



# Mental Capacity Act 2005

## 2005 CHAPTER 9

### PART 1 **E+W**

#### PERSONS WHO LACK CAPACITY

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

### 35 Appointment of independent mental capacity advocates **E+W**

- (1) The appropriate authority must make such arrangements as it considers reasonable to enable persons (“independent mental capacity advocates”) to be available to represent and support persons to whom acts or decisions proposed under sections 37, 38 and 39 relate [<sup>F1</sup>or persons who fall within section 39A, 39C or 39D]<sup>F1</sup>.
- (2) The appropriate authority may make regulations as to the appointment of independent mental capacity advocates.
- (3) The regulations may, in particular, provide—
  - (a) that a person may act as an independent mental capacity advocate only in such circumstances, or only subject to such conditions, as may be prescribed;
  - (b) for the appointment of a person as an independent mental capacity advocate to be subject to approval in accordance with the regulations.
- (4) In making arrangements under subsection (1), the appropriate authority must have regard to the principle that a person to whom a proposed act or decision relates should, so far as practicable, be represented and supported by a person who is independent of any person who will be responsible for the act or decision.
- (5) The arrangements may include provision for payments to be made to, or in relation to, persons carrying out functions in accordance with the arrangements.
- (6) For the purpose of enabling him to carry out his functions, an independent mental capacity advocate—
  - (a) may interview in private the person whom he has been instructed to represent, and

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- (b) may, at all reasonable times, examine and take copies of—
- (i) any health record,
  - (ii) any record of, or held by, a local authority and compiled in connection with a social services function, and
  - (iii) any record held by a person registered under Part 2 of the Care Standards Act 2000 (c. 14) [<sup>F2</sup>or Chapter 2 of Part 1 of the Health and Social Care Act 2008]<sup>F2</sup>,

which the person holding the record considers may be relevant to the independent mental capacity advocate's investigation.

- (7) In this section, section 36 and section 37, “the appropriate authority” means—
- (a) in relation to the provision of the services of independent mental capacity advocates in England, the Secretary of State, and
  - (b) in relation to the provision of the services of independent mental capacity advocates in Wales, the National Assembly for Wales.

#### Textual Amendments

- F1** Words in s. 35(1) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\), ss. 50, 56, Sch. 9 para. 3; S.I. 2009/139, art. 2\(e\)](#) (with art. 3)
- F2** Words in s. 35(6)(b)(iii) inserted (1.10.2010) by [The Health and Social Care Act 2008 \(Consequential Amendments No.2\) Order 2010 \(S.I. 2010/813\), art. 17\(2\)](#)

#### Modifications etc. (not altering text)

- C1** S. 35 extended (E.) (1.11.2006 for certain purposes and otherwise 1.4.2007) by [The Mental Capacity Act 2005 \(Independent Mental Capacity Advocates\) \(Expansion of Role\) Regulations 2006 \(S.I. 2006/2883\), regs. 1\(2\), 2-4](#)

#### Commencement Information

- II** S. 35 wholly in force at 1.10.2007; s. 35 not in force at Royal Assent see s. 68(1)-(3); s. 35 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814, art. 5](#); s. 35 in force at 1.10.2007 for W. by [S.I. 2007/856, art. 5](#)

## 36 Functions of independent mental capacity advocates **E+W**

- (1) The appropriate authority may make regulations as to the functions of independent mental capacity advocates.
- (2) The regulations may, in particular, make provision requiring an advocate to take such steps as may be prescribed for the purpose of—
  - (a) providing support to the person whom he has been instructed to represent (“P”) so that P may participate as fully as possible in any relevant decision;
  - (b) obtaining and evaluating relevant information;
  - (c) ascertaining what P's wishes and feelings would be likely to be, and the beliefs and values that would be likely to influence P, if he had capacity;
  - (d) ascertaining what alternative courses of action are available in relation to P;
  - (e) obtaining a further medical opinion where treatment is proposed and the advocate thinks that one should be obtained.

