

SCHEDULES

SCHEDULE 9

AMENDMENTS RELATING TO NEW SECTION 4A OF, & SCHEDULE A1 TO, MENTAL CAPACITY ACT 2005

PART 1

OTHER AMENDMENTS TO MENTAL CAPACITY ACT 2005

New section 39A

6 [F1After section 39 insert—

“Person becomes subject to Schedule A1

- (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.
- (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.

Section 39A: supplementary provision

- (1) This section applies for the purposes of section 39A.
- (2) P becomes subject to Schedule A1 in any of the following cases.

Changes to legislation: There are currently no known outstanding effects for the Mental Health Act 2007, Cross Heading: New section 39A. (See end of Document for details)

- (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.

Person unrepresented whilst subject to Schedule A1

- (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 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.

Changes to legislation: There are currently no known outstanding effects for the Mental Health Act 2007, Cross Heading: New section 39A. (See end of Document for details)

Person subject to Schedule A1 without paid representative

- (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—
 - (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—

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- (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.

Limitation on duty to instruct advocate under section 39D

- (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.”]

Textual Amendments

- F1** [Sch. 9 para. 6](#) omitted (16.5.2019 for specified purposes) by virtue of [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 13](#)

Changes to legislation:

There are currently no known outstanding effects for the Mental Health Act 2007, Cross
Heading: New section 39A.