



2016 CHAPTER 18

PART 2

LACK OF CAPACITY: PROTECTION
FROM LIABILITY, AND SAFEGUARDS

CHAPTER 8

SUPPLEMENTARY

*Medical reports: involvement of nominated
person and independent mental capacity advocate*

Medical reports: involvement of nominated person

- 54.—**(1) A relevant medical report may be made only if—
- (a) a nominated person is in place for P at the time when the person making the report determines for the purposes of the report what would be in P's best interests; and
 - (b) in making that determination, the person making the report consults and takes into account the views of the nominated person to the extent required by section 7(7) (duty to consult where practicable and appropriate and to take views into account).
- (2) Subsection (1)—
- (a) does not apply where the situation is an emergency for the purposes of this section (see section 56); and
 - (b) is without prejudice to section 55 (need to involve independent mental capacity advocate).

(3) For the purposes of this section a nominated person is “in place for P” at a particular time if at that time there is someone who is P’s nominated person (see section 69).

(4) In this section “a relevant medical report” means—

- (a) a report under section 39;
- (b) a medical report under paragraph 7 of Schedule 1;
- (c) a medical report under paragraph 4, 11, 13 or 14 of Schedule 2; or
- (d) a medical report under paragraph 5 of Schedule 3.

Medical reports: involvement of independent mental capacity advocate

55.—(1) A relevant medical report may be made only if—

- (a) at the time when the person making the report determines for the purposes of the report what would be in P’s best interests, there is an independent mental capacity advocate who is instructed under section 91 to represent and provide support to P; and
- (b) in determining what would be in P’s best interests, the person making the report consults and takes into account the views of the independent mental capacity advocate to the extent required by section 7(7) (duty to consult where practicable and appropriate and to take views into account).

(2) Subsection (1)—

- (a) does not apply where the situation is an emergency for the purposes of this section (see section 56); and
- (b) is without prejudice to section 54 (need to involve nominated person).

(3) Subsection (1) does not apply if, at the time mentioned in subsection (1) (a), P has made a declaration under section 90 or 93 (declarations declining services of an independent mental capacity advocate) in relation to the matter in question (and has not revoked the declaration).

(4) In this section “a relevant medical report” has the same meaning as in section 54.

Sections 54 and 55: meaning of “emergency”

56.—(1) For the purposes of section 54 or 55 the situation is an “emergency” if, at the time when the person making the report determines what would be in P’s best interests, that person—

- (a) knows that the safeguard in that section is not met, but reasonably believes that to delay the report until that safeguard is met would involve an unacceptable risk of harm to P; or

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- (b) does not know whether the safeguard is met, but reasonably believes that to delay the report even until it is established whether the safeguard is met would involve an unacceptable risk of harm to P.
- (2) For the purposes of this section—
- (a) the safeguard in section 54 is met when a nominated person is in place for P (within the meaning given by that section);
 - (b) the safeguard in section 55 is met when—
 - (i) an independent mental capacity advocate is instructed under section 91 to represent and provide support to P in the determination of what would be in P’s best interests; or
 - (ii) P has made (and not revoked) a declaration under section 90 or 93 in relation to the matter.
- (3) For the purposes of this section the risk of harm to P involved in delaying the report until a particular safeguard is met, or until it is established whether it is met, is an “unacceptable” risk if—
- (a) the seriousness of the harm that could be caused to P by such delay, and
 - (b) the likelihood of the harm,
- are such as to outweigh the risk of harm to P of making the report without that safeguard being met.
- (4) In deciding for the purposes of this section when a safeguard would be met, or when it would be established whether a safeguard is met, it must be assumed that any necessary steps would be taken as soon as practicable.

Provision of information

Provision of information

- 57.—**(1) Regulations may make provision requiring a prescribed person to give prescribed information to prescribed persons—
- (a) where, after an authorisation has been granted under Schedule 1 or 2, a prescribed event occurs;
 - (b) in such other circumstances where an act has been done in pursuance of this Part as may be prescribed.
- (2) The regulations may include provision as to when the information must be given.
- (3) The information that may be prescribed by—
- (a) regulations made under this section, or
 - (b) regulations made under any other provision of this Part which requires prescribed information to be given to a person,

includes a copy of a prescribed document.

(4) Regulations under this section must in particular include provision for the purposes of ensuring—

- (a) that where a person is detained by virtue of this Part in circumstances amounting to a deprivation of liberty, the person is made aware as soon as practicable of—
 - (i) the provisions of this Part by virtue of which he or she is detained, and the effect of those provisions; and
 - (ii) what rights are available under Chapter 7 (review by the Tribunal);
- (b) that where a person who has been detained under this Part in circumstances amounting to a deprivation of liberty is discharged from detention, the person is informed in writing that he or she is discharged from detention.

Ways in which information must be provided

58.—(1) Regulations may make provision about the way in which relevant information must be given to prescribed persons.

(2) In this section “relevant information” means information which is—

- (a) required to be given by any provision of this Part or of regulations made under this Part; and
- (b) specified by the regulations under this section.

