

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

Independent mental capacity advocate service

Section 38: Provision of accommodation by NHS body

117. This section applies to long-stay accommodation in a hospital or a care home, or a move between such accommodation, where this accommodation is provided or arranged by the NHS. *Subsection (9)* clarifies that this section only applies when the accommodation is to be provided for more than 28 days in relation to accommodation in hospital or more than 8 weeks in relation to accommodation in a care home. The IMCA is to be instructed where such accommodation is being proposed and a person lacks capacity to agree to the arrangements and there is no other person to discuss it with. Again the role of the IMCA is both to support and to represent the person concerned. Any information or submissions from the IMCA must be taken into account by the NHS body.
118. *Subsection (2)* provides that where the person concerned is to be detained in hospital or otherwise required to live in the accommodation in question under the Mental Health Act 1983, the IMCA does not need to be consulted, as that Act already contains its own safeguards. *Subsection (3)* makes provision in relation to urgent placements.
119. *Subsection (4)* is intended to ensure that an IMCA is involved in relation to people whose residence is initially intended to be less than 28 days/8 weeks (see paragraph 118) if the period is later extended beyond the applicable period.
120. *Subsections (6)* and *(7)* define the types of care homes and hospitals which are covered under by this section. *Subsection (8)* provides that regulations will also define the particular NHS bodies who will become subject to the duties.