MAKING INSTRUMENTS

##### 1 General requirements as to making instruments

- (1) An instrument is not made in accordance with this Schedule unless—
- (a) it is in the prescribed form,

<sup>359</sup> Added by Mental Health Act 2007 c. 12 Sch.7 para.1 (April 1, 2008: insertion has effect on April 1, 2008 for the purpose of making regulations; April 1, 2008 for the purpose specified in SI 2008/745 art.4(a); April 1, 2009 otherwise subject to transitional provisions specified in SI 2009/139 Sch.1 paras 3-4)



- (b) it complies with paragraph 2, and
  - (c) any prescribed requirements in connection with its execution are satisfied.
- (2) Regulations may make different provision according to whether–
- (a) the instrument relates to personal welfare or to property and affairs (or to both);
  - (b) only one or more than one donee is to be appointed (and if more than one, whether jointly or jointly and severally).
- (3) In this Schedule–
- (a) “prescribed” means prescribed by regulations, and
  - (b) “regulations” means regulations made for the purposes of this Schedule by the Lord Chancellor.

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### Commencement

Sch. 1(1) para. 1(1)-(3)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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## 2 Requirements as to content of instruments

- (1) The instrument must include–
- (a) the prescribed information about the purpose of the instrument and the effect of a lasting power of attorney,
  - (b) a statement by the donor to the effect that he–
    - (i) has read the prescribed information or a prescribed part of it (or has had it read to him), and
    - (ii) intends the authority conferred under the instrument to include authority to make decisions on his behalf in circumstances where he no longer has capacity,
  - (c) a statement by the donor–
    - (i) naming a person or persons whom the donor wishes to be notified of any application for the registration of the instrument, or
    - (ii) stating that there are no persons whom he wishes to be notified of any such application,
  - (d) a statement by the donee (or, if more than one, each of them) to the effect that he–
    - (i) has read the prescribed information or a prescribed part of it (or has had it read to him), and
    - (ii) understands the duties imposed on a donee of a lasting power of attorney under sections 1 (the principles) and 4 (best interests), and
  - (e) a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument–
    - (i) the donor understands the purpose of the instrument and the scope of the authority conferred under it,
    - (ii) no fraud or undue pressure is being used to induce the donor to create a lasting power of attorney, and
    - (iii) there is nothing else which would prevent a lasting power of attorney from being created by the instrument.
- (2) Regulations may–
- (a) prescribe a maximum number of named persons;

- (b) provide that, where the instrument includes a statement under sub-paragraph (1)(c)(ii), two persons of a prescribed description must each give a certificate under sub-paragraph (1)(e).
- (3) The persons who may be named persons do not include a person who is appointed as donee under the instrument.
- (4) In this Schedule, “named person” means a person named under sub-paragraph (1)(c).
- (5) A certificate under sub-paragraph (1)(e)–
- (a) must be made in the prescribed form, and
  - (b) must include any prescribed information.
- (6) The certificate may not be given by a person appointed as donee under the instrument.

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**Commencement**

Sch. 1(1) para. 2(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**3 Failure to comply with prescribed form**

- (1) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form, it is to be treated by the Public Guardian as sufficient in point of form and expression.
- (2) The court may declare that an instrument which is not in the prescribed form is to be treated as if it were, if it is satisfied that the persons executing the instrument intended it to create a lasting power of attorney.

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**Commencement**

Sch. 1(1) para. 3(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 2****REGISTRATION***Applications and procedure for registration***4**

- (1) An application to the Public Guardian for the registration of an instrument intended to create a lasting power of attorney–
- (a) must be made in the prescribed form, and
  - (b) must include any prescribed information.
- (2) The application may be made–
- (a) by the donor,
  - (b) by the donee or donees, or
  - (c) if the instrument appoints two or more donees to act jointly and severally in respect of any matter, by any of the donees.

- (3) The application must be accompanied by–
- (a) the instrument, and
  - (b) any fee provided for under section 58(4)(b).
- (4) A person who, in an application for registration, makes a statement which he knows to be false in a material particular is guilty of an offence and is liable–
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.

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**Commencement**

Sch. 1(2) para. 4(1)-(4)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**5**

Subject to paragraphs 11 to 14, the Public Guardian must register the instrument as a lasting power of attorney at the end of the prescribed period.

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**Commencement**

Sch. 1(2) para. 5: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Notification requirements*

**6**

- (1) A donor about to make an application under paragraph 4(2)(a) must notify any named persons that he is about to do so.
- (2) The donee (or donees) about to make an application under paragraph 4(2)(b) or (c) must notify any named persons that he is (or they are) about to do so.

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**Commencement**

Sch. 1(2) para. 6(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**7**

As soon as is practicable after receiving an application by the donor under paragraph 4(2)(a), the Public Guardian must notify the donee (or donees) that the application has been received.

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**Commencement**

Sch. 1(2) para. 7: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**8**

- (1) As soon as is practicable after receiving an application by a donee (or donees) under paragraph 4(2)(b), the Public Guardian must notify the donor that the application has been received.

(2) As soon as is practicable after receiving an application by a donee under paragraph 4(2)(c), the Public Guardian must notify—

- (a) the donor, and
- (b) the donee or donees who did not join in making the application,

that the application has been received.

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**Commencement**

Sch. 1(2) para. 8(1)-(2)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**9**

(1) A notice under paragraph 6 must be made in the prescribed form.

(2) A notice under paragraph 6, 7 or 8 must include such information, if any, as may be prescribed.

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**Commencement**

Sch. 1(2) para. 9(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Power to dispense with notification requirements*

**10**

The court may—

- (a) on the application of the donor, dispense with the requirement to notify under paragraph 6(1), or
- (b) on the application of the donee or donees concerned, dispense with the requirement to notify under paragraph 6(2),

if satisfied that no useful purpose would be served by giving the notice.

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**Commencement**

Sch. 1(2) para. 10(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Instrument not made properly or containing ineffective provision*

**11**

(1) If it appears to the Public Guardian that an instrument accompanying an application under paragraph 4 is not made in accordance with this Schedule, he must not register the instrument unless the court directs him to do so.

(2) Sub-paragraph (3) applies if it appears to the Public Guardian that the instrument contains a provision which—

- (a) would be ineffective as part of a lasting power of attorney, or
- (b) would prevent the instrument from operating as a valid lasting power of attorney.

(3) The Public Guardian—

- (a) must apply to the court for it to determine the matter under section 23(1), and
- (b) pending the determination by the court, must not register the instrument.

- (4) Sub-paragraph (5) applies if the court determines under section 23(1) (whether or not on an application by the Public Guardian) that the instrument contains a provision which–
- (a) would be ineffective as part of a lasting power of attorney, or
  - (b) would prevent the instrument from operating as a valid lasting power of attorney.
- (5) The court must–
- (a) notify the Public Guardian that it has severed the provision, or
  - (b) direct him not to register the instrument.
- (6) Where the court notifies the Public Guardian that it has severed a provision, he must register the instrument with a note to that effect attached to it.

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**Commencement**

Sch. 1(2) para. 11(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Deputy already appointed*

**12**

- (1) Sub-paragraph (2) applies if it appears to the Public Guardian that–
- (a) there is a deputy appointed by the court for the donor, and
  - (b) the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney.
- (2) The Public Guardian must not register the instrument unless the court directs him to do so.

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**Commencement**

Sch. 1(2) para. 12(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Objection by donee or named person*

**13**

- (1) Sub-paragraph (2) applies if a donee or a named person–
- (a) receives a notice under paragraph 6, 7 or 8 of an application for the registration of an instrument, and
  - (b) before the end of the prescribed period, gives notice to the Public Guardian of an objection to the registration on the ground that an event mentioned in section 13(3) or (6)(a) to (d) has occurred which has revoked the instrument.
- (2) If the Public Guardian is satisfied that the ground for making the objection is established, he must not register the instrument unless the court, on the application of the person applying for the registration–
- (a) is satisfied that the ground is not established, and
  - (b) directs the Public Guardian to register the instrument.
- (3) Sub-paragraph (4) applies if a donee or a named person–
- (a) receives a notice under paragraph 6, 7 or 8 of an application for the registration of an instrument, and

- (b) before the end of the prescribed period—
  - (i) makes an application to the court objecting to the registration on a prescribed ground, and
  - (ii) notifies the Public Guardian of the application.
- (4) The Public Guardian must not register the instrument unless the court directs him to do so.

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**Commencement**

Sch. 1(2) para. 13(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Objection by donor*

**14**

- (1) This paragraph applies if the donor—
  - (a) receives a notice under paragraph 8 of an application for the registration of an instrument, and
  - (b) before the end of the prescribed period, gives notice to the Public Guardian of an objection to the registration.
- (2) The Public Guardian must not register the instrument unless the court, on the application of the donee or, if more than one, any of them—
  - (a) is satisfied that the donor lacks capacity to object to the registration, and
  - (b) directs the Public Guardian to register the instrument.

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**Commencement**

Sch. 1(2) para. 14(1)-(2)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Notification of registration*

**15**

- Where an instrument is registered under this Schedule, the Public Guardian must give notice of the fact in the prescribed form to—
- (a) the donor, and
  - (b) the donee or, if more than one, each of them.

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**Commencement**

Sch. 1(2) para. 15(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Evidence of registration*

**16**

- (1) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of—
  - (a) the contents of the instrument, and

- (b) the fact that it has been registered.
- (2) Sub-paragraph (1) is without prejudice to—
- (a) section 3 of the Powers of Attorney Act 1971 (c. 27) (proof by certified copy), and
  - (b) any other method of proof authorised by law.

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**Commencement**

Sch. 1(2) para. 16(1)-(2)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### **PART 3**

#### **CANCELLATION OF REGISTRATION AND NOTIFICATION OF SEVERANCE**

#### **17**

- (1) The Public Guardian must cancel the registration of an instrument as a lasting power of attorney on being satisfied that the power has been revoked—
- (a) as a result of the donor's bankruptcy, or
  - (b) on the occurrence of an event mentioned in section 13(6)(a) to (d).
- (2) If the Public Guardian cancels the registration of an instrument he must notify—
- (a) the donor, and
  - (b) the donee or, if more than one, each of them.

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**Commencement**

Sch. 1(3) para. 17(1)-(2)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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#### **18**

- The court must direct the Public Guardian to cancel the registration of an instrument as a lasting power of attorney if it—
- (a) determines under section 22(2)(a) that a requirement for creating the power was not met,
  - (b) determines under section 22(2)(b) that the power has been revoked or has otherwise come to an end, or
  - (c) revokes the power under section 22(4)(b) (fraud etc.).

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**Commencement**

Sch. 1(3) para. 18(a)-(c): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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#### **19**

- (1) Sub-paragraph (2) applies if the court determines under section 23(1) that a lasting power of attorney contains a provision which—
- (a) is ineffective as part of a lasting power of attorney, or
  - (b) prevents the instrument from operating as a valid lasting power of attorney.
- (2) The court must—
- (a) notify the Public Guardian that it has severed the provision, or

- (b) direct him to cancel the registration of the instrument as a lasting power of attorney.

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**Commencement**

Sch. 1(3) para. 19(1)-(2)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**20**

On the cancellation of the registration of an instrument, the instrument and any office copies of it must be delivered up to the Public Guardian to be cancelled.

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**Commencement**

Sch. 1(3) para. 20: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 4**

**RECORDS OF ALTERATIONS IN REGISTERED POWERS**

**21 Partial revocation or suspension of power as a result of bankruptcy**

If in the case of a registered instrument it appears to the Public Guardian that under section 13 a lasting power of attorney is revoked, or suspended, in relation to the donor's property and affairs (but not in relation to other matters), the Public Guardian must attach to the instrument a note to that effect.

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**Commencement**

Sch. 1(4) para. 21: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**22 Termination of appointment of donee which does not revoke power**

If in the case of a registered instrument it appears to the Public Guardian that an event has occurred—

- (a) which has terminated the appointment of the donee, but
- (b) which has not revoked the instrument,

the Public Guardian must attach to the instrument a note to that effect.

---

**Commencement**

Sch. 1(4) para. 22(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

---

**23 Replacement of donee**

If in the case of a registered instrument it appears to the Public Guardian that the donee has been replaced under the terms of the instrument the Public Guardian must attach to the instrument a note to that effect.

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**Commencement**

Sch. 1(4) para. 23: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**24 Severance of ineffective provisions**

If in the case of a registered instrument the court notifies the Public Guardian under paragraph 19(2)(a) that it has severed a provision of the instrument, the Public Guardian must attach to it a note to that effect.

**Commencement**

Sch. 1(4) para. 24: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**25 Notification of alterations**

If the Public Guardian attaches a note to an instrument under paragraph 21, 22, 23 or 24 he must give notice of the note to the donee or donees of the power (or, as the case may be, to the other donee or donees of the power).

**Commencement**

Sch. 1(4) para. 25: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**[SCHEDULE 1A****PERSONS INELIGIBLE TO BE DEPRIVED OF LIBERTY BY THIS ACT**

] <sup>360</sup>

**[ PART 1****INELIGIBLE PERSONS**

] <sup>361</sup>

**[1 Application**

This Schedule applies for the purposes of—

- (a) section 16A, and
- (b) paragraph 17 of Schedule A1.

] <sup>362</sup>

**[2 Determining ineligibility**

A person (“P”) is ineligible to be deprived of liberty by this Act (“ineligible”) if—

- (a) P falls within one of the cases set out in the second column of the following table, and

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<sup>360</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>361</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>362</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

(b) the corresponding entry in the third column of the table — or the provision, or one of the provisions, referred to in that entry — provides that he is ineligible.

	<i>Status of P</i>	<i>Determination of ineligibility</i>
<i>Case A</i>	P is— (a) subject to the hospital treatment regime, and (b) detained in a hospital under that regime.	P is ineligible.
<i>Case B</i>	P is— (a) subject to the hospital treatment regime, but (b) not detained in a hospital under that regime.	See paragraphs 3 and 4.
<i>Case C</i>	P is subject to the community treatment regime.	See paragraphs 3 and 4.
<i>Case D</i>	P is subject to the guardianship regime.	See paragraphs 3 and 5.
<i>Case E</i>	P is— (a) within the scope of the Mental Health Act, but (b) not subject to any of the mental health regimes.	See paragraph 5.

]<sup>363</sup>

### [3 Authorised course of action not in accordance with regime

- (1) This paragraph applies in cases B, C and D in the table in paragraph 2.
- (2) P is ineligible if the authorised course of action is not in accordance with a requirement which the relevant regime imposes.
- (3) That includes any requirement as to where P is, or is not, to reside.
- (4) The relevant regime is the mental health regime to which P is subject.

]<sup>364</sup>

### [4 Treatment for mental disorder in a hospital

- (1) This paragraph applies in cases B and C in the table in paragraph 2.
- (2) P is ineligible if the relevant care or treatment consists in whole or in part of medical treatment for mental disorder in a hospital.

]<sup>365</sup>

### [5 P objects to being a mental health patient etc

- (1) This paragraph applies in cases D and E in the table in paragraph 2.
- (2) P is ineligible if the following conditions are met.
- (3) The first condition is that the relevant instrument authorises P to be a mental health patient.
- (4) The second condition is that P objects—
  - (a) to being a mental health patient, or
  - (b) to being given some or all of the mental health treatment.

<sup>363</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>364</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>365</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

(5) The third condition is that a donee or deputy has not made a valid decision to consent to each matter to which P objects.

(6) In determining whether or not P objects to something, regard must be had to all the circumstances (so far as they are reasonably ascertainable), including the following—

- (a) P's behaviour;
- (b) P's wishes and feelings;
- (c) P's views, beliefs and values.

(7) But regard is to be had to circumstances from the past only so far as it is still appropriate to have regard to them.

] <sup>366</sup>

## [ PART 2

### INTERPRETATION

] <sup>367</sup>

*[Application]*<sup>368</sup>

[6

This Part applies for the purposes of this Schedule.

] <sup>369</sup>

*[Mental health regimes]*<sup>370</sup>

[7

The mental health regimes are—

- (a) the hospital treatment regime,
- (b) the community treatment regime, and
- (c) the guardianship regime.

] <sup>371</sup>

*[Hospital treatment regime]*<sup>372</sup>

[8

(1) P is subject to the hospital treatment regime if he is subject to—

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<sup>366</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>367</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>368</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>369</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>370</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>371</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>372</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

- (a) a hospital treatment obligation under the relevant enactment, or
- (b) an obligation under another England and Wales enactment which has the same effect as a hospital treatment obligation.

(2) But where P is subject to any such obligation, he is to be regarded as not subject to the hospital treatment regime during any period when he is subject to the community treatment regime.

(3) A hospital treatment obligation is an application, order or direction of a kind listed in the first column of the following table.

(4) In relation to a hospital treatment obligation, the relevant enactment is the enactment in the Mental Health Act which is referred to in the corresponding entry in the second column of the following table.

<i>Hospital treatment obligation</i>	<i>Relevant enactment</i>
Application for admission for assessment	Section 2
Application for admission for assessment	Section 4
Application for admission for treatment	Section 3
Order for remand to hospital	Section 35
Order for remand to hospital	Section 36
Hospital order	Section 37
Interim hospital order	Section 38
Order for detention in hospital	Section 44
Hospital direction	Section 45A
Transfer direction	Section 47
Transfer direction	Section 48
Hospital order	Section 51

]<sup>373</sup>

*[Community treatment regime]*<sup>374</sup>

**[9**

P is subject to the community treatment regime if he is subject to—

- (a) a community treatment order under section 17A of the Mental Health Act, or
- (b) an obligation under another England and Wales enactment which has the same effect as a community treatment order.

]<sup>375</sup>

<sup>373</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>374</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>375</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

*[Guardianship regime]*<sup>376</sup>**[10]**

P is subject to the guardianship regime if he is subject to—

- (a) a guardianship application under section 7 of the Mental Health Act,
- (b) a guardianship order under section 37 of the Mental Health Act, or
- (c) an obligation under another England and Wales enactment which has the same effect as a guardianship application or guardianship order.

]

<sup>377</sup>
*[England and Wales enactments]*<sup>378</sup>**[11]**

(1) An England and Wales enactment is an enactment which extends to England and Wales (whether or not it also extends elsewhere).

(2) It does not matter if the enactment is in the Mental Health Act or not.

]

<sup>379</sup>
*[P within scope of Mental Health Act]*<sup>380</sup>**[12]**

(1) P is within the scope of the Mental Health Act if—

- (a) an application in respect of P could be made under section 2 or 3 of the Mental Health Act, and
- (b) P could be detained in a hospital in pursuance of such an application, were one made.

(2) The following provisions of this paragraph apply when determining whether an application in respect of P could be made under section 2 or 3 of the Mental Health Act.

(3) If the grounds in section 2(2) of the Mental Health Act are met in P's case, it is to be assumed that the recommendations referred to in section 2(3) of that Act have been given.

(4) If the grounds in section 3(2) of the Mental Health Act are met in P's case, it is to be assumed that the recommendations referred to in section 3(3) of that Act have been given.

(5) In determining whether the ground in section 3(2)(c) of the Mental Health Act is met in P's case, it is to be assumed that the treatment referred to in section 3(2)(c) cannot be provided under this Act.

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<sup>381</sup>


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<sup>376</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>377</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>378</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>379</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>380</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>381</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

*[Authorised course of action, relevant care or treatment & relevant instrument]*<sup>382</sup>

**[13**

In a case where this Schedule applies for the purposes of section 16A–

“authorised course of action” means any course of action amounting to deprivation of liberty which the order under section 16(2)(a) authorises;

“relevant care or treatment” means any care or treatment which–

(a) comprises, or forms part of, the authorised course of action, or

(b) is to be given in connection with the authorised course of action;

“relevant instrument” means the order under section 16(2)(a).

]

<sup>383</sup>

**[14**

In a case where this Schedule applies for the purposes of paragraph 17 of Schedule A1–

“authorised course of action” means the accommodation of the relevant person in the relevant hospital or care home for the purpose of being given the relevant care or treatment;

“relevant care or treatment” has the same meaning as in Schedule A1;

“relevant instrument” means the standard authorisation under Schedule A1.

]

<sup>384</sup>

**[15**

(1) This paragraph applies where the question whether a person is ineligible to be deprived of liberty by this Act is relevant to either of these decisions–

(a) whether or not to include particular provision (“the proposed provision”) in an order under section 16(2)(a);

(b) whether or not to give a standard authorisation under Schedule A1.

(2) A reference in this Schedule to the authorised course of action or the relevant care or treatment is to be read as a reference to that thing as it would be if–

(a) the proposed provision were included in the order, or

(b) the standard authorisation were given.

(3) A reference in this Schedule to the relevant instrument is to be read as follows–

(a) where the relevant instrument is an order under section 16(2)(a): as a reference to the order as it would be if the proposed provision were included in it;

(b) where the relevant instrument is a standard authorisation: as a reference to the standard authorisation as it would be if it were given.

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<sup>385</sup>


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<sup>382</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>383</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>384</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>385</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

*[Expressions used in paragraph 5]*<sup>386</sup>**[16]**

- (1) These expressions have the meanings given—
- “donee” means a donee of a lasting power of attorney granted by P;
  - “mental health patient” means a person accommodated in a hospital for the purpose of being given medical treatment for mental disorder;
  - “mental health treatment” means the medical treatment for mental disorder referred to in the definition of “mental health patient”.
- (2) A decision of a donee or deputy is valid if it is made—
- (a) within the scope of his authority as donee or deputy, and
  - (b) in accordance with Part 1 of this Act.

] <sup>387</sup>*[Expressions with same meaning as in Mental Health Act]*<sup>388</sup>**[17]**

- (1) “Hospital” has the same meaning as in Part 2 of the Mental Health Act.
- (2) “Medical treatment” has the same meaning as in the Mental Health Act.
- (3) “Mental disorder” has the same meaning as in Schedule A1 (see paragraph 14).

] <sup>389</sup>**SCHEDULE 2****PROPERTY AND AFFAIRS: SUPPLEMENTARY PROVISIONS****Section 18(4)***Wills: general***1**

Paragraphs 2 to 4 apply in relation to the execution of a will, by virtue of section 18, on behalf of P.

**Commencement**

Sch. 2 para. 1: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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<sup>386</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>387</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>388</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

<sup>389</sup> Added by Mental Health Act 2007 c. 12 Sch.8 para.1 (April 1, 2009)

*Provision that may be made in will*

**2**

The will may make any provision (whether by disposing of property or exercising a power or otherwise) which could be made by a will executed by P if he had capacity to make it.

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**Commencement**

Sch. 2 para. 2: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

---

*Wills: requirements relating to execution*

**3**

(1) Sub-paragraph (2) applies if under section 16 the court makes an order or gives directions requiring or authorising a person (“the authorised person”) to execute a will on behalf of P.

(2) Any will executed in pursuance of the order or direction—

- (a) must state that it is signed by P acting by the authorised person,
- (b) must be signed by the authorised person with the name of P and his own name, in the presence of two or more witnesses present at the same time,
- (c) must be attested and subscribed by those witnesses in the presence of the authorised person, and
- (d) must be sealed with the official seal of the court.

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**Commencement**

Sch. 2 para. 3(1)-(2)(d): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Wills: effect of execution*

**4**

(1) This paragraph applies where a will is executed in accordance with paragraph 3.

(2) The Wills Act 1837 (c. 26) has effect in relation to the will as if it were signed by P by his own hand, except that—

- (a) section 9 of the 1837 Act (requirements as to signing and attestation) does not apply, and
- (b) in the subsequent provisions of the 1837 Act any reference to execution in the manner required by the previous provisions is to be read as a reference to execution in accordance with paragraph 3.

(3) The will has the same effect for all purposes as if—

- (a) P had had the capacity to make a valid will, and
- (b) the will had been executed by him in the manner required by the 1837 Act.

(4) But sub-paragraph (3) does not have effect in relation to the will—

- (a) in so far as it disposes of immovable property outside England and Wales, or
- (b) in so far as it relates to any other property or matter if, when the will is executed—



- (i) P is domiciled outside England and Wales, and
- (ii) the condition in sub-paragraph (5) is met.

(5) The condition is that, under the law of P's domicile, any question of his testamentary capacity would fall to be determined in accordance with the law of a place outside England and Wales.

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**Commencement**

Sch. 2 para. 4(1)-(5): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Vesting orders ancillary to settlement etc.*

**5**

- (1) If provision is made by virtue of section 18 for—
- (a) the settlement of any property of P, or
  - (b) the exercise of a power vested in him of appointing trustees or retiring from a trust,
- the court may also make as respects the property settled or the trust property such consequential vesting or other orders as the case may require.
- (2) The power under sub-paragraph (1) includes, in the case of the exercise of such a power, any order which could have been made in such a case under Part 4 of the Trustee Act 1925 (c. 19).

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**Commencement**

Sch. 2 para. 5(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Variation of settlements*

**6**

- (1) If a settlement has been made by virtue of section 18, the court may by order vary or revoke the settlement if—
- (a) the settlement makes provision for its variation or revocation,
  - (b) the court is satisfied that a material fact was not disclosed when the settlement was made, or
  - (c) the court is satisfied that there has been a substantial change of circumstances.
- (2) Any such order may give such consequential directions as the court thinks fit.