(3) Regulations under this section may in particular require information to be given orally as well as in writing.

Other supplementary provision

Failure by person other than D to take certain steps

59.—(1) This section applies if, in relation to an act done by a person (“D”)—

- (a) all the conditions for section 9 to apply are met, except that supportive steps that it would have been practicable to take were not taken;
- (b) the fact that those steps were not taken is not to any extent due to an unreasonable failure by D to take such steps; and
- (c) at the time of the act, it is no longer practicable for such steps to be taken.

(2) For the purposes of determining whether D is liable in relation to the act, section 9 is to be taken to apply to the act.

(3) But if—

- (a) D is an employee of a person (“E”), and

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- (b) any other employee of E unreasonably failed to take supportive steps in relation to the matter at a time when it would have been practicable to take such steps,

for the purposes of determining whether E is liable in relation to the act subsection (2) is to be disregarded.

(4) In this section “supportive steps” means steps to help or support the person to whom the act relates (“P”) to enable P to make a decision for himself or herself about the matter.

(5) For the purposes of this section a failure by a person at any time to take a supportive step that it would be practicable to take is unreasonable unless—

- (a) at the time in question the person reasonably believes that the step can be taken at a later time and still be as effective as it would be if taken immediately; and
- (b) not taking the step immediately is reasonable in the circumstances.

(6) Any person for whose acts another person may be vicariously liable is to be treated for the purposes of this section as an employee of that other person.

Part 2 not applicable where other authority for act

60.—(1) Section 9 does not apply in relation to an act—

- (a) which gives effect to a relevant decision; or
- (b) which a person has a power (or duty) to do under any other statutory provision (including any provision of this Act).

(2) In this section a “relevant decision” means a decision concerning the care, treatment or personal welfare of a person (“P”) which—

- (a) is made by the court on P’s behalf under section 113(2)(a);
- (b) is made in accordance with this Act by an attorney under a lasting power of attorney granted by P and is within the scope of the attorney’s authority;
- (c) is made in accordance with this Act by a deputy appointed for P by the court and is within the scope of the deputy’s authority; or
- (d) where P is under 18, is a decision made by a parent or guardian of P which is effective under any rule of law.

Power to make further provision

61.—(1) The Department may by regulations make provision modifying any provision of this Part in relation to cases where—

- (a) an act is proposed to be done in respect of a person after that person has reached the age of 16, but
- (b) at the time the act is proposed, the person is under 16.

(2) The Department may by regulations make provision enabling prescribed relevant documents that are found to be incorrect or defective within a prescribed period from being made—

- (a) to be rectified within a prescribed period, and
- (b) to have effect as if originally made as rectified.

(3) In subsection (2) “relevant document” means an authorisation, or other document, made for the purposes of this Part.

Disregard of certain detention

Disregard of certain detention

62.—(1) In this section a “person who has been subject to short-term detention” means a person who—

- (a) for any period, has been detained under this Part in a hospital in circumstances amounting to a deprivation of liberty otherwise than under an authorisation under Schedule 1; and
- (b) immediately after the end of that period, was not detained in a hospital in circumstances amounting to a deprivation of liberty under an authorisation under Schedule 1.

(2) In this section “the relevant detention” means the detention mentioned in subsection (1)(a).

(3) Where a question seeking information with respect to the previous health or circumstances of a person who has been subject to short-term detention is put to that or any other person, otherwise than in judicial proceedings—

- (a) the question is to be treated as not relating to the relevant detention and the answer may be framed accordingly; and
- (b) the person questioned is not to be subjected to any liability or otherwise prejudiced in law by reason of any failure to acknowledge or disclose the relevant detention in answering the question.

(4) An obligation imposed on a person (“A”) by any rule of law or by the provisions of any agreement or arrangement to disclose any matters does not extend to requiring disclosure of the relevant detention of a person who has been subject to short-term detention (whether A or another person).

(5) The fact that a person who has been subject to short-term detention has been subject to the relevant detention, or any failure to disclose that fact, is not a proper ground for dismissing or excluding the person from any office, profession, occupation or employment, or for prejudicing the person in any way in any occupation or employment.

(6) Any disqualification, disability, prohibition or other penalty which, by virtue of any rule of law or statutory provision other than this Act, attaches to or

is imposed on any person by reason of the fact that the person has been detained in circumstances amounting to a deprivation of liberty under this Act is not to attach to a person merely because he or she is a person who has been subject to short-term detention.

(7) In subsection (3) “judicial proceedings” includes, in addition to proceedings before any of the ordinary courts of law, proceedings before any tribunal, body or person that has power—

- (a) by virtue of any statutory provision, law, custom or practice,
- (b) under the rules governing any association, institution, profession, occupation or employment, or
- (c) under any provision of an agreement providing for arbitration with respect to questions arising under the agreement,

to determine any question affecting the rights, privileges, obligations or liabilities of any person, or to receive evidence affecting the determination of any such question.