



# Mental Capacity Act 2005

## 2005 CHAPTER 9

### PART 1

#### PERSONS WHO LACK CAPACITY

##### *Independent mental capacity advocate service*

#### **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.

[<sup>F1</sup>(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
- (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.]

- (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—

*Status: Point in time view as at 02/04/2018. This version of this provision has been superseded.*

*Changes to legislation: Mental Capacity Act 2005, Section 38 is up to date with all changes known to be in force on or before 09 October 2023. There are changes that may be brought into force at a future date. Changes that have been made appear in the content and are referenced with annotations. (See end of Document for details)*

- (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.
- [<sup>F2</sup>(6) “Care home” means—
- (a) a care home in England within the meaning given in section 3 of the Care Standards Act 2000 (c. 14), and
  - (b) a place in Wales at which a care home service within the meaning of Part 1 of the Regulation and Inspection of Social Care (Wales) Act 2016 is provided wholly or mainly to persons aged 18 or over.]
- [<sup>F3</sup>(7) “Hospital” means—
- (a) in relation to England, a hospital as defined by section 275 of the National Health Service Act 2006; and
  - (b) in relation to Wales, a health service hospital as defined by section 206 of the National Health Service (Wales) Act 2006 or 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.
- [<sup>F4</sup>(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.]

#### Textual Amendments

- F1** S. 38(2A) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 4\(2\)](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))
- F2** S. 38(6) substituted (2.4.2018) by [The Regulation and Inspection of Social Care \(Wales\) Act 2016 \(Consequential Amendments\) Regulations 2018 \(S.I. 2018/195\)](#), [regs. 2\(1\)](#), 9
- F3** S. 38(7) substituted (1.10.2010) by [The Health and Social Care Act 2008 \(Consequential Amendments No.2\) Order 2010 \(S.I. 2010/813\)](#), [art. 17\(3\)](#)
- F4** S. 38(10) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 4\(3\)](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

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#### **Commencement Information**

- II** S. 38 wholly in force at 1.10.2007; s. 38 not in force at Royal Assent see s. 68(1)-(3); s. 38 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 38 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

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