



# Mental Health Act 2007

## 2007 CHAPTER 12

### PART 2

#### AMENDMENTS TO OTHER ACTS

### CHAPTER 2

#### AMENDMENTS TO MENTAL CAPACITY ACT 2005

#### **49 Independent mental capacity advocacy service: exceptions**

For section 40 of the Mental Capacity Act 2005 (c. 9) (independent mental capacity advocacy service: exceptions) substitute—

#### **“40 Exceptions**

The duty imposed by section 37(3), 38(3) or (4) or 39(4) or (5) 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.”

#### **50 Mental Capacity Act 2005: deprivation of liberty**

(1) The Mental Capacity Act 2005 (c. 9) is amended as follows.

(2) After section 4 insert—

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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).

#### **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.
  - (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.”
- (3) After section 16 insert—

#### **“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,

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- 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).”
- (4) Omit the following provisions (which make specific provision about deprivation of liberty)—
- (a) section 6(5);
  - (b) section 11(6);
  - (c) section 20(13).
- (5) Schedule 7 (which inserts the new Schedule A1 into the Mental Capacity Act 2005 (c. 9)) has effect.
- (6) Schedule 8 (which inserts the new Schedule 1A into the Mental Capacity Act 2005) has effect.
- (7) Schedule 9 (which makes other amendments to the Mental Capacity Act 2005 and to other Acts) has effect.
- (8) In subsection (9)—
- “GOWA 1998” means the Government of Wales Act 1998 (c. 38);
  - “GOWA 2006” means the Government of Wales Act 2006 (c. 32);
  - “initial period” has the same meaning as in Schedule 11 to GOWA 2006.
- (9) If this Act is passed after the end of the initial period, the functions conferred on the National Assembly for Wales by virtue of any provision of this Part of this Act are to be treated for the purposes of Schedule 11 to GOWA 2006 as if they—
- (a) had been conferred on the Assembly constituted by GOWA 1998 by an Act passed before the end of the initial period, and
  - (b) were exercisable by that Assembly immediately before the end of the initial period.
- (10) If any function of making subordinate legislation conferred by virtue of any provision of this Part of this Act is transferred to the Welsh Ministers (whether by virtue of subsection (9) or otherwise)—
- (a) paragraphs 34 and 35 of Schedule 11 to the Government of Wales Act 2006 do not apply; and
  - (b) subsections (11) and (12) apply instead.
- (11) If a relevant statutory instrument contains regulations under paragraph 42(2)(b), 129, 163 or 164 of Schedule A1 to the Mental Capacity Act 2005 (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 the National Assembly for Wales.
- (12) Subject to that, a relevant statutory instrument is subject to annulment in pursuance of a resolution of the National Assembly for Wales.

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- (13) In subsections (11) and (12) “relevant statutory instrument” means a statutory instrument containing subordinate legislation made in exercise of a function transferred as mentioned in subsection (10).

**Commencement Information**

- II** S. 50 not in force at Royal Assent see s. 56(1); s. 50(5)(7)(8)-(13) in force for specified purposes at 1.4.2008 by S.I. 2008/745, art. 4; s. 50 in force insofar as not already in force at 1.4.2009 by S.I. 2009/139, art. 2(b) (with Sch. paras. 3, 4)

**51 Amendment to section 20(11) of Mental Capacity Act 2005**

In section 20 of the Mental Capacity Act 2005 (c. 9) (restrictions on deputies), in subsection (11)(a), for “or” substitute “and”.

**Changes to legislation:**

There are currently no known outstanding effects for the Mental Health Act 2007, Chapter 2.