



# Mental Capacity Act 2005

## 2005 CHAPTER 9

### PART 1 **E+W**

#### PERSONS WHO LACK CAPACITY

##### *Miscellaneous and supplementary*

#### 42 Codes of practice **E+W**

- (1) The Lord Chancellor must prepare and issue one or more codes of practice—
- (a) for the guidance of persons assessing whether a person has capacity in relation to any matter,
  - (b) for the guidance of persons acting in connection with the care or treatment of another person (see section 5),
  - (c) for the guidance of donees of lasting powers of attorney,
  - (d) for the guidance of deputies appointed by the court,
  - (e) for the guidance of persons carrying out research in reliance on any provision made by or under this Act (and otherwise with respect to sections 30 to 34),
  - (f) for the guidance of independent mental capacity advocates,
  - (fa) [<sup>F1</sup>for the guidance of persons exercising functions under Schedule AA1,]
  - (fb) [<sup>F1</sup>for the guidance of appropriate persons within paragraph 42(5) of Schedule AA1,]
  - <sup>F2</sup>(g) with respect to the provisions of sections 24 to 26 (advance decisions and apparent advance decisions), and
  - (h) with respect to such other matters concerned with this Act as he thinks fit.

[<sup>F3</sup>(1A) Guidance about what kinds of arrangements for enabling the care or treatment of a person fall within paragraph 2(1)(b) of Schedule AA1 must be included in the code, or one of the codes, issued under subsection (1).]

- (2) The Lord Chancellor may from time to time revise a code.

[<sup>F4</sup>(2A) Before the end of each review period the Lord Chancellor must—

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- (a) review each code for the guidance of persons exercising functions under Schedule AA1, and
- (b) lay a report of the review before Parliament.

But this does not affect the Lord Chancellor's functions under subsection (2).

(2B) A review period is—

- (a) in relation to the first review, the period of 3 years beginning with the day on which this subsection comes into force, and
- (b) in relation to subsequent reviews, each period of 5 years beginning with the day on which the report of the previous review was laid before Parliament.]

(3) The Lord Chancellor may delegate the preparation<sup>F5</sup>, review] or revision of the whole or any part of a code so far as he considers expedient.

(4) It is the duty of a person to have regard to any relevant code if he is acting in relation to a person who lacks capacity and is doing so in one or more of the following ways—

- (a) as the donee of a lasting power of attorney,
- (b) as a deputy appointed by the court,
- (c) as a person carrying out research in reliance on any provision made by or under this Act (see sections 30 to 34),
- (d) as an independent mental capacity advocate,
- (da) <sup>F6</sup>in the exercise of functions under Schedule AA1,]
- (db) <sup>F6</sup>as an appropriate person within paragraph 42(5) of Schedule AA1,]
- <sup>F7</sup>(e) in a professional capacity,
- (f) for remuneration.

(5) If it appears to a court or tribunal conducting any criminal or civil proceedings that—

- (a) a provision of a code, or
- (b) a failure to comply with a code,

is relevant to a question arising in the proceedings, the provision or failure must be taken into account in deciding the question.

(6) A code under subsection (1)(d) may contain separate guidance for deputies appointed by virtue of paragraph 1(2) of Schedule 5 (functions of deputy conferred on receiver appointed under the Mental Health Act).

(7) In this section and in section 43, “code” means a code prepared or revised under this section.

#### Textual Amendments

- F1** S. 42(1)(fa)(fb) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), s. 6(3), [Sch. 2 para. 9\(2\)](#)
- F2** S. 42(1)(fa)(fb) inserted (1.4.2008) by [Mental Health Act 2007 \(c. 12\)](#), ss. 50, 56, [Sch. 9 para. 8\(2\)](#); [S.I. 2008/745](#), [art. 4\(b\)](#)
- F3** S. 42(1A) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), [ss. 4\(2\)](#), 6(3)
- F4** S. 42(2A)(2B) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), [ss. 4\(3\)](#), 6(3)
- F5** Word in s. 42(3) inserted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\)](#), [ss. 4\(4\)](#), 6(3)