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**Commencement**

Sch. 2 para. 6(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Vesting of stock in curator appointed outside England and Wales*

**7**

- (1) Sub-paragraph (2) applies if the court is satisfied—

- (a) that under the law prevailing in a place outside England and Wales a person (“M”) has been appointed to exercise powers in respect of the property or affairs of P on the ground (however formulated) that P lacks capacity to make decisions with respect to the management and administration of his property and affairs, and
- (b) that, having regard to the nature of the appointment and to the circumstances of the case, it is expedient that the court should exercise its powers under this paragraph.

(2) The court may direct—

- (a) any stocks standing in the name of P, or
- (b) the right to receive dividends from the stocks,

to be transferred into M's name or otherwise dealt with as required by M, and may give such directions as the court thinks fit for dealing with accrued dividends from the stocks.

(3) “Stocks” includes—

- (a) shares, and
- (b) any funds, annuity or security transferable in the books kept by any body corporate or unincorporated company or society or by an instrument of transfer either alone or accompanied by other formalities,

and “dividends” is to be construed accordingly.

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#### Commencement

Sch. 2 para. 7(1)-(3)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### *Preservation of interests in property disposed of on behalf of person lacking capacity*

## 8

(1) Sub-paragraphs (2) and (3) apply if—

- (a) P's property has been disposed of by virtue of section 18,
- (b) under P's will or intestacy, or by a gift perfected or nomination taking effect on his death, any other person would have taken an interest in the property but for the disposal, and
- (c) on P's death, any property belonging to P's estate represents the property disposed of.

(2) The person takes the same interest, if and so far as circumstances allow, in the property representing the property disposed of.

(3) If the property disposed of was real property, any property representing it is to be treated, so long as it remains part of P's estate, as if it were real property.

(4) The court may direct that, on a disposal of P's property—

- (a) which is made by virtue of section 18, and
- (b) which would apart from this paragraph result in the conversion of personal property into real property,

property representing the property disposed of is to be treated, so long as it remains P's property or forms part of P's estate, as if it were personal property.

(5) References in sub-paragraphs (1) to (4) to the disposal of property are to—

- (a) the sale, exchange, charging of or other dealing (otherwise than by will) with property other than money;

- (b) the removal of property from one place to another;
- (c) the application of money in acquiring property;
- (d) the transfer of money from one account to another;

and references to property representing property disposed of are to be construed accordingly and as including the result of successive disposals.

(6) The court may give such directions as appear to it necessary or expedient for the purpose of facilitating the operation of sub-paragraphs (1) to (3), including the carrying of money to a separate account and the transfer of property other than money.

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#### Commencement

Sch. 2 para. 8(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### 9

(1) Sub-paragraph (2) applies if the court has ordered or directed the expenditure of money—

- (a) for carrying out permanent improvements on any of P's property, or
- (b) otherwise for the permanent benefit of any of P's property.

(2) The court may order that—

- (a) the whole of the money expended or to be expended, or
- (b) any part of it,

is to be a charge on the property either without interest or with interest at a specified rate.

(3) An order under sub-paragraph (2) may provide for excluding or restricting the operation of paragraph 8(1) to (3).

(4) A charge under sub-paragraph (2) may be made in favour of such person as may be just and, in particular, where the money charged is paid out of P's general estate, may be made in favour of a person as trustee for P.

(5) No charge under sub-paragraph (2) may confer any right of sale or foreclosure during P's lifetime.

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#### Commencement

Sch. 2 para. 9(1)-(5): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### *Powers as patron of benefice*

### 10

(1) Any functions which P has as patron of a benefice may be discharged only by a person (“R”) appointed by the court.

(2) R must be an individual capable of appointment under section 8(1)(b) of the 1986 Measure (which provides for an individual able to make a declaration of communicant status, a clerk in Holy Orders, etc. to be appointed to discharge a registered patron's functions).

(3) The 1986 Measure applies to R as it applies to an individual appointed by the registered patron of the benefice under section 8(1)(b) or (3) of that Measure to discharge his functions as patron.

(4) “The 1986 Measure” means the Patronage (Benefices) Measure 1986 (No. 3).

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**Commencement**

Sch. 2 para. 10(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**SCHEDULE 3**

**INTERNATIONAL PROTECTION OF ADULTS**

**Section 63**

**PART 1**

**PRELIMINARY**

**1 Introduction**

This Part applies for the purposes of this Schedule.

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**Commencement**

Sch. 3(1) para. 1: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**2 The Convention**

- (1) “Convention” means the Convention referred to in section 63.
- (2) “Convention country” means a country in which the Convention is in force.
- (3) A reference to an Article or Chapter is to an Article or Chapter of the Convention.
- (4) An expression which appears in this Schedule and in the Convention is to be construed in accordance with the Convention.

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**Commencement**

Sch. 3(1) para. 2(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**3 Countries, territories and nationals**

- (1) “Country” includes a territory which has its own system of law.
- (2) Where a country has more than one territory with its own system of law, a reference to the country, in relation to one of its nationals, is to the territory with which the national has the closer, or the closest, connection.

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**Commencement**

Sch. 3(1) para. 3(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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#### **4 Adults with incapacity**

“Adult” means a person who—

- (a) as a result of an impairment or insufficiency of his personal faculties, cannot protect his interests, and
- (b) has reached 16.

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#### **Commencement**

Sch. 3(1) para. 4(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

#### **Amendments Pending**

Sch. 3(1) para. 4(2): existing Sch.3 para.4 is renumbered as Sch.3 para.4(1) and Sch.3 para.4(2) is inserted by Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010/1898, Sch. 1 para. 10(b) (date to be appointed)

Sch. 3(1) para. 4: words inserted by Parental Responsibility and Measures for the Protection of Children (International Obligations) (England and Wales and Northern Ireland) Regulations 2010/1898, Sch. 1 para. 10(a) (date to be appointed)

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#### **5 Protective measures**

(1) “Protective measure” means a measure directed to the protection of the person or property of an adult; and it may deal in particular with any of the following—

- (a) the determination of incapacity and the institution of a protective regime,
- (b) placing the adult under the protection of an appropriate authority,
- (c) guardianship, curatorship or any corresponding system,
- (d) the designation and functions of a person having charge of the adult's person or property, or representing or otherwise helping him,
- (e) placing the adult in a place where protection can be provided,
- (f) administering, conserving or disposing of the adult's property,
- (g) authorising a specific intervention for the protection of the person or property of the adult.

(2) Where a measure of like effect to a protective measure has been taken in relation to a person before he reaches 16, this Schedule applies to the measure in so far as it has effect in relation to him once he has reached 16.

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#### **Commencement**

Sch. 3(1) para. 5(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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#### **6 Central Authority**

(1) Any function under the Convention of a Central Authority is exercisable in England and Wales by the Lord Chancellor.

(2) A communication may be sent to the Central Authority in relation to England and Wales by sending it to the Lord Chancellor.

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#### **Commencement**

Sch. 3(1) para. 6(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 2**  
**JURISDICTION OF COMPETENT AUTHORITY**

*Scope of jurisdiction*

**7**

(1) The court may exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to—

- (a) an adult habitually resident in England and Wales,
- (b) an adult's property in England and Wales,
- (c) an adult present in England and Wales or who has property there, if the matter is urgent, or
- (d) an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.

(2) An adult present in England and Wales is to be treated for the purposes of this paragraph as habitually resident there if—

- (a) his habitual residence cannot be ascertained,
- (b) he is a refugee, or
- (c) he has been displaced as a result of disturbance in the country of his habitual residence.

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**Commencement**

Sch. 3(2) para. 7(1)-(2)(c): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**8**

(1) The court may also exercise its functions under this Act (in so far as it cannot otherwise do so) in relation to an adult if sub-paragraph (2) or (3) applies in relation to him.

(2) This sub-paragraph applies in relation to an adult if—

- (a) he is a British citizen,
- (b) he has a closer connection with England and Wales than with Scotland or Northern Ireland, and
- (c) Article 7 has, in relation to the matter concerned, been complied with.

(3) This sub-paragraph applies in relation to an adult if the Lord Chancellor, having consulted such persons as he considers appropriate, agrees to a request under Article 8 in relation to the adult.

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**Commencement**

Sch. 3(2) para. 8(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Exercise of jurisdiction***9**

(1) This paragraph applies where jurisdiction is exercisable under this Schedule in connection with a matter which involves a Convention country other than England and Wales.

(2) Any Article on which the jurisdiction is based applies in relation to the matter in so far as it involves the other country (and the court must, accordingly, comply with any duty conferred on it as a result).

(3) Article 12 also applies, so far as its provisions allow, in relation to the matter in so far as it involves the other country.

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**Commencement**

Sch. 3(2) para. 9(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

---

**10**

A reference in this Schedule to the exercise of jurisdiction under this Schedule is to the exercise of functions under this Act as a result of this Part of this Schedule.

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**Commencement**

Sch. 3(2) para. 10: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 3****APPLICABLE LAW***Applicable law***11**

In exercising jurisdiction under this Schedule, the court may, if it thinks that the matter has a substantial connection with a country other than England and Wales, apply the law of that other country.

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**Commencement**

Sch. 3(3) para. 11: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**12**

Where a protective measure is taken in one country but implemented in another, the conditions of implementation are governed by the law of the other country.

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**Commencement**

Sch. 3(3) para. 12: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Lasting powers of attorney, etc.***13**

- (1) If the donor of a lasting power is habitually resident in England and Wales at the time of granting the power, the law applicable to the existence, extent, modification or extinction of the power is—
- (a) the law of England and Wales, or
  - (b) if he specifies in writing the law of a connected country for the purpose, that law.
- (2) If he is habitually resident in another country at that time, but England and Wales is a connected country, the law applicable in that respect is—
- (a) the law of the other country, or
  - (b) if he specifies in writing the law of England and Wales for the purpose, that law.
- (3) A country is connected, in relation to the donor, if it is a country—
- (a) of which he is a national,
  - (b) in which he was habitually resident, or
  - (c) in which he has property.
- (4) Where this paragraph applies as a result of sub-paragraph (3)(c), it applies only in relation to the property which the donor has in the connected country.
- (5) The law applicable to the manner of the exercise of a lasting power is the law of the country where it is exercised.
- (6) In this Part of this Schedule, “lasting power” means—
- (a) a lasting power of attorney (see section 9),
  - (b) an enduring power of attorney within the meaning of Schedule 4, or
  - (c) any other power of like effect.

**Commencement**

Sch. 3(3) para. 13(1)-(6)(c): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**14**

- (1) Where a lasting power is not exercised in a manner sufficient to guarantee the protection of the person or property of the donor, the court, in exercising jurisdiction under this Schedule, may disapply or modify the power.
- (2) Where, in accordance with this Part of this Schedule, the law applicable to the power is, in one or more respects, that of a country other than England and Wales, the court must, so far as possible, have regard to the law of the other country in that respect (or those respects).

**Commencement**

Sch. 3(3) para. 14(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**15**

Regulations may provide for Schedule 1 (lasting powers of attorney: formalities) to apply with modifications in relation to a lasting power which comes within paragraph 13(6)(c) above.



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**Commencement**

Sch. 3(3) para. 15: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Protection of third parties***16**

- (1) This paragraph applies where a person (a “representative”) in purported exercise of an authority to act on behalf of an adult enters into a transaction with a third party.
- (2) The validity of the transaction may not be questioned in proceedings, nor may the third party be held liable, merely because—
  - (a) where the representative and third party are in England and Wales when entering into the transaction, sub-paragraph (3) applies;
  - (b) where they are in another country at that time, sub-paragraph (4) applies.
- (3) This sub-paragraph applies if—
  - (a) the law applicable to the authority in one or more respects is, as a result of this Schedule, the law of a country other than England and Wales, and
  - (b) the representative is not entitled to exercise the authority in that respect (or those respects) under the law of that other country.
- (4) This sub-paragraph applies if—
  - (a) the law applicable to the authority in one or more respects is, as a result of this Part of this Schedule, the law of England and Wales, and
  - (b) the representative is not entitled to exercise the authority in that respect (or those respects) under that law.
- (5) This paragraph does not apply if the third party knew or ought to have known that the applicable law was—
  - (a) in a case within sub-paragraph (3), the law of the other country;
  - (b) in a case within sub-paragraph (4), the law of England and Wales.

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**Commencement**

Sch. 3(3) para. 16(1)-(5)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Mandatory rules***17**

Where the court is entitled to exercise jurisdiction under this Schedule, the mandatory provisions of the law of England and Wales apply, regardless of any system of law which would otherwise apply in relation to the matter.

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**Commencement**

Sch. 3(3) para. 17: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Public policy***18**

Nothing in this Part of this Schedule requires or enables the application in England and Wales of a provision of the law of another country if its application would be manifestly contrary to public policy.

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**Commencement**

Sch. 3(3) para. 18: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 4****RECOGNITION AND ENFORCEMENT***Recognition***19**

(1) A protective measure taken in relation to an adult under the law of a country other than England and Wales is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country.

(2) A protective measure taken in relation to an adult under the law of a Convention country other than England and Wales is to be recognised in England and Wales if it was taken on a ground mentioned in Chapter 2 (jurisdiction).

(3) But the court may disapply this paragraph in relation to a measure if it thinks that—

- (a) the case in which the measure was taken was not urgent,
- (b) the adult was not given an opportunity to be heard, and
- (c) that omission amounted to a breach of natural justice.

(4) It may also disapply this paragraph in relation to a measure if it thinks that—

- (a) recognition of the measure would be manifestly contrary to public policy,
- (b) the measure would be inconsistent with a mandatory provision of the law of England and Wales, or
- (c) the measure is inconsistent with one subsequently taken, or recognised, in England and Wales in relation to the adult.

(5) And the court may disapply this paragraph in relation to a measure taken under the law of a Convention country in a matter to which Article 33 applies, if the court thinks that that Article has not been complied with in connection with that matter.

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**Commencement**

Sch. 3(4) para. 19(1)-(5): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**20**

(1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales.

(2) No permission is required for an application to the court under this paragraph.

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**Commencement**

Sch. 3(4) para. 20(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**21**

For the purposes of paragraphs 19 and 20, any finding of fact relied on when the measure was taken is conclusive.

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**Commencement**

Sch. 3(4) para. 21: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Enforcement***22**

(1) An interested person may apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than England and Wales is enforceable, or to be registered, in England and Wales in accordance with Court of Protection Rules.

(2) The court must make the declaration if—

- (a) the measure comes within sub-paragraph (1) or (2) of paragraph 19, and
- (b) the paragraph is not disapplied in relation to it as a result of sub-paragraph (3), (4) or (5).

(3) A measure to which a declaration under this paragraph relates is enforceable in England and Wales as if it were a measure of like effect taken by the court.

---

**Commencement**

Sch. 3(4) para. 22(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

---

*Measures taken in relation to those aged under 16***23**

(1) This paragraph applies where—

- (a) provision giving effect to, or otherwise deriving from, the Convention in a country other than England and Wales applies in relation to a person who has not reached 16, and
- (b) a measure is taken in relation to that person in reliance on that provision.

(2) This Part of this Schedule applies in relation to that measure as it applies in relation to a protective measure taken in relation to an adult under the law of a Convention country other than England and Wales.

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**Commencement**

Sch. 3(4) para. 23(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Supplementary*

**24**

The court may not review the merits of a measure taken outside England and Wales except to establish whether the measure complies with this Schedule in so far as it is, as a result of this Schedule, required to do so.

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**Commencement**

Sch. 3(4) para. 24: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**25**

Court of Protection Rules may make provision about an application under paragraph 20 or 22.

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**Commencement**

Sch. 3(4) para. 25: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 5**

**CO -OPERATION**

*Proposal for cross-border placement*

**26**

(1) This paragraph applies where a public authority proposes to place an adult in an establishment in a Convention country other than England and Wales.

(2) The public authority must consult an appropriate authority in that other country about the proposed placement and, for that purpose, must send it—

- (a) a report on the adult, and
- (b) a statement of its reasons for the proposed placement.

(3) If the appropriate authority in the other country opposes the proposed placement within a reasonable time, the public authority may not proceed with it.

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**Commencement**

Sch. 3(5) para. 26(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**27**

A proposal received by a public authority under Article 33 in relation to an adult is to proceed unless the authority opposes it within a reasonable time.

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**Commencement**

Sch. 3(5) para. 27: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Adult in danger etc.***28**

- (1) This paragraph applies if a public authority is told that an adult—
- (a) who is in serious danger, and
  - (b) in relation to whom the public authority has taken, or is considering taking, protective measures,
- is, or has become resident, in a Convention country other than England and Wales.
- (2) The public authority must tell an appropriate authority in that other country about—
- (a) the danger, and
  - (b) the measures taken or under consideration.

---

**Commencement**

Sch. 3(5) para. 28(1)-(2)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**29**

A public authority may not request from, or send to, an appropriate authority in a Convention country information in accordance with Chapter 5 (co-operation) in relation to an adult if it thinks that doing so—

- (a) would be likely to endanger the adult or his property, or
- (b) would amount to a serious threat to the liberty or life of a member of the adult's family.

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**Commencement**

Sch. 3(5) para. 29(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 6****GENERAL***Certificates***30**

A certificate given under Article 38 by an authority in a Convention country other than England and Wales is, unless the contrary is shown, proof of the matters contained in it.

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**Commencement**

Sch. 3(6) para. 30: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Powers to make further provision as to private international law*

**31**

Her Majesty may by Order in Council confer on the Lord Chancellor, the court or another public authority functions for enabling the Convention to be given effect in England and Wales.

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**Commencement**

Sch. 3(6) para. 31: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**32**

- (1) Regulations may make provision—
- (a) giving further effect to the Convention, or
  - (b) otherwise about the private international law of England and Wales in relation to the protection of adults.
- (2) The regulations may—
- (a) confer functions on the court or another public authority;
  - (b) amend this Schedule;
  - (c) provide for this Schedule to apply with specified modifications;
  - (d) make provision about countries other than Convention countries.

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**Commencement**

Sch. 3(6) para. 32(1)-(2)(d): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Exceptions*

**33**

Nothing in this Schedule applies, and no provision made under paragraph 32 is to apply, to any matter to which the Convention, as a result of Article 4, does not apply.

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**Commencement**

Sch. 3(6) para. 33: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Regulations and orders*

**34**

A reference in this Schedule to regulations or an order (other than an Order in Council) is to regulations or an order made for the purposes of this Schedule by the Lord Chancellor.

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**Commencement**

Sch. 3(6) para. 34: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Commencement***35**

The following provisions of this Schedule have effect only if the Convention is in force in accordance with Article 57–

- (a) paragraph 8,
- (b) paragraph 9,
- (c) paragraph 19(2) and (5),
- (d) Part 5,
- (e) paragraph 30.

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**Commencement**

Sch. 3(6) para. 35(a)-(e): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**SCHEDULE 4****PROVISIONS APPLYING TO EXISTING ENDURING POWERS OF ATTORNEY****Section 66(3)****PART 1****ENDURING POWERS OF ATTORNEY****1 Enduring power of attorney to survive mental incapacity of donor**

(1) Where an individual has created a power of attorney which is an enduring power within the meaning of this Schedule–

- (a) the power is not revoked by any subsequent mental incapacity of his,
- (b) upon such incapacity supervening, the donee of the power may not do anything under the authority of the power except as provided by sub-paragraph (2) unless or until the instrument creating the power is registered under paragraph 13, and
- (c) if and so long as paragraph (b) operates to suspend the donee's authority to act under the power, section 5 of the Powers of Attorney Act 1971 (c. 27) (protection of donee and third persons), so far as applicable, applies as if the power had been revoked by the donor's mental incapacity,

and, accordingly, section 1 of this Act does not apply.

(2) Despite sub-paragraph (1)(b), where the attorney has made an application for registration of the instrument then, until it is registered, the attorney may take action under the power–

- (a) to maintain the donor or prevent loss to his estate, or
- (b) to maintain himself or other persons in so far as paragraph 3(2) permits him to do so.

(3) Where the attorney purports to act as provided by sub-paragraph (2) then, in favour of a person who deals with him without knowledge that the attorney is acting otherwise than in accordance with sub-paragraph (2)(a) or (b), the transaction between them is as valid as if the attorney were acting in accordance with sub-paragraph (2)(a) or (b).

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### Commencement

Sch. 4(1) para. 1(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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## 2 Characteristics of an enduring power of attorney

(1) Subject to sub-paragraphs (5) and (6) and paragraph 20, a power of attorney is an enduring power within the meaning of this Schedule if the instrument which creates the power—

- (a) is in the prescribed form,
- (b) was executed in the prescribed manner by the donor and the attorney, and
- (c) incorporated at the time of execution by the donor the prescribed explanatory information.

(2) In this paragraph, “prescribed” means prescribed by such of the following regulations as applied when the instrument was executed—

- (a) the Enduring Powers of Attorney (Prescribed Form) Regulations 1986 (S.I. 1986/126),
- (b) the Enduring Powers of Attorney (Prescribed Form) Regulations 1987 (S.I. 1987/1612),
- (c) the Enduring Powers of Attorney (Prescribed Form) Regulations 1990 (S.I. 1990/1376),
- (d) the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2000 (S.I. 2000/289).

(3) An instrument in the prescribed form purporting to have been executed in the prescribed manner is to be taken, in the absence of evidence to the contrary, to be a document which incorporated at the time of execution by the donor the prescribed explanatory information.

(4) If an instrument differs in an immaterial respect in form or mode of expression from the prescribed form it is to be treated as sufficient in point of form and expression.

(5) A power of attorney cannot be an enduring power unless, when he executes the instrument creating it, the attorney is—

- (a) an individual who has reached 18 and is not bankrupt, or
- (b) a trust corporation.

(6) A power of attorney which gives the attorney a right to appoint a substitute or successor cannot be an enduring power.

(7) An enduring power is revoked by the bankruptcy of the donor or attorney.

(8) But where the donor or attorney is bankrupt merely because an interim bankruptcy restrictions order has effect in respect of him, the power is suspended for so long as the order has effect.

(9) An enduring power is revoked if the court—

- (a) exercises a power under sections 16 to 20 in relation to the donor, and
- (b) directs that the enduring power is to be revoked.

(10) No disclaimer of an enduring power, whether by deed or otherwise, is valid unless and until the attorney gives notice of it to the donor or, where paragraph 4(6) or 15(1) applies, to the Public Guardian.



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**Commencement**

Sch. 4(1) para. 2(1)-(10): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**3 Scope of authority etc. of attorney under enduring power**

(1) If the instrument which creates an enduring power of attorney is expressed to confer general authority on the attorney, the instrument operates to confer, subject to—

- (a) the restriction imposed by sub-paragraph (3), and
- (b) any conditions or restrictions contained in the instrument,

authority to do on behalf of the donor anything which the donor could lawfully do by an attorney at the time when the donor executed the instrument.

(2) Subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) act under the power so as to benefit himself or other persons than the donor to the following extent but no further—

- (a) he may so act in relation to himself or in relation to any other person if the donor might be expected to provide for his or that person's needs respectively, and
- (b) he may do whatever the donor might be expected to do to meet those needs.

(3) Without prejudice to sub-paragraph (2) but subject to any conditions or restrictions contained in the instrument, an attorney under an enduring power, whether general or limited, may (without obtaining any consent) dispose of the property of the donor by way of gift to the following extent but no further—

- (a) he may make gifts of a seasonal nature or at a time, or on an anniversary, of a birth, a marriage or the formation of a civil partnership, to persons (including himself) who are related to or connected with the donor, and
- (b) he may make gifts to any charity to whom the donor made or might be expected to make gifts,

provided that the value of each such gift is not unreasonable having regard to all the circumstances and in particular the size of the donor's estate.

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**Commencement**

Sch. 4(1) para. 3(1)-(3) Proviso. 001: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 2****ACTION ON ACTUAL OR IMPENDING INCAPACITY OF DONOR****4 Duties of attorney in event of actual or impending incapacity of donor**

(1) Sub-paragraphs (2) to (6) apply if the attorney under an enduring power has reason to believe that the donor is or is becoming mentally incapable.

(2) The attorney must, as soon as practicable, make an application to the Public Guardian for the registration of the instrument creating the power.

- (3) Before making an application for registration the attorney must comply with the provisions as to notice set out in Part 3 of this Schedule.
- (4) An application for registration—
- (a) must be made in the prescribed form, and
  - (b) must contain such statements as may be prescribed.
- (5) The attorney—
- (a) may, before making an application for the registration of the instrument, refer to the court for its determination any question as to the validity of the power, and
  - (b) must comply with any direction given to him by the court on that determination.
- (6) No disclaimer of the power is valid unless and until the attorney gives notice of it to the Public Guardian; and the Public Guardian must notify the donor if he receives a notice under this sub-paragraph.
- (7) A person who, in an application for registration, makes a statement which he knows to be false in a material particular is guilty of an offence and is liable—
- (a) on summary conviction, to imprisonment for a term not exceeding 12 months or a fine not exceeding the statutory maximum or both;
  - (b) on conviction on indictment, to imprisonment for a term not exceeding 2 years or a fine or both.
- (8) In this paragraph, “prescribed” means prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor.

