

MENTAL CAPACITY ACT 2005

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 1: Persons Who Lack Capacity

Independent mental capacity advocate service

Section 35: Appointment of independent mental capacity advocates

109. *Sections 35 to 41* create a new scheme designed to provide the input of an independent mental capacity advocate (“IMCA”) where certain decisions need to be taken for particularly vulnerable people who lack capacity. This may include 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. Such people will be represented and provided with support when decisions are to be made about serious medical treatment or significant changes of residence provided by public bodies.
110. *Subsection (1)* places a duty on the appropriate authority to make arrangements for the provision of a new independent mental capacity advocacy service. The appropriate authority is, in relation to England, the Secretary of State and, in relation to Wales, the National Assembly for Wales.
111. *Subsection (2)* allows the appropriate authority to make regulations setting out how the IMCA will be appointed. This will ensure that an individual will need to meet common standards in order to be approved as an IMCA. *Subsection (4)* provides that, as far as practicable, the IMCA should be independent of the person who is making the decision concerned. *Subsection (5)* provides that the arrangements may include provision for payments to be made to, or in relation to, the IMCA. *Subsection (6)* stipulates that an IMCA must be able to meet the person concerned in private and see relevant health, social services and care home records. This is to enable the IMCA to be able to perform properly his function of representing and supporting the person who lacks capacity.

Section 36: Functions of independent mental capacity advocates

112. This section allows the appropriate authority to make regulations setting out the functions of IMCAs. *Subsection (2)* provides that those regulations may set out the steps which an IMCA needs to take in fulfilling those functions. These steps should ensure that the IMCA supports the person to participate as fully as possible in the decision; obtains and evaluates relevant information; ascertains and represents the person's wishes, feelings, beliefs and values; finds out about all the available options; and seeks a second medical opinion if necessary. *Subsection (3)* provides that the regulations may also set out the circumstances in which the IMCA may challenge the decision-maker on behalf of the person, if appropriate.

Section 37: Provision of serious medical treatment by NHS body

113. This section applies where “serious medical treatment” is to be provided or arranged by the NHS for a person who lacks capacity, and there is no one for the treatment-provider to discuss it with. If there is neither a person from the list in [section 40](#) (such as an attorney under an LPA or deputy) nor a non-professional carer or friend whom it is appropriate to consult, then an IMCA is to be instructed.
114. The role of the IMCA will be both to represent and to support the person in accordance with the regulations made under [section 36](#). The information and submissions provided by the IMCA must be taken into account by the decision-maker.
115. *Subsection (2)* provides that where the person’s treatment is regulated under Part 4 of the Mental Health Act 1983, the IMCA does not need to be instructed under [section 37\(3\)](#). That Act already contains its own safeguards.
116. *Subsection (4)* makes provision in relation to urgent treatment. *Subsection (6)* provides that the types of “serious medical treatment” to be covered will be set out in regulations. *Subsection (7)* provides that regulations will also define the particular NHS bodies who will become subject to the duties. The intention is that this will cover the bodies responsible for direct provision or funding of treatment as appropriate.

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.

Section 39: Provision of accommodation by local authority

121. This section applies to long-stay accommodation (8 weeks or more) arranged by a local authority or a change in such accommodation. It applies to residential accommodation provided in accordance with [section 21](#) or [29](#) of the National Assistance Act 1948. This may be accommodation in a care home, nursing home, ordinary and sheltered housing, housing association or other registered social housing, or in private sector housing provided by a local authority or in hostel accommodation. The IMCA safeguard will also apply to people accommodated following discharge under section 117 of the Mental Health Act 1983.
122. The IMCA is to be instructed where 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 local authority.

123. *Subsection (3)* provides that the IMCA does not need to be instructed where the person is to be required under the Mental Health Act 1983 to live in the accommodation in question (for example, as a requirement of conditional discharge). *Subsection (4)* makes provision in relation to urgent placements.
124. *Subsection (5)* is intended to ensure that an IMCA is involved in relation to people whose residence is initially intended to be less than 8 weeks if the period is later extended.

Section 40: Exceptions

125. This section provides that the independent mental capacity advocacy service does not have a role when the person concerned already has somebody who can speak with the provider of treatment or accommodation (e.g. a person chosen in advance, an attorney under an EPA or LPA, or a deputy). This overrides *sections 37(3), 38(3) and (4) and 39(4) and (5)*, which generally trigger the involvement of an IMCA when there is no one appropriate to consult about the person's interests, other than a paid or professional carer.

Section 41: Power to adjust role of independent mental capacity advocate

126. This section provides that the scope of the independent mental capacity advocacy service can be extended, by regulations made for England by the Secretary of State or for Wales by the National Assembly for Wales, to other sets of circumstances. Such regulations would follow consultation about where the involvement of an IMCA might prove useful. Regulations made by the Secretary of State will be subject to the affirmative procedure in Parliament (see *section 65*).

Miscellaneous and supplementary

Section 42: Codes of practice

127. This section provides for the Lord Chancellor to make and revise a code or codes of practice to supplement the Act. Attorneys, deputies, professionals, paid workers, researchers and IMCAs acting on behalf of adults who lack capacity will be under an obligation to have regard to any relevant code. Any codes of practice issued will be allowed to be used as evidence in court or tribunal proceedings.

Section 43: Codes of practice: procedure

128. This section sets out the procedure for issuing and revising any codes of practice. The Lord Chancellor will have to consult the National Assembly for Wales and other appropriate persons before preparing or revising a code. Draft codes will have to be laid before both Houses of Parliament for 40 days. They may then be issued, provided that neither House has resolved to reject the draft. The Lord Chancellor must arrange for the code to be brought to the attention of people who may need to know about it.

Section 44: Ill-treatment or neglect

129. This section creates an offence of ill-treatment or wilful neglect of a person lacking capacity by anyone responsible for that person's care, donees of LPAs or EPAs, or deputies appointed by the court.