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- F6** S. 42(4)(da)(db) substituted (16.5.2019 for specified purposes) by [Mental Capacity \(Amendment\) Act 2019 \(c. 18\), s. 6\(3\), Sch. 2 para. 9\(3\)](#)
- F7** S. 42(4)(da)(db) inserted (1.4.2008) by [Mental Health Act 2007 \(c. 12\), ss. 50, 56, Sch. 9 para. 8\(3\); S.I. 2008/745, art. 4\(b\)](#)

#### Commencement Information

- II** S. 42 wholly in force at 1.10.2007; s. 42 not in force at Royal Assent see s. 68(1)-(3); s. 42(1)(2)(3)(6)(7) in force for E.W. and s. 42(4)(5) in force for certain purposes for E. at 1.4.2007 by [S.I. 2007/563, arts. 1\(2\)\(3\), 2\(2\)\(e\)\(3\)](#); s. 42(4)(5) in force for all purposes at 1.10.2007 by [S.I. 2007/1897, art. 2\(2\)\(e\)](#)

### 43 Codes of practice: procedure **E+W**

- (1) Before preparing or revising a code, the Lord Chancellor must consult—
  - (a) the National Assembly for Wales, and
  - (b) such other persons as he considers appropriate.
- (2) The Lord Chancellor may not issue a code unless—
  - (a) a draft of the code has been laid by him before both Houses of Parliament, and
  - (b) the 40 day period has elapsed without either House resolving not to approve the draft.
- (3) The Lord Chancellor must arrange for any code that he has issued to be published in such a way as he considers appropriate for bringing it to the attention of persons likely to be concerned with its provisions.
- (4) “40 day period”, in relation to the draft of a proposed code, means—
  - (a) if the draft is laid before one House on a day later than the day on which it is laid before the other House, the period of 40 days beginning with the later of the two days;
  - (b) in any other case, the period of 40 days beginning with the day on which it is laid before each House.
- (5) In calculating the period of 40 days, no account is to be taken of any period during which Parliament is dissolved or prorogued or during which both Houses are adjourned for more than 4 days.

### 44 Ill-treatment or neglect **E+W**

- (1) Subsection (2) applies if a person (“D”)—
  - (a) has the care of a person (“P”) who lacks, or whom D reasonably believes to lack, capacity,
  - (b) is the donee of a lasting power of attorney, or an enduring power of attorney (within the meaning of Schedule 4), created by P, or
  - (c) is a deputy appointed by the court for P.
- (2) D is guilty of an offence if he ill-treats or wilfully neglects P.
- (3) A person guilty of an offence under this section is liable—
  - (a) on summary conviction, to imprisonment for a term not exceeding [<sup>F8</sup>the general limit in a magistrates’ court] or a fine not exceeding the statutory maximum or both;

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- (b) on conviction on indictment, to imprisonment for a term not exceeding 5 years or a fine or both.

**Textual Amendments**

- F8** Words in s. 44(3)(a) substituted (7.2.2023 at 12.00 p.m.) by [The Judicial Review and Courts Act 2022 \(Magistrates' Court Sentencing Powers\) Regulations 2023 \(S.I. 2023/149\)](#), regs. 1(2), 2(1), **Sch. Pt. 1** table

**Changes to legislation:**

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**Changes and effects yet to be applied to the whole Act associated Parts and Chapters:**

Whole provisions yet to be inserted into this Act (including any effects on those provisions):

- s. 58(4)(ca) inserted by [2023 c. 42 Sch. para. 10](#)
- Sch. 1 para. 4A inserted by [2023 c. 42 Sch. para. 3](#)
- Sch. 1 para. 10A and cross-heading inserted by [2023 c. 42 Sch. para. 6](#)
- Sch. 1 para. 13A inserted by [2023 c. 42 Sch. para. 7\(2\)](#)
- Sch. 1 para. 16(1A) inserted by [2023 c. 42 Sch. para. 8\(b\)](#)