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**Commencement**

Sch. 4(2) para. 4(1)-(8): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 3****NOTIFICATION PRIOR TO REGISTRATION***Duty to give notice to relatives***5**

Subject to paragraph 7, before making an application for registration the attorney must give notice of his intention to do so to all those persons (if any) who are entitled to receive notice by virtue of paragraph 6.

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**Commencement**

Sch. 4(3) para. 5: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**6**

- (1) Subject to sub-paragraphs (2) to (4), persons of the following classes (“relatives”) are entitled to receive notice under paragraph 5—
- (a) the donor's spouse or civil partner,

- (b) the donor's children,
  - (c) the donor's parents,
  - (d) the donor's brothers and sisters, whether of the whole or half blood,
  - (e) the widow, widower or surviving civil partner of a child of the donor,
  - (f) the donor's grandchildren,
  - (g) the children of the donor's brothers and sisters of the whole blood,
  - (h) the children of the donor's brothers and sisters of the half blood,
  - (i) the donor's uncles and aunts of the whole blood,
  - (j) the children of the donor's uncles and aunts of the whole blood.
- (2) A person is not entitled to receive notice under paragraph 5 if–
- (a) his name or address is not known to the attorney and cannot be reasonably ascertained by him, or
  - (b) the attorney has reason to believe that he has not reached 18 or is mentally incapable.
- (3) Except where sub-paragraph (4) applies–
- (a) no more than 3 persons are entitled to receive notice under paragraph 5, and
  - (b) in determining the persons who are so entitled, persons falling within the class in sub-paragraph (1)(a) are to be preferred to persons falling within the class in sub-paragraph (1)(b), those falling within the class in sub-paragraph (1)(b) are to be preferred to those falling within the class in sub-paragraph (1)(c), and so on.
- (4) Despite the limit of 3 specified in sub-paragraph (3), where–
- (a) there is more than one person falling within any of classes (a) to (j) of sub-paragraph (1), and
  - (b) at least one of those persons would be entitled to receive notice under paragraph 5,
- then, subject to sub-paragraph (2), all the persons falling within that class are entitled to receive notice under paragraph 5.

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#### **Commencement**

Sch. 4(3) para. 6(1)-(4)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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## **7**

- (1) An attorney is not required to give notice under paragraph 5–
- (a) to himself, or
  - (b) to any other attorney under the power who is joining in making the application,
- even though he or, as the case may be, the other attorney is entitled to receive notice by virtue of paragraph 6.
- (2) In the case of any person who is entitled to receive notice by virtue of paragraph 6, the attorney, before applying for registration, may make an application to the court to be dispensed from the requirement to give him notice; and the court must grant the application if it is satisfied–
- (a) that it would be undesirable or impracticable for the attorney to give him notice, or
  - (b) that no useful purpose is likely to be served by giving him notice.

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#### **Commencement**

Sch. 4(3) para. 7(1)-(2)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Duty to give notice to donor***8**

(1) Subject to sub-paragraph (2), before making an application for registration the attorney must give notice of his intention to do so to the donor.

(2) Paragraph 7(2) applies in relation to the donor as it applies in relation to a person who is entitled to receive notice under paragraph 5.

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**Commencement**

Sch. 4(3) para. 8(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Contents of notices***9**

A notice to relatives under this Part of this Schedule must—

- (a) be in the prescribed form,
- (b) state that the attorney proposes to make an application to the Public Guardian for the registration of the instrument creating the enduring power in question,
- (c) inform the person to whom it is given of his right to object to the registration under paragraph 13(4), and
- (d) specify, as the grounds on which an objection to registration may be made, the grounds set out in paragraph 13(9).

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**Commencement**

Sch. 4(3) para. 9(a)-(d): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**10**

A notice to the donor under this Part of this Schedule—

- (a) must be in the prescribed form,
- (b) must contain the statement mentioned in paragraph 9(b), and
- (c) must inform the donor that, while the instrument remains registered, any revocation of the power by him will be ineffective unless and until the revocation is confirmed by the court.

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**Commencement**

Sch. 4(3) para. 10(a)-(c): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Duty to give notice to other attorneys***11**

(1) Subject to sub-paragraph (2), before making an application for registration an attorney under a joint and several power must give notice of his intention to do so to any other attorney under the power who is not joining in making the application; and paragraphs 7(2) and 9 apply in relation to

attorneys entitled to receive notice by virtue of this paragraph as they apply in relation to persons entitled to receive notice by virtue of paragraph 6.

- (2) An attorney is not entitled to receive notice by virtue of this paragraph if—
- (a) his address is not known to the applying attorney and cannot reasonably be ascertained by him, or
  - (b) the applying attorney has reason to believe that he has not reached 18 or is mentally incapable.

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**Commencement**

Sch. 4(3) para. 11(1)-(2)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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*Supplementary*

**12**

Despite section 7 of the Interpretation Act 1978 (c. 30) (construction of references to service by post), for the purposes of this Part of this Schedule a notice given by post is to be regarded as given on the date on which it was posted.

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**Commencement**

Sch. 4(3) para. 12: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 4**

**REGISTRATION**

**13 Registration of instrument creating power**

- (1) If an application is made in accordance with paragraph 4(3) and (4) the Public Guardian must, subject to the provisions of this paragraph, register the instrument to which the application relates.
- (2) If it appears to the Public Guardian that—
- (a) there is a deputy appointed for the donor of the power created by the instrument, and
  - (b) the powers conferred on the deputy would, if the instrument were registered, to any extent conflict with the powers conferred on the attorney,
- the Public Guardian must not register the instrument except in accordance with the court's directions.
- (3) The court may, on the application of the attorney, direct the Public Guardian to register an instrument even though notice has not been given as required by paragraph 4(3) and Part 3 of this Schedule to a person entitled to receive it, if the court is satisfied—
- (a) that it was undesirable or impracticable for the attorney to give notice to that person, or
  - (b) that no useful purpose is likely to be served by giving him notice.
- (4) Sub-paragraph (5) applies if, before the end of the period of 5 weeks beginning with the date (or the latest date) on which the attorney gave notice under paragraph 5 of an application for registration, the Public Guardian receives a valid notice of objection to the registration from a person entitled to notice of the application.

- (5) The Public Guardian must not register the instrument except in accordance with the court's directions.
- (6) Sub-paragraph (7) applies if, in the case of an application for registration—
- (a) it appears from the application that there is no one to whom notice has been given under paragraph 5, or
  - (b) the Public Guardian has reason to believe that appropriate inquiries might bring to light evidence on which he could be satisfied that one of the grounds of objection set out in sub-paragraph (9) was established.
- (7) The Public Guardian—
- (a) must not register the instrument, and
  - (b) must undertake such inquiries as he thinks appropriate in all the circumstances.
- (8) If, having complied with sub-paragraph (7)(b), the Public Guardian is satisfied that one of the grounds of objection set out in sub-paragraph (9) is established—
- (a) the attorney may apply to the court for directions, and
  - (b) the Public Guardian must not register the instrument except in accordance with the court's directions.
- (9) A notice of objection under this paragraph is valid if made on one or more of the following grounds—
- (a) that the power purported to have been created by the instrument was not valid as an enduring power of attorney,
  - (b) that the power created by the instrument no longer subsists,
  - (c) that the application is premature because the donor is not yet becoming mentally incapable,
  - (d) that fraud or undue pressure was used to induce the donor to create the power,
  - (e) that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.
- (10) If any of those grounds is established to the satisfaction of the court it must direct the Public Guardian not to register the instrument, but if not so satisfied it must direct its registration.
- (11) If the court directs the Public Guardian not to register an instrument because it is satisfied that the ground in sub-paragraph (9)(d) or (e) is established, it must by order revoke the power created by the instrument.
- (12) If the court directs the Public Guardian not to register an instrument because it is satisfied that any ground in sub-paragraph (9) except that in paragraph (c) is established, the instrument must be delivered up to be cancelled unless the court otherwise directs.

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#### **Commencement**

Sch. 4(4) para. 13(1)-(12): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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#### **14 Register of enduring powers**

The Public Guardian has the function of establishing and maintaining a register of enduring powers for the purposes of this Schedule.

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**Commencement**

Sch. 4(4) para. 14: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 5****LEGAL POSITION AFTER REGISTRATION****15 Effect and proof of registration**

- (1) The effect of the registration of an instrument under paragraph 13 is that—
  - (a) no revocation of the power by the donor is valid unless and until the court confirms the revocation under paragraph 16(3);
  - (b) no disclaimer of the power is valid unless and until the attorney gives notice of it to the Public Guardian;
  - (c) the donor may not extend or restrict the scope of the authority conferred by the instrument and no instruction or consent given by him after registration, in the case of a consent, confers any right and, in the case of an instruction, imposes or confers any obligation or right on or creates any liability of the attorney or other persons having notice of the instruction or consent.
- (2) Sub-paragraph (1) applies for so long as the instrument is registered under paragraph 13 whether or not the donor is for the time being mentally incapable.
- (3) A document purporting to be an office copy of an instrument registered under this Schedule is, in any part of the United Kingdom, evidence of—
  - (a) the contents of the instrument, and
  - (b) the fact that it has been so registered.
- (4) Sub-paragraph (3) is without prejudice to section 3 of the Powers of Attorney Act 1971 (c. 27) (proof by certified copies) and to any other method of proof authorised by law.

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**Commencement**

Sch. 4(5) para. 15(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**16 Functions of court with regard to registered power**

- (1) Where an instrument has been registered under paragraph 13, the court has the following functions with respect to the power and the donor of and the attorney appointed to act under the power.
- (2) The court may—
  - (a) determine any question as to the meaning or effect of the instrument;
  - (b) give directions with respect to—
    - (i) the management or disposal by the attorney of the property and affairs of the donor;
    - (ii) the rendering of accounts by the attorney and the production of the records kept by him for the purpose;

- (iii) the remuneration or expenses of the attorney whether or not in default of or in accordance with any provision made by the instrument, including directions for the repayment of excessive or the payment of additional remuneration;
  - (c) require the attorney to supply information or produce documents or things in his possession as attorney;
  - (d) give any consent or authorisation to act which the attorney would have to obtain from a mentally capable donor;
  - (e) authorise the attorney to act so as to benefit himself or other persons than the donor otherwise than in accordance with paragraph 3(2) and (3) (but subject to any conditions or restrictions contained in the instrument);
  - (f) relieve the attorney wholly or partly from any liability which he has or may have incurred on account of a breach of his duties as attorney.
- (3) On application made for the purpose by or on behalf of the donor, the court must confirm the revocation of the power if satisfied that the donor—
- (a) has done whatever is necessary in law to effect an express revocation of the power, and
  - (b) was mentally capable of revoking a power of attorney when he did so (whether or not he is so when the court considers the application).
- (4) The court must direct the Public Guardian to cancel the registration of an instrument registered under paragraph 13 in any of the following circumstances—
- (a) on confirming the revocation of the power under sub-paragraph (3),
  - (b) on directing under paragraph 2(9)(b) that the power is to be revoked,
  - (c) on being satisfied that the donor is and is likely to remain mentally capable,
  - (d) on being satisfied that the power has expired or has been revoked by the mental incapacity of the attorney,
  - (e) on being satisfied that the power was not a valid and subsisting enduring power when registration was effected,
  - (f) on being satisfied that fraud or undue pressure was used to induce the donor to create the power,
  - (g) on being satisfied that, having regard to all the circumstances and in particular the attorney's relationship to or connection with the donor, the attorney is unsuitable to be the donor's attorney.
- (5) If the court directs the Public Guardian to cancel the registration of an instrument on being satisfied of the matters specified in sub-paragraph (4)(f) or (g) it must by order revoke the power created by the instrument.
- (6) If the court directs the cancellation of the registration of an instrument under sub-paragraph (4) except paragraph (c) the instrument must be delivered up to the Public Guardian to be cancelled, unless the court otherwise directs.

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#### **Commencement**

Sch. 4(5) para. 16(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### **17 Cancellation of registration by Public Guardian**

The Public Guardian must cancel the registration of an instrument creating an enduring power of attorney—



- (a) on receipt of a disclaimer signed by the attorney;
- (b) if satisfied that the power has been revoked by the death or bankruptcy of the donor or attorney or, if the attorney is a body corporate, by its winding up or dissolution;
- (c) on receipt of notification from the court that the court has revoked the power;
- (d) on confirmation from the court that the donor has revoked the power.

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**Commencement**

Sch. 4(5) para. 17(a)-(d): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 6****PROTECTION OF ATTORNEY AND THIRD PARTIES****18 Protection of attorney and third persons where power is invalid or revoked**

- (1) Sub-paragraphs (2) and (3) apply where an instrument which did not create a valid power of attorney has been registered under paragraph 13 (whether or not the registration has been cancelled at the time of the act or transaction in question).
- (2) An attorney who acts in pursuance of the power does not incur any liability (either to the donor or to any other person) because of the non-existence of the power unless at the time of acting he knows—
- (a) that the instrument did not create a valid enduring power,
  - (b) that an event has occurred which, if the instrument had created a valid enduring power, would have had the effect of revoking the power, or
  - (c) that, if the instrument had created a valid enduring power, the power would have expired before that time.
- (3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person has knowledge of any of the matters mentioned in sub-paragraph (2).
- (4) If the interest of a purchaser depends on whether a transaction between the attorney and another person was valid by virtue of sub-paragraph (3), it is conclusively presumed in favour of the purchaser that the transaction was valid if—
- (a) the transaction between that person and the attorney was completed within 12 months of the date on which the instrument was registered, or
  - (b) that person makes a statutory declaration, before or within 3 months after the completion of the purchase, that he had no reason at the time of the transaction to doubt that the attorney had authority to dispose of the property which was the subject of the transaction.
- (5) For the purposes of section 5 of the Powers of Attorney Act 1971 (c. 27) (protection where power is revoked) in its application to an enduring power the revocation of which by the donor is by virtue of paragraph 15 invalid unless and until confirmed by the court under paragraph 16—
- (a) knowledge of the confirmation of the revocation is knowledge of the revocation of the power, but
  - (b) knowledge of the unconfirmed revocation is not.

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**Commencement**

Sch. 4(6) para. 18(1)-(5)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**19 Further protection of attorney and third persons**

(1) If–

- (a) an instrument framed in a form prescribed as mentioned in paragraph 2(2) creates a power which is not a valid enduring power, and
- (b) the power is revoked by the mental incapacity of the donor,

sub-paragraphs (2) and (3) apply, whether or not the instrument has been registered.

(2) An attorney who acts in pursuance of the power does not, by reason of the revocation, incur any liability (either to the donor or to any other person) unless at the time of acting he knows–

- (a) that the instrument did not create a valid enduring power, and
- (b) that the donor has become mentally incapable.

(3) Any transaction between the attorney and another person is, in favour of that person, as valid as if the power had then been in existence, unless at the time of the transaction that person knows–

- (a) that the instrument did not create a valid enduring power, and
- (b) that the donor has become mentally incapable.

(4) Paragraph 18(4) applies for the purpose of determining whether a transaction was valid by virtue of sub-paragraph (3) as it applies for the purpose of determining whether a transaction was valid by virtue of paragraph 18(3).

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**Commencement**

Sch. 4(6) para. 19(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**PART 7****JOINT AND JOINT AND SEVERAL ATTORNEYS****20 Application to joint and joint and several attorneys**

(1) An instrument which appoints more than one person to be an attorney cannot create an enduring power unless the attorneys are appointed to act–

- (a) jointly, or
- (b) jointly and severally.

(2) This Schedule, in its application to joint attorneys, applies to them collectively as it applies to a single attorney but subject to the modifications specified in paragraph 21.

(3) This Schedule, in its application to joint and several attorneys, applies with the modifications specified in sub-paragraphs (4) to (7) and in paragraph 22.

(4) A failure, as respects any one attorney, to comply with the requirements for the creation of enduring powers–

- (a) prevents the instrument from creating such a power in his case, but

- (b) does not affect its efficacy for that purpose as respects the other or others or its efficacy in his case for the purpose of creating a power of attorney which is not an enduring power.
- (5) If one or more but not both or all the attorneys makes or joins in making an application for registration of the instrument—
- (a) an attorney who is not an applicant as well as one who is may act pending the registration of the instrument as provided in paragraph 1(2),
  - (b) notice of the application must also be given under Part 3 of this Schedule to the other attorney or attorneys, and
  - (c) objection may validly be taken to the registration on a ground relating to an attorney or to the power of an attorney who is not an applicant as well as to one or the power of one who is an applicant.
- (6) The Public Guardian is not precluded by paragraph 13(5) or (8) from registering an instrument and the court must not direct him not to do so under paragraph 13(10) if an enduring power subsists as respects some attorney who is not affected by the ground or grounds of the objection in question; and where the Public Guardian registers an instrument in that case, he must make against the registration an entry in the prescribed form.
- (7) Sub-paragraph (6) does not preclude the court from revoking a power in so far as it confers a power on any other attorney in respect of whom the ground in paragraph 13(9)(d) or (e) is established; and where any ground in paragraph 13(9) affecting any other attorney is established the court must direct the Public Guardian to make against the registration an entry in the prescribed form.
- (8) In sub-paragraph (4), “the requirements for the creation of enduring powers” means the provisions of—
- (a) paragraph 2 other than sub-paragraphs (8) and (9), and
  - (b) the regulations mentioned in paragraph 2.

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**Commencement**

Sch. 4(7) para. 20(1)-(8)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**21 Joint attorneys**

- (1) In paragraph 2(5), the reference to the time when the attorney executes the instrument is to be read as a reference to the time when the second or last attorney executes the instrument.
- (2) In paragraph 2(6) to (8), the reference to the attorney is to be read as a reference to any attorney under the power.
- (3) Paragraph 13 has effect as if the ground of objection to the registration of the instrument specified in sub-paragraph (9)(e) applied to any attorney under the power.
- (4) In paragraph 16(2), references to the attorney are to be read as including references to any attorney under the power.
- (5) In paragraph 16(4), references to the attorney are to be read as including references to any attorney under the power.
- (6) In paragraph 17, references to the attorney are to be read as including references to any attorney under the power.

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**Commencement**

Sch. 4(7) para. 21(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**22 Joint and several attorneys**

(1) In paragraph 2(7), the reference to the bankruptcy of the attorney is to be read as a reference to the bankruptcy of the last remaining attorney under the power; and the bankruptcy of any other attorney under the power causes that person to cease to be an attorney under the power.

(2) In paragraph 2(8), the reference to the suspension of the power is to be read as a reference to its suspension in so far as it relates to the attorney in respect of whom the interim bankruptcy restrictions order has effect.

(3) The restriction upon disclaimer imposed by paragraph 4(6) applies only to those attorneys who have reason to believe that the donor is or is becoming mentally incapable.

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**Commencement**

Sch. 4(7) para. 22(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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## PART 8

### INTERPRETATION

**23**

(1) In this Schedule—

“enduring power” is to be construed in accordance with paragraph 2,

“mentally incapable” or “mental incapacity”, except where it refers to revocation at common law, means in relation to any person, that he is incapable by reason of mental disorder [...]

<sup>390</sup> of managing and administering his property and affairs and “mentally capable” and “mental capacity” are to be construed accordingly,

“notice” means notice in writing, and

“prescribed”, except for the purposes of paragraph 2, means prescribed by regulations made for the purposes of this Schedule by the Lord Chancellor.

[ (1A) In sub-paragraph (1), “mental disorder” has the same meaning as in the Mental Health Act but disregarding the amendments made to that Act by the Mental Health Act 2007. ]<sup>391</sup>

(2) Any question arising under or for the purposes of this Schedule as to what the donor of the power might at any time be expected to do is to be determined by assuming that he had full mental capacity at the time but otherwise by reference to the circumstances existing at that time.

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<sup>390</sup> Words repealed subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.2 by Mental Health Act 2007 c. 12 Sch.11(1) para.1 (November 3, 2008: repeal has effect on November 3, 2008 as specified in SI 2008/1900 subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.2)

<sup>391</sup> Inserted subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.2 by Mental Health Act 2007 c. 12 Sch.1(2) para.23(3) (November 3, 2008: insertion has effect subject to savings/transitional provisions specified in 2007 c.12 Sch.10 para.2)

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**Commencement**

Sch. 4(8) para. 23(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**SCHEDULE 5**

**TRANSITIONAL PROVISIONS AND SAVINGS**

**Section 66(4)**

**PART 1**

**REPEAL OF PART 7 OF THE MENTAL HEALTH ACT 1983**

**1 Existing receivers**

- (1) This paragraph applies where, immediately before the commencement day, there is a receiver (“R”) for a person (“P”) appointed under section 99 of the Mental Health Act.
- (2) On and after that day—
  - (a) this Act applies as if R were a deputy appointed for P by the court, but with the functions that R had as receiver immediately before that day, and
  - (b) a reference in any other enactment to a deputy appointed by the court includes a person appointed as a deputy as a result of paragraph (a).
- (3) On any application to it by R, the court may end R's appointment as P's deputy.
- (4) Where, as a result of section 20(1), R may not make a decision on behalf of P in relation to a relevant matter, R must apply to the court.
- (5) If, on the application, the court is satisfied that P is capable of managing his property and affairs in relation to the relevant matter—
  - (a) it must make an order ending R's appointment as P's deputy in relation to that matter, but
  - (b) it may, in relation to any other matter, exercise in relation to P any of the powers which it has under sections 15 to 19.
- (6) If it is not satisfied, the court may exercise in relation to P any of the powers which it has under sections 15 to 19.
- (7) R's appointment as P's deputy ceases to have effect if P dies.
- (8) “Relevant matter” means a matter in relation to which, immediately before the commencement day, R was authorised to act as P's receiver.
- (9) In sub-paragraph (1), the reference to a receiver appointed under section 99 of the Mental Health Act includes a reference to a person who by virtue of Schedule 5 to that Act was deemed to be a receiver appointed under that section.

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**Commencement**

Sch. 5(1) para. 1(1)-(9): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**2 Orders, appointments etc.**

- (1) Any order or appointment made, direction or authority given or other thing done which has, or by virtue of Schedule 5 to the Mental Health Act was deemed to have, effect under Part 7 of the Act immediately before the commencement day is to continue to have effect despite the repeal of Part 7.
- (2) In so far as any such order, appointment, direction, authority or thing could have been made, given or done under sections 15 to 20 if those sections had then been in force—
- (a) it is to be treated as made, given or done under those sections, and
  - (b) the powers of variation and discharge conferred by section 16(7) apply accordingly.
- (3) Sub-paragraph (1)—
- (a) does not apply to nominations under section 93(1) or (4) of the Mental Health Act, and
  - (b) as respects receivers, has effect subject to paragraph 1.
- (4) This Act does not affect the operation of section 109 of the Mental Health Act (effect and proof of orders etc.) in relation to orders made and directions given under Part 7 of that Act.
- (5) This paragraph is without prejudice to section 16 of the Interpretation Act 1978 (c. 30) (general savings on repeal).

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**Commencement**

Sch. 5(1) para. 2(1)-(5): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**3 Pending proceedings**

- (1) Any application for the exercise of a power under Part 7 of the Mental Health Act which is pending immediately before the commencement day is to be treated, in so far as a corresponding power is exercisable under sections 16 to 20, as an application for the exercise of that power.
- (2) For the purposes of sub-paragraph (1) an application for the appointment of a receiver is to be treated as an application for the appointment of a deputy.

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**Commencement**

Sch. 5(1) para. 3(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**4 Appeals**

- (1) Part 7 of the Mental Health Act and the rules made under it are to continue to apply to any appeal brought by virtue of section 105 of that Act which has not been determined before the commencement day.
- (2) If in the case of an appeal brought by virtue of section 105(1) (appeal to nominated judge) the judge nominated under section 93 of the Mental Health Act has begun to hear the appeal, he is to continue to do so but otherwise it is to be heard by a puisne judge of the High Court nominated under section 46.

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**Commencement**

Sch. 5(1) para. 4(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**5 Fees**

All fees and other payments which, having become due, have not been paid to the former Court of Protection before the commencement day, are to be paid to the new Court of Protection.

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**Commencement**

Sch. 5(1) para. 5: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**6 Court records**

(1) The records of the former Court of Protection are to be treated, on and after the commencement day, as records of the new Court of Protection and are to be dealt with accordingly under the Public Records Act 1958 (c. 51).

(2) On and after the commencement day, the Public Guardian is, for the purpose of exercising any of his functions, to be given such access as he may require to such of the records mentioned in sub-paragraph (1) as relate to the appointment of receivers under section 99 of the Mental Health Act.

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**Commencement**

Sch. 5(1) para. 6(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**7 Existing charges**

This Act does not affect the operation in relation to a charge created before the commencement day of—

- (a) so much of section 101(6) of the Mental Health Act as precludes a charge created under section 101(5) from conferring a right of sale or foreclosure during the lifetime of the patient, or
- (b) section 106(6) of the Mental Health Act (charge created by virtue of section 106(5) not to cause interest to fail etc.).

