

2006 No. 1832

MENTAL CAPACITY, ENGLAND

The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006

Made - - - - - *7th July 2006*

Laid before Parliament *13th July 2006*

Coming into force in accordance with regulation 1(2)

The Secretary of State makes these Regulations in exercise of the powers conferred on her by sections 35(2) and (3), 36, 37(6) and (7), 38(8), 64(1) and 65(1) of the Mental Capacity Act 2005(a).

Citation, commencement and extent

1.—(1) These Regulations may be cited as the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006.

(2) These Regulations shall come into force—

- (a) for the purpose of enabling the Secretary of State to make arrangements under section 35 of the Act, and for the purpose of enabling local authorities to approve IMCAs, on 1st November 2006, and
- (b) for all other purposes, on 1st April 2007.

(3) These Regulations apply in relation to England only.

Interpretation

2.—(1) In these Regulations—

“the Act” means the Mental Capacity Act 2005; and

“IMCA” means an independent mental capacity advocate.

(2) In these Regulations, references to instructions given to a person to act as an IMCA are to instructions given under sections 37 to 39 of the Act or under regulations made by virtue of section 41 of the Act.

Meaning of NHS Body

3.—(1) For the purposes of sections 37 and 38 of the Act, “NHS body” means a body in England which is—

- (a) a Strategic Health Authority;
- (b) an NHS foundation trust;

(a) 2005 c.9. Section 64(1) is cited because of the meaning there given to “prescribed”.

- (c) a Primary Care Trust;
- (d) an NHS Trust; or
- (e) a Care Trust.

(2) In this regulation—

“Care Trust” means a body designated as a Care Trust under section 45 of the Health and Social Care Act 2001(a);

“NHS foundation trust” has the meaning given in section 1 of the Health and Social Care (Community Health and Standards) Act 2003(b);

“NHS trust” means a body established under section 5 of the National Health Service and Community Care Act 1990(c);

“Primary Care Trust” means a body established under section 16A of the National Health Service Act 1977(d); and

“Strategic Health Authority” means a Strategic Health Authority established under section 8 of the National Health Service Act 1977(e).

Meaning 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 the patient and the burdens and risks it is likely to entail for him,
- (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 the patient.

Appointment of independent mental capacity advocates

5.—(1) No person may be appointed to act as an IMCA for the purposes of sections 37 to 39 of the Act, or regulations made by virtue of section 41 of the Act, unless—

- (a) he is for the time being approved by a local authority on the grounds that he satisfies the appointment requirements, or
- (b) he belongs to a class of persons which is for the time being approved by a local authority on the grounds that all persons in that class satisfy the appointment requirements.

(2) The appointment requirements, in relation to a person appointed to act as an IMCA, are that—

- (a) he has appropriate experience or training or an appropriate combination of experience and training;
- (b) he is a person of integrity and good character; and
- (c) he is able to act independently of any person who instructs him.

(3) Before a determination is made in relation to any person for the purposes of paragraph (2)(b), there must be obtained in respect of that person—

(a) 2001 c.15.
 (b) 2003 c.43.
 (c) 1990 c.19. Section 5 is amended by paragraph 69(1)(b) and (d) of Schedule 1 to the Health Authorities Act 1995 (c.17), paragraph 65(2) of Schedule 2 to the National Health Service (Primary Care) Act 1997 (c.46) and sections 13(1) and (10) and 14 of the Health Act 1999 (c.8).
 (d) 1977 c.49. Section 16A is inserted by section 2(1) of the Health Act 1999.
 (e) Section 8 of the National Health Service Act 1977 is substituted by section 1(2) of the National Health Service Reform and Health Care Professions Act 2002 (c.17).

- (a) an enhanced criminal record certificate issued pursuant to section 113B of the Police Act 1997(a); 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.

Functions of an independent mental capacity advocate

6.—(1) This regulation applies where an IMCA has been instructed by an authorised person to represent a person (“P”).

(2) “Authorised person” means a person who is required or enabled to instruct an IMCA under sections 37 to 39 of the Act or under regulations made by virtue of section 41 of the Act.

(3) The IMCA must determine in all the circumstances how best to represent and support P.

(4) In particular, the IMCA must—

- (a) verify that the instructions were issued by an authorised person;
- (b) to the extent that it is practicable and appropriate to do so—
 - (i) interview P, 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.

(5) The IMCA must evaluate all the information he has obtained for the purpose of—

- (a) ascertaining the extent of the support provided to P to enable him to participate in making any decision about the matter in relation to which the IMCA has been instructed;
- (b) ascertaining what P’s wishes and feelings would be likely to be, and the beliefs and values that would be likely to influence P, if he 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 he would be likely to benefit from a further medical opinion.

(6) The IMCA must prepare a report for the authorised person who instructed him.

(7) The IMCA may include in the report such submissions as he considers appropriate in relation to P and the act or decision which is proposed in relation to him.

Challenges to decisions affecting persons who lack capacity

7.—(1) This regulation applies where—

- (a) an IMCA has been instructed to represent a person (“P”) in relation to any matter, and
- (b) a decision affecting P (including a decision as to his capacity) is made in that matter.

(2) The IMCA has the same rights to challenge the decision as he would have if he were a person (other than an IMCA) engaged in caring for P or interested in his welfare.

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

Signed by authority of the Secretary of State for Health

7th July 2006

Rosie Winterton
Minister of State
Department of Health

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations define “NHS body” and “serious medical treatment” for the purposes of certain provisions 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 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 (see regulation 2(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.

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.

Regulation 5 provides that a person can only act as an IMCA if he has been approved by a local authority or is a member of a class which has been so approved. For an IMCA to be appointed, he must satisfy certain requirements as to experience, training, good character and independence.

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

Under *regulation 7*, 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 welfare.

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