

# Health & Social Services Committee

**HSS (2)-18-06(p.1)**

**Meeting date: Wednesday 13 December 2006**

**Venue: Committee Room 1, Senedd, National Assembly for Wales**

**Title: Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007**

## **Purpose**

To seek the Subject Committee's views on the Mental Capacity Act 2005 (Commencement) (Wales) Order 2007 and the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007

## **Summary**

The Mental Capacity Act 2005 (" the Act ") and the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations (" the IMCA Regulations") will enable Wales to secure the provision of statutory advocacy in life-changing situations for vulnerable people who lack capacity.

The Commencement Order and the IMCA Regulations are part of a package, including the Act itself, the Code of Practice and the commissioning guidance, that together provide the framework for implementing the IMCA service.

Sections 35-40 of the Act provide for powers to prescribe the appointment of independent mental capacity advocates (IMCAs) where a person who lacks capacity is either receiving serious medical treatment or where arrangements are made for their accommodation in a hospital or care home.

An IMCA must be consulted in such decisions involving people who have no-one, including family or friends, whom it is appropriate to consult. Section 41 provides that the Assembly may make regulations that will extend the provision of this service to other groups and situations.

The Commencement Order and the IMCA Regulations were identified for scrutiny within the Health and Social Services Portfolio Subordinate Legislation Programme 2005-06 on 25<sup>th</sup> May 2005 and this paper is being presented to this meeting of the Subject Committee to meet the target timetable for these regulations to come into force on 1<sup>st</sup> April 2007.

There are different regulations for England and for Wales.

## **Background**

The Act provides the framework for acting and making decisions on behalf of individuals who lack the mental capacity to do these acts or make these decisions for themselves. Everyone working with and/or caring for people who lack capacity, whether they are dealing with everyday matters or life-changing events in the lives of people who lack capacity, will have to comply with the Act.

In a day-to-day context, mental capacity includes making decisions or taking actions affecting daily life. In a legal context, it refers to a person's ability to do something, including making a decision, which may have legal consequences for the person lacking capacity, or for other people.

The legal framework provided in the Act is supported by a Code of Practice, which provides guidance and information to those acting under the terms of the legislation. This Code of Practice will cover England and Wales and is to be issued by the Lord Chancellor. The Assembly has been consulted on the contents of the Code in accordance with the requirements of the Act. The Department of Constitutional Affairs intend to lay the Code before the UK Parliament in advance of the commencement of the Act.

The Act establishes a number of safeguards which include: new lasting powers of attorneys; a new Court of Protection; a new Office of the Public Guardian; safeguards in relation to vulnerable people who are the subject of research and the new Independent Mental Capacity Advocate (IMCA) service.

Importantly, the Act's framework provisions are not new but they enshrine best practice and the common law. The Department for Constitutional Affairs, the Department of Health and the Welsh Assembly Government are working together to bring the Mental Capacity Act into force in April 2007. The Act applies to people in England and Wales.

## **The Independent Mental Capacity Advocate (IMCA) Service**

During the debates in both Houses of Parliament it became clear that there was very great concern to provide extra support in the Act for the most vulnerable people. In response, the UK Government created provision for the Independent Mental Capacity Advocate (IMCA) service as an additional safeguard and, in so doing, established the first statutory right to advocacy.

In the majority of cases, people who do not have the capacity to make particular decisions will have a network of support. This will be either from family members or friends who take an interest in their welfare or from an attorney appointed under a Lasting Power of Attorney or from a deputy appointed by the Court of Protection. The person may also have nominated someone as a person to be consulted in matters affecting his or her interests. When determining what is in the best interests of a person lacking capacity in relation to a particular decision or course of action, those people in the person's network of support must be consulted where it is appropriate or practicable to do so and their views taken into account.

In circumstances where there is no appropriate person to represent someone who does not have the capacity to make certain serious decisions, an IMCA must be appointed to provide support and representation. This will be provided to those without capacity who are facing major decisions about certain serious, potentially life-changing situations relating to serious medical treatment and changes

of residence. The exception is where the decision has to be taken as a matter of urgency. The NHS body or local authority (for example doctors, nurses or social workers) involved in the decision must take into account any information given or submissions made by the IMCA when determining what decision is in the best interests of the person lacking capacity.

It is anticipated that those who may lack capacity will include people with dementia or Alzheimer's disease, people with an acquired brain injury, or people with a learning disability or long term mental health problems. Examples were given in the Explanatory Notes to the Mental Capacity Bill as

" older people with dementia who have lost contact with all friends and family, or people with severe learning disabilities or long term mental health problems who have been in residential institutions for long periods and lack outside contacts" (para.109).

The IMCA will have the right to talk to the person lacking capacity and a right of access to relevant records. The IMCA can take a broad view of what will be in the best interests of the person whom they are supporting. The IMCA will not make the decision themselves but will make recommendations to the decision-maker. If the decision-maker chooses to depart from this advice the reasons for doing so must be fully recorded.

The UK Government has estimated that around 15% of people in England and Wales who lack capacity, when major decisions need to be made about their living arrangements or medical treatment, have no family or friends to be consulted. Using this estimate suggests that there will be cases involving about 1000 decisions across Wales every year.

