

# Joint guidance on the instruction of Independent Mental Capacity Advocates

Norfolk County Council – Community Services  
Norfolk and Suffolk Foundation NHS Trust  
Norfolk CCGs

## Principles of the Mental Capacity Act 2005

### 1.0 The five statutory principles are:

- 1.1 A person must be assumed to have capacity unless it is established that they lack capacity.
- 1.2 A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
- 1.3 A person is not to be treated as unable to make a decision merely because he makes an unwise decision.
- 1.4 An act done, or decision made, under this Act for or on behalf of a person who lacks capacity must be done, or made, in his best interests.
- 1.5 Before the act is done, or the decision made, regard must be had to whether the purpose or which it is needed can be as effectively achieved in a way that is less restrictive of the person's rights and freedom of action.

These principles must be considered and any statutory criteria met before an Independent Mental Capacity Advocate (IMCA) is appointed.

### 2.0 What is the Independent Mental Capacity Advocate (IMCA) service?

- 2.1 The IMCA service is a statutory advocacy service introduced by the Mental Capacity Act (MCA) 2005 and defined in regulations and the MCA Code of Practice. In Norfolk, PoHwer provides the IMCA service. Contact details are shown on Page 9 paragraph 10.0.
- 2.2 The purpose of the IMCA service is to help people who lack the relevant capacity to make important decisions about serious medical treatment and change of long-term accommodation. It **must be** made available to people who have no family or friends whom it would be appropriate to consult with about the above decisions. The scope of the service was extended Regulation to include two further situations (safeguarding adults and accommodation care reviews) where an IMCA **may be** instructed.
- 2.3 An IMCA is someone who is instructed by a health or care professional, to support and represent a person who lacks the relevant capacity to make specified decisions (see sections 5-8). Their role is to gather further information, provide support to the service user/patient involved in the decision and make representations about that person's wishes, feelings, beliefs and values.

- 2.4 Instructing an IMCA is a safeguard for people who lack relevant capacity and have no one close to them whom it would be “practicable and appropriate to consult”.

People who could be considered for consultation prior to using IMCA services include:

- A person named by the Service User/Patient as someone to be consulted
- A person engaged in the unpaid care of the Service User/Patient
- A person interested in the Service Users/Patients welfare.

If none of the above people are available an IMCA should be consulted.

- 2.5 There may be situations where a person who lacks capacity has family or friends, but it is not practicable or appropriate to consult them. The Code of Practice gives the following examples:

- An older person with dementia may have an adult child who is not contactable.
- An older person may have relatives who very rarely visit, or
- A family member may simply refuse to be consulted.

Similarly, the person who lacks relevant capacity may have friends who know their wishes and feelings, but are not willing or able to help with the decision making process. For example, they may be frail or unable to attend meetings or they feel that the responsibility is too great. In such cases, decision-makers must instruct an IMCA for serious medical treatment and long-term accommodations moves and record the reason for the decision.

### 3.0 In what situations should an IMCA be instructed?

- 3.1 Decision-makers in Norfolk County Council and responsible NHS organisations in Norfolk **must** instruct an IMCA where a person lacks the relevant capacity and does not have friends or relatives whom it would be appropriate to consult in the following circumstances:

- 3.2 In addition to the situations described in 3.1 the County Council or the appropriate NHS body **may** involve an IMCA in care reviews and adult protection cases where the person lacks the relevant capacity and where they “**are satisfied that it would be of particular benefit to the person to be so represented**” (the Expansion Regulations). In adult safeguarding cases the requirement that the person has no family or friends does not apply.

- 3.3 **An IMCA cannot be instructed in the following circumstances:**

- Someone who currently lacks the relevant capacity but has previously named a person who should be consulted about decisions and that person is willing and available to help.

- A person lacking the relevant capacity has appointed an attorney under an Enduring Power of Attorney (EPA) and the attorney continues to manage all of their affairs.
- The Court of Protection has appointed a deputy who continues to act on behalf of the person lacking the relevant capacity.
- The person lacking the relevant capacity has appointed an attorney under a Lasting Power of Attorney (LPA) who continues to manage all their affairs.