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- (3) The regulations may also make provision as to circumstances in which the advocate may challenge, or provide assistance for the purpose of challenging, any relevant decision.

#### Commencement Information

- I2** S. 36 wholly in force at 1.10.2007; s. 36 not in force at Royal Assent see s. 68(1)-(3); s. 36 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 36 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

### 37 Provision of serious medical treatment by NHS body **E+W**

- (1) This section applies if an NHS body—
- is proposing to provide, or secure the provision of, serious medical treatment for a person (“P”) who lacks capacity to consent to the treatment, 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 to consult in determining what would be in P’s best interests.
- (2) But this section does not apply if P’s treatment is regulated by Part 4 [<sup>F3</sup>or 4A]<sup>F3</sup> of the Mental Health Act.
- (3) Before the treatment is provided, the NHS body must instruct an independent mental capacity advocate to represent P.
- (4) If the treatment needs to be provided as a matter of urgency, it may be provided even though the NHS body has not been able to comply with subsection (3).
- (5) The NHS body must, in providing or securing the provision of treatment for P, take into account any information given, or submissions made, by the independent mental capacity advocate.
- (6) “Serious medical treatment” means treatment which involves providing, withholding or withdrawing treatment of a kind prescribed by regulations made by the appropriate authority.
- (7) “NHS body” has such meaning as may be prescribed by regulations made for the purposes of this section by—
- the Secretary of State, in relation to bodies in England, or
  - the National Assembly for Wales, in relation to bodies in Wales.

#### Textual Amendments

- F3** Words in s. 37(2) inserted (3.11.2008) by [Mental Health Act 2007 \(c. 12\)](#), [ss. 35\(6\)](#), [56](#); [S.I. 2008/1900](#), [art. 2\(k\)](#) (with [art. 3](#), [Sch.](#))

#### Commencement Information

- I3** S. 37 wholly in force at 1.10.2007; s. 37 not in force at Royal Assent see s. 68(1)-(3); s. 37 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 37 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

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### **38 Provision of accommodation by NHS body E+W**

- (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>F4</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.]
- <sup>F4</sup>(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—
- (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.
- (6) “Care home” has the meaning given in section 3 of the Care Standards Act 2000 (c. 14).
- [<sup>F5</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.]
- <sup>F5</sup>(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

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- (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>F6</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.<sup>F6</sup>]

#### Textual Amendments

- F4** 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](#))
- F5** 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\(3\)](#)
- F6** 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](#))

#### Commencement Information

- I4** 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](#)

### 39 Provision of accommodation by local authority **E+W**

- (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.
- (2) But this section applies only if the accommodation is to be provided in accordance with—
- (a) section 21 or 29 of the National Assistance Act 1948 (c. 29), or
  - (b) section 117 of the Mental Health Act,
- as the result of a decision taken by the local authority under section 47 of the National Health Service and Community Care Act 1990 (c. 19).
- (3) This section does not apply if P is accommodated as a result of an obligation imposed on him under the Mental Health Act.

[<sup>F7</sup>(3A) 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 local authority) to represent P, and
- (b) the place 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.]

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- <sup>F7</sup>(4) Before making the arrangements, 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.
- <sup>F8</sup>(7) 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.<sup>F8</sup>]

#### Textual Amendments

- 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](#))
- F8** S. 39(7) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 5\(3\)](#); [S.I. 2009/139](#), [art. 2\(e\)](#) (with [art. 3](#))

#### Commencement Information

- I5** 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](#)

### <sup>F9</sup>39A Person becomes subject to Schedule A1 **E+W**

- (1) This section applies if—
- (a) a person (“P”) becomes subject to Schedule A1, and
  - (b) the managing authority of the relevant hospital or care home 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 to consult in determining what would be in P's best interests.
- (2) The managing authority must notify the supervisory body that this section applies.
- (3) The supervisory body must instruct an independent mental capacity advocate to represent P.
- (4) Schedule A1 makes provision about the role of an independent mental capacity advocate appointed under this section.