The IMCA Regulations will set out:

- How the IMCA will be approved and appointed under the powers in section 35(2) and (3)
- The steps an IMCA must take in fulfilling the functions under section 36, to include challenging decisions
- The definition of the term "NHS body" for the purposes of instructing an IMCA under sections 37 and 38 of the Act
- The definition of "serious medical treatment" under section 37(6)
- Sections 37 to 39 of the Act set out the circumstances in which an IMCA must be appointed – (1) where an NHS body proposes to provide, withdraw or withhold serious medical treatment in relation to a person or (2) where an NHS body or local authority propose to make certain arrangements as to P's accommodation in a hospital or care home or in residential accommodation provided in accordance with sections 21 or 29 of the National Assistance Act 1948 (c.29) or section 117 of the Mental Health Act 1983.
- The power to make regulations expanding the role of the IMCA in section 41

## **Consultation on the IMCA service**

### **Consultation with Stakeholders**

Between 1 August and 31 October 2005 a consultation was held on the policy for the IMCA service.

Views were sought on: the operation of the IMCA service (funding, commissioning, standards, training and skills, independence, monitoring and accountability); the functions of the IMCA; the definition of serious medical treatment; and about extending the service.

There were 49 written responses to the consultation from a range of individuals and organisations, and the Welsh Assembly Government published its response to the policy consultation on 7 June 2006. In light of views expressed by the respondents an extension of the IMCA service was agreed to include adult protection cases.

Taking account of that consultation, IMCA Regulations were drafted and a paper issued for consultation between 25 July and 27 October 2006. The IMCA Regulations cover the following areas:

- Regulation 1 - Title, commencement and extent
- Regulation 2 - Interpretation section
- Regulation 3 - Meaning of "NHS body"
- Regulation 4 - Definition of "serious medical treatment"
- Regulation 5 - Appointment of an IMCA
- Regulation 6 - Functions of an IMCA
- Regulation 7 - Challenging decisions
- Regulation 8 - Review of arrangements as to accommodation
- Regulation 9 - Adult protection cases

The consultation paper sought views on Regulations 4, 5, 6, 7, 8, and 9 and asked for comments on the draft Commencement Order.

There were 19 written responses to the consultation paper from a wide range of organisations and individuals. The majority of responses came from healthcare professionals, or organisations representing them, and the voluntary sector. Respondents included the NHS and local authorities, independent advocacy organisations, organisations representing healthcare professionals, community health councils and other regional and national stakeholder organisations representing people who lack capacity.

A summary of consultation responses and the Assembly's response can be found within the Explanatory Memorandum which is attached. Broadly these regulations found favour with the respondents and no changes will be made to the Commencement Order or the IMCA Regulations as a result of the consultation.

## **Consultation with Subject Committee**

The Commencement Order and the IMCA Regulations were identified for scrutiny within the Health and Social Services Portfolio Subordinate Legislation Programme 2005-06 on 25<sup>th</sup> May 2005. The Commencement Order and the IMCA Regulations are scheduled for scrutiny by the Health and Social Services Committee on 13<sup>th</sup> December 2007.

## **Financial Implications**

The funding for the Mental Capacity Act 2005 in 2007-08 is £1.113m which includes £0.390m identified for the IMCA service.

## **Timetable for Implementation**

Following the Subject Committee's consideration of the draft regulations, it is planned for them to be considered by the Business Committee on 13 February 2007, the Legislation Committee on the 6 March 2007 and Plenary on 13<sup>th</sup> March. The regulations are due to come into force on the 1<sup>st</sup> April 2007.

## **Action for Subject Committee**

The Subject Committee is invited to discuss this paper and scrutinise the draft regulations.

Brian Gibbons AM

November 2006

Minister for Health And Social Services

Contact point: Susan Elsmore, Community,

Primary Care and Health Services Policy Directorate 029 2082 3277

## **Draft**

**To: Business Committee**

**From: Brian Gibbons AM,**

**Minister for Health and Social Services**

## **Explanatory Memorandum**

**Mental Capacity, Wales**

**Mental Capacity Act 2005 (Commencement) (Wales) Order 2007**

## **Summary**

This Order will enable Wales to establish the operation of the Independent Mental Capacity Advocate (IMCA) service that has been created by the Mental Capacity Act 2005.

This Memorandum is submitted to the Assembly's Business Committee in relation to the Mental Capacity Act 2005 (Commencement) (Wales) Order 2007 in accordance with Standing Order 24.6.

A copy of the Order is submitted with this Memorandum.

## **Enabling powers**

The powers enabling this Order to be made are contained in section 68(2) of the Mental Capacity Act

2005. These powers have been conferred on the National Assembly for Wales. Responsibility for issues relating to the contents of these Regulations has been delegated to my portfolio as Minister for Health and Social Services. Under the post-2007 arrangements we foresee that the commencement order would be subject to negative resolution.

## **Effect**

Sections 35 to 40 of the Act provide that independent mental capacity advocates (IMCAs) must be instructed by NHS bodies and local authorities to represent and support people who lack capacity in the circumstances specified in those sections.

