

DEPRIVATION OF LIBERTY SAFEGUARDS

Procedure for appointing a relevant person's representative



DEFINITIONS:

Relevant person's representative: A person, independent of the hospital or care home, appointed to maintain contact with a person subject to a deprivation of liberty authorisation and to represent and support the person in all matters relating to the deprivation of liberty safeguards.

The Role of the Representative

The supervisory body must appoint a representative for every person subject to a standard authorisation. It is important that the representative is appointed at the time the authorisation is given or as soon as possible and practical thereafter.

The role of the representative, once appointed, is:

- to maintain contact with the person (It is important that the representative has sufficient contact with the person to ensure that their best interests are safeguarded. In order to fulfill their role, the representative must have face-to-face contact with the person)
- to represent and support the person in all matters relating to the deprivation of liberty safeguards, including, if appropriate, triggering a review, using an organisation's complaints procedure on the person's behalf or making an application to the Court of Protection.

This is a crucial role in the deprivation of liberty process, providing the person with representation and support that is independent of the commissioners and providers of the services they are receiving. The person must be willing to represent the wishes of the person and assist them to request a review or appeal the authorization, even if that is contrary to the representatives' view.

The appointment of the representative is in addition to, and does not affect, any appointment of a donee with Lasting Power of Attorney or a deputy appointed by the court.

The best interests assessor must NOT recommend a representative where the person, if they have the capacity to do so, or a donee or a deputy acting within the scope of their authority objects to that selection.

Eligibility

To be eligible to be a representative, a person must be:

- 18 years of age or over
- able to keep in contact with the person
- willing to represent and support the person in all matters relating to the deprivation of liberty safeguards, including, helping them to appeal to the Court of Protection if they want to.
- willing to be appointed.

The person must NOT be:

- financially interested¹ in the person's managing authority
- a relative² of a person who has a financial interest in the person's managing authority
- employed by, or providing services to, the care home in which the person is residing
- employed by the hospital in a role that is, or could be, related to the treatment or care of the person, or employed to work in the supervisory body in a role that is, or could be, related to the person's case.

Any decision about the instruction of the person's representatives should take account of the cultural, national, racial or ethnic background of the person.

It should not be assumed that the representative needs to be someone who supports the deprivation of liberty.

Selecting the Representative

If a person has mental capacity to choose his own representative, (as determined by the best interests assessor) and he selects an eligible person, the assessor must recommend that person to the supervisory body for appointment.

¹ **Financial Interest:** a person has a financial interest in a managing authority where that person is an owner of the managing authority; a partner, director, other office-holder or major shareholder (any person holding one tenth or more of the issued shares in the managing authority, where the managing authority is a company limited by shares) of a care home or independent hospital.

² **Relative:** a spouse, ex-spouse, civil partner or ex-civil partner or their child; a person living with the relevant person as if they were a spouse or a civil partner or their child; a parent or child; a brother or sister, or their child; a grandparent or grandchild; a grandparent-in-law or grandchild-in-law; an uncle or aunt; a brother-in-law or sister-in-law; a son-in-law or daughter-in-law; a first cousin; or a half-brother or half-sister. This includes step relationships.

If the person lacks capacity and there is a donee³ or deputy⁴ with the appropriate authority, the donee or deputy may select the person to be recommended as the representative. If the donee or deputy selects an eligible person, the assessor must recommend that person to the supervisory body for appointment. A donee or deputy may select himself to be the representative.

If the relevant person and his donee do not wish to make a selection, the best interest assessor should proceed to choose a representative to recommend.

It is up to the best interests assessor to confirm whether any representative proposed by the person, a donee or a deputy is eligible. If the assessor decides that a proposed representative is not eligible, they must advise the person who made the selection and invite them to make a further selection. This will continue until an eligible person is selected. A donee or deputy may be appointed as the representative if they meet the eligibility criteria.

There is no reason that person's representative should be the same as the person who is their nearest relative for the purposes of the Mental Health Act 1983, even if person is subject simultaneously to an authorisation under these safeguards and a provision of the Mental Health Act. This is because the representative is not selected in the same way as the nearest relative under the Mental Health Act, nor do they perform the same role. However, there is nothing to stop the representative being the same as their nearest relative.

Representative selected by the Best Interest Assessor

If neither the person, nor a donee or deputy, selects an eligible person, then the best interests assessor must consider whether they are able to identify someone eligible who could act as the person's representative.

In making a recommendation, the assessor should consider, and balance, factors such as the persons preference (including any written statement made by the person when they had capacity); the proposed representative's ability to keep in contact with the person; whether the person appears to trust and feel comfortable with the proposed representative; the representative's ability to represent the person effectively; whether the representative is likely to represent the person's best interests; and where the person wishes to appeal against the deprivation, whether the representative is likely to support them to do so despite any conflict of opinion or apparent conflict of interest.