#### **4.0 What is an IMCA's role?**

##### 4.1 In carrying out their responsibilities an IMCA:

- Must confirm that the person instructing them has the authority to do so.
- Should interview or meet in private with the person who lacks the relevant capacity, where possible.
- Must act in accordance with the principles of the Act and take account of the Code of Practice.
- May examine any relevant records that the Act gives them access to. Where records refer to third parties it will be necessary to establish whether those references need to be passed on to enable the IMCA to fulfil their role (where references to third parties are not relevant to the decision they should not be passed on to the IMCA).
- Should get views of professionals and paid workers providing care or treatment for the person who lacks the relevant capacity.
- Should get the views of anybody else who can give information about the wishes and feelings, beliefs or values of the person who lacks the relevant capacity.
- Should get hold of any other information they think will be necessary.
- Must find out what support a person lacking the relevant capacity has had to help them make the specific decision.
- Must try to find out what the person's wishes and feelings, beliefs and values would be likely to be if she/he had the relevant capacity.
- Should find out what alternative options there are.
- Should consider whether getting another professional opinion would help the person who lacks the relevant capacity.
- Must write a report on their findings for the County Council or the responsible NHS Body.
- The IMCA must bring to the attention of the decision-maker all of the factors relevant to the specific decision.
- The IMCA is able to challenge the decision-maker.

The decision-maker should take any information and/or report provided by the IMCA into account.

#### **5.0 When must an IMCA be instructed in cases of proposed serious medical treatment?**

- ##### 5.1
- When a doctor or other healthcare professional is proposing to provide, withhold or stop serious medical treatment for someone who lacks the

relevant capacity to give consent and there is nobody appropriate to consult, other than paid staff, an IMCA must be instructed.

5.2 For decisions about serious medical treatment, the responsible body is **the NHS organisation providing the person's healthcare or treatment**. The duty on the NHS to instruct an IMCA applies equally to treatment in independent sector healthcare (e.g. private hospitals) when the treatment is being arranged and funded by the NHS, in which case the responsible body will be the NHS body arranging and funding the person's care.

5.3 The definition of serious medical treatment is set out in Regulations. It is defined as giving new treatment, stopping treatment that has already started or withholding treatment that could be offered, in circumstances where:

- If a single treatment is proposed there is a fine balance between the likely benefits/burdens to the patient and the risks involved, or
- A decision between the choice of treatments is finely balanced, or
- What is proposed is likely to have serious consequences for the patient.

The Code of Practice defines serious consequences as those actions that "could have a serious impact on the patient/service user either from the effects of the treatment itself or its wider implications". This may include treatments which:

- Cause serious and prolonged pain, distress or side effects, or
- Have potentially major consequences (e.g. stopping life-sustaining treatment or having major surgery such as heart surgery), or
- Have a serious impact on future life choices (e.g. interventions for ovarian cancer).

5.4 Neither the Act nor the Regulations provide a definitive list of procedures that may amount to serious medical treatment. The Code of Practice provides the following examples of medical treatments that might be considered serious:

- Chemotherapy and surgery for cancer
- Electro-convulsive therapy
- Therapeutic sterilisation
- Major surgery (such as open heart surgery or brain/neuro-surgery)
- Major amputations (e.g. the loss of an arm or leg)
- Treatments that will result in permanent loss of hearing or sight
- Withholding or stopping artificial nutrition and hydration
- Termination of pregnancy.

5.5 Some decisions about medical treatment are so serious that the courts need to be involved and there is detailed guidance on such situations in chapter 8 of the Code of Practice. In particular 8.18 of the Code says that cases involving any of the following decisions should be brought before a court:

- Decisions about the proposed withdrawal of withholding or artificial nutrition or hydration from patients in a permanent vegetative state
- Cases involving organ or bone marrow donation by a person lacking the relevant capacity to consent
- Cases involving the proposed non-therapeutic sterilisation of a person who lacks the relevant capacity to consent to this (e.g. for contraceptive purposes), and
- All other cases where there is a doubt or dispute about whether a treatment will be in the best interests of a person who lacks the relevant capacity.

5.6 Where an urgent decision is required about serious medical treatment the duty to instruct an IMCA need not be followed. Such urgent decisions must be recorded with the reason for the non-referral.