Section 35(1) imposes an obligation on the appropriate authority – in relation to Wales, the National Assembly for Wales – to make such arrangements as it considers reasonable to enable IMCAs to be available in the circumstances set out in sections 37 to 39 or in Regulations made under section 41. The authority for the National Assembly for Wales to provide funding for the statutory IMCA service is in section 35(5) of the Act.

The Act sets out the basic framework for the IMCA service but the Assembly has power to make Regulations in relation to how the IMCA should be used and on the operation and implementation of the service. The aim will be to keep statutory regulation to a minimum.

## **Target Implementation**

It is intended that this Order will be made on 13 March 2007 and will come into force on 1 April 2007. Failure to make this Order would mean the service could not operate in Wales as there would be no legal basis for it. This would result in qualifying individuals not being able to access the new safeguard provided by the Mental Capacity Act 2005.

## **Financial Implications**

The funding for the Mental Capacity Act 2005 in 2007-08 is £1.113m which includes £0.390m identified for the IMCA service.

There are no additional financial implications for the Assembly or others arising from the making of this Order.

## **Regulatory Appraisal**

Having regard to paragraph 7(ii) of the Assembly guidance on Regulatory Appraisals, I have concluded that a Regulatory Appraisal is not required as paragraph 7(ii) exempts Commencement Orders bringing into force primary legislation from the need for a Regulatory Appraisal.

## **Consultation**

## **With Stakeholders**

These Regulations were subject to formal consultation between 25 July 2006 and 27 October 2006. Key stakeholders were invited to comment on the draft Commencement Order, including: healthcare professionals, the voluntary sector, NHS Trusts, Local Health Boards and local authorities, independent advocacy organisations, organisations representing healthcare professionals, community health councils and other regional and national stakeholder organisations representing people who lack capacity. A list of consultees is attached at Annex A. There were 6b respondents who commented on the draft Order, but no specific issues were raised. The Commencement Order remained as drafted.

## **Consultation**

### **With Subject Committee**

This Order was notified to the Health and Social Services Committee, via the list of forthcoming legislation, on 25 May 2005 in paper HSS 02(05) and has remained ever since.

The Order was identified for detailed scrutiny on 25 May 2005. The Order is scheduled for scrutiny by the Health and Social Services Committee on 13 December 2007.

## **Recommended Procedure**

Subject to the views of the Business Committee, I recommend that these Regulations proceed to Plenary under the Standard procedure, to give Members an opportunity to debate them.

## **Compliance**

The proposed legislation will (as far as is applicable):

- have due regard to the principle of equality of opportunity for all people (Government of Wales Act 1998 section 120);
- be compatible with the Assembly's scheme for sustainable development (section 121);
- be compatible with Community law (section 106);
- be compatible with the Assembly's human rights legislation (section 107);
- be compatible with any international obligations binding the UK Government and the Assembly (section 108).

The information in this Memorandum has been cleared by the Legal Services Department (LS).  
Drafting lawyer: Nicola Frodsham, ext 5145

Head of Division: John Sweeney, ext 3984  
Drafting Policy Official: Susan Elsmore, ext 3277

Brian Gibbons AM  
November 2006  
Minister for Health And Social Services

## **Annex A**

<b>Name</b>	<b>Department/Title</b>	<b>Organisation</b>	<b>Date received</b>
6. Tina Donnelly	Director	Royal College of Nursing	27.10.06
5. Karen Williams-Jones		North East Wales NHS Trust	26.10.06
4. Eryl Davies	Project Coordinator, Participation and Engagement	Age Concern North Wales Central	27.10.06
3. Martyn Jenkins	Chief Officer	Cardiff Community Health Council	25.10.06
2. Heather Hughes	Social Services Planning Manager	City and County of Swansea	04.10.06
1. Daphne James	Chair of Welsh Nursing and Midwifery Committee	North Glamorgan NHS Trust	06.09.06

**To: Business Committee**  
**From: Brian Gibbons AM,**  
**Minister for Health and Social Services**

### **Explanatory Memorandum** **Mental Capacity, Wales** **Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales)** **Regulations 2007**

#### **Summary**

These Regulations will establish the operation of the Independent Mental Capacity Advocate (IMCA) service that has been created by the Mental Capacity Act 2005.

This Memorandum is submitted to the Assembly's Business Committee in relation to the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007, in



accordance with Standing Order 24.6.

A copy of the Regulations is submitted with this Memorandum.

## **Enabling powers**

The powers enabling these Regulations to be made are contained in sections 35(2) and (3), 36, 37(6) and (7), 38(8), 41, 64(1) and 65(1) of the Mental Capacity Act 2005 and by section 16BB of the National Health Service Act 1977. The powers under the Mental Capacity Act 2005 have been conferred on the National Assembly for Wales and the powers under the National Health Service Act 1977 have been transferred to the National Assembly for Wales. Responsibility for issues relating to the contents of these Regulations has been delegated to my portfolio as Minister for Health and Social Services. Under the post-2007 arrangements, regulations made under sections 35(2) and (3), 36, 37(6) and (7), 38(8) of the Mental Capacity Act 2005 would be subject to negative resolution, whereas regulations made under s.41 would be subject to affirmative resolution. Regulations made under the direction making power of the National Health Service Act 1977 would be subject to negative resolution.

