



# Mental Capacity Act 2005

## 2005 CHAPTER 9

### PART 1

#### PERSONS WHO LACK CAPACITY

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

#### **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.

[<sup>F1</sup>(1A) But this section applies only if—

- (a) in the case of a local authority in England, subsection (1B) applies;
- (b) in the case of a local authority in Wales, subsection (2) applies.]

[<sup>F2</sup>(1B) This subsection applies if the accommodation is to be provided in accordance with—

- (a) Part 1 of the Care Act 2014, or
- (b) section 117 of the Mental Health Act.]

- (2) [<sup>F3</sup>This subsection applies] if the accommodation is to be provided in accordance with—

- [<sup>F4</sup>(a) Part 4 of the Social Services and Well-being (Wales) Act 2014; or]
- (b) section 117 of the Mental Health Act,

<sup>F5</sup>...

- (3) This section does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act.

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*Changes to legislation: Mental Capacity Act 2005, Section 39 is up to date with all changes known to be in force on or before 27 May 2024. 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) View outstanding changes*

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- (3A) [<sup>F6</sup>And this section does not apply if—
- (a) an independent mental capacity advocate is appointed under paragraph 42 of Schedule AA1 to represent and support P, and
  - (b) the arrangements which are authorised or proposed under Schedule AA1 in respect of P include arrangements for P to be accommodated in the residential accommodation referred to in this section.]
- <sup>F7</sup>(4) Before making the arrangements [<sup>F8</sup>mentioned in subsection (1)] , 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
  - (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) [<sup>F9</sup> 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. 39(1A) inserted (1.4.2015) by [The Care Act 2014 and Children and Families Act 2014 \(Consequential Amendments\) Order 2015 \(S.I. 2015/914\)](#), art. 1(2), **Sch. para. 79(2)** (with arts. 1(3), 3)
- F2** S. 39(1B) inserted (1.4.2015) by [The Care Act 2014 and Children and Families Act 2014 \(Consequential Amendments\) Order 2015 \(S.I. 2015/914\)](#), art. 1(2), **Sch. para. 79(3)** (with arts. 1(3), 3)
- F3** Words in s. 39(2) substituted (1.4.2015) by [The Care Act 2014 and Children and Families Act 2014 \(Consequential Amendments\) Order 2015 \(S.I. 2015/914\)](#), art. 1(2), **Sch. para. 79(4)** (with arts. 1(3), 3)
- F4** S. 39(2)(a) substituted (6.4.2016) by [The Social Services and Well-being \(Wales\) Act 2014 \(Consequential Amendments\) Regulations 2016 \(S.I. 2016/413\)](#), regs. 2(1), **227(a)**
- F5** Words in s. 39(2)(b) omitted (6.4.2016) by virtue of [The Social Services and Well-being \(Wales\) Act 2014 \(Consequential Amendments\) Regulations 2016 \(S.I. 2016/413\)](#), regs. 2(1), **227(b)**
- F6** S. 39(3A) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), **Sch. 2 para. 6(2)**
- F7** S. 39(3A) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, **Sch. 9 para. 5(2)**; S.I. 2009/139, **art. 2(e)** (with art. 3)

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- F8** Words in s. 39(4) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 6\(3\)](#)
- F9** S. 39(7) omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 6\(4\)](#)

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**Commencement Information**

- I1** S. 39 wholly in force at 1.10.2007; s. 39 not in force at Royal Assent see s. 68(1)-(3); s. 39 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 39 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

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**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 58(4)(ca) inserted by [2023 c. 42 Sch. para. 10](#)
- Sch. 1 para. 4A inserted by [2023 c. 42 Sch. para. 3](#)
- Sch. 1 para. 10A and cross-heading inserted by [2023 c. 42 Sch. para. 6](#)
- Sch. 1 para. 13A inserted by [2023 c. 42 Sch. para. 7\(2\)](#)
- Sch. 1 para. 16(1A) inserted by [2023 c. 42 Sch. para. 8\(b\)](#)