

2007 No. (W.)

MENTAL CAPACITY, WALES

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

EXPLANATORY NOTE

(This note is not part of the Regulations)

1. These Regulations define “NHS body” and “serious medical treatment” for the purposes of certain provisions in the Mental Capacity Act 2005 (“the Act”) which deal with independent mental capacity advocates (“IMCAs”). The Regulations also contain provision as to who can be appointed to act as an IMCA and as to an IMCA’s functions when he or she has been instructed to represent a person in a particular case. The provisions about the IMCA’s appointment and functions apply where the IMCA is instructed under sections 37 to 39 of the Act or under regulations made by virtue of section 41 of the Act.

2. Regulation 3 defines “NHS body”. This term is used in sections 37 and 38 of the Act. Those sections impose an obligation on NHS bodies to instruct an IMCA in certain circumstances involving acts or decisions relating to serious medical treatment or to accommodation.

3. Regulation 4 defines “serious medical treatment”. Under section 37 of the Act, an NHS body must instruct an IMCA where it is proposing to provide, or secure the provision of, such treatment.

4. Regulation 5 provides that—

- (a) a Local Health Board (“LHB”) must make arrangements to make available IMCAs to residents in its area (Regulation 5(1));
- (b) in making such arrangements an LHB may make arrangements with a provider of advocacy services (Regulation 5(2));

- (c) no person may act as an IMCA unless he or she is approved by the LHB or is employed by a provider of advocacy services to act as an IMCA (Regulation 5(3));
- (d) before approving a person to act as an IMCA an LHB must be satisfied that he or she satisfies the appointment requirements as to experience, training, good character and independence (Regulation 5(6));
- (e) criminal record certificates are required in determining whether a person meets the appointment requirements as to good character (Regulation 5(8)).

5. Regulation 6 sets out the steps an IMCA must take once he or she has been instructed to act in a particular case. The IMCA must obtain and evaluate information about the person he or she has been instructed to represent (“P”) and about P’s wishes, feelings, beliefs or values. The IMCA must then report to the person who instructed him or her.

6. Regulation 7 provides that an IMCA who is instructed to represent P in relation to any matter may challenge a decision made in that matter in relation to P, including any decision as to whether P is a person who lacks capacity. For the purpose of making a challenge, the IMCA is treated in the same way as any other person caring for P or interested in his or her welfare.

7. Regulation 8 provides that where an NHS body or a local authority has made arrangements as to P’s accommodation and it is then proposed to review those arrangements, that NHS body or local authority may instruct an IMCA. An IMCA may only be instructed under Regulation 8 if P does not have capacity to participate in the review or there is no one else who can be consulted as to matters affecting P’s best interests.

8. Regulation 9 provides that where it is alleged that P is or has been abused or neglected by another person or that P is abusing or has abused another person and protective measures affecting P are, or are proposed, to be taken by an NHS body or a local authority that NHS body or local authority may instruct an IMCA to represent P. “Protective measures” are those measures taken in pursuance of guidance issued under section 7 of the Local Authority Social Services Act 1970. The guidance current when these Regulations were made is entitled “In Safe Hands”.

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Made

Coming into force

1 April 2007

The National Assembly for Wales makes the following Regulations in exercise of powers conferred by sections 35(2) and (3), 36, 37(6) and (7), 38(8), 41, 64(1) and 65(1) of the Mental Capacity Act 2005⁽¹⁾ and by section 16BB of the National Health Service Act 1977⁽²⁾.

Title, commencement and extent

1.—(1) The title of these Regulations is the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007.

(2) These Regulations come into force on 1 April 2007 and apply to Wales.

Interpretation

2.—(1) In these Regulations—

“the 1977 Act” (“*Deddf 1977*”) means the National Health Service Act 1977;

“the Act” (“*y Ddeddf*”) means the Mental Capacity Act 2005;

“IMCA” (“*EAGM*”) means an independent mental capacity advocate;

(1) 2005 c.9. Section 64(1) sets out the meaning of “prescribed”.

(2) 1977 c.49.