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**Commencement**

Sch. 5(1) para. 7(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**8 Preservation of interests on disposal of property**

Paragraph 8(1) of Schedule 2 applies in relation to any disposal of property (within the meaning of that provision) by a person living on 1st November 1960, being a disposal effected under the Lunacy Act 1890 (c. 5) as it applies in relation to the disposal of property effected under sections 16 to 20.

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**Commencement**

Sch. 5(1) para. 8: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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## **9 Accounts**

Court of Protection Rules may provide that, in a case where paragraph 1 applies, R is to have a duty to render accounts—

- (a) while he is receiver;
- (b) after he is discharged.

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### **Commencement**

Sch. 5(1) para. 9(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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## **10 Interpretation**

In this Part of this Schedule—

- (a) “the commencement day” means the day on which section 66(1)(a) (repeal of Part 7 of the Mental Health Act) comes into force,
- (b) “the former Court of Protection” means the office abolished by section 45, and
- (c) “the new Court of Protection” means the court established by that section.

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### **Commencement**

Sch. 5(1) para. 10(a)-(c): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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## **PART 2**

### **REPEAL OF THE ENDURING POWERS OF ATTORNEY ACT 1985**

#### **11 Orders, determinations, etc.**

- (1) Any order or determination made, or other thing done, under the 1985 Act which has effect immediately before the commencement day continues to have effect despite the repeal of that Act.
- (2) In so far as any such order, determination or thing could have been made or done under Schedule 4 if it had then been in force—
  - (a) it is to be treated as made or done under that Schedule, and
  - (b) the powers of variation and discharge exercisable by the court apply accordingly.
- (3) Any instrument registered under the 1985 Act is to be treated as having been registered by the Public Guardian under Schedule 4.
- (4) This paragraph is without prejudice to section 16 of the Interpretation Act 1978 (c. 30) (general savings on repeal).

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### **Commencement**

Sch. 5(2) para. 11(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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#### **12 Pending proceedings**

- (1) An application for the exercise of a power under the 1985 Act which is pending immediately before the commencement day is to be treated, in so far as a corresponding power is exercisable under Schedule 4, as an application for the exercise of that power.



(2) For the purposes of sub-paragraph (1)–

- (a) a pending application under section 4(2) of the 1985 Act for the registration of an instrument is to be treated as an application to the Public Guardian under paragraph 4 of Schedule 4 and any notice given in connection with that application under Schedule 1 to the 1985 Act is to be treated as given under Part 3 of Schedule 4,
- (b) a notice of objection to the registration of an instrument is to be treated as a notice of objection under paragraph 13 of Schedule 4, and
- (c) pending proceedings under section 5 of the 1985 Act are to be treated as proceedings on an application for the exercise by the court of a power which would become exercisable in relation to an instrument under paragraph 16(2) of Schedule 4 on its registration.

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#### **Commencement**

Sch. 5(2) para. 12(1)-(2)(c): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### **13 Appeals**

(1) The 1985 Act and, so far as relevant, the provisions of Part 7 of the Mental Health Act and the rules made under it as applied by section 10 of the 1985 Act are to continue to have effect in relation to any appeal brought by virtue of section 10(1)(c) of the 1985 Act which has not been determined before the commencement day.

(2) If, in the case of an appeal brought by virtue of section 105(1) of the Mental Health Act as applied by section 10(1)(c) of the 1985 Act (appeal to nominated judge), the judge nominated under section 93 of the Mental Health Act has begun to hear the appeal, he is to continue to do so but otherwise the appeal is to be heard by a puisne judge of the High Court nominated under section 46.

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#### **Commencement**

Sch. 5(2) para. 13(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### **14 Exercise of powers of donor as trustee**

(1) Section 2(8) of the 1985 Act (which prevents a power of attorney under section 25 of the Trustee Act 1925 (c. 19) as enacted from being an enduring power) is to continue to apply to any enduring power–

- (a) created before 1st March 2000, and
- (b) having effect immediately before the commencement day.

(2) Section 3(3) of the 1985 Act (which entitles the donee of an enduring power to exercise the donor's powers as trustee) is to continue to apply to any enduring power to which, as a result of the provision mentioned in sub-paragraph (3), it applies immediately before the commencement day.

(3) The provision is section 4(3)(a) of the Trustee Delegation Act 1999 (c. 15) (which provides for section 3(3) of the 1985 Act to cease to apply to an enduring power when its registration is cancelled, if it was registered in response to an application made before 1st March 2001).

(4) Even though section 4 of the 1999 Act is repealed by this Act, that section is to continue to apply in relation to an enduring power–

- (a) to which section 3(3) of the 1985 Act applies as a result of sub-paragraph (2), or

(b) to which, immediately before the repeal of section 4 of the 1999 Act, section 1 of that Act applies as a result of section 4 of it.

(5) The reference in section 1(9) of the 1999 Act to section 4(6) of that Act is to be read with sub-paragraphs (2) to (4).

---

**Commencement**

Sch. 5(2) para. 14(1)-(5): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**15 Interpretation**

In this Part of this Schedule, “the commencement day” means the day on which section 66(1)(b) (repeal of the 1985 Act) comes into force.

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**Commencement**

Sch. 5(2) para. 15: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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## SCHEDULE 6

### MINOR AND CONSEQUENTIAL AMENDMENTS

#### Section 67(1)

##### 1 Fines and Recoveries Act 1833 (c. 74)

(1) The Fines and Recoveries Act 1833 (c. 74) is amended as follows.

(2) In section 33 (case where protector of settlement lacks capacity to act), for the words from “shall be incapable” to “is incapable as aforesaid” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2005) to manage his property and affairs, the Court of Protection is to take his place as protector of the settlement while he lacks capacity”.

(3) In sections 48 and 49 (mental health jurisdiction), for each reference to the judge having jurisdiction under Part 7 of the Mental Health Act substitute a reference to the Court of Protection.

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**Commencement**

Sch. 6 para. 1(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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##### 2 Improvement of Land Act 1864 (c. 114)

In section 68 of the Improvement of Land Act 1864 (c. 114) (apportionment of rentcharges)–

(a) for “, curator, or receiver of” substitute “or curator of, or a deputy with powers in relation to property and affairs appointed by the Court of Protection for;”, and

(b) for “or patient within the meaning of Part VII of the Mental Health Act 1983” substitute “person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to receive the notice”.

---

**Commencement**

Sch. 6 para. 2(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**3 Trustee Act 1925 (c. 19)**

- (1) The Trustee Act 1925 (c. 19) is amended as follows.
- (2) In section 36 (appointment of new trustee)—
  - (a) in subsection (6C), for the words from “a power of attorney” to the end, substitute “an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005”, and
  - (b) in subsection (9)—
    - (i) for the words from “is incapable” to “exercising” substitute “lacks capacity to exercise”, and
    - (ii) for the words from “the authority” to the end substitute “the Court of Protection”.
- (3) In section 41(1) (power of court to appoint new trustee) for the words from “is incapable” to “exercising” substitute “lacks capacity to exercise”.
- (4) In section 54 (mental health jurisdiction)—
  - (a) for subsection (1) substitute—

“(1) Subject to subsection (2), the Court of Protection may not make an order, or give a direction or authority, in relation to a person who lacks capacity to exercise his functions as trustee, if the High Court may make an order to that effect under this Act.”,
  - (b) in subsection (2)—
    - (i) for the words from the beginning to “of a receiver” substitute “Where a person lacks capacity to exercise his functions as a trustee and a deputy is appointed for him by the Court of Protection or an application for the appointment of a deputy”,
    - (ii) for “the said authority”, in each place, substitute “the Court of Protection”, and
    - (iii) for “the patient”, in each place, substitute “the person concerned”, and
  - (c) omit subsection (3).
- (5) In section 55 (order made on particular allegation to be conclusive evidence of it)—
  - (a) for the words from “Part VII” to “Northern Ireland” substitute “sections 15 to 20 of the Mental Capacity Act 2005 or any corresponding provisions having effect in Northern Ireland”, and
  - (b) for paragraph (a) substitute—

“(a) that a trustee or mortgagee lacks capacity in relation to the matter in question;”.
- (6) In section 68 (definitions), at the end add—

“(3) Any reference in this Act to a person who lacks capacity in relation to a matter is to a person—

  - (a) who lacks capacity within the meaning of the Mental Capacity Act 2005 in relation to that matter, or
  - (b) in respect of whom the powers conferred by section 48 of that Act are exercisable and have been exercised in relation to that matter.”.

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**Commencement**

Sch. 6 para. 3(1)-(6): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**4 Law of Property Act 1925 (c. 20)**

- (1) The Law of Property Act 1925 (c. 20) is amended as follows.
- (2) In section 22 (conveyances on behalf of persons who lack capacity)–
  - (a) in subsection (1)–
    - (i) for the words from “in a person suffering” to “is acting” substitute “, either solely or jointly with any other person or persons, in a person lacking capacity (within the meaning of the Mental Capacity Act 2005) to convey or create a legal estate, a deputy appointed for him by the Court of Protection or (if no deputy is appointed”, and
    - (ii) for “the authority having jurisdiction under Part VII of the Mental Health Act 1983” substitute “the Court of Protection”,
  - (b) in subsection (2), for “is incapable, by reason of mental disorder, of exercising” substitute “lacks capacity (within the meaning of that Act) to exercise”, and
  - (c) in subsection (3), for the words from “an enduring power” to the end substitute “an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act) is entitled to act for the trustee who lacks capacity in relation to the dealing.”.
- (3) In section 205(1) (interpretation), omit paragraph (xiii).

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**Commencement**

Sch. 6 para. 4(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**5 Administration of Estates Act 1925 (c. 23)**

- (1) The Administration of Estates Act 1925 (c. 23) is amended as follows.
- (2) In section 41(1) (powers of personal representatives to appropriate), in the proviso–
  - (a) in paragraph (ii)–
    - (i) for the words from “is incapable” to “the consent” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2005) to give the consent, it”, and
    - (ii) for “or receiver” substitute “or a person appointed as deputy for him by the Court of Protection”, and
  - (b) in paragraph (iv), for “no receiver is acting for a person suffering from mental disorder” substitute “no deputy is appointed for a person who lacks capacity to consent”.
- (3) Omit section 55(1)(viii) (definitions of “person of unsound mind” and “defective”).

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**Commencement**

Sch. 6 para. 5(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**6 National Assistance Act 1948 (c. 29)**

In section 49 of the National Assistance Act 1948 (c. 29) (expenses of council officers acting for persons who lack capacity)–

- (a) for the words from “applies” to “affairs of a patient” substitute “applies for appointment by the Court of Protection as a deputy”, and
- (b) for “such functions” substitute “his functions as deputy”.

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#### Commencement

Sch. 6 para. 6(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### **7 U.S.A. Veterans' Pensions (Administration) Act 1949 (c. 45)**

In section 1 of the U.S.A. Veterans' Pensions (Administration) Act 1949 (c. 45) (administration of pensions)–

- (a) in subsection (4), omit the words from “or for whom” to “1983”, and
- (b) after subsection (4), insert–

“(4A) An agreement under subsection (1) is not to be made in relation to a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) for the purposes of this Act if–

- (a) there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act), or a deputy appointed for the person by the Court of Protection, and
- (b) the donee or deputy has power in relation to the person for the purposes of this Act.

(4B) The proviso at the end of subsection (4) also applies in relation to subsection (4A).”.

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#### Commencement

Sch. 6 para. 7(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### **8 Intestates' Estates Act 1952 (c. 64)**

In Schedule 2 to the Intestates' Estates Act 1952 (c. 64) (rights of surviving spouse or civil partner in relation to home), for paragraph 6(1) substitute–

“(1) Where the surviving spouse or civil partner lacks capacity (within the meaning of the Mental Capacity Act 2005) to make a requirement or give a consent under this Schedule, the requirement or consent may be made or given by a deputy appointed by the Court of Protection with power in that respect or, if no deputy has that power, by that court.”.

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#### Commencement

Sch. 6 para. 8: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### **9 Variation of Trusts Act 1958 (c. 53)**

In section 1 of the Variation of Trusts Act 1958 (c. 53) (jurisdiction of courts to vary trusts)–

- (a) in subsection (3), for the words from “shall be determined” to the end substitute “who lacks capacity (within the meaning of the Mental Capacity Act 2005) to give his assent is to be determined by the Court of Protection”, and

(b) in subsection (6), for the words from “the powers” to the end substitute “the powers of the Court of Protection”.

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**Commencement**

Sch. 6 para. 9(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**10 Administration of Justice Act 1960 (c. 65)**

In section 12(1)(b) of the Administration of Justice Act 1960 (c. 65) (contempt of court to publish information about proceedings in private relating to persons with incapacity) for the words from “under Part VIII” to “that Act” substitute “under the Mental Capacity Act 2005, or under any provision of the Mental Health Act 1983”.

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**Commencement**

Sch. 6 para. 10: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**11 Industrial and Provident Societies Act 1965 (c. 12)**

In section 26 of the Industrial and Provident Societies Act 1965 (c. 12) (payments for mentally incapable people), for subsection (2) substitute–

“(2) Subsection (1) does not apply where the member or person concerned lacks capacity (within the meaning of the Mental Capacity Act 2005) for the purposes of this Act and–

- (a) there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act), or a deputy appointed for the member or person by the Court of Protection, and
- (b) the donee or deputy has power in relation to the member or person for the purposes of this Act.”.

---

**Commencement**

Sch. 6 para. 11: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**12 Compulsory Purchase Act 1965 (c. 56)**

In Schedule 1 to the Compulsory Purchase Act 1965 (c. 56) (persons without power to sell their interests), for paragraph 1(2)(b) substitute–

“(b) do not have effect in relation to a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) for the purposes of this Act if–

- (i) there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act), or a deputy appointed for the person by the Court of Protection, and
- (ii) the donee or deputy has power in relation to the person for the purposes of this Act.”.

---

**Commencement**

Sch. 6 para. 12: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**13 Leasehold Reform Act 1967 (c. 88)**

(1) For section 26(2) of the Leasehold Reform Act 1967 (c. 88) (landlord lacking capacity) substitute—

“(2) Where a landlord lacks capacity (within the meaning of the Mental Capacity Act 2005) to exercise his functions as a landlord, those functions are to be exercised—

- (a) by a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act), or a deputy appointed for him by the Court of Protection, with power to exercise those functions, or
- (b) if no donee or deputy has that power, by a person authorised in that respect by that court.”.

(2) That amendment does not affect any proceedings pending at the commencement of this paragraph in which a receiver or a person authorised under Part 7 of the Mental Health Act is acting on behalf of the landlord.

**Commencement**

Sch. 6 para. 13(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**14 Medicines Act 1968 (c. 67)**

In section 72 of the Medicines Act 1968 (c. 67) (pharmacist lacking capacity)—

- (a) in subsection (1)(c), for the words from “a receiver” to “1959” substitute “he becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to carry on the business”,
- (b) after subsection (1) insert—

“(1A) In subsection (1)(c), the reference to a person who lacks capacity to carry on the business is to a person—

- (a) in respect of whom there is a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the Mental Capacity Act 2005), or
- (b) for whom a deputy is appointed by the Court of Protection, and in relation to whom the donee or deputy has power for the purposes of this Act.”,
- (c) in subsection (3)(d)—
  - (i) for “receiver” substitute “deputy”, and
  - (ii) after “guardian” insert “or from the date of registration of the instrument appointing the donee”, and
- (d) in subsection (4)(c), for “receiver” substitute “donee, deputy”.

**Commencement**

Sch. 6 para. 14(a)-(d): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**15 Family Law Reform Act 1969 (c. 46)**

For section 21(4) of the Family Law Reform Act 1969 (c. 46) (consent required for taking of bodily sample from person lacking capacity), substitute—

“(4) A bodily sample may be taken from a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to give his consent, if consent is given by the court giving the direction under section 20 or by–

- (a) a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act), or
- (b) a deputy appointed, or any other person authorised, by the Court of Protection, with power in that respect.”.

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#### Commencement

Sch. 6 para. 15: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### 16 Local Authority Social Services Act 1970 (c. 42)

(1) Schedule 1 to the Local Authority Social Services Act 1970 (c. 42) (enactments conferring functions assigned to social services committee) is amended as follows.

(2) In the entry for section 49 of the National Assistance Act 1948 (expenses of local authority officer appointed for person who lacks capacity) for “receiver” substitute “deputy”.

(3) At the end, insert–

“Mental Capacity Act 2005	
Section 39	Instructing independent mental capacity advocate before providing accommodation for person lacking capacity.
Section 49	Reports in proceedings.”

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#### Commencement

Sch. 6 para. 16(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### 17 Courts Act 1971 (c. 23)

In Part 1A of Schedule 2 to the Courts Act 1971 (c. 23) (office-holders eligible for appointment as circuit judges), omit the reference to a Master of the Court of Protection.

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#### Commencement

Sch. 6 para. 17: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### 18 Local Government Act 1972 (c. 70)

(1) Omit section 118 of the Local Government Act 1972 (c. 70) (payment of pension etc. where recipient lacks capacity).

(2) Sub-paragraph (3) applies where, before the commencement of this paragraph, a local authority has, in respect of a person referred to in that section as “the patient”, made payments under that section–

- (a) to an institution or person having the care of the patient, or
- (b) in accordance with subsection (1)(a) or (b) of that section.



(3) The local authority may, in respect of the patient, continue to make payments under that section to that institution or person, or in accordance with subsection (1)(a) or (b) of that section, despite the repeal made by sub-paragraph (1).

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**Commencement**

Sch. 6 para. 18(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**19 Matrimonial Causes Act 1973 (c. 18)**

In section 40 of the Matrimonial Causes Act 1973 (c. 18) (payments to person who lacks capacity) (which becomes subsection (1))–

- (a) for the words from “is incapable” to “affairs” substitute “(“P”) lacks capacity (within the meaning of the Mental Capacity Act 2005) in relation to the provisions of the order”,
- (b) for “that person under Part VIII of that Act” substitute “P under that Act”,
- (c) for the words from “such persons” to the end substitute “such person (“D”) as it may direct”, and
- (d) at the end insert–

“(2) In carrying out any functions of his in relation to an order made under subsection (1), D must act in P's best interests (within the meaning of that Act).”.

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**Commencement**

Sch. 6 para. 19(a)-(d): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**20 Juries Act 1974 (c. 23)**

In Schedule 1 to the Juries Act 1974 (c. 23) (disqualification for jury service), for paragraph 3 substitute–

**“3**

A person who lacks capacity, within the meaning of the Mental Capacity Act 2005, to serve as a juror.”.

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**Commencement**

Sch. 6 para. 20: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**21 Consumer Credit Act 1974 (c. 39)**

For section 37(1)(c) of the Consumer Credit Act 1974 (c. 39) (termination of consumer credit licence if holder lacks capacity) substitute–

“(c) becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to carry on the activities covered by the licence.”.

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**Commencement**

Sch. 6 para. 21: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**22 Solicitors Act 1974 (c. 47)**

(1) The Solicitors Act 1974 (c. 47) is amended as follows.

(3) In section 62(4) (contentious business agreements made by clients) for paragraphs (c) and (d) substitute—

“(c) as a deputy for him appointed by the Court of Protection with powers in relation to his property and affairs, or

(d) as another person authorised under that Act to act on his behalf.”.

(4) In paragraph 1(1) of Schedule 1 (circumstances in which Law Society may intervene in solicitor's practice), for paragraph (f) substitute—

“(f) a solicitor lacks capacity (within the meaning of the Mental Capacity Act 2005) to act as a solicitor and powers under sections 15 to 20 or section 48 of that Act are exercisable in relation to him;”.

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**Commencement**

Sch. 6 para. 22(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**23 Local Government (Miscellaneous Provisions) Act 1976 (c. 57)**

In section 31 of the Local Government (Miscellaneous Provisions) Act 1976 (c. 57) (the title to which becomes “Indemnities for local authority officers appointed as deputies or administrators”), for the words from “as a receiver” to “1959” substitute “as a deputy for a person by the Court of Protection”.

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**Commencement**

Sch. 6 para. 23: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**24 Sale of Goods Act 1979 (c. 54)**

In section 3(2) of the Sale of Goods Act 1979 (c. 54) (capacity to buy and sell) the words “mental incapacity or” cease to have effect in England and Wales.

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**Commencement**

Sch. 6 para. 24: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**25 Limitation Act 1980 (c. 58)**

In section 38 of the Limitation Act 1980 (c. 58) (interpretation) substitute—

(a) in subsection (2) for “of unsound mind” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2005) to conduct legal proceedings”, and

(b) omit subsections (3) and (4).

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**Commencement**

Sch. 6 para. 25(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**26 Public Passenger Vehicles Act 1981 (c. 14)**

In section 57(2)(c) of the Public Passenger Vehicles Act 1981 (c. 14) (termination of public service vehicle licence if holder lacks capacity) for the words from “becomes a patient” to “or” substitute “becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to use a vehicle under the licence, or”.

**Commencement**

Sch. 6 para. 26: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**27 Judicial Pensions Act 1981 (c. 20)**

In Schedule 1 to the Judicial Pensions Act 1981 (c. 20) (pensions of Supreme Court officers, etc.), in paragraph 1, omit the reference to a Master of the Court of Protection except in the case of a person holding that office immediately before the commencement of this paragraph or who had previously retired from that office or died.

**Commencement**

Sch. 6 para. 27: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**28 Supreme Court Act 1981 (c. 54)**

In [Schedule 2 to the Senior Courts Act 1981 (c. 54)]<sup>392</sup> (qualifications for appointment to office in Supreme Court), omit paragraph 11 (Master of the Court of Protection).

**Commencement**

Sch. 6 para. 28: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**29 Mental Health Act 1983 (c. 20)**

(1) The Mental Health Act is amended as follows.

(2) In section 134(3) (cases where correspondence of detained patients may not be withheld) for paragraph (b) substitute—

“(b) any judge or officer of the Court of Protection, any of the Court of Protection Visitors or any person asked by that Court for a report under section 49 of the Mental Capacity Act 2005 concerning the patient;”.

(3) In section 139 (protection for acts done in pursuance of 1983 Act), in subsection (1), omit from “or in, or in pursuance” to “Part VII of this Act,”.

(4) Section 142 (payment of pension etc. where recipient lacks capacity) ceases to have effect in England and Wales.

(5) Sub-paragraph (6) applies where, before the commencement of sub-paragraph (4), an authority has, in respect of a person referred to in that section as “the patient”, made payments under that section—

(a) to an institution or person having the care of the patient, or

<sup>392</sup> Words substituted by Constitutional Reform Act 2005 c. 4 Sch.11(1) para.1(2) (October 1, 2009)

(b) in accordance with subsection (2)(a) or (b) of that section.

(6) The authority may, in respect of the patient, continue to make payments under that section to that institution or person, or in accordance with subsection (2)(a) or (b) of that section, despite the amendment made by sub-paragraph (4).

(7) In section 145(1) (interpretation), in the definition of “patient”, omit “(except in Part VII of this Act)”.

(8) In section 146 (provisions having effect in Scotland), omit from “104(4)” to “section)”.

(9) In section 147 (provisions having effect in Northern Ireland), omit from “104(4)” to “section)”.

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#### Commencement

Sch. 6 para. 29(1)-(9): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### 30 Administration of Justice Act 1985 (c. 61)

In section 18(3) of the Administration of Justice Act 1985 (c. 61) (licensed conveyancer who lacks capacity), for the words from “that person” to the end substitute “he becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to practise as a licensed conveyancer.”.

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#### Commencement

Sch. 6 para. 30: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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### 31 Insolvency Act 1986 (c. 45)

(1) The Insolvency Act 1986 (c. 45) is amended as follows.

(2) In section 389A (people not authorised to act as nominee or supervisor in voluntary arrangement), in subsection (3)–

- (a) omit the “or” immediately after paragraph (b),
- (b) in paragraph (c), omit “Part VII of the Mental Health Act 1983 or”, and
- (c) after that paragraph, insert

“, or

(d) he lacks capacity (within the meaning of the Mental Capacity Act 2005) to act as nominee or supervisor”.

(3) In section 390 (people not qualified to be insolvency practitioners), in subsection (4)–

- (a) omit the “or” immediately after paragraph (b),
- (b) in paragraph (c), omit “Part VII of the Mental Health Act 1983 or”, and
- (c) after that paragraph, insert

“, or

(d) he lacks capacity (within the meaning of the Mental Capacity Act 2005) to act as an insolvency practitioner.”.

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#### Commencement

Sch. 6 para. 31(1)-(3)(c): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**32 Building Societies Act 1986 (c. 53)**

In section 102D(9) of the Building Societies Act 1986 (c. 53) (references to a person holding an account on trust for another)–

- (a) in paragraph (a), for “Part VII of the Mental Health Act 1983” substitute “the Mental Capacity Act 2005”, and
- (b) for paragraph (b) substitute–

“(b) to an attorney holding an account for another person under–

- (i) an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005, or
- (ii) an enduring power registered under the Enduring Powers of Attorney (Northern Ireland) Order 1987;”.

**Commencement**

Sch. 6 para. 32(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**33 Public Trustee and Administration of Funds Act 1986 (c. 57)**

In section 3 of the Public Trustee and Administration of Funds Act 1986 (c. 57) (functions of the Public Trustee)–

- (a) for subsections (1) to (5) substitute–

“(1) The Public Trustee may exercise the functions of a deputy appointed by the Court of Protection.”,

- (b) in subsection (6), for “the 1906 Act” substitute “the Public Trustee Act 1906”, and
- (c) omit subsection (7).