## **Background**

The Mental Capacity Bill introduced to Parliament in June 2004 included provision for an "independent consultee" in response to concerns about a lack of safeguards for particularly serious health and welfare decisions in the draft Mental Incapacity Bill 2003. The name of the independent consultee service and the functions were changed during the passage of the Bill, to reflect concerns that independent advocacy was key to both empowering and protecting the most vulnerable people who lack capacity to make decisions about their health and social care.

Sections 35 to 40 of the Act provide for IMCAs to be available in specified circumstances to support and represent particularly vulnerable people who lack capacity to make certain important decisions.

During the passage of the Mental Capacity Bill, UK Ministers committed to consulting with stakeholders on how the regulation making powers in sections 35 to 41 would be used. The powers cover the appointment of IMCAs, the function of IMCAs and the steps required in fulfilling the IMCA role, the circumstances in which an IMCA may challenge, or provide assistance for the purpose of challenging, and the definition of 'serious medical treatment', as well as extending the IMCA service to other groups and situations.

However an IMCA need not be appointed under these provisions unless there is no-one (other than a paid carer) whom it would be appropriate to consult in determining what would be in the best interests of the person who lacks capacity. Further, section 40 provides that no IMCA need be appointed where the person who lacks capacity has nominated someone who should be consulted or where he or she has created an Enduring Power of Attorney, a Lasting Power of Attorney (LPA) or the Court has appointed a deputy for him.

Further under the power of section 41, these IMCA Regulations provide for two additional

circumstances where IMCAs may (not must) be instructed by an NHS body or local authority. These are:

- where ‘qualifying arrangements’ have been made by an NHS body or local authority as to the accommodation of a person (‘P’) who lacks capacity and a review of the arrangements is proposed or in progress;
- an NHS body or local authority propose to take protective measures in relation to P, in accordance with guidance issued by the Welsh Assembly Government under section 7 of the Local Government Social Services Act 1979 (c.42), following allegations of abuse or neglect of P or abuse of another on the part of P.

## **Effect**

Sections 35 to 40 of the Act provide that independent mental capacity advocates (IMCAs) must be instructed by NHS bodies and local authorities to represent and support people who lack capacity in the circumstances specified in those sections.

Section 35(1) imposes an obligation on the appropriate authority – in relation to Wales, the National Assembly for Wales – to make such arrangements as it considers reasonable to enable IMCAs to be available in the circumstances set out in sections 37 to 39 or in regulations made under s.41. The authority for the National Assembly for Wales to provide funding for the statutory IMCA service is in section 35(5) of the Act.

The Act sets out the basic framework for the IMCA service but the Assembly has power to make regulations in relation to how the IMCA should be used and on the operation and implementation of the service. The aim will be to keep statutory regulation to a minimum.

The Regulations will set out:

- The direction to local health boards to make arrangements for the availability of IMCAs under the powers in section 16BB of the National Health Service Act 1977
- How the IMCA will be approved and appointed under the powers in section 35(2) and (3)
- The steps an IMCA must take in fulfilling the functions under section 36, including challenging decisions
- The definition of the term "NHS body" for the purposes of instructing an IMCA under sections 37 and 38 of the Act
- The definition of "serious medical treatment" under section 37(6)
- Sections 37 to 39 of the Act set out the circumstances in which an IMCA must be appointed –

(1) where an NHS body proposes to provide, withdraw or withhold serious medical treatment in relation to a person or (2) where an NHS body or local authority proposes to make certain arrangements as to P's accommodation in a hospital or care home or in residential accommodation provided in accordance with sections 21 or 29 of the National Assistance Act 1948 (c.29) or section 117 of the Mental Health Act 1983.

- The power to make regulations expanding the role of the IMCA in section 41. Regulations will be made in exercise of those powers.

## **Meaning of NHS Body**

Regulation 3 sets out the definition of NHS body for the purpose of sections 37 and 38 of the Act. These are a Local Health Board and a NHS Trust. It also includes a Special Health Authority performing functions only or mainly in respect of Wales. Although it is unlikely they will be exercising functions by including them we are allowing for the possibility should this be needed in the future.

## **Definition of Serious Medical Treatment**

Section 37(6) of the Act defines 'serious medical treatment' as 'treatment which involves providing, withholding or withdrawing treatment of a kind prescribed by regulations'.

Regulation 4 prescribes certain kinds of treatment by reference to characteristics of the treatment. Where the provision, withholding or withdrawal of such treatment is considered serious an IMCA must be instructed. The characteristics specified in Regulation 4 are where the decision to be made as to treatment is finely balanced, whether between the risks/burdens versus perceived benefit of a treatment or in choosing between different treatments. It also applies where what is proposed is likely to involve serious consequences for the patient.

Examples of medical treatments that might be considered serious will be included in the Code of Practice. The Code provides guidance and information to those acting under the terms of the legislation. The Department of Constitutional Affairs intend to lay the Code before Parliament in advance of the commencement of the Act.