5.7 There is no requirement to instruct an IMCA for patients detained under the Mental Health Act 1983, if the proposed treatment is for mental disorder and it can be given without patient consent under that Act. If serious medical treatment proposed for a detained patient is not for their mental disorder, the patient has the right to an IMCA as long as they meet the IMCA requirements (i.e. no friends or family who are appropriate to consult with and the patient lacks the relevant capacity).

## 6.0 When must an IMCA be instructed in cases of moves to long-term care accommodation?

6.1 Where a person lacks the relevant capacity and there are no friends or relatives whom it is appropriate to consult, the County Council or responsible NHS body **must** instruct an IMCA in the following circumstances:

- The responsible NHS body is proposing to place a person on long-term hospital accommodation for more than 28 days **or** move them to a different hospital for more than 28 days. This does not apply to patients detained under the Mental Health Act 1983.
- The County Council or the responsible NHS body are proposing to place a person in a care home for more than eight weeks.

The right to an IMCA applies to long-term accommodation in a hospital or care home if it is:

- Provided or arranged by the NHS, or
- Residential care provided by or arranged by the County Council or provided under section 117 of the Mental Health Act 1983, or
- A move between such accommodations.

6.2 The MCA states that “care home” has the meaning given in the Care Standards Act 2000. Norfolk accepts these definitions for the purpose of this protocol. “It provides accommodation together with nursing or personal care”. The Code of Practice defines long-term care accommodation as follows: “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 Code of Practice refers to former care homes that have de-registered in order to provide accommodation and care in a different way and says that people living in such deregistered settings should qualify for instruction of IMCA's if they meet the other qualifying conditions.

- 6.3 In situations where a placement or move is urgent, the NHS body or the County Council can put aside their duty to involve an IMCA. The person making the decision must involve an IMCA as soon as possible after making the emergency placement or move if:
- The person is likely to stay in hospital for longer than 28 days
  - The person is likely to stay in a care home for longer than 8 weeks.
- 6.4 Sometimes a person's placement will be longer than expected. The PCT or the County Council should involve an IMCA as soon as they realise that the person's stay will be longer than 28 days or eight weeks, as appropriate.
- 6.5 IMCAs do not have to be instructed if the person in question is going to be **required** to stay in the accommodation as a result of the Mental Health Act 1983. This is different from the position where someone is discharged from hospital to long-term accommodation under section 117 of the Mental Health Act 1983, where an IMCA has to be instructed when the qualifying criteria are met.
- 6.6 People who pay their own care home fees (self-funders) have the same rights to an IMCA as people funded by the County Council, as long as the Council has:
- Carried out an assessment under the NHS and Community Care Act 1990, and
  - Decided to provide or arrange residential care under the National Assistance Act or section 117 of the Mental Health Act.

This means that a person who is self-funding is entitled to IMCA if the County Council assess them as requiring accommodation in a care home, even when the person pays their own fees.

## **7.0 When may an IMCA be instructed in the case of care reviews?**

- 7.1 An IMCA **may** be instructed to represent a person in a care review in the following circumstances:
- Their long-term care accommodation has been arranged by a responsible NHS body or the County Council and meets the Code of Practice definition of care home
  - The person does not have the relevant capacity to participate in the proposed review and has been in the accommodation for 12 weeks or more continuously, and
  - There is nobody other than a paid carer to support and represent him/her, and

- The accommodation is not provided under an obligation required by the Mental Health Act 1983, and
- The County Council or responsible NHS body “**are satisfied that it would be of particular benefit to the person to be so represented**”. (MCA – IMCA Regulations 2006).

7.2 An individual decision on whether to instruct an IMCA **must** be made in **each case** that meets the criteria at 7.1. Additionally, the following factors may indicate that instructing an IMCA would be of **particular benefit** where:

- The care review will consider decisions about the nature of the physical accommodation to be provided
- Changes to the person’s care package are going to be considered which may have implications for his/her quality of life
- There are conflicting views between parties involved in an accommodation review; this may be a conflict of opinion between the assessor and the provider of the accommodation, or between the service user/patient and the assessor
- Changes are being made to charging arrangements that will have an impact upon the service user/patient
- Additional sanctions or controls in relation to a service user/patient’s behaviour are going to be discussed.
- Restraint has been applied to any service user/patient.