“local authority” (“*awdurdod lleol*“) means a county or county borough council in Wales;

“Local Health Board” (“*Bwrdd Iechyd Lleol*“) means a body established under section 16BA of the 1977 Act;

“NHS trust” (“*ymddiriedolaeth GIG*“) has the same meaning as in the 1977 Act;

“provider of advocacy services” (“*darparnydd gwasanaethau eirioli*“) means a body or person, including a voluntary organisation, that employs and makes available persons who may be instructed to act as an IMCA.

(2) In these Regulations, references to instructing a person to act as an IMCA are to instructions given pursuant to sections 37, 38 and 39 of the Act or to these Regulations.

Meaning of NHS Body

3. For the purposes of sections 37 and 38 of the Act, and for these Regulations “NHS body” means—

- (a) a Local Health Board;
- (b) an NHS trust all or most of whose hospitals, establishments and facilities are situated in Wales;
- (c) a Special Health Authority performing functions only or mainly in respect of Wales.

Definition of serious medical treatment

4.—(1) This regulation defines serious medical treatment for the purposes of section 37 of the Act.

(2) Serious medical treatment is treatment which involves providing, withdrawing or withholding treatment in circumstances where—

- (a) in a case where a single treatment is being proposed, there is a fine balance between its benefits to a person (P) and the burdens and risks it is likely to entail for P,
- (b) in a case where there is a choice of treatments, a decision as to which one to use is finely balanced, or
- (c) what is proposed would be likely to involve serious consequences for P.

Appointment of independent mental capacity advocates

5.—(1) Subject to directions that may be given by the Assembly, a Local Health Board must make such arrangements as it considers reasonable to enable IMCAs to be available to act in respect of persons usually resident in the area for which the Local Health

Board is established and to whom acts or decisions proposed under sections 37, 38 or 39 of the Act or under these Regulations relate.

(2) In making arrangements under paragraph (1) a Local Health Board may make arrangements with a provider of advocacy services.

(3) No person may be instructed to act as an IMCA unless that person is approved by the Local Health Board or is employed by a provider of advocacy services to act as an IMCA.

(4) Before approving any person under paragraph (3) a Local Health Board must be satisfied that the person satisfies the appointment requirements in paragraph (6).

(5) A Local Health Board must ensure that any provider of advocacy services with whom it makes arrangements under paragraph (2) is required, in accordance with the terms of that arrangement, to ensure that any person employed by that provider of advocacy services and who is made available to be instructed to act as an IMCA satisfies the appointment requirements in paragraph (6).

(6) The appointment requirements in paragraphs (4) and (5) are that a person—

- (a) has appropriate experience or training;
- (b) is of integrity and good character; and
- (c) will act independently of any person who instructs him or her to act as an IMCA and of any person who is responsible for an act or decision proposed under sections 37, 38 or 39 of the Act or under these Regulations.

(7) In determining whether a person meets the appointment requirement in paragraph (6)(a) regard will be had to standards in guidance that may be issued by the Assembly.

(8) Before a determination is made for the purposes of paragraph (6)(b) in relation to any person, there must be obtained in respect of that person—

- (a) an enhanced criminal record certificate issued pursuant to section 113B of the Police Act 1997⁽¹⁾; or
- (b) if the purpose for which the certificate is required is not one prescribed under subsection (2) of that section, a criminal record certificate issued pursuant to section 113A of that Act.

(9) In this regulation a person is employed by the provider of advocacy services if that person is—

- (a) employed under a contract of service; or
- (b) engaged under a contract for services.

(1) 1997 c.50. Sections 113A to 113D are inserted by section 163 of the Serious Organised Crime and Police Act 2005 (c.14).

Functions of an independent mental capacity advocate

6.—(1) This regulation applies where an NHS body or a local authority instructs a person to act as an IMCA to represent a person (P).

(2) The IMCA must determine in all the circumstances how best to represent and support P and must act in accordance with the requirements in paragraph (3).

(3) The IMCA must—

- (a) verify that the instructions have been issued by an NHS body or a local authority;
- (b) to the extent that it is practicable and appropriate to do so—
 - (i) interview P in private, and
 - (ii) examine the records relevant to P to which the IMCA has access under section 35(6) of the Act;
- (c) to the extent that it is practicable and appropriate to do so, consult—
 - (i) persons engaged in providing care or treatment for P in a professional capacity or for remuneration, and
 - (ii) other persons who may be in a position to comment on P's wishes, feelings, beliefs or values; and
- (d) take all practicable steps to obtain such other information about P, or the act or decision that is proposed in relation to P, as the IMCA considers necessary.