**Commencement**

Sch. 6 para. 33(a)-(c): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**34 Patronage (Benefices) Measure 1986 (No.3)**

(1) The Patronage (Benefices) Measure 1986 (No. 3) is amended as follows.

(2) In section 5 (rights of patronage exercisable otherwise than by registered patron), after subsection (3) insert–

“(3A) The reference in subsection (3) to a power of attorney does not include an enduring power of attorney or lasting power of attorney (within the meaning of the Mental Capacity Act 2005).”

(3) In section 9 (information to be sent to designated officer when benefice becomes vacant), after subsection (5) insert–

“(5A) Subsections (5B) and (5C) apply where the functions of a registered patron are, as a result of paragraph 10 of Schedule 2 to the Mental Capacity Act 2005 (patron's loss of capacity to discharge functions), to be discharged by an individual appointed by the Court of Protection.

(5B) If the individual is a clerk in Holy Orders, subsection (5) applies to him as it applies to the registered patron.

(5C) If the individual is not a clerk in Holy Orders, subsection (1) (other than paragraph (b)) applies to him as it applies to the registered patron.”

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**Commencement**

Sch. 6 para. 34(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**35 Courts and Legal Services Act 1990 (c. 41)**

(1) The Courts and Legal Services Act 1990 (c. 41) is amended as follows.

(2) In Schedule 11 (judges etc. barred from legal practice), for the reference to a Master of the Court of Protection substitute a reference to each of the following—

- (a) Senior Judge of the Court of Protection,
- (b) President of the Court of Protection,
- (c) Vice-President of the Court of Protection.

(3) In paragraph 5(3) of Schedule 14 (exercise of powers of intervention in registered foreign lawyer's practice), for paragraph (f) substitute—

“(f) he lacks capacity (within the meaning of the Mental Capacity Act 2005) to act as a registered foreign lawyer and powers under sections 15 to 20 or section 48 are exercisable in relation to him;”.

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**Commencement**

Sch. 6 para. 35(1)-(3): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**36 Child Support Act 1991 (c. 48)**

In section 50 of the Child Support Act 1991 (c. 48) (unauthorised disclosure of information)—

- (a) in subsection (8)—
  - (i) immediately after paragraph (a), insert “or”,
  - (ii) omit paragraphs (b) and (d) and the “or” immediately after paragraph (c), and
  - (iii) for “, receiver, custodian or appointee” substitute “or custodian”, and
- (b) after that subsection, insert—

“(9) Where the person to whom the information relates lacks capacity (within the meaning of the Mental Capacity Act 2005) to consent to its disclosure, the appropriate person is—

- (a) a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act), or
- (b) a deputy appointed for him, or any other person authorised, by the Court of Protection,

with power in that respect.”.

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**Commencement**

Sch. 6 para. 36(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

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**37 Social Security Administration Act 1992 (c. 5)**

In section 123 of the Social Security Administration Act 1992 (c. 5) (unauthorised disclosure of information)–

- (a) in subsection (10), omit–
  - (i) in paragraph (b), “a receiver appointed under section 99 of the Mental Health Act 1983 or”,
  - (ii) in paragraph (d)(i), “sub-paragraph (a) of rule 41(1) of the Court of Protection Rules 1984 or”,
  - (iii) in paragraph (d)(ii), “a receiver ad interim appointed under sub-paragraph (b) of the said rule 41(1) or”, and
  - (iv) “receiver,”, and
- (b) after that subsection, insert–

“(11) Where the person to whom the information relates lacks capacity (within the meaning of the Mental Capacity Act 2005) to consent to its disclosure, the appropriate person is–

- (a) a donee of an enduring power of attorney or lasting power of attorney (within the meaning of that Act), or
- (b) a deputy appointed for him, or any other person authorised, by the Court of Protection,

with power in that respect.”.

**Commencement**

Sch. 6 para. 37(a)-(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**38 Judicial Pensions and Retirement Act 1993 (c. 8)**

- (1) The Judicial Pensions and Retirement Act 1993 (c. 8) is amended as follows.
- (2) In Schedule 1 (qualifying judicial offices), in Part 2, under the cross-heading “Court officers”, omit the reference to a Master of the Court of Protection except in the case of a person holding that office immediately before the commencement of this sub-paragraph or who had previously retired from that office or died.
- (3) In Schedule 5 (retirement: the relevant offices), omit the entries relating to the Master and Deputy or temporary Master of the Court of Protection, except in the case of a person holding any of those offices immediately before the commencement of this sub-paragraph.
- (4) In Schedule 7 (retirement: transitional provisions), omit paragraph 5(5)(i)(g) except in the case of a person holding office as a deputy or temporary Master of the Court of Protection immediately before the commencement of this sub-paragraph.

**Commencement**

Sch. 6 para. 38(1)-(4): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**39 Leasehold Reform, Housing and Urban Development Act 1993 (c. 28)**

- (1) For paragraph 4 of Schedule 2 to the Leasehold Reform, Housing and Urban Development Act 1993 (c. 28) (landlord under a disability), substitute–

**“4**

(1) This paragraph applies where a Chapter I or Chapter II landlord lacks capacity (within the meaning of the Mental Capacity Act 2005) to exercise his functions as a landlord.

(2) For the purposes of the Chapter concerned, the landlord's place is to be taken—  
 (a) by a donee of an enduring power of attorney or lasting power of attorney (within the meaning of the 2005 Act), or a deputy appointed for him by the Court of Protection, with power to exercise those functions, or  
 (b) if no deputy or donee has that power, by a person authorised in that respect by that court.”.

(2) That amendment does not affect any proceedings pending at the commencement of this paragraph in which a receiver or a person authorised under Part 7 of the Mental Health Act 1983 (c. 20) is acting on behalf of the landlord.

**Commencement**

Sch. 6 para. 39(1)-(2): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**40 Goods Vehicles (Licensing of Operators) Act 1995 (c. 23)**

(1) The Goods Vehicles (Licensing of Operators) Act 1995 (c. 23) is amended as follows.

(2) In section 16(5) (termination of licence), for “he becomes a patient within the meaning of Part VII of the Mental Health Act 1983” substitute “he becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to use a vehicle under the licence”.

(3) In section 48 (licence not to be transferable, etc.)—

(a) in subsection (2)—

(i) for “or become a patient within the meaning of Part VII of the Mental Health Act 1983” substitute “, or become a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to use a vehicle under the licence,”, and

(ii) in paragraph (a), for “became a patient” substitute “became a person who lacked capacity in that respect”, and

(b) in subsection (5), for “a patient within the meaning of Part VII of the Mental Health Act 1983” substitute “a person lacking capacity”.

**Commencement**

Sch. 6 para. 40(1)-(3)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**41 Disability Discrimination Act 1995 (c. 50)**

In section 20(7) of the Disability Discrimination Act 1995 (c. 50) (regulations to disapply provisions about incapacity), in paragraph (b), for “Part VII of the Mental Health Act 1983” substitute “the Mental Capacity Act 2005”.

**Commencement**

Sch. 6 para. 41: October 1, 2007 (SI 2007/1897 art. 2(1)(d))



**42 Trusts of Land and Appointment of Trustees Act 1996 (c. 47)**

(1) The Trusts of Land and Appointment of Trustees Act 1996 (c. 47) is amended as follows.

(2) In section 9 (delegation by trustees), in subsection (6), for the words from “an enduring power” to the end substitute “an enduring power of attorney or lasting power of attorney within the meaning of the Mental Capacity Act 2005”.

(3) In section 20 (the title to which becomes “Appointment of substitute for trustee who lacks capacity”)–

(a) in subsection (1)(a), for “is incapable by reason of mental disorder of exercising” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2005) to exercise”, and

(b) in subsection (2)–

(i) for paragraph (a) substitute–

“(a) a deputy appointed for the trustee by the Court of Protection,”,

(ii) in paragraph (b), for the words from “a power of attorney” to the end substitute “an enduring power of attorney or lasting power of attorney registered under the Mental Capacity Act 2005”, and

(iii) in paragraph (c), for the words from “the authority” to the end substitute “the Court of Protection”.

**Commencement**

Sch. 6 para. 42(1)-(3)(b)(iii): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**43 Human Rights Act 1998 (c. 42)**

In section 4(5) of the Human Rights Act 1998 (c. 42) (courts which may make declarations of incompatibility), after paragraph (e) insert–

“(f) the Court of Protection, in any matter being dealt with by the President of the Family Division, the Vice-Chancellor or a puisne judge of the High Court.”

**Commencement**

Sch. 6 para. 43: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**44 Access to Justice Act 1999 (c. 22)**

In paragraph 1 of Schedule 2 to the Access to Justice Act 1999 (c. 22) (services excluded from the Community Legal Service), after paragraph (e) insert–

“(ea) the creation of lasting powers of attorney under the Mental Capacity Act 2005,

(eb) the making of advance decisions under that Act,”.

**Commencement**

Sch. 6 para. 44: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**45 Adoption and Children Act 2002 (c. 38)**

In section 52(1)(a) of the Adoption and Children Act 2002 (c. 38) (parental consent to adoption), for “is incapable of giving consent” substitute “lacks capacity (within the meaning of the Mental Capacity Act 2005) to give consent”.

**Commencement**

Sch. 6 para. 45: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**46 Licensing Act 2003 (c. 17)**

(1) The Licensing Act 2003 (c.17) is amended as follows.

(2) In section 27(1) (lapse of premises licence), for paragraph (b) substitute—

“(b) becomes a person who lacks capacity (within the meaning of the Mental Capacity Act 2005) to hold the licence,”.

(3) In section 47 (interim authority notice in relation to premises licence)—

(a) in subsection (5), for paragraph (b) substitute—

“(b) the former holder lacks capacity (within the meaning of the Mental Capacity Act 2005) to hold the licence and that person acts for him under an enduring power of attorney or lasting power of attorney registered under that Act,”

, and

(b) in subsection (10), omit the definition of “mentally incapable”.

**Commencement**

Sch. 6 para. 46(1)-(3)(b): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**47 Courts Act 2003 (c. 39)**

(1) The Courts Act 2003 (c. 39) is amended as follows.

(2) In section 1(1) (the courts in relation to which the Lord Chancellor must discharge his general duty), after paragraph (a) insert—

“(aa) the Court of Protection,”.

(3) In section 64(2) (judicial titles which the Lord Chancellor may by order alter)—

(a) omit the reference to a Master of the Court of Protection, and

(b) at the appropriate place insert a reference to each of the following—

(i) Senior Judge of the Court of Protection,

(ii) President of the Court of Protection,

(iii) Vice-president of the Court of Protection.

**Commencement**

Sch. 6 para. 47(1)-(3)(b)(iii): October 1, 2007 (SI 2007/1897 art. 2(1)(d))

**SCHEDULE 7****REPEALS****Section 67(2)**

<i>Short title and chapter</i>	<i>Extent of repeal</i>
Trustee Act 1925 (c. 19)	Section 54(3).
Law of Property Act 1925 (c. 20)	Section 205(1)(xiii).
Administration of Estates Act 1925 (c. 23)	Section 55(1)(viii)
U.S.A. Veterans' Pensions (Administration) Act 1949 (c. 45)	In section 1(4), the words from "or for whom" to "1983".
Mental Health Act 1959 (c. 72)	In Schedule 7, in Part 1, the entries relating to— section 33 of the Fines and Recoveries Act 1833, section 68 of the Improvement of Land Act 1864, section 55 of the Trustee Act 1925, section 205(1) of the Law of Property Act 1925, section 49 of the National Assistance Act 1948, and section 1 of the Variation of Trusts Act 1958.
Courts Act 1971 (c. 23)	In Schedule 2, in Part 1A, the words "Master of the Court of Protection".
Local Government Act 1972 (c. 70)	Section 118.
Limitation Act 1980 (c. 58)	Section 38(3) and (4).
[Senior Courts Act 1981 (c. 54)] <sup>393</sup>	In Schedule 2, in Part 2, paragraph 11.
Mental Health Act 1983 (c. 20)	Part 7. In section 139(1) the words from "or in, or in pursuance" to "Part VII of this Act,". In section 145(1), in the definition of "patient" the words "(except in Part VII of this Act)". In sections 146 and 147 the words from "104(4)" to "section),". Schedule 3. In Schedule 4, paragraph 1, 2, 4, 5, 7, 9, 14, 20, 22, 25, 32, 38, 55 and 56. In Schedule 5, paragraphs 26, 43, 44 and 45.
Enduring Powers of Attorney Act 1985 (c. 29)	The whole Act.
Insolvency Act 1986 (c. 45)	In section 389A(3)— the "or" immediately after paragraph (b), and in paragraph (c), the words "Part VII of the Mental Health Act 1983 or". In section 390(4)— the "or" immediately after paragraph (b), and in paragraph (c), the words "Part VII of the Mental Health Act 1983 or".
Public Trustee and Administration of Funds Act 1986 (c. 57)	Section 2. Section 3(7).
Child Support Act 1991 (c. 48)	In section 50(8)— paragraphs (b) and (d), and the "or" immediately after paragraph (c).
Social Security Administration Act 1992 (c. 5)	In section 123(10)— in paragraph (b), "a receiver appointed under section 99 of the Mental Health Act 1983 or",

<sup>393</sup> Words substituted by Constitutional Reform Act 2005 c. 4 Sch.11(1) para.1(2) (October 1, 2009)

<i>Short title and chapter</i>	<i>Extent of repeal</i>
	in paragraph (d)(i), “sub-paragraph (a) of rule 41(1) of the Court of Protection Rules Act 1984 or”, in paragraph (d)(ii), “a receiver and interim appointed under sub-paragraph (b) of the said rule 41(1) or”, and “receiver;”.
Trustee Delegation Act 1999 (c. 15)	Section 4. Section 6. In section 7(3), the words “in accordance with section 4 above”.
Care Standards Act 2000 (c. 14)	In Schedule 4, paragraph 8.
Licensing Act 2003 (c. 17)	In section 47(10), the definition of “mentally incapable”.
Courts Act 2003 (c. 64)	In section 64(2), the words “Master of the Court of Protection”.

### Commencement

Sch. 7 para. 1: October 1, 2007 (SI 2007/1897 art. 2(1)(d))

## EXPLANATORY NOTES

### INTRODUCTION

1. These explanatory notes relate to the Mental Capacity Act 2005 which received Royal Assent on 7 April 2005. They have been prepared by the Department for Constitutional Affairs and the Department of Health in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament.

2. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. So where a provision or part of a provision does not seem to require any explanation or comment, none is given.

### SUMMARY AND BACKGROUND

3. The Act has its basis in the Law Commission Report No.231 on Mental Incapacity, which was published in February 1995 after extensive consultation. The Government consulted further and published a Policy Statement, *Making Decisions*, in October 1999, setting out proposals to reform the law in order to improve and clarify the decision-making process for people unable to make decisions for themselves. On 27 June 2003 the Government published a draft Mental Incapacity Bill and accompanying notes (Cm 5859-I & II) which was subject to pre-legislative scrutiny by a Joint Committee of both Houses. The Joint Committee published their report on 28 November 2003 (HL Paper 189-I & HC 1083-I). The Government's response to the Joint Committee report was presented to Parliament in February 2004 (Cm 6121). The renamed Mental Capacity Bill was introduced in Parliament on 17 June 2004 and received Royal Assent on 7 April 2005, having been carried over from the previous session.

4. The Act aims to clarify a number of legal uncertainties and to reform and update the current law where decisions need to be made on behalf of others. The Act will govern decision-making on behalf of adults, both where they lose mental capacity at some point in their lives, for example as

a result of dementia or brain injury, and where the incapacitating condition has been present since birth. It covers a wide range of decisions, on personal welfare as well as financial matters and substitute decision-making by attorneys or court-appointed “deputies”, and clarifies the position where no such formal process has been adopted. The Act includes new rules to govern research involving people who lack capacity and provides for new independent mental capacity advocates to represent and provide support to such people in relation to certain decisions. The Act provides recourse, where necessary, and at the appropriate level, to a court with power to deal with all personal welfare (including health care) and financial decisions on behalf of adults lacking capacity.

5. The Act replaces Part 7 of the Mental Health Act 1983 and the whole of the Enduring Powers of Attorney Act 1985. A new Court of Protection with more comprehensive powers will replace the current Court of Protection, which is an office of the Supreme Court.

### **The Act**

6. The Act is divided into 3 parts.

#### **Part 1: Persons who lack capacity**

7. Part 1 contains provisions defining “persons who lack capacity”. It contains a set of key principles and sets out a checklist to be used in ascertaining a person's best interests. It deals with liability for actions in connection with the care or treatment of a person who lacks capacity to consent to what is done. Part 1 also establishes a new statutory scheme for “lasting” powers of attorney which may extend to personal welfare (including health care) matters. It sets out the jurisdiction of the new Court of Protection to make declarations and orders and to appoint substitute decision-makers (“deputies”), where a person lacks capacity. This Part also sets out rules about advance decisions to refuse medical treatment and creates new safeguards controlling many types of research involving people who lack capacity. It establishes a system for providing independent mental capacity advocates for particularly vulnerable people. It also provides for codes of practice to give guidance about the legislation and creates a new offence of neglect or ill-treatment.

#### **Part 2: The Court of Protection and the Public Guardian**

8. Part 2 establishes a new superior court of record, to be known as the Court of Protection, and provides for its judges and procedures. It also establishes a new statutory official, the Public Guardian, to support the work of the court. Provision is also made for Court of Protection Visitors.

#### **Part 3: Miscellaneous and General**

9. Part 3 deals with private international law and transitional and other technical provisions and includes a declaratory provision that nothing in the Act is to be taken to affect the law relating to unlawful killing or assisting suicide. ECHR issues arise in relation to a number of provisions.

### **COMPATIBILITY WITH ECHR**

10. The Act meets the state's positive obligation under Article 8 of the European Convention on Human Rights (“ECHR”) to ensure respect for private life. ECHR issues arise in relation to a number of provisions.

11. Article 8 issues in relation to private life are engaged in connection with sections 5, 6, 9 and 11 and could also be engaged as a result of section 20 and a court order made under section 16(2). Any interference pursues the legitimate aim of protecting the health and wellbeing of the person lacking capacity and ensures that those who care for and treat persons who lack capacity are protected from certain liabilities where appropriate. The principles in section 1, the criteria for lack of capacity

(section 2), the checklist as to best interests (section 4) and the safeguards within the sections themselves create a framework within which any interference will be proportionate to this legitimate aim. Article 8 rights may also be engaged by section 49(7) to (9), which allows the court to direct a medical examination or interview of the person concerned and the examination of his health and social services records: the court is bound by the principles in section 1 and the best interests checklist. Sections 35(6), 58(5) and (6) and 61(5) and (6) also make provision whereby particular persons may interview the person concerned and examine relevant records. Again, any interference is justified as being for the protection of that person's own health and welfare and proportionate to that aim. The powers are given to the relevant officials for the purpose of enabling them to carry out their functions, which are directed to the protection of the interests of the person who lacks capacity.

12. Rights under Article 1 of the First Protocol may be engaged in connection with sections 7 to 9 and 12 which provide for the control of a person's property and affairs and payment on his behalf for necessary goods and services. The statutory rules are intended to be clear and precise and are designed to strike a fair balance between the property interests of the person lacking capacity, his own wider welfare interests and the interests of others (persons supplying necessary goods and services to the person lacking capacity, anyone bearing the cost and, in the case of section 12, persons related to or connected with him).

13. Sections 10(2) and 13(8) and (9) prevent a bankrupt from acting as a donee of a lasting power of attorney (an "LPA") where the power covers property and affairs and suspend that power where there is an interim bankruptcy restrictions order. Interim bankruptcy restrictions orders will not bring an LPA to an end; but the appointment and power would be suspended (as far as it concerns the donor's property and affairs) so long as the order has effect. Bankruptcy restrictions orders are provided for in Schedule 4A to the Insolvency Act 1986. Article 8 and Article 14 rights may be engaged but any difference of treatment has the legitimate aim of protecting an incapacitated donor from the possibility of financial abuse and is proportionate to that end.

14. A donee of an LPA can be given power to refuse to give consent to life-sustaining treatment on behalf of the donor (see section 11(7) and (8)). The donor's Article 2 and Article 3 rights could be engaged. A person can also make an advance decision to refuse treatment, including life-sustaining treatment. Section 25(5) provides that an advance decision will not apply to any treatment necessary to sustain life unless the advance decision is in writing and is signed and the signature is witnessed. Further, there must be a statement that the decision stands even if life is at risk (and this statement must also be in writing and be signed and the signature must be witnessed). Sections 6(7) and 26(5) provide that action can be taken to preserve life or prevent serious deterioration while the court resolves any dispute or difficulty. These provisions are designed to protect a person's Article 2 and 3 rights, while also discharging the obligation to respect the Article 8 rights of those who choose to give powers to a donee under an LPA or to make an advance decision.

15. Sections 35 to 39 may engage Article 14 rights in connection with Article 8 by providing for an independent mental capacity advocate to represent and support people who lack capacity where they are being treated and cared for by the NHS or a local authority and there is no one who could be consulted about that treatment or care. Any relevant difference in treatment which there might be would have the legitimate aim of protecting the Article 8 rights of incapacitated persons.

16. The comprehensive jurisdiction of the new Court of Protection (sections 15 to 21 and 45 to 56) ensures protection for any rights engaged in connection with the provisions of the Act. The

Government is satisfied that sections 50 (certain applicants to obtain permission to apply), 51(2)(d) (exercise of jurisdiction by officers or staff) and 54 (court fees) do not breach Article 6 rights.

## **TERRITORIAL EXTENT**

17. The Act extends only to England and Wales. Two exceptions are set out in section 68(5) and concern evidence of instruments and registration of LPAs. The amendments and repeals made by Schedules 6 and 7 will have the same extent as the enactments concerned.

18. Similar legislation has already been passed in Scotland in the form of the Adults with Incapacity (Scotland) Act 2000.

## **TERRITORIAL APPLICATION: WALES**

19. The National Assembly for Wales may make regulations under section 30 (research) and section 34 (loss of capacity during research project) and issue guidance under section 32(3). It may also make regulations under section 35 (appointment of independent mental capacity advocates), section 36 (functions of independent mental capacity advocates), section 37 (provision of serious medical treatment by NHS body) and 41 (power to adjust role of independent mental capacity advocate). Section 68(2) provides that sections 30 to 41 will come into force by order made by the National Assembly. Section 43(1) provides that the National Assembly must be consulted by the Lord Chancellor before a code of practice is prepared or revised.

## **COMMENTARY ON SECTIONS**

### **PART 1: PERSONS WHO LACK CAPACITY**

#### *The principles*

#### **Section 1: The principles**

20. This sets out key principles applying to decisions and actions taken under the Act. The starting point is a presumption of capacity. A person must be assumed to have capacity until it is proved otherwise. A person must also be supported to make his own decision, as far it is practicable to do so. The Act requires “all practicable steps” to be taken to help the person. This could include, for example, making sure that the person is in an environment in which he is comfortable or involving an expert in helping him express his views. It is expressly provided that a person is not to be treated as lacking capacity to make a decision simply because he makes an unwise decision. This means that a person who has the necessary ability to make the decision has the right to make irrational or eccentric decisions that others may not judge to be in his best interests (see section 3). Everything done, or decision made, under the Act for a person who lacks capacity must be done in that person's best interests. This principle is expanded upon in section 4. In addition, the “least restrictive option” principle must always be considered. The person making the decision or acting must think whether it is possible to decide or act in a way that would interfere less with the rights and freedom of action of the person who lacks capacity.

#### *Preliminary*

#### **Section 2: People who lack capacity**

21. This sets out the Act's definition of a person who lacks capacity. It focuses on the particular time when a decision has to be made and on the particular matter to which the decision relates, not on any theoretical ability to make decisions generally. It follows that a person can lack capacity for the purposes of the Act even if the loss of capacity is partial or temporary or if his capacity

fluctuates. It also follows that a person may lack capacity in relation to one matter but not in relation to another matter.

22. The inability to make a decision must be caused by an impairment of or disturbance in the functioning of the mind or brain. This is the so-called “diagnostic test”. This could cover a range of problems, such as psychiatric illness, learning disability, dementia, brain damage or even a toxic confusional state, as long as it has the necessary effect on the functioning of the mind or brain, causing the person to be unable to make the decision.

23. Subsection (3) introduces a principle of equal consideration in relation to determinations of a person's capacity. It makes it clear that such determinations should not merely be made on the basis of a person's age, appearance or unjustified assumptions about capacity based on the person's condition or behaviour. Any preconceptions and prejudicial assumptions held by a person making the assessment of capacity must therefore have no input into the assessment of capacity. The reference to “condition” captures a range of factors, including any physical disability a person may have. So, in making an assessment of capacity, the fact that the person in question has a learning difficulty should not in itself lead the person making the assessment to assume that the person with the learning difficulty would lack capacity to decide, for example, where to live. The reference to “appearance” would also include skin colour.