This list is not exhaustive and there will be a number of other situations where **particular benefit** may arise from instructing an IMCA. As a general principle, care reviews where decisions are to be made about significant changes that will have implications for a person’s quality of life, may benefit from the involvement of an IMCA.

7.3 Where a person is to be detained or required to live in accommodation under the Mental Health Act 1983, an IMCA will not be needed as the safeguards under that Act will apply.

## 8.0 When may an IMCA be instructed in cases of adult safeguarding?

8.1 The County Council or responsible NHS body **may** instruct an IMCA where they are satisfied that it would be of **particular benefit** for a person to be represented, in the following circumstances:

- Where a person lacking the relevant capacity is being, or has been abused or neglected, **or**
- Where a person lacking the relevant capacity is, or has been abusing another person.
- An IMCA can **only** be instructed where protective measures have been taken, or are proposed, in accordance with the statutory guidance in “No Secrets”.
- **An IMCA may be instructed in adult safeguarding cases even if the person has family or friends who can be consulted.**

8.2 An individual decision **must** be made in each case that meets the criteria at 8.1 above. Additionally, the following factors may indicate that instructing an IMCA would be of **particular benefit**:

- Where the person involved has no family or friends whom it is appropriate to consult
- Where the family or friends of the person being abused or neglected are involved in the abuse or neglect
- Where there is a conflict of interest between family members/friends and the person lacking the relevant capacity or between the person lacking the relevant capacity and the professional decision-maker.
- Where there is reasonable belief that the family or friends of the person involved will not have the person's best interests at heart
- Where there are widely differing views between professionals, including any key workers in a provider services (e.g. a care home)
- Where the protection plan produced by the adult safeguarding conference involves a life-changing decision or serious exposure to risk.

## 9.0 IMCA's and Enduring or Lasting Power of Attorney or deputies of the Court of Protection

9.1 The Act says that IMCAs cannot be instructed if the circumstances that are listed at 3.3 of this guidance apply. However, the Code of Practice says that where a person has no family or friends to represent them, but does have an attorney or deputy who has been appointed **solely to deal with their property and financial affairs**, they should not be denied access to IMCA. This would enable an IMCA to be appointed to represent the person in decisions relating to serious medical treatment or long-term accommodation moves. The government is seeking to amend the MCA at the earliest opportunity to give force of law to this Code of Practice Guidance.

## 10.0 Making a referral to IMCA

PoHwer is the provider of the IMCA Service in Norfolk. PoHwer will accept a referral for any person living in Norfolk who meets the criteria described in this document regardless of their normal residence. PoHwer's Advice and Support Centre can be contacted on 0300 456 2370 to discuss a potential referral. Referrals must be made in writing (link to <http://www.pohwer.net/our-services/imca-referral-form>) and signed by the Decision Maker. Referrals should be faxed or posted to PoHwer, they should not be sent by email.

PoHwer  
PO Box 14043  
Birmingham  
B6 9BL

Fax: 0300 456 2365



## 11.0 Reference Mental Capacity Act 2005 and the Code of Practice.

<http://www.justice.gov.uk/protecting-the-vulnerable/mental-capacity-act>

<http://www.legislation.gov.uk/ukpga/2005/9/contents>

## 12.0 Acknowledgement

Thanks and acknowledgements are recorded to colleagues in Suffolk who produced a document on which this is based.

## 13.0 Work completed by:

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## 14.0 Document Control

Version	Date	Control Reason	Responsible
1.0	May 2007	Protocol issued	
1.01	November 2010	Updated with new IMCA provider details, new hyperlinks to legislation and code of practice	Ed Jarvis
1.02	December 2011	Updated links and amended references to Adult Safeguarding	Simon Shreeve
1.03	October 2012	Minor changes, new hyperlinks and address to IMCA provider and new hyperlinks to legislation and code of practice	Simon Shreeve
1.04	November 2013	Changes to new IMCA provider from 01/12/2013	Simon Shreeve