



Mental Capacity Act 2005

2005 CHAPTER 9

PART 1

PERSONS WHO LACK CAPACITY

Independent mental capacity advocate service

35 Appointment of independent mental capacity advocates

- (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.
- (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

Status: This is the original version (as it was originally enacted).

- (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),
 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.

36 Functions of independent mental capacity advocates

- (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.
- (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.

37 Provision of serious medical treatment by NHS body

- (1) This section applies if an NHS body—
 - (a) 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
 - (b) 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 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—
 - (a) the Secretary of State, in relation to bodies in England, or
 - (b) the National Assembly for Wales, in relation to bodies in Wales.

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.
- (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).
- (7) “Hospital” means—
 - (a) a health service hospital as defined by section 128 of the National Health Service Act 1977 (c. 49), or

Status: This is the original version (as it was originally enacted).

- (b) 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.

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.
- (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.
- (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.

40 Exceptions

Sections 37(3), 38(3) and (4) and 39(4) and (5) do not apply if there is—

- (a) a person nominated by P (in whatever manner) as a person to be consulted in matters affecting his interests,
- (b) a donee of a lasting power of attorney created by P,
- (c) a deputy appointed by the court for P, or
- (d) a donee of an enduring power of attorney (within the meaning of Schedule 4) created by P.

41 Power to adjust role of independent mental capacity advocate

- (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.