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- (5) This section is subject to paragraph 161 of Schedule A1.
- (6) 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

**F9** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

### **39B Section 39A: supplementary provision** E+W

- (1) This section applies for the purposes of section 39A.
- (2) P becomes subject to Schedule A1 in any of the following cases.
- (3) The first case is where an urgent authorisation is given in relation to P under paragraph 76(2) of Schedule A1 (urgent authorisation given before request made for standard authorisation).
- (4) The second case is where the following conditions are met.
- (5) The first condition is that a request is made under Schedule A1 for a standard authorisation to be given in relation to P (“the requested authorisation”).
- (6) The second condition is that no urgent authorisation was given under paragraph 76(2) of Schedule A1 before that request was made.
- (7) The third condition is that the requested authorisation will not be in force on or before, or immediately after, the expiry of an existing standard authorisation.
- (8) The expiry of a standard authorisation is the date when the authorisation is expected to cease to be in force.
- (9) The third case is where, under paragraph 69 of Schedule A1, the supervisory body select a person to carry out an assessment of whether or not the relevant person is a detained resident.

#### Textual Amendments

**F9** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

### **39C Person unrepresented whilst subject to Schedule A1** E+W

- (1) This section applies if—
  - (a) an authorisation under Schedule A1 is in force in relation to a person (“P”),
  - (b) the appointment of a person as P's representative ends in accordance with regulations made under Part 10 of Schedule A1, and
  - (c) the managing authority of the relevant hospital or care home are satisfied that there is no person, other than one engaged in providing care or treatment for P

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in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P's best interests.

- (2) The managing authority must notify the supervisory body that this section applies.
- (3) The supervisory body must instruct an independent mental capacity advocate to represent P.
- (4) Paragraph 159 of Schedule A1 makes provision about the role of an independent mental capacity advocate appointed under this section.
- (5) The appointment of an independent mental capacity advocate under this section ends when a new appointment of a person as P's representative is made in accordance with Part 10 of Schedule A1.
- (6) 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

**F9** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

### 39D Person subject to Schedule A1 without paid representative **E+W**

- (1) This section applies if—
  - (a) an authorisation under Schedule A1 is in force in relation to a person (“P”),
  - (b) P has a representative (“R”) appointed under Part 10 of Schedule A1, and
  - (c) R is not being paid under regulations under Part 10 of Schedule A1 for acting as P's representative.
- (2) The supervisory body must instruct an independent mental capacity advocate to represent P in any of the following cases.
- (3) The first case is where P makes a request to the supervisory body to instruct an advocate.
- (4) The second case is where R makes a request to the supervisory body to instruct an advocate.
- (5) The third case is where the supervisory body have reason to believe one or more of the following—
  - (a) that, without the help of an advocate, P and R would be unable to exercise one or both of the relevant rights;
  - (b) that P and R have each failed to exercise a relevant right when it would have been reasonable to exercise it;
  - (c) that P and R are each unlikely to exercise a relevant right when it would be reasonable to exercise it.
- (6) The duty in subsection (2) is subject to section 39E.
- (7) If an advocate is appointed under this section, the advocate is, in particular, to take such steps as are practicable to help P and R to understand the following matters—