The Act provides that if treatment needs to be provided to a person as a matter of urgency, it may be provided even though the NHS body has not been able to instruct an IMCA to represent the person.

## **Appointment of Independent Mental Capacity Advocates**

Regulation 5 specifies certain minimum requirements that a person must meet in order to be appointed as an IMCA. These will apply to an IMCA whether he or she is instructed to act under section 37 to 39 or under regulations made by virtue of section 41. In order to act as an IMCA, a person must be approved by a local health board as meeting the appointment requirements or is employed by a provider of advocacy services commissioned to provide the service. The provider of advocacy services must ensure that any person that it employs to act as an IMCA satisfies the

approval requirements. The IMCA service will generally be commissioned by local health boards in partnership with local authorities, but the Regulation permits direct approval by a local health board.

The IMCA Regulations do not mention the commissioning arrangements or the partnership arrangements between local health boards and local authorities. Therefore, the Welsh Assembly Government has issued Commissioning Guidance to local health boards and local authorities which encourages a regional approach to commissioning across geographical boundaries.

The IMCA Regulations provide that IMCAs will be appointed only following approval by a local health board in accordance with the appointment requirements. These include requirements that the person must:

- have appropriate experience or training;
- be a person of integrity and good character and have obtained a criminal record certificate; and
- act independently of anyone who instructs him or her to act as an IMCA.

To require criminal record certificates provision must be made under sections 113A and 113B of the Police Act 1997 to allow such certificates to be issued in relation to persons acting as IMCAs. The UK Parliament is therefore taking steps to secure that the necessary provision will be in place by the time IMCAs come to be appointed.

## **Functions of an Independent Mental Capacity Advocate**

Regulation 6 provides that it is for the IMCA to determine in all the circumstances how best to represent and support the person concerned. It also set out the steps that the IMCA must take when he or she has been instructed to represent a person who lacks capacity. The instructions must be given by an NHS body or a local authority.

### **The main steps are:**

- verify the instructions are properly issued; and, where practicable –
- interview the person in private;
- examine records about the person to which the IMCA has access under section 35(6) of the Act;
- consult anyone who may be in a position to comment on the person's wishes, feelings, beliefs or values;
- obtain any other information about the person, or the act or decision that is proposed, as the IMCA thinks necessary;

- evaluate all the information in order to ascertain what support was provided to enable the person who lacks capacity to participate in making the decision in question;
- ascertaining what his or her wishes and feelings would be likely to be and what alternative courses of action are available;
- where medical treatment is proposed, the IMCA must ascertain whether the person would be likely to benefit from a further medical opinion;
- the IMCA must then prepare a report for the authorised person who instructed him or her.

Under sections 37 to 39 of the Act, and under the IMCA Regulations, the NHS body or local authority which gives the instructions must take the IMCA's report into account in making a decision.

## **Challenging decisions**

Regulation 7 sets out that an IMCA can challenge decisions affecting persons who lack capacity. Regulation 7(2) gives the IMCA the same rights to challenge the decision as he or she would have if he or she were a person (other than an IMCA) engaged in caring for the person or interested in his or her welfare. The right of challenge extends to decisions that a person the IMCA is representing is a person who lacks capacity, for example where there is disagreement as to this.

## **Additional regulations to expand the IMCA role**

Regulations 8 and 9 deal with circumstances where discretion is given to NHS bodies and local authorities to appoint an IMCA using the power in section 41 of the Act to make regulations expanding the role of the IMCA. In using these discretionary powers, the NHS body or local authority must be satisfied that it would be in the benefit of the person who lacks capacity to be represented by an IMCA and they must take into account any information or report made by the IMCA in making a decision.

## **Review of arrangements as to accommodation ("care reviews")**

Regulation 8 provides that where any NHS body or local authority propose to review the accommodation arrangements (whether under a care plan or otherwise) of a person who lacks capacity NHS bodies and local authorities may instruct an IMCA to represent the person.

The arrangements for accommodation which qualify for support are those for a continuous period of 12 weeks or more, in a care home or hospital or in residential accommodation provided under section 21 or 29 of the National Assistance Act 1948 (c.29) or section 117 of the Mental Health Act 1983.

The role of the IMCA will be to support and represent the person who lacks capacity and to provide information to help decision-makers in social services or the NHS make a decision on best interests.

An IMCA would only be instructed if the local authority and NHS body decided it would benefit the person who lacks capacity. Where arrangements are working well it may not be appropriate to instruct an IMCA.

As for sections 38 and 39 of the Act, accommodation provided as a result of an obligation imposed on the person who lacks capacity under the Mental Health Act 1983 does not count. In practice, this means that where the person concerned is to be detained or otherwise required to live in the accommodation in question under the Mental Health Act 1983, the IMCA does not need to be consulted. This is because the Mental Health Act contains its own safeguards and rights of appeal.

In relation to care reviews, Regulation 8 does not provide for an IMCA to be instructed where the person has nominated someone to be consulted, where the person has family or friends, where he or she has an enduring or a lasting power of attorney or where the Court has appointed a deputy for him.