³ **Donee:** a person who has a lasting power of attorney conferred on them by the relevant person, giving that donee the authority to make decisions about the relevant person's personal welfare

⁴ **Deputy:** a person appointed by the Court of Protection with ongoing legal authority, as prescribed by the Court, to make decisions on behalf of a person who lacks capacity.

Paid Representative appointed by the Supervisory Body

If the best interests assessor cannot identify anyone willing and eligible to be the representative, they must notify the supervisory body accordingly. The supervisory body must then itself identify a suitable person to be appointed.

The supervisory body may select a person who:

- is not a family member, friend or carer of the person
- would be performing the role in a professional capacity
- has satisfactory skills and experience to perform the role; AND
- has an appropriate criminal record certificate
- is NOT employed by, or providing services to, the person's managing authority, where the person's managing authority is a care home
- is NOT employed to work in the person's managing authority in a role that is, or could be, related to the person's case, where the person's managing authority is a hospital
- is NOT employed by the supervisory body

The supervisory body may pay a person they select to be the person's representative. This service could be commissioned, for example, through an advocacy services provider, ensuring that the service provides effective independent representation for the person.

When selecting a suitable representative for the person, the best interests assessor or supervisory body should pay particular attention to the person's communication and cultural needs.

Appointing the Representative

The supervisory body will send a written invitation to individual recommended by the best interest assessor to act as the representative. This will include information about the responsibilities of the role and sources of support and information available to help including how to access an IMCA.

If the person refuses, a further eligible person must be recommended by the best interest assessor and invited to become the representative. This process must continue until an eligible person is appointed. If it is not possible for the best interest assessor to recommend any suitable person, the supervisory body should appoint a paid representative.

If the person is willing to become the representative they should respond in writing to confirm that they are willing to accept the appointment.

Role of the Independent Mental Capacity Advocate (IMCA)

An IMCA may also be instructed at any time where:

- the person does not have a paid ‘professional’ representative

Where the person has a paid ‘professional’ representative, the need for additional advocacy support should not arise and so there is no requirement for an IMCA to be provided.

- the person or their representative requests that an IMCA is instructed to help them, or
- a supervisory body believes that instructing an IMCA will help to ensure that the person’s rights are protected

The supervisory body MUST instruct an IMCA when:

- There are gaps in the appointment of a person’s representative (for instance, while new representative is being sought).
- if the person or their representative requests one. Both the person who is deprived of liberty and their representative has a statutory right of access to an IMCA.

Terminating the Appointment of the Representative

The appointment of the representative will be terminated if the standard authorisation comes to an end and a new authorisation is not applied for or, if applied for, is not given.

When the appointment of a person’s representative ends but the lawful deprivation of liberty continues, the supervisory body must appoint a suitable replacement to be the person’s representative as soon as possible and practical after they become aware of the vacancy. As before, a person qualified to be a best interests assessor should make a recommendation to the supervisory body and the supervisory body should take account of any such recommendations.

This may be necessary if:

- The representative is no longer willing or eligible to continue in the role. The views of the former representative on who might replace them should be sought.
- The person, if they have capacity to do so, objects to the representative continuing.
- A donee or deputy objects to the representative continuing. (if it is within their authority to do so AND the person lacks the capacity to decide who should be his representative).
- The supervisory body becomes aware that the representative is not keeping in touch with the person, is not representing and supporting them effectively.

MANAGING AUTHORITIES ROLE WITH REPRESENTATIVES

Providing Information

As soon as possible and practical after a standard deprivation of liberty authorisation is given; the managing authority must seek to ensure that the person and their representative understand:

- the effect of the authorisation
- their right to request a review
- the formal and informal complaints procedures available to them
- their right to make an application to the Court of Protection to seek variation or termination of the authorisation, and
- their right, where the person does not have a paid 'professional' representative, to request the support of an IMCA

When providing information to the person and their representative, the managing authority should take account of the communication and language needs of both the person and their representative. Provision of information should be seen as an ongoing responsibility, rather than a one-off activity.

Monitoring

A managing authority should monitor and record whether the person's representative maintains regular contact. The care home or hospital should accommodate visits by the representative at any reasonable time. When the managing authority is reviewing the person's care plan, it should consider whether the representative is in sufficient contact with the person to offer effective support. Records kept by managing authorities on frequency of contact will support this consideration.

If the representative does not maintain an appropriate level of contact with the person, the managing authority will need to consider informing the supervisory body. Because the appropriate levels and methods of contact between a person and their representative will vary from case to case, this is a matter about which the managing authority will need to exercise discretion. If the managing authority has any concerns, it may be best to raise the matter with the representative initially to see whether any perceived problems could be resolved informally. If after this the representative still does not maintain what the managing authority considers to be an appropriate level of contact with the person, then the managing authority should notify the supervisory body.