24. Subsection (5) makes it clear that powers under the Act generally only arise where the person lacking capacity is 16 or over (although powers in relation to property might be exercised in relation to a younger person who has disabilities which will cause the incapacity to last into adulthood: see section 18(3)). Any overlap with the jurisdiction under the Children Act 1989 can be dealt with by orders about the transfer of proceedings to the more appropriate court (see section 21).

25. Subsection (5) has the first use of the capital letter “D” to refer to a person exercising powers in relation to a person who lacks capacity. The use of capital letters sometimes makes complex provisions easier to follow (particularly where a number of different people are being referred to), and is a technique often adopted in recent legislation. In this Act, the fact that lack of capacity is specific to particular decisions and that there are many reasons why a person may lack capacity makes it necessary to use a neutral, rather than descriptive, label for the person concerned.

### **Section 3: Inability to make decisions**

26. This sets out the test for assessing whether a person is unable to make a decision about a matter and therefore lacks capacity in relation to that matter. It is a “functional” test, looking at the decision-making process itself. Four reasons are given why a person may be unable to make a decision. The first three (subsection (1)(a) to (c)) will cover the vast majority of cases. To make a decision, a person must first be able to comprehend the information relevant to the decision (further defined in subsection (4)). Subsection (2) makes clear that a determination of incapacity may not be reached without the relevant information having been presented to the person in a way that is appropriate to his circumstances. Secondly, the person must be able to retain this information (for long enough to make the decision, as explained in subsection (3)). And thirdly, he must be able to use and weigh it to arrive at a choice. If the person cannot undertake one of these three aspects of the decision-making process then he is unable to make the decision.

27. Subsection (1)(d) provides for the fourth situation where someone is unable to make a decision namely where he cannot communicate it in any way. This is intended to be a residual category and will only affect a small number of persons, in particular some of those with the very rare condition of “locked-in syndrome”. It seems likely that people suffering from this condition can in fact still



understand, retain and use information and so would not be regarded as lacking capacity under subsection (1)(a) to (c). Some people who suffer from this condition can communicate by blinking an eye, but it seems that others cannot communicate at all. Subsection (1)(d) treats those who are completely unable to communicate their decisions as unable to make a decision. Any residual ability to communicate (such as blinking an eye to indicate “yes” or “no” in answer to a question) would exclude a person from this category.

#### Section 4: **Best interests**

28. It is a key principle of the Act that all steps and decisions taken for someone who lacks capacity must be taken in the person's best interests. The best interests principle is an essential aspect of the Act and builds on the common law while offering further guidance. Given the wide range of acts, decisions and circumstances that the Act will cover, the notion of “best interests” is not defined in the Act. Rather, subsection (2) makes clear that determining what is in a person's best interests requires a consideration of all relevant circumstances (defined in subsection (11)). Subsection (1) makes clear that best interests determinations must not be based merely on a person's age, appearance, or unjustified assumptions about what might be in a person's best interests based on the person's condition or behaviour. Best interests determinations must not therefore be made on the basis of any unjustified and prejudicial assumptions. For example, in making a best interests determination for a person who has a physical disability it would not be acceptable to assume that, because of this disability, they will not have a good quality of life and should therefore not receive treatment. As with section 2(3) the references to “condition” and “appearance” capture a range of factors. The section goes on to list particular steps that must be taken. Best interests is not a test of “substituted judgement” (what the person would have wanted), but rather it requires a determination to be made by applying an objective test as to what would be in the person's best interests. All the relevant circumstances, including the factors mentioned in the section must be considered, but none carries any more weight or priority than another. They must all be balanced in order to determine what would be in the best interests of the person concerned. The factors in this section do not provide a definition of best interests and are not exhaustive.

29. The decision-maker must consider whether the individual concerned is likely to have capacity at some future date (subsection (3)). This is in case the decision can be put off, until the person can make it himself. Even if the decision cannot be put off, the decision is likely to be influenced by whether the person will always lack capacity or is likely to regain capacity.

30. Subsection (4) provides that the person concerned must so far as possible be involved in the process. Even where a person lacks capacity he should not be excluded from the decision-making process.

31. Subsection (5) applies to determinations as to whether treatment that is necessary to sustain life is in the best interests of the person concerned. It provides that the decision-maker must not be motivated by a desire to bring about the person's death. This means that whatever a decision-maker personally feels about, or wants for, the person concerned this must not affect his assessment of whether a particular treatment is in the person's best interests. This subsection does not change the previously understood common law on best interests. It does not mean that doctors are under an obligation to provide, or to continue to provide, life-sustaining treatment where that treatment is not in the best interests of the person.

32. The decision-maker must also consider, as far as is reasonably ascertainable, the “past and present wishes and feelings” of the person concerned (subsection (6)). Such wishes and feelings would include any relevant written statement. Even where people cannot make their own decisions,

they can express preferences and feelings which should be taken seriously. For those who have lost capacity (for example because of progressive dementia) it may be particularly important to consider past wishes and feelings as well as current ones. In particular, there must be consideration of written statements made by the person whilst he had capacity. Such statements may be about what sort of care or treatment the person would wish to have in the case of future illness. Where written statements are well-thought out and considered, they are likely to carry particular weight for the purposes of best interests determinations. There must also be consideration of the person's beliefs and values — religious beliefs, cultural values and lifestyle choices are obvious aspects of this. There may also be other factors that the person would have been likely to consider if able to do so. For example, a person with capacity will often consider emotional bonds or family obligations when deciding how to spend his money or where to live.

33. Subsection (7) specifies who should be consulted when making a best interests determination, recognising that they will often have important information and views as to what would be in the person's best interests. They will also often have information about the past and present wishes and feelings of the person concerned, his beliefs and values and other factors he would be likely to consider were he able to do so. The decision-maker should consult anyone the person concerned has named as someone to consult and anyone who has a caring role or is interested in his welfare. This will include informal carers, family and friends and others who care for the person in a professional or voluntary capacity, including any kind of existing advocate. Anyone appointed under an LPA and any deputy appointed by the court (dealt with later in Part 1) should also be consulted. Consultation is required where it is “practicable and appropriate”. For example, no consultation may be possible in an emergency situation and it might not be appropriate for every day-to-day decision (such as whether to watch television). For significant, non-urgent, decisions, including where there is a series of minor decisions that cumulatively become significant, consultation will be required, as being both practicable and appropriate.

34. Subsection (8) applies the best interests principle to situations where the person concerned may not lack capacity. A donee may be acting under a lasting power of attorney while the donor still has capacity. The subsection makes clear that the obligation also applies where the person concerned does not in fact lack capacity but where the other person reasonably believes that he does lack capacity. There would otherwise be a lacuna in the applicability of the best interests test.

35. Subsection (9) offers appropriate protection to those who act in the reasonable belief that they are doing so in the other person's best interests. It should be remembered that “reasonable belief” is an objective test. Where the court makes a decision it must of course be satisfied that its decision is indeed in the person's best interests.

36. Subsection (11) explains what relevant circumstances means in the context of considering a person's best interests. The person making the determination must consider those circumstances of which he is aware and which it would be reasonable to regard as relevant. This strikes a balance by acknowledging that the decision-maker cannot be expected to be aware of everything whilst stipulating that he must take into account factors that it is reasonable to regard as relevant.

### **Section 5: Acts in connection with care or treatment**

37. This provides statutory protection against liability for certain acts done in connection with the care or treatment of another person. If an act qualifies as a “section 5 act” then a carer can be confident that he will not face civil liability or criminal prosecution. Civil liability could involve being sued for committing a tort such as battery, false imprisonment or breach of confidence.

Criminal prosecution might be for an offence against the person (assault or causing actual bodily harm) or for an offence against property (theft).

38. A qualifying “section 5 act” may be performed by a range of people on any one day. The key requirements are that the person (“D”) acts in connection with the care or treatment of another person (“P”) and that D has formed a reasonable belief as to P's lack of capacity and best interests.

39. D will not incur any liability which would not have arisen if P, with capacity to do so, had in fact consented to D's act. Consent is a complete defence to a wide range of torts (battery, false imprisonment, trespass to land or goods, breach of confidence) and to many offences against the person or against property. Many people who are fully capable will regularly consent (expressly or impliedly) to others touching them, locking the doors of a car or dealing with their property. If a person takes someone else's unwanted clothes to a charity shop he could, in the absence of the owner's consent, in principle face civil liability for trespass to goods or criminal prosecution for theft. This section offers protection against liability where the owner is unable to give a valid consent, as long as the step is taken in connection with caring for him and is in his best interests.

40. Consent is not a defence to a claim in the tort of negligence. There are some offences which depend on a finding of negligence as defined in civil law (most notably, manslaughter where the element of unlawful killing may be made out by grossly negligent behaviour, whether an act or an omission to act in breach of duty). Consent might be relevant to issues of contributory negligence. Subsection (3) therefore makes it clear that liability for negligence is unaffected by the section.

41. This section does not affect the operation of advance decisions to refuse treatment, as covered by sections 24 to 26. If a person has made a valid and applicable advance decision then that takes priority over the rules in this section.

#### **Section 6: Section 5 acts: limitations**

42. This sets two limitations to “section 5 acts”. Subsections (1) to (4) deal with restraint, which is defined as the use or threat of force where P is resisting and any restriction of liberty of movement, whether or not P resists. This will include actions such as pulling someone away from the road, putting a seat belt on someone in a car or administering sedatives in order to undertake treatment. Restraint is permitted only when the person using it reasonably believes it is necessary to prevent harm to P. The restraint used must be proportionate both to the likelihood of the harm and the seriousness of the harm. It follows that the minimum level of restraint must be used; if the risk of harm diminishes, the restraint used must be reduced. It should be remembered that the principles in section 1 also apply when restraint is proposed. The principle of the “least restrictive option” in section 1(6) is likely to be particularly significant here.

43. Decisions of the European Court of Human Rights draw a clear distinction between acts which restrict a person's liberty of movement and those which deprive a person of his liberty within the meaning of Article 5 of the ECHR. Subsection (4)(b) refers only to restriction of the person's liberty of movement. Subsection (5) makes clear that for section 6 a deprivation of liberty, within the ECHR meaning, amounts to more than mere restraint. Section 6 will therefore not provide protection for an action that amounts to a deprivation of liberty for the purposes of Article 5.

44. The second limitation is in subsection (6) which makes it clear that a valid decision by an attorney or a deputy takes priority over any action which might be taken under section 5. However, there is a limitation on the authority of an attorney or deputy. There could be a dispute or difficulty over a decision made by an attorney or deputy. For example, a doctor might be concerned that the

attorney is not acting in P's best interests. Subsection (7) makes it clear that action can be taken to sustain life or prevent serious deterioration while any such dispute is referred to the court.

### **Section 7: Payment for necessary goods and services**

45. This revises and extends the statutory rule in section 3(2) of the Sale of Goods Act 1979 insofar as it applies to people who lack capacity to contract. In general, a contract entered into by a person who lacks capacity to contract is voidable if the other person knew or must be taken to have known of the lack of capacity. This does not apply if “necessaries” are supplied. In those circumstances, the person lacking capacity must still pay a reasonable price. The rule in section 3(2) of the 1979 Act only applies to “necessary” goods, but there is a matching common law rule about “necessary” services. This section combines these rules to set out a single statutory rule to cover “necessary” goods and services. Subsection (2) repeats the established legal definition of what is ‘necessary’. Thus, for example, if the milkman carries on delivering milk to the house of someone who has a progressive dementia, he can expect to be paid. If, however, a roofer puts a completely unnecessary new roof on to that person's house, when all that was required was a minor repair, then the rule will operate to prevent the roofer from being able to recover his charges.

### **Section 8: Expenditure**

46. This is to be read with sections 5 and 7. It allows a person who is acting under section 5 and who arranges something for P's care or treatment that costs money to do certain things. He can promise that P will pay, use money which P has in his possession and pay himself back from P's money in his possession or consider himself owed by P. This restates existing common law rules which provide that a person acting as an “agent of necessity” for another person should not be out of pocket as a result. A carer might, acting in P's best interests, arrange the delivery of disability aids or household items. Nothing in this section allows a carer to gain access to P's funds where they are held by a third party such as a bank or building society. The bank or building society would remain bound by contractual obligations to P until formal steps were taken (for example, registering a relevant power of attorney, or obtaining a court order).

47. Subsection (3) recognises that some people may have control over P's money or property by other routes, for example under the Social Security (Claims and Payments) Regulations 1987 (SI 1987/1968) or by way of banking arrangements.

### *Lasting powers of attorney*

### **Section 9: Lasting powers of attorney**

48. Sections 9 to 14 create a new statutory form of power of attorney, the “lasting power of attorney” (or LPA). This replaces the “enduring power of attorney” (or EPA) provided for by the Enduring Powers of Attorney Act 1985. The 1985 Act is repealed by section 66(1)(b), but the legal effect of an EPA already made under the current law is preserved and integrated into the scheme of the Act by section 66(3) and Schedule 4.

49. Section 9 sets out the key aspects of an LPA. Unlike an EPA, it can extend to personal welfare matters ((subsection (1)(a)) as well as to property and affairs. By making an LPA, an individual (the donor) confers on another individual or individuals (donee/s) authority to make decisions about the donor's personal welfare and/or property and affairs or specified matters concerning those areas. Power to make decisions includes, by virtue of section 64(2), acting on decisions made where appropriate.

50. Subsection (1) also makes clear that to be valid an LPA must include authority to make decisions when the donor no longer has capacity to make those decisions himself. An LPA can, in certain circumstances, operate as an ‘ordinary’ power of attorney when the donor has full mental capacity but it will also continue to operate after the donor has lost capacity.

51. Subsection (2) deals with the creation of an LPA. The donor must be aged 18 or over and have capacity to execute an LPA. The rules in section 10 about who can be a donee must be complied with. Detailed provisions about the making and registration of the instrument, as set out in Schedule 1, must be complied with. If the rules are not complied with the document created will not be a valid LPA and cannot be lawfully used to make decisions on behalf of the donor (subsection (3)).

52. Subsection (4) reiterates that any donee must apply the principles set out in section 1 and act in the donor's best interests. A donee's authority is also subject to any conditions or restrictions that the donor may choose to put in the LPA document itself.

### **Section 10: Appointment of donees**

53. This sets out certain requirements relating to donees and how they should act. A donee must be aged 18 or over. Someone who is bankrupt cannot be appointed as the donee of an LPA relating to property and affairs. If the LPA relates only to property and affairs, the donee can be either an individual or a trust corporation (defined in section 68(1) of the Trustee Act 1925 as the Public Trustee or a corporation appointed by the court in any particular case to be a trustee, or entitled by rules made under section 4(3) of the Public Trustee Act 1906, to act as custodian trustee).

54. Subsection (4) provides that where two or more people are appointed as donees, they may be appointed either to act jointly (so that they must all join together in any decision) or to act jointly and severally (which means they can act all together or each of them can act independently). The donor may also appoint two or more persons to act jointly in respect of some matters and jointly and severally in respect of others. To the extent that the donor does not specify in the instrument whether donees are to act jointly or jointly and severally, it will be assumed from the instrument that they are appointed to act jointly (subsection (5)).

55. For joint attorneys, any breach of the relevant rules about how lasting powers of attorney are made will prevent a valid LPA being created (subsection (6)). For “joint and several” attorneys, a breach only affects the attorney who is in breach; a valid LPA is still created in respect of the other donee(s) (subsection (7)).

56. Subsection (8) allows a donor to provide for the replacement of the donee(s) on the occurrence of a specified event which would normally terminate a donee's powers. The specified events are: the donee renouncing his appointment, the donee's death or insolvency, the dissolution or annulment of a marriage or civil partnership between the donor and the donee or the lack of capacity of the donee. For example, an older donor might wish to appoint his spouse, but nominate a son or daughter as a replacement donee. A donee cannot be given power to choose a successor (subsection (8)(a)) as this would be inconsistent with the core principle that the donor is giving authority to a chosen attorney. A civil partnership is a registered relationship between two people of the same sex which ends only on death, dissolution or annulment, as provided for in the Civil Partnership Act 2004.

### **Section 11: Lasting powers of attorney: restrictions**

57. Subsections (1) to (4) place restrictions on the use of restraint by attorneys, matching those applying in relation to “section 5 acts” (see section 6) and deputies (see section 20). Restraint can

only be used to prevent harm, and must be proportionate. Subsection (6) makes clear that for section 11 a deprivation of liberty within the ECHR meaning amounts to more than mere restraint.

58. Further restrictions are set out in subsection (7). An attorney cannot act where the donor has capacity, or where the donor has made a qualifying advance decision (*see* sections 24 to 26). Subsection 7(c) has to be read with subsection (8). Thus, although an attorney may give or refuse consent to the carrying out or continuation of health care, this would not extend to refusing life-sustaining treatment unless the LPA expressly said so, and is subject to any conditions or restrictions in the LPA.

### **Section 12: Scope of lasting powers of attorney: gifts**

59. This is similar to section 3(5) of the Enduring Powers of Attorney Act 1985 and deals with an attorney's power to make gifts of the donor's property. The attorney can only do something that is in the donor's best interests but this section operates as a specific restriction in relation to gifts. It allows modest gifts proportionate to the donor's assets to people related or connected to the donor (including himself) on "customary occasions", as defined; and to charities (subject to any conditions or restrictions in the LPA itself). The court has power to authorise more substantial gifts (*see* section 23(4)) if satisfied this would be in the donor's best interests. For example, if an older person has substantial assets then tax planning might be a reason for the making of gifts.

### **Section 13: Revocation of lasting powers of attorney**

60. This deals with the ways in which LPAs may cease to be effective, whether before or after registration. A donor may revoke an LPA at any time while he has capacity to do so (subsection (2)). Other events will automatically terminate an LPA.

61. The bankruptcy of either the donor or the attorney will terminate any financial powers granted. Section 64(3) provides that all references to the bankruptcy of an individual include a case where a bankruptcy restrictions order is in force in respect of him. Bankruptcy restrictions orders are provided for in Schedule 4A to the Insolvency Act 1986. Interim bankruptcy restrictions orders do not bring a power of attorney to an end; they just have a suspensive effect (subsections (4) and (9)).

62. An LPA also comes to an end if the donee disclaims, dies or loses capacity. The dissolution or annulment of a marriage or civil partnership between the donee and the donor will terminate the donee's powers unless the donor has specified that it should not (subsection (11)).

63. Subsections (7) and (10) provide for situations where there is a replacement or a "joint and several" attorney (in respect of any matter) who can continue to act.

### **Section 14: Protection of donee and others if no power created or power revoked**

64. This sets out the legal consequences when a registered LPA turns out to be invalid. There is similar provision in relation to EPAs in section 9 of the 1985 Act. Broadly, both attorneys and third parties are given protection from liability if they were unaware that the LPA was invalid or had come to an end.

### *General powers of the court and appointment of deputies*

### **Section 15: Power to make declarations**

65. This gives the court power to make declarations, if necessary, about whether an individual has capacity, either in relation to a specific decision that needs to be made, or in relation to decisions on such matters as are described in the declaration. It also gives the court power to make declarations about whether an act or proposed act was or would be lawful. The Court of Protection would have

this latter power as a superior court of record which, under section 47, has the same powers, rights, privileges and authority as the High Court, but it is considered helpful to spell this out. Subsection (2) confirms that the court can be asked to adjudicate on omissions to act (for example, the withholding or withdrawing of medical treatment) and a course of conduct.

### **Section 16: Powers to make decisions and appoint deputies: general**

66. This sets out the core jurisdiction of the court, which is to make decisions about personal welfare or property and affairs for persons lacking capacity or to appoint a deputy to do so.

67. Subsection (3) confirms that the principles in section 1 and the best interests checklist will govern the court's exercise of its powers.

68. Subsection (4) requires the court to consider two additional principles, further emphasising the “least restrictive intervention” principle mentioned in section 1(6). The first additional principle is that a decision of the court is preferable to the appointment of a deputy and the second is that, if a deputy is appointed, the appointment should be as limited in scope and duration as is reasonably practicable in the circumstances. In welfare (including health care) matters a deputy is never required in order for care or treatment to be given to a person because section 5 provides sufficient scope for carers and professionals to act. Nevertheless, a deputy may be particularly helpful in cases of dispute. For matters concerning property and affairs, a deputy may be needed in order to provide the authority to deal with contractual matters and where there is an on-going need for such decisions to be taken. Subsection (5) enables the court to grant the deputy powers or impose duties on him as it thinks necessary to avoid repeated applications to the court. However, it also enables the court to require the deputy to seek consent before taking certain actions. Subsection (6) gives the court an “own motion” power to make whatever order is in the person's best interests.

69. The court can always vary or discharge its orders and subsection (8) provides that it has power to take away or alter a deputy's powers if the deputy is overstepping his powers or not adhering to his best interests obligations.

### **Section 17: Section 16 powers: personal welfare**

70. The powers created by section 16 in relation to making orders and appointing deputies will extend to a wide range of personal welfare issues. Particular mention is made in this section of issues which have arisen in the past and been dealt with by the High Court in the exercise of its inherent jurisdiction and may be most likely to arise in future. This is not an exhaustive, merely an indicative, list. It is not a list of decisions that must always go to court, rather it provides examples of where the court can act if it would be appropriate, and beneficial to the person, for the court to do so. There are restrictions on what may be delegated to a deputy, set out in section 20(2).

### **Section 18: Section 16 powers: property and affairs**

71. Subsection (1) indicates the extent of the court's powers with regard to property and affairs. Again it provides a non-exhaustive, indicative list of the matters within the powers relating to property and affairs. This largely reproduces the list which applies to the original Court of Protection in section 96 of the Mental Health Act 1983. Again, this is not a list of matters which must always go to the new Court of Protection but rather an indication of the types of order the court might make if an application were made. Where property and financial matters are concerned the effect of the general law relating to contract and property will often be to create a need for formal powers. So if the person concerned has lost capacity to enter into a contract for the sale of his house no purchaser is going to accept a contract or Land Registry transfer document signed by someone who

is not the registered owner, unless the proposed purchaser sees a document proving that someone else has formal authority to contract to sell and transfer the property on his behalf. Equally, the person's bank will be bound by the terms of its contract with him not to hand his money over to someone else. If he can no longer give a valid instruction or valid receipt to the bank then his money will have to be held by the bank until formal authority is provided. If a valid power of attorney exists then this would probably remove any need for the Court of Protection to make orders. Again, not all of the powers can be given to deputies (see section 20(3)). These correspond to matters which, under the current law, always have to be dealt with by the court itself.

### **Section 19: Appointment of deputies**

72. This deals with deputies appointed by the court. The general rule is that a deputy must be at least 18 years of age. If a trust corporation is appointed deputy it can only act in respect of property and affairs. The court may appoint the holder of a specified office as deputy (this is different to LPAs where the attorney must be an individual). Before being appointed deputy, a person must consent to being appointed. The court will be able to appoint more than one deputy to act on behalf of an individual who lacks capacity and these deputies can act jointly, jointly and severally, or jointly for some matters and jointly and severally for other matters. That is, the court can specify that they must all act together, that each can act independently of the other or that they can act either way, depending on the matter in question. When appointing a deputy, the court will also have the power to appoint a successor or successors to the original appointees. The court will specify the circumstances under which this could occur.

73. Subsection (6) provides that a deputy will be treated as an “agent” of the adult who lacks capacity. The law of agency imposes a range of duties on those who act as agents for someone else. For example, an agent must act with “due care and skill” and is bound by fiduciary duties amongst other duties. Case law has established that receivers appointed by the original Court of Protection under Part 7 of the Mental Health Act 1983 are agents but it is considered helpful to make statutory provision to that effect in relation to deputies.

74. All deputies will be able to claim reasonable expenses from the estate of the adult lacking capacity and if the court directs, the deputy can be paid for his services from the estate. The court will be able to give a deputy the power to deal with all matters concerning the control and management of any property belonging to the adult lacking capacity, including being able to invest. The court will also be able to require a deputy to give the Public Guardian security against misbehaviour (that is, either a deposit of money or a guarantee bond) and to direct the deputy to file with the Public Guardian reports and accounts as it sees fit. These provisions are broadly in line with arrangements in the original Court of Protection (Mental Health Act 1983, Part 7).

### **Section 20: Restrictions on deputies**

75. This sets a number of limitations on the powers of deputies. Subsection (1) specifies that a deputy cannot act where the person concerned is able to act for himself. In some cases the person may have fluctuating capacity, for example as a result of mental health problems, and it is not acceptable for a deputy to carry on making substitute decisions when the person concerned has in fact recovered. Subsection (6) reiterates that a deputy must act in accordance with section 1 (principles) and section 4 (best interests).

76. Subsections (2) and (3) relate back to sections 16 to 17 and list certain matters which must always be dealt with by the court, not a deputy. The powers to prohibit a person from having contact with an adult lacking capacity or to direct a person responsible for his health care to allow a different



person to take over are, of course, powers which have to be exercised by the court itself. As under the current law, deputies will also be restricted from making certain financial decisions in connection with wills and trusts.