Statutory guidance under Section 7 of the Local Authority Social Services Act 1970 sets out good practice for care reviews. In Wales the guidance is 'Creating a Unified and Fair System for Assessing and Managing Care'. Involving an IMCA therefore should not place a significant additional burden on local authorities since reviews will already be undertaken and an IMCA only instructed in certain cases.

## **Adult protection cases**

Regulation 9 specifies that an IMCA may be made available to represent and support a person, where an NHS body or local authority proposes to take, or has taken, protective measures, including measures to minimise risk. The regulation applies in relation to the person who lacks capacity to agree to one or more of the measures. Unlike all other circumstances, an IMCA can be instructed in adult protection cases even where the person who lacks capacity has family or friends. In using these discretionary powers, the local authority or the NHS must be satisfied that involving an IMCA will be of particular benefit to the person who lacks capacity and they must take into account any information or report made by the IMCA in making a decision.

An IMCA will only be instructed in adult protection cases where proceedings following guidance issued under Section 7 of the Local Authority Social Services Act 1970 have already been instigated. In Wales the guidance is 'In Safe Hands'. The IMCA involvement will not increase the number of cases and may serve to clarify a situation and avoid lengthy proceedings.

These Regulations do not prevent an NHS body or local authority from instructing an advocate in other circumstances. However, the Regulations only provide authority for the National Assembly for Wales to make arrangements for IMCAs to be available in the circumstances set out in the Regulations.

The policy intention is not to prevent independent advocates being used in other circumstances but to put their use and functions on a statutory footing for certain important decisions.

## **Target Implementation**

It is intended that these Regulations will be made on 13 March 2007 and will come into force on 1 April 2007. Failure to make these Regulations would mean the service could not operate in Wales as there would be no legal basis for it. This would result in qualifying individuals not being able to access the new safeguard provided by the Mental Capacity Act 2005.

## **Financial Implications**

The funding for the Mental Capacity Act 2005 in 2007-08 is £1.113m which includes £0.390m identified for the IMCA service. Funding for the IMCA service will be included in LHB allocations.

There are no significant additional costs or burdens imposed on local authorities, NHS bodies, small businesses or the charity and voluntary sector as a result of these Regulations. Any additional burdens that result, such as appointing and training IMCAs, will be balanced by the annual funding provided.

## **Regulatory Appraisal**

A Regulatory Appraisal has been carried out in relation to these Regulations and is below.

## **Consultation**

### **With Stakeholders**

Between 1 August and 31 October 2005 a consultation was held on the IMCA policy proposals. Views were sought on: the operation of the IMCA service (funding, commissioning, standards, training and skills, independence, monitoring and accountability); the functions of the IMCA; the definition of serious medical treatment; and about extending the service.

There were 49 written responses to the consultation from a range of individuals and organisations and the Welsh Assembly Government published its response to the policy consultation on 7 June 2006. In light of views expressed by the respondents an extension of the IMCA service was agreed to include adult protection cases.

Taking account of that consultation, IMCA Regulations were drafted and a paper issued for consultation between 25 July and 27 October 2006. This sought views on Regulations 4, 5, 6, 7, 8, and 9.

There were 19 written responses to the consultation paper from a wide range of organisations and individuals. The majority of responses came from healthcare professionals or organisations representing them, and the voluntary sector. Respondents included the NHS and local authorities, independent advocacy organisations, organisations representing healthcare professionals, community health councils and other regional and national stakeholder organisations representing people who lack capacity. A list of consultees is attached at Annex A to the Regulatory Appraisal.

A summary of consultation responses is attached at Annex B to the Regulatory Appraisal. Consultees

broadly welcomed these Regulations and no changes were made to the Regulations as a result of the consultation.

## **With Subject Committee**

These Regulations were notified to the Health and Social Services Committee, via the list of forthcoming legislation, on 25 May 2005 in HSS 02 (05) and have remained ever since.

The Regulations were identified for detailed scrutiny on 25 May 2005. The Regulations are scheduled for scrutiny by the Health and Social Services Committee on 13 December 2007.

## **Recommended Procedure**

Subject to the views of the Business Committee, I recommend that these Regulations proceed to Plenary under the Standard procedure, to give Members an opportunity to debate them.

## **Compliance**

The proposed legislation will (as far as is applicable):

- have due regard to the principle of equality of opportunity for all people (Government of Wales Act 1998 section 120);
- be compatible with the Assembly's scheme for sustainable development (section 121);
- be compatible with Community law (section 106);
- be compatible with the Assembly's human rights legislation (section 107);
- be compatible with any international obligations binding the UK Government and the Assembly (section 108).

The information in this Memorandum has been cleared with the Legal Services Department (LS).

Drafting lawyer: Nicola Frodsham, ext 5145

Head of Division: John Sweeney, ext 3984

Drafting Policy Official: Susan Elsmore, ext 3277

Brian Gibbons AM

November 2006

Minister for Health And Social Services

**Draft**



# **Regulatory Appraisal Mental Capacity, Wales Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007**

## **Background**

The Mental Capacity Act 2005 ("the Act") provides a statutory framework for people who may not be able to make their own decisions for example because of a learning disability, an illness such as dementia or brain injury or mental health problems. The Act sets out who can take decisions, in which situations, and how they should go about this.