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- (a) the effect of the authorisation;
  - (b) the purpose of the authorisation;
  - (c) the duration of the authorisation;
  - (d) any conditions to which the authorisation is subject;
  - (e) the reasons why each assessor who carried out an assessment in connection with the request for the authorisation, or in connection with a review of the authorisation, decided that P met the qualifying requirement in question;
  - (f) the relevant rights;
  - (g) how to exercise the relevant rights.
- (8) The advocate is, in particular, to take such steps as are practicable to help P or R—
- (a) to exercise the right to apply to court, if it appears to the advocate that P or R wishes to exercise that right, or
  - (b) to exercise the right of review, if it appears to the advocate that P or R wishes to exercise that right.
- (9) If the advocate helps P or R to exercise the right of review—
- (a) the advocate may make submissions to the supervisory body on the question of whether a qualifying requirement is reviewable;
  - (b) the advocate may give information, or make submissions, to any assessor carrying out a review assessment.
- (10) In this section—
- “relevant rights” means—
    - (a) the right to apply to court, and
    - (b) the right of review;
  - “right to apply to court” means the right to make an application to the court to exercise its jurisdiction under section 21A;
  - “right of review” means the right under Part 8 of Schedule A1 to request a review.

#### Textual Amendments

**F9** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

### **39E**    **Limitation on duty to instruct advocate under section 39D** **E+W**

- (1) This section applies if an advocate is already representing P in accordance with an instruction under section 39D.
- (2) Section 39D(2) does not require another advocate to be instructed, unless the following conditions are met.
- (3) The first condition is that the existing advocate was instructed—
  - (a) because of a request by R, or
  - (b) because the supervisory body had reason to believe one or more of the things in section 39D(5).
- (4) The second condition is that the other advocate would be instructed because of a request by P.]

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#### Textual Amendments

- F9** Ss. 39A-39E inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 6](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

### <sup>F10</sup>40 Exceptions **E+W**

<sup>F11</sup>(1<sup>F11</sup>) The duty imposed by section 37(3), 38(3) or (4) [<sup>F12</sup>, 39(4) or (5), 39A(3), 39C(3) or 39D(2)]<sup>F12</sup> 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.

<sup>F13</sup>(2) A person appointed under Part 10 of Schedule A1 to be P's representative is not, by virtue of that appointment, a person nominated by P as a person to be consulted in matters to which a duty mentioned in subsection (1) relates.<sup>F13F10</sup>]]

#### Textual Amendments

- F10** S. 40 substituted (1.10.2007) by [Mental Health Act 2007 \(c. 12\)](#), ss. 49, 56; S.I. 2007/2798, [art. 2\(h\)](#)
- F11** S. 40 renumbered as s. 40(1) (1.4.2009) by virtue of [The Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 7\(2\)](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))
- F12** Words in s. 40(1) substituted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 7\(3\)](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))
- F13** S. 40(2) inserted (1.4.2009) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 7\(4\)](#); S.I. 2009/139, [art. 2\(e\)](#) (with [art. 3](#))

#### Commencement Information

- I6** S. 40 wholly in force at 1.10.2007; s. 40 not in force at Royal Assent see s. 68(1)-(3); s. 40 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 40 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

### 41 Power to adjust role of independent mental capacity advocate **E+W**

- (1) The appropriate authority may make regulations—
  - (a) expanding the role of independent mental capacity advocates in relation to persons who lack capacity, and
  - (b) adjusting the obligation to make arrangements imposed by section 35.
- (2) The regulations may, in particular—
  - (a) prescribe circumstances (different to those set out in sections 37, 38 and 39) in which an independent mental capacity advocate must, or circumstances in which one may, be instructed by a person of a prescribed description to represent a person who lacks capacity, and
  - (b) include provision similar to any made by section 37, 38, 39 or 40.
- (3) “Appropriate authority” has the same meaning as in section 35.

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#### **Commencement Information**

- I7** S. 41 wholly in force at 1.10.2007; s. 41 not in force at Royal Assent see s. 68(1)-(3); s. 41 in force for E. at 1.11.2006 for certain purposes and otherwise 1.4.2007 by [S.I. 2006/2814](#), [art. 5](#); s. 41 in force at 1.10.2007 for W. by [S.I. 2007/856](#), [art. 5](#)

**Status:**

Point in time view as at 18/09/2012.

**Changes to legislation:**

Mental Capacity Act 2005, Cross Heading: Independent mental capacity advocate service is up to date with all changes known to be in force on or before 19 June 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.