77. Subsection (4) makes it clear that a deputy cannot be given power to “trump” an attorney (who will have been chosen by the donor himself, at a time when he had capacity). If there is a concern or a dispute about the way an attorney is behaving the court must use its powers in sections 22 and 23, rather than seeking to appoint a deputy. Subsection (5) restricts deputies from refusing consent to the carrying out or continuation of treatment that is necessary to sustain life. Subsection (6) clarifies that the principles in section 1 and the considerations as to best interests as set out in section 4 apply to deputies.

78. Subsections (7) to (11) impose limitations on deputies in relation to restraint, matching those imposed in relation to “section 5 acts” by section 6 and on attorneys by section 11. A deputy will have to be acting within the scope of an authority expressly conferred on him by the court. Restraint can only be used to prevent harm and must be proportionate. Subsection (13) makes clear that for section 20 a deprivation of liberty within the ECHR meaning amounts to more than mere restraint.

### **Section 21: Transfer of proceedings relating to people under 18**

79. The Act deals with people aged 16 and over (and with the property of younger children — see section 18(3)), while the Children Act 1989 deals with people under the age of 18. There will be some overlap between the jurisdictions and the Lord Chancellor is therefore given power by this section to make transfer of proceedings orders. It is intended that the order will indicate that a case should be transferred to the court most suitable to deal with the issues. One factor is likely to be the prospect of a person under 18 who is the subject of a dispute still lacking capacity when an adult. For example, if the parents of a 17-year old with profound learning difficulties are in dispute about residence or contact then it may be more appropriate for the Court of Protection to deal with the case, since an order made under the Children Act 1989 would expire on the child's 18<sup>th</sup> birthday at the latest.

#### *Powers of the court in relation to lasting powers of attorney*

### **Section 22: Powers of court in relation to validity of lasting powers of attorney**

80. This section and section 23 set out what the Court of Protection can do in relation to LPAs. The powers are similar to those in section 8 of the Enduring Powers of Attorney Act 1985, except that administrative functions connected with registration will be performed by the Public Guardian.

81. The court can determine questions about validity and revocation (subsection (2)). It can direct that an instrument should not be registered or (if it is unregistered) revoke it on the grounds set out in subsection (3) (fraud or undue pressure, or misbehaviour by the attorney).

82. Subsection (5) provides that where there is more than one donee the court may revoke the instrument or the LPA so far as it relates to any of them.

### **Section 23: Powers of court in relation to operation of lasting powers of attorney**

83. This allows the court to decide questions about the meaning or effect of an LPA (or an instrument purporting to create an LPA) and to give directions to attorneys where the donor lacks capacity. The court may also give the attorney directions about producing reports, accounts, records and information and about his remuneration and expenses. The court has power to relieve a donee from some or all of the liabilities arising from a breach of duty (cf Enduring Powers of Attorney Act

1985, section 8(2)(f)). It may also authorise gifts beyond the scope of what is permitted by section 12(2) (for example, for tax planning purposes).

### *Advance decisions to refuse treatment*

#### **Section 24: Advance decisions to refuse treatment: general**

84. Sections 24 to 26 deal with advance decisions to refuse treatment. Some people already choose to make such decisions and their legal effect has been analysed in a number of judicial decisions. It has been confirmed by the High Court that a competent adult patient's anticipatory refusal of consent remains binding and effective notwithstanding that he has subsequently become incompetent (*HE v NHS Trust A and AE* [2003] EWHC 1017 (Fam), a case concerning a refusal of blood transfusion). Broadly, the sections seek to codify and clarify the current common law rules, integrating them into the broader scheme of the Act. There would otherwise be a lacuna in the scheme of the Act and the powers of the new court. Many general forms of advance statement or "living will" will be important and relevant as "past wishes" of the person for the purposes of the best interests checklist in section 4. An "advance decision" as defined in these sections is a special type of advance statement that represents an actual decision to refuse treatment, albeit at an earlier date. As now, it will therefore be decisive in certain circumstances.

85. The key characteristics of an "advance decision" for the purposes of the Act are set out in subsection (1) of this section. It must be made by a person who is 18 or over and at a time when the person has capacity to make it. A qualifying advance decision must specify the treatment that is being refused, although this can be in lay terms (for example using "tummy" instead of stomach). It may specify particular circumstances, again in lay terms, in which the refusal will apply. A person can change or completely withdraw the advance decision if he has capacity to do so (subsection (3)). Subsection (4) confirms that the withdrawal, including a partial withdrawal, of an advance decision does not need to be in writing and can be by any means. Subsection (5) confirms that an alteration of an advance decision does not need to be in writing, unless it applies to an advance decision refusing life-sustaining treatment, in which case formalities will need to be satisfied in order for it to apply.

#### **Section 25: Validity and applicability of advance decisions**

86. This introduces the two important safeguards of validity and applicability in relation to advance decisions to refuse treatment.

87. To be valid the advance decision must not have been withdrawn or overridden by a subsequent LPA giving a donee the authority to consent or refuse consent to the treatment (other LPAs will not override — see subsection ((7)). Also, if the person has acted in a way that is clearly inconsistent with the advance decision remaining his fixed decision, then the advance decision is invalid. An example of an inconsistent action might be a former Jehovah's Witness converting to Islam and marrying a Muslim man. Even if she had forgotten to destroy a written advance decision refusing blood transfusion, her actions could be taken into account in determining whether that earlier refusal remained her fixed decision.

88. An advance decision will not be applicable if the person actually has capacity to make the decision when the treatment concerned is proposed. It will also not be applicable to treatments, or in circumstances, not specified in the decision. Furthermore the decision will not be applicable if there are reasonable grounds for believing that the current circumstances were not anticipated by the person and, if they had been anticipated by him, would have affected his decision. For example,

there may be new medications available that radically change the outlook for a particular condition and make treatment much less burdensome than was previously the case.

89. Subsection (5) introduces further rules about the applicability of advance decisions to refuse treatment that is necessary to sustain life. An advance decision will not apply to life-sustaining treatment unless it is verified by a statement confirming that the decision is to apply to that treatment even if life is at risk. The reference to “life” includes the life of an unborn child. Both the decision and the statement verifying it must be in writing and be signed and the signature must be witnessed. It is important to note that a person does not physically need to write his advance decision himself. This means that advance decisions recorded in medical notes are considered to be in writing. Writing can also include electronic records.

90. If the maker of the advance decision cannot sign then another person can sign for him at his direction and in his presence (section 25(6)(b)). As with a signature by the person himself, the witness must be present when the third party signs.

### **Section 26: Effect of advance decisions**

91. This deals with the legal effect of a qualifying advance decision. If it is both valid and applicable it has the same effect as a contemporaneous refusal of treatment by a person with capacity. That is, the treatment cannot lawfully be given. If given, the person refusing would be able to claim damages for the tort of battery and the treatment-provider might face criminal liability for assault. Subsections (2) and (3) clarify the rules about liability. A treatment-provider may safely treat unless satisfied that there is a valid and applicable qualifying advance refusal; and a treatment-provider may safely withhold or withdraw treatment as long as he has reasonable grounds for believing that there is a valid and applicable qualifying advance decision.

92. If there is doubt or a dispute about the existence, validity or applicability of an advance decision then the Court of Protection can determine the issue. There is an important proviso to the general rule that an advance refusal is legally effective. There may be a doubt or dispute about whether a particular refusal is in fact one which meets all the tests (existence, validity and applicability). As with decisions by donees or deputies in section 6(7), action may be taken to prevent the death of the person concerned, or a serious deterioration in his condition, whilst any such doubt or dispute is referred to the court.

### *Excluded decisions*

### **Section 27: Family relationships etc.**

93. This lists certain decisions that can never be made under the Act on behalf of a person who lacks capacity. For example, in relation to adoption, if a birth parent lacks capacity to consent to an adoption order the rules as to dispensing with consent in the adoption legislation will apply. There will be no question of an attorney consenting or of the Court of Protection making an order or appointing a deputy to provide the requisite consent.

### **Section 28: Mental Health Act matters**

94. This deals with the question of people who are detained for psychiatric treatment pursuant to the Mental Health Act 1983. The section ensures that the Mental Capacity Act does not apply to any treatment for mental disorder which is being given in accordance with the rules about compulsory treatment set out in Part 4 of the 1983 Act. The specific statutory safeguards which the 1983 Act gives in relation to compulsory psychiatric treatment must always be afforded to those patients to whom that Act applies.

**Section 29: Voting rights**

95. This provides that the Act does not apply to decisions on voting.

*Research***Section 30: Research**

96. This section and sections 31 to 33 allow intrusive research to be lawfully carried out on, or in relation to, a person who lacks capacity, where the research is part of a research project approved by an appropriate body and it is carried out in accordance with the conditions set out in sections 32 and 33. The provisions are based on long-standing international standards, for example, those laid down by the World Medical Association and the Council of Europe Convention on Human Rights and Biomedicine.

97. This section relates to intrusive research, which means research that would normally need consent if it involved an adult with capacity. Clinical trials that are currently regulated under the Medicines for Human Use (Clinical Trials) Regulations 2004 (SI 2004/1031) (or regulations succeeding or amending them) are excluded from the Act because those Regulations already make provision for trials involving participants who lack capacity. Research on anonymised medical data or tissue is also not included, but may be subject to controls under the Data Protection Act 1998 or the Human Tissue Act 2004.

98. The appropriate authority (the Secretary of State in relation to research in England and the National Assembly for Wales in relation to research in Wales) must specify an appropriate body for approving research projects, such as a Research Ethics Committee (REC).

**Section 31: Requirements for approval**

99. This section sets out the matters of which the appropriate body — such as an REC— must satisfy itself before approving a research project involving a person who lacks capacity.

100. Subsection (2) requires that the research must be connected with an impairing condition that affects the person participating in the research or with the treatment of the condition. Impairing condition means one that is, or may be, attributable to or causes or contributes to the impairment of or disturbance in the functioning of the person's mind or brain. This limits the sort of research projects that the person may be involved in but will include research into the effects of the impairment on his health and day-to-day life as well as into the causes or possible causes of the impairment and its treatment. Subsection (4) requires that there are reasonable grounds for believing that there is no alternative to the involvement of the person in the research, that is, it cannot be carried out as effectively if it only involves people who have capacity.

101. Subsections (5) and (6) deal with the anticipated benefits and risks of the research. There are two alternatives: either the research has the potential to benefit the person without imposing a burden disproportionate to that benefit (this type of research is sometimes called “therapeutic research”); or the research is to provide knowledge of the causes of the person's condition, its treatment or the care of people who have the same or similar condition now or who may develop it in the future. In relation to this latter category, there must be reasonable grounds for believing that the risk to the person is negligible and the research must not interfere with the person's freedom of action or privacy in a significant way or be unduly invasive or restrictive. This latter category of research might include indirect research on medical notes or on tissue already taken for other purposes. It may also include interviews or questionnaires with carers about health or social-care

services received by the person or limited observation of the person. And it could include taking samples from the person, e.g. blood samples, specifically for the research project.

### **Section 32: Consulting carers etc**

102. Before any decision is taken to involve a particular person in approved research, the researcher must take reasonable steps to identify a person close to the person (this could include an attorney or deputy but not someone acting in a professional capacity or for payment, such as a paid carer) who is prepared to be consulted about the person's involvement in the research (subsection (2)). If there is no such person, then the researcher must nominate a person independent of the research in accordance with guidance issued by the appropriate authority (see paragraph 99).

103. Subsection (4) requires the researcher to give the consultee information about the research and to ask him or her for advice as to whether the person should take part in the research and what, in his opinion, the consultee's wishes and feelings would be about taking part in the research. If at any time the person consulted advises the researcher that in his opinion the person's wishes and feelings would be likely to lead him to decline to take part in the project then the researcher must ensure that the person does not take part in the project, or if it is already underway must ensure that the person is withdrawn from it. But the person may still receive treatment he was receiving during the research if withdrawal would create a significant risk to his health (subsection (6)).

104. Subsections (8) and (9) allow for action to be taken in relation to the research where treatment is to be provided to the person urgently and there is insufficient opportunity to consult. The researcher may proceed if he has the agreement of a doctor who is not connected to the project or in accordance with a procedure agreed by the appropriate body at the time of approval. However subsection (10) makes it clear that the researcher may only rely on subsection (9) while there is an urgent need to treat. Examples of this type of research may involve action by a paramedic or doctor to make measurements in the first few minutes following a serious head injury or stroke. These arrangements are similar to those provided for in the Clinical Trials Regulations.

### **Section 33: Additional safeguards**

105. The purpose of section 33 is to provide additional safeguards for the person participating in the research once the research has begun. It requires the researcher to respect any signs of resistance from the person (except where this would conflict with procedures designed to protect him from harm or injury), and not to involve the person in research that would be contrary to an advance decision or any other form of statement. The person's interests must be assumed to outweigh those of science and society (subsection (3)).

106. The person must be withdrawn from the project without delay if he indicates that he wishes to be withdrawn from it or if the researcher has reasonable grounds for believing that any of the requirements for approval of the project as set out at in section 31(2) to (7) are no longer met. As in section 32, the person may still receive treatment he was receiving during the research if withdrawal would create a significant risk to his health (subsection (6)).

### **Section 34: Loss of capacity during research project**

107. This section provides for a transitional regulation-making power to cover research started before section 30 comes into force and which involves people who had capacity when enrolled but who lose capacity before the end of the project. The regulations will lay down the conditions on which such research may continue; the research must meet prescribed requirements, the information

or material used in the research must have been obtained before the loss of capacity and certain steps must be taken to protect the person participating (subsection (2)).

108. The regulations will set out these requirements and steps and may include safeguards similar to those provided for in sections 31 to 33 but with any necessary alterations to the requirements for approval by an appropriate body, consultation with carers or the additional safeguards (subsection (3)). Regulations made by the Secretary of State will be subject to the affirmative procedure in Parliament (see section 65).

### *Independent mental capacity advocate service*

#### **Section 35: Appointment of independent mental capacity advocates**

109. Sections 35 to 41 create a new scheme designed to provide the input of an independent mental capacity advocate (“IMCA”) where certain decisions need to be taken for particularly vulnerable people who lack capacity. This may include older people with dementia who have lost contact with all friends and family, or people with severe learning disabilities or long term mental health problems who have been in residential institutions for long periods and lack outside contacts. Such people will be represented and provided with support when decisions are to be made about serious medical treatment or significant changes of residence provided by public bodies.

110. Subsection (1) places a duty on the appropriate authority to make arrangements for the provision of a new independent mental capacity advocacy service. The appropriate authority is, in relation to England, the Secretary of State and, in relation to Wales, the National Assembly for Wales.

111. Subsection (2) allows the appropriate authority to make regulations setting out how the IMCA will be appointed. This will ensure that an individual will need to meet common standards in order to be approved as an IMCA. Subsection (4) provides that, as far as practicable, the IMCA should be independent of the person who is making the decision concerned. Subsection (5) provides that the arrangements may include provision for payments to be made to, or in relation to, the IMCA. Subsection (6) stipulates that an IMCA must be able to meet the person concerned in private and see relevant health, social services and care home records. This is to enable the IMCA to be able to perform properly his function of representing and supporting the person who lacks capacity.

#### **Section 36: Functions of independent mental capacity advocates**

112. This section allows the appropriate authority to make regulations setting out the functions of IMCAs. Subsection (2) provides that those regulations may set out the steps which an IMCA needs to take in fulfilling those functions. These steps should ensure that the IMCA supports the person to participate as fully as possible in the decision; obtains and evaluates relevant information; ascertains and represents the person's wishes, feelings, beliefs and values; finds out about all the available options; and seeks a second medical opinion if necessary. Subsection (3) provides that the regulations may also set out the circumstances in which the IMCA may challenge the decision-maker on behalf of the person, if appropriate.

#### **Section 37: Provision of serious medical treatment by NHS body**

113. This section applies where “serious medical treatment” is to be provided or arranged by the NHS for a person who lacks capacity, and there is no one for the treatment-provider to discuss it with. If there is neither a person from the list in section 40 (such as an attorney under an LPA or deputy) nor a non-professional carer or friend whom it is appropriate to consult, then an IMCA is to be instructed.

114. The role of the IMCA will be both to represent and to support the person in accordance with the regulations made under section 36. The information and submissions provided by the IMCA must be taken into account by the decision-maker.

115. Subsection (2) provides that where the person's treatment is regulated under Part 4 of the Mental Health Act 1983, the IMCA does not need to be instructed under section 37(3). That Act already contains its own safeguards.

116. Subsection (4) makes provision in relation to urgent treatment. Subsection (6) provides that the types of "serious medical treatment" to be covered will be set out in regulations. Subsection (7) provides that regulations will also define the particular NHS bodies who will become subject to the duties. The intention is that this will cover the bodies responsible for direct provision or funding of treatment as appropriate.

### **Section 38: Provision of accommodation by NHS body**

117. This section applies to long-stay accommodation in a hospital or a care home, or a move between such accommodation, where this accommodation is provided or arranged by the NHS. Subsection (9) clarifies that this section only applies when the accommodation is to be provided for more than 28 days in relation to accommodation in hospital or more than 8 weeks in relation to accommodation in a care home. The IMCA is to be instructed where such accommodation is being proposed and a person lacks capacity to agree to the arrangements and there is no other person to discuss it with. Again the role of the IMCA is both to support and to represent the person concerned. Any information or submissions from the IMCA must be taken into account by the NHS body.

118. Subsection (2) provides that where the person concerned is to be detained in hospital or otherwise required to live in the accommodation in question under the Mental Health Act 1983, the IMCA does not need to be consulted, as that Act already contains its own safeguards. Subsection (3) makes provision in relation to urgent placements.

119. Subsection (4) is intended to ensure that an IMCA is involved in relation to people whose residence is initially intended to be less than 28 days/8 weeks (see paragraph 118) if the period is later extended beyond the applicable period.

120. Subsections (6) and (7) define the types of care homes and hospitals which are covered under by this section. Subsection (8) provides that regulations will also define the particular NHS bodies who will become subject to the duties.

### **Section 39: Provision of accommodation by local authority**

121. This section applies to long-stay accommodation (8 weeks or more) arranged by a local authority or a change in such accommodation. It applies to residential accommodation provided in accordance with section 21 or 29 of the National Assistance Act 1948. This may be accommodation in a care home, nursing home, ordinary and sheltered housing, housing association or other registered social housing, or in private sector housing provided by a local authority or in hostel accommodation. The IMCA safeguard will also apply to people accommodated following discharge under section 117 of the Mental Health Act 1983.

122. The IMCA is to be instructed where a person lacks capacity to agree to the arrangements and there is no other person to discuss it with. Again the role of the IMCA is both to support and to represent the person concerned. Any information or submissions from the IMCA must be taken into account by the local authority.

123. Subsection (3) provides that the IMCA does not need to be instructed where the person is to be required under the Mental Health Act 1983 to live in the accommodation in question (for example, as a requirement of conditional discharge). Subsection (4) makes provision in relation to urgent placements.

124. Subsection (5) is intended to ensure that an IMCA is involved in relation to people whose residence is initially intended to be less than 8 weeks if the period is later extended.

#### **Section 40: Exceptions**

125. This section provides that the independent mental capacity advocacy service does not have a role when the person concerned already has somebody who can speak with the provider of treatment or accommodation (e.g. a person chosen in advance, an attorney under an EPA or LPA, or a deputy). This overrides sections 37(3), 38(3) and (4) and 39(4) and (5), which generally trigger the involvement of an IMCA when there is no one appropriate to consult about the person's interests, other than a paid or professional carer.

#### **Section 41: Power to adjust role of independent mental capacity advocate**

126. This section provides that the scope of the independent mental capacity advocacy service can be extended, by regulations made for England by the Secretary of State or for Wales by the National Assembly for Wales, to other sets of circumstances. Such regulations would follow consultation about where the involvement of an IMCA might prove useful. Regulations made by the Secretary of State will be subject to the affirmative procedure in Parliament (see section 65).

Miscellaneous and supplementary

#### **Section 42: Codes of practice**

127. This section provides for the Lord Chancellor to make and revise a code or codes of practice to supplement the Act. Attorneys, deputies, professionals, paid workers, researchers and IMCAs acting on behalf of adults who lack capacity will be under an obligation to have regard to any relevant code. Any codes of practice issued will be allowed to be used as evidence in court or tribunal proceedings.

#### **Section 43: Codes of practice: procedure**

128. This section sets out the procedure for issuing and revising any codes of practice. The Lord Chancellor will have to consult the National Assembly for Wales and other appropriate persons before preparing or revising a code. Draft codes will have to be laid before both Houses of Parliament for 40 days. They may then be issued, provided that neither House has resolved to reject the draft. The Lord Chancellor must arrange for the code to be brought to the attention of people who may need to know about it.

#### **Section 44: Ill-treatment or neglect**

129. This section creates an offence of ill-treatment or wilful neglect of a person lacking capacity by anyone responsible for that person's care, donees of LPAs or EPAs, or deputies appointed by the court.

## **PART 2: THE COURT OF PROTECTION AND THE PUBLIC GUARDIAN**

*The Court of Protection*

#### **Section 45: The Court of Protection**



130. This section establishes a superior court of record, called the Court of Protection, which will be able to sit anywhere in England and Wales. Welfare matters previously referred to the High Court may be referred to this court. It is intended that the Court of Protection will have a regional presence but will have a central office and registry as designated by the Lord Chancellor. Additional registries (being High Court district registries or county courts) may also be designated. Subsection (6) provides that the former office of the Supreme Court known as the Court of Protection will cease to exist.

#### **Section 46: The judges of the Court of Protection**

131. The Lord Chancellor or an appropriate person acting on his behalf will nominate judges to exercise the jurisdiction of the Court of Protection. Subsection (2) sets out which judges may be nominated. Subsection (3) gives the Lord Chancellor the power to appoint one of the senior nominated judges to be designated President of the Court of Protection and another to be Vice-President of the Court of Protection. Subsection (4) gives the Lord Chancellor the power to appoint a judge to be Senior Judge of the Court of Protection, with various administrative functions.

#### *Supplementary powers*

#### **Section 47: General powers and effect of orders etc.**

132. Subsection (1) gives the Court of Protection the same powers as the High Court, for example in relation to witnesses, contempt and enforcement.

#### **Section 48: Interim orders and directions**

133. This section allows the court to make interim orders even if evidence as to lack of capacity is not yet available, where there is reason for the court to believe that the person lacks capacity in respect of a particular matter and it is in his best interests for the court to act without delay.

#### **Section 49: Power to call for reports**

134. This section makes provision for reports to assist the court in determining a case. Such reports can be commissioned from the Public Guardian, local authorities, NHS bodies or Court of Protection Visitors. The Public Guardian is a new statutory official (see section 57) and the Court of Protection Visitors replace current "Lord Chancellor's Visitors" (see section 102 of the Mental Health Act 1983 and section 61). Local authority staff or NHS staff may already be providing services to the person concerned and be able to report to the court on the basis of their existing involvement.

135. Subsections (7) to (9) allow the Public Guardian or Court of Protection Visitor who is reporting to the court to have access to health, social services or care records relating to the person and interview him in private. Where a Court of Protection Visitor is a Special Visitor (e.g. a registered medical practitioner or someone with other suitable qualifications or training) he may, on the directions of the court, carry out medical, psychiatric or psychological examinations.

#### *Practice and procedure*

#### **Section 50: Applications to the Court of Protection**

136. This section provides that persons listed in subsection (1) can apply to the Court of Protection as of right while others generally will be required to obtain permission from the court. Court of Protection Rules can, however, provide that certain types of application will not require permission. The factors that the court must have regard to when considering whether to grant permission are listed in subsection (3) and are designed to ensure that any proposed application will promote the interests of the person concerned, rather than causing unnecessary distress or difficulty for him.

**Section 51: Court of Protection Rules**

137. The specialist jurisdiction of the new court calls for specialist rules of court, which will be made by the Lord Chancellor. Subsection (2) lists different matters in relation to which rules may be made and subsection (4) permits different provisions to be made for different geographical areas.

**Section 52: Practice directions**

138. This section gives power to make practice directions. These are directions about a court's practices and procedures, issued for the assistance and guidance of litigants. They often support and add detail to rules of court. Practice directions for the Court of Protection will have to be made by the President with the approval of the Lord Chancellor or by another person (for example, the Vice-President) with the approval of the President and the Lord Chancellor. Subsection (3) provides that the Lord Chancellor need not approve any directions giving guidance about the law or the making of judicial decisions. Section 51(3) enables Court of Protection Rules, instead of providing for any matter, to refer to provision made or to be made by these directions. The intention is to make rules accompanied by practice directions, on the model of the Civil Procedure Rules 1998.

**Section 53: Rights of appeal**

139. This section concerns appeals from the Court of Protection and will be supplemented by Court of Protection Rules. Subject to such rules, an appeal will lie from any decision of the court to the Court of Appeal. However, the Court of Protection will comprise a range of judges at different levels. It is therefore intended to make provision by rules of court, by virtue of subsection (2), so that decisions made at a lower level of the Court of Protection are appealed to a higher judge within the Court of Protection. Rules may make further detailed provision as to permission to appeal and may provide that where an appeal has already been made to a higher judge of the Court of Protection no appeal may be made to the Court of Appeal from that decision unless the Court of Appeal considers that the appeal would raise an important point of principle or practice or there is some other compelling reason to hear the appeal. This matches the "2<sup>nd</sup> appeal" test in the Civil Procedures Rules 1998, Rule 52.13.