The clauses on the IMCA service were introduced into the Mental Capacity Bill in June 2004 in response to concerns about a lack of safeguards for particularly serious health and welfare decisions for the most vulnerable people in the draft Mental Incapacity Bill published in June 2003.

The duty to involve an IMCA only applies to people who lack capacity to make certain important decisions and who have no family or friends. Under the Act, people who have the support of family or friends or those who have an Enduring Power of Attorney, a Lasting Power of Attorney (LPA) or a deputy under the Act will not have access to the IMCA service.

The Act includes regulation making powers to extend the service to other groups and situations and the IMCA Regulations use these powers.

## **Purpose and intended effect of the measure**

The Act provided the statutory framework for a new service, the Independent Mental Capacity Advocate (IMCA) service. Its purpose is to help particularly vulnerable people who have no family or friends and who lack capacity to make important decisions about serious medical treatment and changes of residence, for example moving to a hospital or care home. The provisions of the Act are intended to come into force on 1<sup>st</sup> April 2007.

The Act sets out the basic framework for the IMCA service. The IMCA Regulations are the first use of the powers contained in sections 35 to 41 of the Act.

The purpose of the IMCA Regulations is to set out the detail on how the IMCA service will be set up, and in particular they:

- set out how the IMCA will be appointed under the powers in sections 35(2) and (3),
- set out the functions and role of the IMCA and how the IMCA can challenge decisions,
- define 'serious medical treatment' under the powers in section 37(6)

- define the term "NHS body" under the powers in section 37(7), and
- set out how the powers to expand the IMCA service to other groups and situations will be used under the powers in section 41.

This regulatory appraisal applies in relation to Wales.

## **Risk Assessment**

The central role of an IMCA is to represent and support particularly vulnerable people who are without family or friends, who lack capacity in specified circumstances. If the service is not established the risk is that such people will not receive the support created by the Act.

## **Options**

### **Option 1: 'Do Nothing'**

The Mental Capacity Act 2005 applies across England and Wales, failure to make these Regulations would mean that the IMCA service would not operate on a statutory basis, resulting in qualifying people in Wales not receiving the support they are entitled to under the Mental Capacity Act 2005.

### **Option 2: 'Make the Regulations'**

The Regulations will set out the detail on how the IMCA service will be set up and will enable the implementation of a service prescribed by the Act.

## **Costs**

The funding for the Mental Capacity Act 2005 in 2007-08 is £1.113m which includes £0.390m identified for the IMCA service. Funding for the IMCA service will be included in LHB allocations.

There are no significant additional costs or burdens imposed on local authorities, NHS bodies, small businesses or the charity and voluntary sector as a result of these regulations. Any additional burdens that result, such as appointing and training IMCAs, will be balanced by the annual funding provided.

## **Benefits**

Introduction of the IMCA Regulations will ensure that qualifying persons who lack capacity will receive support in the circumstances specified in the Mental Capacity Act 2005 and under these Regulations. This will assist in decisions being taken in their best interests.

## **Consultation**

### **With Stakeholders**

Between 1 August and 31 October 2005 a consultation was held on the policy for the IMCA service. Views were sought on: the operation of the IMCA service (funding, commissioning, standards, training and skills, independence, monitoring and accountability); the functions of the IMCA; the definition of serious medical treatment; and about extending the service.

There were 49 written responses to the consultation from a range of individuals and organisations, and the Welsh Assembly Government published its response to the policy consultation on 7 June 2006. In light of views expressed by the respondents an extension of the IMCA service was agreed to include adult protection cases.

Taking account of that consultation, IMCA Regulations were drafted and a paper issued for consultation between 25 July and 27 October 2006. The IMCA Regulations cover the following areas:

- Regulation 1 - Title, commencement and extent
- Regulation 2 - Interpretation section
- Regulation 3 - Meaning of "NHS body"
- Regulation 4 - Definition of "serious medical treatment"
- Regulation 5 - Appointment of an IMCA
- Regulation 6 - Functions of an IMCA
- Regulation 7 - Challenging decisions
- Regulation 8 - Review of arrangements as to accommodation
- Regulation 9 - Adult protection cases

The consultation paper sought views on Regulations 4, 5, 6, 7, 8, and 9 and.

There were 19 written responses to the consultation paper from a wide range of organisations and individuals. The majority of responses came from healthcare professionals, or organisations representing them, and the voluntary sector. Respondents included the NHS and local authorities, independent advocacy organisations, organisations representing healthcare professionals, community health councils and other regional and national stakeholder organisations representing people who lack capacity. A list of consultees is attached at Annex A.

A summary of consultation responses is attached at Annex B. Consultees broadly welcomed these Regulations and no changes were made to the Regulations as a result of the consultation.

## Consultation

### With Subject Committee

These Regulations were notified to the Health and Social Services Committee, via the list of forthcoming legislation, on 25 May 2005 in HSS 02 (05) and have remained ever since.

These Regulations were identified for detailed scrutiny on 25 May 2005. The Regulations are scheduled for scrutiny by the Health and Social Services Committee on 13 December 2007.

