

## Countdown to the Mental Capacity Act 4 – The Coming of the Independent Mental Capacity Advocates

The Independent Mental Capacity Advocate Service will be operational in England from 1 April 2007.

IMCAS are Advocates whose role is to assist particularly vulnerable people who lack capacity to make important decisions about serious medical treatment and change of accommodation, where those people have no family and friends who it would be appropriate to consult about their wishes as relevant to the proposed decision concerning the person in question. It is anticipated that IMCAs are most likely to play a significant role in decisions relating to people who have, for example, been suffering from dementia for a long period of time and over that period have lost all contact with family and friends.

The IMCA is a totally new concept introduced by the Mental Capacity Act, although the role of the IMCA is likely to touch upon that of the traditional advocate, namely supporting and representing the wishes and feelings of the person who lacks capacity to seek to ensure that proper account is taken of the matters relevant to the best interests of that person in relation to decisions made on their behalf. The IMCA is also likely to challenge and provide assistance for challenging decisions made on behalf of the incapacitated person

when that person has no-one else who is likely to be able to represent their interest.

### When must an IMCA be instructed?

There is duty to instruct an IMCA and consult the IMCA in relation to decisions concerning a person lacking capacity where there is no-one else appropriate to consult in the following circumstances:

- An NHS body is proposing to provide serious medical treatment, or
- An NHS body or local authority is proposing to arrange accommodation (or a change of accommodation) in hospital or a care home **and**
- The person would stay in hospital for longer than 28 days or
- They would stay in the care home for longer than 8 weeks.

As indicated above, an IMCA must be instructed when an NHS body is to provide or arrange “serious medical treatment” for a person who lacks capacity to consent to such treatment and there is no-one whom the decision maker can consult in determining what would be in that

person's best interests (other than paid care staff). Serious medical treatment is defined as "treatment which involves providing, withholding or withdrawing treatment of a kind prescribed by regulations made by the appropriate authority".<sup>1</sup> This definition has been given greater context by regulations published supplementary to the Act<sup>2</sup> and the draft Code of Practice, which suggests that such treatment will include a treatment that gives rise to a fine balance between its benefits to the patient and the burden and risks that it is likely to entail for that patient. Treatment that is likely to involve serious consequences for the patient is also included in the definition. The commentary in the Code suggests that treatment that is likely to have "serious consequences" includes that which could have a serious impact on the patient other than the effect of the treatment or its wider implications; this will include prolonged pain, distress or side-effects, having potentially major consequences for the patient or having a serious impact on the patient's future life choices. The sort of treatment that is likely to fall within this definition includes therapeutic sterilisation, withholding or stopping artificial nutrition and hydration and major surgery.

## The Discretion to Involve IMCAS

In addition to the situations where it will be compulsory to involve IMCAS, as outlined above, regulations have come into force<sup>3</sup> which give local authorities and NHS bodies the power to appoint an IMCA in respect of the following:

- Care review of arrangements as to accommodation; and
- Adult protection cases involving vulnerable people.

It should be noted that, unlike the compulsory provisions in the Act, the involvement of IMCAs will not be restricted in situations concerning adult protection to persons who have no-one else who can be consulted about their best interests. This is clearly another protective measure introduced by the legislation towards safeguarding those who lack capacity to ensure that their

own interests are protected.

## The Appointment of the IMCA

Local authorities and NHS bodies will be responsible for instructing an IMCA to represent a person; it is anticipated that in the case of a decision about serious medical treatment, the NHS body providing that person with health care and/or proposed treatment will be responsible for instructing the IMCA. In the case of decisions about moves into long-term accommodation or a change in accommodation, it is likely that the local authority, who has carried out an assessment of the person under the NHS and Community Care Act 1990 and who considers on that basis that a move is necessary, will instruct the IMCA.

## Statutory Powers of the IMCA

In order to carry out the statutory functions and provide the necessary support to the incapacitated person, an IMCA will have the following powers:

- To examine health records relevant to the person who lacks capacity;
- Consult other persons who may be in a position to comment on the incapacitated person's wishes, feelings and beliefs etc;
- Ascertain what alternative courses, actions and options may be available to the incapacitated person; and
- To obtain alternative medical opinion where treatment is proposed and the advocate thinks that one is required.

The IMCA will be required to write a report to the local authority or NHS body who instructed him.

For more information on the Mental Capacity Act 2005, please contact the following:

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<sup>1</sup> Reference section 37(6) of the Mental Capacity Act 2005

<sup>2</sup> See Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (General) Regulations 2006

<sup>3</sup> The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Roll) Regulations 2006