

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

Introduction

- 1 The Mental Capacity Act 2005 (c. 9) is amended as set out in this Part of this Schedule.

New section 21A

- 2 After section 21 insert—

“Powers of the court in relation to Schedule A1

21A Powers of court in relation to Schedule A1

- (1) This section applies if either of the following has been given under Schedule A1—
 - (a) a standard authorisation;
 - (b) an urgent authorisation.
- (2) Where a standard authorisation has been given, the court may determine any question relating to any of the following matters—
 - (a) whether the relevant person meets one or more of the qualifying requirements;
 - (b) the period during which the standard authorisation is to be in force;
 - (c) the purpose for which the standard authorisation is given;
 - (d) the conditions subject to which the standard authorisation is given.
- (3) If the court determines any question under subsection (2), the court may make an order—
 - (a) varying or terminating the standard authorisation, or
 - (b) directing the supervisory body to vary or terminate the standard authorisation.
- (4) Where an urgent authorisation has been given, the court may determine any question relating to any of the following matters—
 - (a) whether the urgent authorisation should have been given;

- (b) the period during which the urgent authorisation is to be in force;
 - (c) the purpose for which the urgent authorisation is given.
- (5) Where the court determines any question under subsection (4), the court may make an order—
- (a) varying or terminating the urgent authorisation, or
 - (b) directing the managing authority of the relevant hospital or care home to vary or terminate the urgent authorisation.
- (6) Where the court makes an order under subsection (3) or (5), the court may make an order about a person’s liability for any act done in connection with the standard or urgent authorisation before its variation or termination.
- (7) An order under subsection (6) may, in particular, exclude a person from liability.”

Section 35: Appointment of independent mental capacity advocates

- 3 In section 35, in subsection (1) after “relate” insert “or persons who fall within section 39A, 39C or 39D”.

Section 38: IMCAs and provision of accommodation by NHS body

- 4 (1) Section 38 is amended as follows.
- (2) After subsection (2) insert—
- “(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.”
- (3) After subsection (9) insert—
- “(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.”

Section 39: IMCAs and provision of accommodation by local authority

- 5 (1) Section 39 is amended as follows.
- (2) After subsection (3) insert—
- “(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.”

(3) After subsection (6) insert—

“(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.”

New section 39A

6 After section 39 insert—

“39A 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.

39B 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.
- (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.

39C 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.

39D 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—
 - (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.

39E 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.”

Section 40: Exceptions to duty to appoint IMCAs

- 7 (1) Section 40 (as substituted by section 49 of this Act) is amended as follows.
- (2) The provision of section 40 becomes subsection (1) of section 40.
- (3) In subsection (1) for “or 39(4) or (5)” substitute “, 39(4) or (5), 39A(3), 39C(3) or 39D(2)”.
- (4) After subsection (1) insert—

“(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.”

Section 42: Codes of practice

- 8 (1) Section 42 is amended as follows.
- (2) In subsection (1), after paragraph (f) insert—
 - “(fa) for the guidance of persons exercising functions under Schedule A1,
 - (fb) for the guidance of representatives appointed under Part 10 of Schedule A1,”.
- (3) In subsection (4), after paragraph (d) insert—
 - “(da) in the exercise of functions under Schedule A1,
 - (db) as a representative appointed under Part 10 of Schedule A1,”.

Section 50: Application to the Court of Protection

- 9 In section 50, after subsection (1) insert—

“(1A) Nor is permission required for an application to the court under section 21A by the relevant person’s representative.”

Section 64: Interpretation

- 10 (1) Section 64 is amended as follows.
- (2) In subsection (1), insert at the appropriate place—
- ““authorisation under Schedule A1” means either—
- (a) a standard authorisation under that Schedule, or
- (b) an urgent authorisation under that Schedule.”
- (3) In subsection (1), in the definition of “local authority” after ““local authority”” insert “, except in Schedule A1,”.
- (4) After subsection (4) insert—
- “(5) In this Act, references to deprivation of a person’s liberty have the same meaning as in Article 5(1) of the Human Rights Convention.
- (6) For the purposes of such references, it does not matter whether a person is deprived of his liberty by a public authority or not.”

Section 65: Rules, regulations and orders

- 11 (1) Section 65 is amended as follows.
- (2) After subsection (4) insert—
- “(4A) Subsection (2) does not apply to a statutory instrument containing regulations made by the Secretary of State under Schedule A1.
- (4B) If such a statutory instrument contains regulations under paragraph 42(2) (b), 129, 162 or 164 of Schedule A1 (whether or not it also contains other regulations), the instrument may not be made unless a draft has been laid before and approved by resolution of each House of Parliament.
- (4C) Subject to that, such a statutory instrument is subject to annulment in pursuance of a resolution of either House of Parliament.”