### Review

Compliance with standards is part of monitoring by the local health board of the contract awarded to the advocacy provider. Local health boards themselves are inspected by Healthcare Inspectorate Wales. All contracts between the commissioner and IMCA provider will include agreed complaints procedures. All IMCA advocacy services will have a clear and accessible complaints procedure and be required to report complaints about them to their commissioning body. Welsh Assembly Government will review the regulations after 3 years.

### Summary

The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007 are made under sections 35-41 of the Act. In summary they cover: the meaning of NHS body; the definition of serious medical treatment; the appointment of IMCAs (training, integrity and character, independence and criminal record certificates); the functions of IMCAs; the right of IMCAs to challenge decisions; care reviews and adult protection cases. Annual funding of £0.39m is being provided to fund the service.

## Annex A

### List of Consultees

Name	Department/Title	Organisation	Date received
18. Chris Hayes	Head of Nursing and Quality	Pembrokeshire and Derwen NHS Trust	31.10.06
17. Laura Morgan	Communications and Policy Officer	Autism Cymru	31.10.06
16. Sharon Gay	Project Officer	Age Concern Cymru	30.10.06
15. Andrea Matthews	Consultation and Liaison Officer	Board of CHCs in Wales	27.10.06

14. Richard S Jackson	Honorary Chairman	RESCARE The Society for Children and Adults with Learning Disabilities and their Families	27.10.06
13. Tina Donnelly	Director	RCN Wales	27.10.06
12. Karen Williams-Jones		North East Wales NHS Trust	26.10.06
11. Eryl Davies	Project Coordinator, Participation and Engagement	Age Concern North Wales Central	27.10.06
10. Martyn Jenkins	Chief Officer	Cardiff Community Health Council	25.10.06
9. Evan Davies		All Wales Forum of Parents and Carers of People with Learning Disabilities	24.10.06
8 and 7. Simon Land	Consultations and Committee Services Manager	Royal College of Physicians	24.10.06
6. Paul Ryder	Mental Health Advocate	Mental Health Advocacy in Pembrokeshire	16.10.06
5. Michael Power	Family Carer		20.10.06
4. Bill Walden-Jones	Chief Executive	Hafal	17.10.06
3. Shanaz Dorkenoo	Brecknock and Radnor CHC EMI and CAMHS Advocacy Coordinator	Brecknock and Radnor CHC	04.10.06
2. Heather Hughes	Social Services Planning Manager	City and County of Swansea	04.10.06
1. Daphne James	Chair of Welsh Nursing and Midwifery Committee	North Glamorgan NHS Trust	06.09.06

## **Annex B**

### **Summary of Consultation Responses**

#### **Regulation 4 – Definition of "serious medical treatment"**

About 60% of the respondents were fully in favour of this regulation as drafted. Those who were not in favour called for greater clarity in relation to the definition and commented that the wide interpretation will compromise eligibility for the service.

## **Response to Regulation 4**

The Code of Practice will provide important guidance on these issues, including an illustrative list of what is considered 'serious medical treatment'. This regulation will remain as drafted.

## **Regulation 5 – Appointment of IMCAs**

About 53% of respondents were fully in favour of this regulation as drafted. Some of the concerns related to how the integrity and character of the IMCA would be tested, who decides on what is appropriate experience or training and how would independence be safeguarded?

## **Response to Regulation 5**

This regulation will remain as drafted. The Assembly is working closely with stakeholders on areas for implementation, such as training qualifications and standards, and will consider issuing guidance in advance of commencement.

## **Regulation 6 – Functions of an IMCA**

About 80% of respondents were fully in favour of this regulation as drafted; whilst a minority wanted further detail about the role.

## **Response to Regulation 6**

This regulation will remain as drafted. The Assembly is working closely with stakeholders on areas for implementation and will consider issuing guidance in advance of commencement.

## **Regulation 7 – Challenges to decisions**

About 80% of respondents were fully in favour of this regulation as drafted; whilst a minority thought the right to challenge should go further to include arbitration or rights of audience in court.

## **Response to Regulation 7**

Some of the suggestions fall outside the remit of these regulations. This regulation will remain as drafted.

## **Regulation 8 – Care reviews**

90% of respondents were fully in favour of this regulation as drafted and generally there was recognition that this builds on good practice.

## **Response to Regulation 8**

This regulation will remain as drafted.

## **Regulation 9 – Adult protection cases**

About 60% of respondents were fully in favour of this regulation as drafted. Concerns were raised about the definition and the fact that a wide interpretation will compromise eligibility for the service. A minority of respondents were concerned that this regulation could be used to displace family representatives with an IMCA. Others called for details of the IMCA role to be included in guidance and local protocols.

## **Response to Regulation 9**

This regulation reflects good practice in terms of involving an independent advocate in such cases, but those instructing the IMCA must be satisfied that involving an IMCA will be of particular benefit to the person who lacks capacity. The creation of a discretionary power to appoint IMCAs in adult protection cases will not override the duty on the NHS body or local authority to consult anyone engaged in caring for the person or anyone interested in his or her welfare. Statutory organisations will be encouraged to amend their policies and procedures accordingly.

Brian Gibbons AM  
November 2006  
Minister for Health And Social Services