



# 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.
- (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—

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*Status: Point in time view as at 03/11/2008. This version of this provision has been superseded.*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 22 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)*

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- (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 [<sup>F1</sup>section 275 of the National Health Service Act 2006 or section 206 of the National Health Service (Wales) Act 2006]<sup>F1</sup>(c. 49), or
  - (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.

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**Textual Amendments**

**F1** Words in s. 38(7)(a) substituted (1.3.2007) by [National Health Service \(Consequential Provisions\) Act 2006 \(c. 43\)](#), ss. 2, 8(2), [Sch. 1 para. 278](#) (with Sch. 3 Pt. 1)

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