*Fees and costs***Section 54: Fees**

140. This section concerns the setting of fees chargeable by the Court of Protection (which will be by order of the Lord Chancellor with the consent of the Treasury). The order will be subject to the negative resolution procedure (see section 65(2)). The order may set the level of fees, any exemptions from and reductions in the fees and any partial or whole remission of fees. Prior to making the order the Lord Chancellor must consult with the President, Vice-President and Senior Judge of the Court of Protection. The Lord Chancellor must take reasonably practicable steps to give out information about fees. Similar provision is made about other court fees in section 92 of the Courts Act 2003.

**Section 55: Costs**

141. This section concerns the costs of Court of Protection proceedings and will be supplemented by Court of Protection Rules. Subject to such rules, the court will have discretion to make costs orders, including wasted costs orders, against legal or other representatives. It seeks to put the new court in the same position as the other civil courts.

**Section 56: Fees and costs: supplementary**

142. This section provides that the Court of Protection rules can deal with the way in which, and funds from which, fees and costs are to be paid and make provision for them to be charged against the estate of the person concerned. It is modelled on the Mental Health Act 1983, section 106.

### *The Public Guardian*

#### **Section 57: The Public Guardian**

143. This section provides for a new public official, the Public Guardian, to be appointed by the Lord Chancellor. The Public Guardian will have staff and officers so that he can discharge his duties. The Lord Chancellor may also enter into contracts with other persons for the provision of officers, staff or services for the discharge of the Public Guardian's functions.

#### **Section 58: Functions of the Public Guardian**

144. This section sets out the role of the Public Guardian and may be supplemented by regulations made by the Lord Chancellor. It is intended that regulations will set out in more detail how the Public Guardian will exercise his administrative duties in connection with court-ordered security and reports. The regulations will also deal with fees and the sources from which they may be met.

145. The functions of the Public Guardian are set out in subsection (1). They include establishing and maintaining registers of lasting powers of attorney and of orders appointing deputies and supervising deputies. He may also direct Court of Protection Visitors to visit donors or donees of LPAs, deputies or those appointing them. He may deal with complaints and concerns expressed to him about how an attorney or deputy is exercising his powers. He may also publish any information he thinks appropriate about his work.

146. Subsection (2) provides that certain functions may be discharged in co-operation with any other person who has functions in relation to the care or treatment of the person to whom the power of attorney or appointment of a deputy relates. It is intended that the Public Guardian will work closely with organisations such as local authorities and NHS bodies.

147. Subsection (4) provides for regulations made by the Lord Chancellor to make provision for the setting of fees which may be charged by the Public Guardian, and for any exemptions from and reductions in the fees and any partial or whole remission of fees.

148. Subsections (5) and (6) allow the Public Guardian to examine and take copies of relevant health, social services or care records, and to interview the person concerned in private. This is to ensure that the Public Guardian will be able to carry out his functions. The Public Guardian has similar rights when reporting to the Court of Protection (see section 49(7) and (8)). Court of Protection Visitors are given similar rights (see section 61(5) and (6)).

#### **Section 59: Public Guardian Board**

149. This section provides for a body, to be known as the Public Guardian Board, members of which are to be appointed by the Lord Chancellor. The Board will scrutinise and review the Public Guardian's work and make recommendations to the Lord Chancellor.

150. The Board must have at least one member who is a judge of the Court of Protection and at least four members with appropriate knowledge or experience of the Public Guardian's work. Subsection (6) provides a regulation-making power that will allow the Lord Chancellor to set out in more detail how members will be appointed and how the Board will operate.

151. Subsection (8) provides for the Lord Chancellor to make payments to members of the Board for reimbursement of expenses, allowances and remuneration. Subsection (9) requires the Board to make an annual report to the Lord Chancellor.

#### **Section 60: Annual report**

152. This requires the Public Guardian to make an annual report about his work to the Lord Chancellor, who must within one month of receipt lay a copy of the report before both Houses of Parliament.

#### *Court of Protection Visitors*

#### **Section 61: Court of Protection Visitors**

153. Court of Protection Visitors are appointed to carry out visits and produce reports, as directed by the court (section 49(2)) or the Public Guardian (section 58(1)(d)) in relation to those who lack capacity. Their functions and powers are similar to those of Lord Chancellor's Visitors appointed under Part 7 of the Mental Health Act 1983.

### **PART 3: MISCELLANEOUS AND GENERAL**

#### *Declaratory provision*

#### **Section 62: Scope of the Act**

154. This confirms that the Act has no effect on the law relating to unlawful killing or assisting suicide.

#### *Private international law*

#### **Section 63: International Protection of Adults**

155. This introduces Schedule 3 which makes provision as to the private international law of England and Wales in relation to persons who cannot protect their interests. For example it determines which jurisdiction should apply when a national of one country is in another.

#### *General*

#### **Section 66: Existing receivers and enduring powers of attorney etc.**

156. This repeals Part 7 of the Mental Health Act 1983 (management of property and affairs of patients) and the whole of the Enduring Powers of Attorney Act 1985, but introduces transitional provisions.

#### **Section 67: Minor consequential amendments and repeals**

157. This section enables the Lord Chancellor to make secondary legislation (orders) to give effect to the Act. Any such order which amends or repeals primary legislation (an Act of Parliament or General Synod Measure) will be subject to the affirmative resolution procedure in Parliament.

### **SCHEDULES**

#### **Schedule 1: Lasting powers of attorney: formalities**

##### **Part 1: Making instruments**

158. This Part sets out the requirements with regard to the form and execution of an LPA. A document which fails to comply with the provisions of this Schedule or regulations made under it will not generally create an LPA and consequently will not give any powers to the donee. An LPA

must be in the form prescribed by regulations. The form must also contain statements by both the donor and the donee of the power to the effect that they have read, or have had read to them, such information as may be prescribed. The LPA must include names of any persons whom the donor wishes to be notified of any application to register the LPA (“named persons”) or a statement that there are no such persons.

159. The form must also include a certificate by a person of a prescribed description that, in his opinion, at the time when the donor executes the instrument he understands the purpose of the instrument and the scope of the authority conferred, that no fraud or undue pressure is being used to induce him to create an LPA, and that there is nothing else that would prevent an LPA from being created by the instrument. The Public Guardian may treat an LPA differing in an immaterial respect from the prescribed form as sufficient to create an LPA. The Court of Protection has the power to make a declaration that an instrument not in the prescribed form is to be treated as if it were, if satisfied that the persons executing the instrument intended to create an LPA.

## **Part 2: Registration**

160. The powers given in an LPA to the donee cannot be exercised until the document has been registered. In order to register an LPA an application must be made by the donor or donee(s) to the Public Guardian. When about to apply to register the LPA, the donor or donee(s) must notify the named persons to inform them of the pending registration. The Public Guardian is required to notify the donor or donee(s) (depending on who makes the application). The court will have the power to dispense with the notification requirement on the application of either the donor or donee.

161. If the instrument received by the Public Guardian is flawed in some way (that is, it is ineffective, or contains a provision that would make it inoperable as an LPA), the Public Guardian must refer it to the Court of Protection and must not register the instrument in the interim. The court can either remove (or “sever”) the offending provision from the instrument or direct the Public Guardian not to register the LPA instrument. If the court severs a provision, the Public Guardian can then register the instrument, but must attach a note to that effect to it.

162. Objections can be made to the registration of the LPA within a prescribed period. An objection by a donor to registration by the donee(s) must be made to the Public Guardian and the court will only direct him to register the LPA if satisfied that the donor lacks capacity to object. An objection by a donee or named person on the basis that the LPA has been revoked (for example, because of bankruptcy of the donee) must also be made to the Public Guardian who, if satisfied, will not register the LPA. If the person wishing to register the LPA disagrees with the Public Guardian's decision not to register the instrument, he can apply to the court. If the court finds that the grounds for the Public Guardian objecting to registration are not established, the court can direct the Public Guardian to register the LPA. An objection by a donee or named person on such other grounds as may be prescribed must be made to the court. The Public Guardian must not register the instrument, unless told to do so by the court, where it appears to him that there is a deputy appointed for the donor and that the powers of the deputy would conflict with the powers to be conferred on the donee.

## **Part 3: Cancellation of registration and notification of severance**

163. The Public Guardian will cancel an LPA if he is satisfied that the power has been revoked on the basis of:

- the donor's bankruptcy;
- the donee giving up his/her appointment by exercising a disclaimer;
- the death of the donee;

- the insolvency of the donee;
- the dissolution or annulment of a marriage or civil partnership between donor and donee; and
- the lack of capacity of the donee.

164. The court must direct the Public Guardian to cancel the registration of an LPA if the court:

- decides that a requirement for creating the LPA was not met;
- decides that the power has been revoked or otherwise come to an end; or
- revokes the power on fraud or undue pressure grounds.

165. On cancellation of the registration of an LPA the Public Guardian will notify both the donor and donee to this effect. Where the court has removed a provision from an instrument, paragraph 19(2)(a) requires the court to notify the Public Guardian of the severance of that provision. And where the court determines that a provision in an instrument means that instrument cannot operate as a valid LPA, paragraph 19(2)(b) requires the court to direct the Public Guardian to cancel the registration of that instrument as an LPA.

#### **Part 4: Records of alterations in registered powers**

166. A note of any revocation of an LPA, because of the donor or donee's bankruptcy, which only takes effect in so far as the power relates to the property and affairs of the donor will be attached to the LPA by the Public Guardian. The Public Guardian must also attach a note to an instrument if an event has terminated the appointment of the donee but not revoked the instrument (for example, if there is more than one donee), where a donee's ability to act has been suspended by the making of an interim bankruptcy restrictions order or the appointment of the donee has been replaced under the terms of the LPA. The Public Guardian must give the donor and donee notice of any notes attached to the LPA. Where the court has notified the Public Guardian that it has removed a provision from an instrument, paragraph 24 requires that the Public Guardian must attach a note to that effect to the instrument.

#### **Schedule 2: Property and affairs: supplementary provisions**

167. This contains detailed provisions relating to the court's powers in relation to property and affairs, in particular the making of wills and settlements. Paragraphs 1 to 4 deal with wills that can be made on behalf of an adult lacking capacity. These are generally known as "statutory wills" when made under the Mental Health Act 1983, Part 7. Paragraphs 5 and 6 concern settlements, that is putting a person's property into a trust. Paragraph 7 enables the court to direct the transfer of stocks to a person appointed outside England and Wales.

168. Paragraph 10 specifies that only a representative appointed by the Court of Protection may exercise the powers which the person concerned has as patron of a benefice. A benefice is a freehold office in the Church of England, such as the vicar or rector of a parish, and the patron of a benefice has the right to present a priest for admission to that benefice. The representative must be an individual capable of appointment by a patron as his representative under section 8(1)(b) of the Patronage (Benefices) Measure 1986. This means he must be a communicant member of the Church of England (or of a Church in communion with it) or a clerk in Holy Orders. The representative will discharge the person's functions as patron of the benefice not only presenting a priest to a vacant benefice, but also performing other functions of the patron such as acting as a consultee when there is a proposal to suspend presentation under section 67 of the Pastoral Measure 1983. In discharging his functions, the representative is subject to the provisions of the 1986 Measure in the same way that a representative appointed by a patron with capacity would be.

### **Schedule 3: International protection of adults**

169. This makes provision as to the private international law of England and Wales in relation to persons who cannot protect their interests. In particular, it gives effect in England and Wales to the Convention on the International Protection of Adults signed at the Hague on 13th January 2000 (Cm. 5881) (the “Hague Convention”) (the text of which is available at: <http://www.hcch.net/e/conventions/menu35e.html>).

170. It should be noted that for the purposes of the Hague Convention, England and Wales, Scotland and Northern Ireland are treated separately because they constitute separate jurisdictions. The provisions of Schedule 3 are intended to be compatible with the provisions of Schedule 3 to the Adults with Incapacity (Scotland) Act 2000 which provided for the private international law of Scotland in this field and implemented the Hague Convention for Scotland. Scotland is as yet the only country to have ratified the Convention, which will enter into force only once it has been ratified by three states. However, Schedule 3 provides private international law rules to govern jurisdictional issues between Scotland and England/Wales, irrespective of whether the Convention is in force.

#### **Part 1: Preliminary**

171. This Part contains relevant definitions and introductory provisions. The definition of “adult” in paragraph 4 is consistent with the Act but is not the same as the definition provided in the Hague Convention.

#### **Part 2: Jurisdiction of competent authority**

172. Part 2 of the Schedule provides the grounds, based on Articles 5 to 11 of the Hague Convention, on which the Court of Protection will exercise its jurisdiction under the Act when dealing with cases with an international element. Paragraph 7(1) provides that the court may exercise its jurisdiction in relation to: an adult habitually resident in England and Wales; an adult's property in England and Wales; an adult present in England or Wales or who has property there, if the matter is urgent; or an adult present in England and Wales, if a protective measure which is temporary and limited in its effect to England and Wales is proposed in relation to him.

173. Paragraph 7(2) provides that an adult present in England and Wales is to be treated as habitually resident if his habitual residence cannot be ascertained, he is a refugee or he has been displaced as a result of disturbance in the country of his habitual residence.

174. Once the provisions of the Convention are in force the court will also be able to exercise jurisdiction, in so far as it cannot otherwise do so under the provisions of paragraph 7, in relation to a British citizen with a closer connection with England and Wales than with Scotland or Northern Ireland. The jurisdiction may be exercised provided that the court considers that it is in a better position to assess the interests of the adult, that certain requirements as to notification of other Convention countries are complied with and that other Convention countries which may have jurisdiction on certain grounds have not dealt, or are not dealing with the matter (paragraph 8(2)(c) and Article 7 of the Hague Convention).

#### **Part 3: Applicable law**

175. Part 3 of the Schedule makes provision as to which law is to apply in various situations. Although the Court of Protection will normally apply the law of England and Wales, and the conditions of implementation of any protective measure taken abroad will be governed by the law

of England and Wales if implemented here, the court may apply the law of another country if it thinks that a matter has a substantial connection with that country (paragraphs 11 and 12).

176. In addition the donor of a foreign power akin to an LPA may specify that the law applicable to the existence, extent, modification or extinction of the power is to be the law of a country of which he is a national, in which he is habitually resident, or in which he has property. If the power is exercised in England and Wales the law of England and Wales shall, however, apply to the manner of the exercise of the power. Regulations may apply the provisions of Schedule 1 (lasting powers of attorney: formalities) to such foreign powers (paragraphs 15).

177. The court may disapply or modify a lasting power (including a foreign power) where the power is not exercised in a manner sufficient to guarantee the protection of the donor or his property. In these circumstances the court must, so far as possible, have regard to any foreign law applicable by virtue of this (paragraph 14).

178. This Part provides protection for a third party who enters into a transaction with a representative on behalf of a person, where that representative was actually not entitled so to act under the law of a country other than England and Wales applicable by virtue of this Part. Protection is provided if the third party neither knew nor ought to have known that such a law was applicable (paragraph 16); ensures that mandatory provisions of the law of England and Wales apply regardless of any other system of law that would apply (paragraph 17); and provides that nothing in this Part of the Schedule requires or enables the application in England and Wales of a provision of the law of another country that is manifestly contrary to public policy (paragraph 18).

#### **Part 4: Recognition and enforcement**

179. Part 4 of the Schedule provides for the recognition and enforcement of protective measures taken in other countries. It provides that a protective measure is to be recognised in England and Wales if it was taken on the ground that the adult is habitually resident in the other country. It also provides that a protective measure taken in another Convention country is to be recognised provided that it was taken on a ground provided for in the Convention (the same grounds on which the Court of Protection will exercise jurisdiction under Part 2) (paragraph 19(1) and (2)).

180. However the court may refuse to recognise a protective measure where it thinks that the case in which the measure was taken was not urgent, the adult was not given an opportunity to be heard, and that omission amounted to a breach of natural justice. The court may also refuse to recognise a protective measure if recognition of the measure would be manifestly contrary to public policy, the measure would be inconsistent with a mandatory provision of the law of England and Wales, or the measure is inconsistent with one subsequently taken or recognised in relation to the adult (paragraph 19(3) and (4)).

181. Paragraph 20 provides for any interested person to apply to the court for a declaration as to whether a protective measure taken under the law of a country other than England and Wales is to be recognised in England and Wales.

182. Paragraph 22 provides for an interested person to apply to the court for a declaration as to whether a protective measure taken under the law of, and enforceable in, a country other than England and Wales is enforceable, or to be registered, in England and Wales in accordance with Court of Protection Rules.

#### **Part 5: Co-operation**



183. Part 5 of the Schedule provides for co-operation between authorities in England and Wales and authorities in other Convention countries.

#### **Part 6: General**

184. Part 6 includes powers to make further provision as to private international law by Order in Council and regulations (paragraphs 31 and 32). An Order in Council under paragraph 31 will be subject to the negative resolution procedure in Parliament. Regulations under paragraph 32(1)(b) will be subject to the affirmative resolution procedure (see section 65).

#### **Schedule 4: Provisions applying to existing enduring powers of attorney**

185. This Schedule has effect in relation to any EPAs remaining at the time of the repeal of the Enduring Powers of Attorney Act 1985. It ensures that such instruments will continue to have the same legal effect as they had at the time they were made. They will also continue to be governed by the legal rules and procedures which were in place at the time they were made. The Schedule therefore restates with amendments the relevant provisions of the Enduring Powers of Attorney Act 1985. The amendments relate to the distribution of the functions of the original Court of Protection between the new Court of Protection and the new office of the Public Guardian.

#### **Part 1: Enduring powers of attorney**

186. Part 1 sets out the main elements of EPAs. They are not revoked by any subsequent mental incapacity of the donor of the power, unlike ordinary powers of attorney. Such a power is only created if it is in the prescribed form and complies with the provisions in paragraph 2 of this Part. This Part also deals with the scope of EPAs. Both general and specific powers may be subject to conditions and restrictions as set out by the donor. A donee may from time to time make gifts from the donor's property to people connected to the donor (including himself) and to any charity the donor may have been expected to make gifts to. This is subject to any conditions or restrictions as mentioned above and also to the reasonableness of such gifts with regard to the size of the donor's estate.

#### **Part 2: Action on actual or impending incapacity of donor**

187. This Part outlines the steps which should be taken on the actual or impending incapacity of the donor. Once the attorney believes that the donor is or is becoming mentally incapacitated he or she must immediately make an application to the Public Guardian to register the power. Part 3 deals with the steps which must be taken before the application to the Public Guardian is made. The application for registration must be made in the prescribed form and must contain the appropriate statements (as prescribed by regulations).

#### **Part 3: Notification prior to registration**

188. Part 3 sets out the steps which should be taken by the attorney before making an application to the Public Guardian to register the power. The attorney must give notice of his intention to register the power to all those entitled to receive notice. These people can include the donor's spouse or current partner, the donor's children and the donor's parents. The attorney is also under a duty to give notice of his intention to register to the donor. The attorney may apply to the court to dispense with this requirement to give notice to entitled persons. Notices should be in the prescribed form and must contain specific information, especially with regard to the right of that person to object to registration.

#### **Part 4: Registration**

189. Where an application for registration is made in accordance with the provisions of Part 2, the Public Guardian must register the instrument unless a valid notice of objection has been made in accordance with the provisions of this part. A notice of objection is valid if made on one or more of the following grounds:

- that the power was not valid as an EPA;
- that the power created no longer exists;
- that the application is premature because the donor is not yet becoming mentally incapable;
- that fraud or undue pressure was used to induce the donor to create the power;
- that, having regard to all the circumstances, the donee is unsuitable to be the donor's attorney.

190. It is for the court to decide whether any of those grounds is actually made out and if so it must direct the Public Guardian not to register the instrument. If the court is satisfied that fraud or undue pressure was used or that the donee is unsuitable, then it must also order the revocation of the power created by the instrument.

191. Where it appears that there is no one to whom notice has been given or the Public Guardian has reason to believe that appropriate inquiries might bring to light evidence on which he could be satisfied that one of the valid grounds of objection was established, he must not register the instrument and must undertake such inquiries as he thinks appropriate. If, after those inquiries, he considers one of the grounds of objection to be made out, he must apply to the court for directions and must not register the instrument except in accordance with such directions. The Public Guardian must not register an EPA if a deputy has been appointed and the powers of the attorney would conflict. Again, the court may give directions.

#### **Part 5: Legal position after registration**

192. Once an EPA has been registered any revocation of the power must be confirmed by the court. A disclaimer by the attorney is not valid until the attorney has given notice of such to the Public Guardian. Furthermore, the donor cannot alter in any way the scope of the power given in the registered power. This Part also sets out the role of the court with regard to registered powers. The court has a number of functions, not least the power to decide any question about the meaning or effect of an EPA. The court is also under an obligation to direct the Public Guardian to cancel the registration of a power in a number of circumstances (for example, if it is satisfied that the donor is and is likely to remain capable or that undue force or pressure was put on the donor to create the power). The full list of circumstances is given in paragraph 16(4). This Part also lists the circumstances under which the Public Guardian is obliged to cancel the registration of a power, such as on receipt of a disclaimer from the attorney.

#### **Part 6: Protection of attorney and third parties**

193. This Part provides protection for those who act under a power which is invalid as long as at the time of acting they did not know that the power was invalid or that, had the EPA been valid, either an event had occurred which would have revoked the power or that the power would have expired. Any transaction between an attorney and another person is valid unless that person is aware of any of those matters.

#### **Part 7: Joint and joint and several attorneys**

194. A document which appoints more than one attorney cannot create an EPA unless the attorneys are appointed to act jointly or jointly and severally. Where attorneys are appointed to act jointly and severally, if one of them fails to comply with the necessary requirements for the creation of an

EPA, then the document will not create a power in his case. But this will not affect the creation of a power in relation to the other attorneys. If one or more (but not both or all) of the attorneys applies to register the document, they must notify the other attorney(s) of this.

### Schedule 5: Transitional provisions and savings

195. Schedule 5 sets out transitional arrangements arising from the repeal of Part 7 of the Mental Health Act 1983 and repeal of the Enduring Powers of Attorney Act 1985.

196. In particular, Part 1 sets out provisions for enabling receivers appointed under the Mental Health Act 1983 to continue. Paragraph 1(2) provides that after implementation the Act shall apply as if any receiver for the person were, in fact, a deputy appointed in relation to that person, but only with the functions he had as a receiver. Part 2 allows for the continuation of procedural matters (e.g. appeals and other legal proceedings) relating to EPAs which remain in place by the time the Enduring Powers of Attorney Act 1985 is repealed.

### COMMENCEMENT

197. The Act (with the exception of sections 30 to 41) will come into force on dates appointed by the Lord Chancellor. Sections 30 to 41 will come into force on dates appointed by the Secretary of State (in relation to England) and the National Assembly for Wales (in relation to Wales).

### PARLIAMENTARY STAGES

198. The following table sets out the dates for each stage of this Act's passage through Parliament.

Stage	Date	Hansard Reference
<b>House of Commons</b>		
Introduction	17 June 2004	Vol.422(no.603)Col 928
Second Reading	11 October 2004	Vol.425 (no.134) Col 22
Standing Committee A	Day 1 — 19 October 2004	First Sitting (Morning) Second Sitting (Afternoon)
	Day 2 — 21 October 2004	Third Sitting (Morning) Fourth Sitting (Afternoon)
	Day 3 — 26 October 2004	Fifth Sitting (Morning) Sixth Sitting (Afternoon)
	Day 4 — 28 October 2004	Seventh Sitting (Morning) Eighth Sitting (Afternoon)
	Day 5 — 2 November 2004	Ninth Sitting (Morning) Tenth Sitting (Afternoon)
	Day 6 — 5 November 2004	Eleventh Sitting (Morning) Twelfth Sitting (Afternoon)
Re-introduction (following carry-over)	24 November 2004	Vol. 428 (No. 2) Col. 101
Report and Third Reading	14 December 2004	Vol. 428 (No.13) Col.1531
<b>House of Lords</b>		
Introduction	15 December 2005	Vol. 667 (No.14) Col. 1333
Second Reading	10 January 2005	Vol.668 (No.18) Col. 11
Committee	25 January 2005	Vol. 668 (No.28) Col.1143

<b>Stage</b>	<b>Date</b>	<b>Hansard Reference</b>
	27 January 2005	Vol. 668 (No.30) Col.1395
	1 February 2005	Vol. 669 (No.32) Col.102
	8 February 2005	Vol. 669 (No.37) Col.734
Report	Day 1 — 15 March 2005	Vol. 670 (No.53) Col. 1275
	Day 2 — 17 March 2005	Vol. 670 (No.55) Col. 1441
Third Reading	24 March 2005	Vol. 671 (No.59) Col. 412
<b>Commons Consideration of Lords Amendments</b>	5 April 2005	Vol. 432 (No.63) Col. 1362

**Royal Assent — 7 April 2005** House of Commons Hansard Vol. 432 Col. 1641

House of Lords Hansard Vol. 671 Col. 950