(4) The IMCA must evaluate all the information that he or she has obtained for the purpose of—

- (a) ascertaining the extent of the support provided to P to enable P to participate in making any decision about the matter in relation to which the IMCA has been instructed;
- (b) ascertaining how P would feel, what P would wish and the beliefs and values that would be likely to influence P if P had capacity in relation to the proposed act or decision;
- (c) ascertaining what alternative courses of action are available in relation to P;
- (d) where medical treatment is proposed for P, ascertaining whether P would be likely to benefit from a further medical opinion.

(5) The IMCA must prepare a report for the NHS body or the local authority who instructed him or her.

(6) The IMCA may include in the report such submissions as he or she considers appropriate in relation to P and the acts or decisions which are proposed in relation to P.

Challenges to decisions affecting persons who lack capacity

7.—(1) This regulation applies where an IMCA has been instructed to act and a decision (including a decision as to P's capacity) is made in relation to a person (P).

(2) The IMCA has the same rights to challenge the decision as if he or she were a person (other than an IMCA) who—

- (a) was entitled, in accordance with section 4(7)(b) of the Act, to be consulted in relation to a matter about which the IMCA is now instructed; or
- (b) it would otherwise be appropriate for an NHS body or a local authority to consult.

Review of arrangements as to accommodation

8.—(1) This regulation applies where—

- (a) an NHS body or a local authority has made arrangements for the provision of accommodation in a hospital or care home for a person (P) who lacks capacity;
- (b) an IMCA has been instructed in relation to those arrangements in pursuance of sections 38 or 39 of the Act; and
- (c) that accommodation has been provided for P for a continuous period of 12 weeks or more.

(2) Subject to paragraphs (4) and (5), any NHS body or local authority that—

- (a) proposes to review P's accommodation arrangements (whether under a care plan or otherwise);
- (b) is satisfied that there is no person, other than a person 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; and
- (c) is satisfied that it would be of benefit to P to be so represented and supported,

may instruct a person to act as an IMCA in relation to P.

(3) Where an NHS body or a local authority instructs an IMCA under this regulation it must, in making any decision resulting from a review of arrangements for P's accommodation, take into account any information given or submissions made, by the IMCA.

(4) An IMCA may not be instructed under this regulation where an IMCA is instructed in accordance with sections 37, 38 or 39 of the Act or regulation 9.

(5) An IMCA may not be instructed under this regulation where there is—

- (a) a person nominated by P (in whatever manner) as a person to be consulted in matters affecting P's interest;
- (b) a donee of a lasting power of attorney created by P;
- (c) a deputy appointed by the Court of Protection for P; or
- (d) a donee of an enduring power of attorney (within the meaning of Schedule 4 of the Act) created by P.

Adult protection cases

9.—(1) This regulation applies where an NHS body or a local authority proposes to take, or proposes to arrange to be taken, protective measures in relation to a person (P) who lacks capacity to agree to one or more of the measures.

(2) Subject to paragraph (4), where an NHS body or a local authority receives notice of an allegation or receives evidence that P—

- (a) is being abused or neglected or has been abused or neglected, or
- (b) is abusing or has abused another person

it may instruct an IMCA if it is satisfied that it would benefit P to be represented and supported.

(3) Where an NHS body or a local authority instructs an IMCA under this regulation it must, in making any decision about protective measures to be taken in relation to P, take into account any information given or submissions made, by the IMCA.

(4) An IMCA may not be instructed under this regulation where an IMCA is instructed in accordance with sections 37, 38 or 39 of the Act or regulation 8.

(5) “Protective measures” (“*Camau Gwarchodol*”) includes measures to minimise the risk that any abuse or neglect of P, or abuse by P, will continue and measures taken in pursuance of guidance issued under section 7 of the Local Authority Social Services Act 1970(1).

Signed on behalf of the National Assembly for Wales under section 66(1) of the Government of Wales Act 1998(2)

Date

The Presiding Officer of the National Assembly

(1) 1970 c.42

(2) 1998 c.38.