22 February 2007 Gateway number: 7890

The Mental Capacity Act 2005

1.0 When does the Mental Capacity Act come into force?

The timetable for implementing the Act was published in December 2006 and states that the Act will be implemented in **two** phases: April and October 2007. This paper sets out in broad terms what local authorities and NHS organisations need to know and do between April and October 2007.

The advice contained here is, in addition to that contained in the Code of Practice, in relation to the IMCA service between April and October 2007. This is the period when certain sections (S1-4) of the Act will come into force for the purposes of where an IMCA is involved and the criminal offence.

From October 2007, when the entire Act is in force those who have a duty to have regard to the Code of Practice should refer solely to the Code. This guidance should be read alongside the relevant parts of the legislation and, when published, the Code of Practice. It is not intended to be a definitive guide to the law.

There are checklist points that may assist organisations in their preparation.

April 2007

- The new **Independent Mental Capacity Advocate (IMCA) service** will become operational in England from 1st April.

- The new **criminal offences** of ill-treatment or wilful neglect will come into force in England and Wales from 1st April.

- **Sections 1-4** of the Act (*the principles, assessing capacity and determining best interests*) which are essential to how IMCAs will operate also come into force on April 1st **but** only for the purposes of where an IMCA is involved and for the criminal offence. Sections 1–4 of the Act will **not** apply in any other situations until October 2007.

- The Code of Practice for the Act will be formally issued, after it has completed the necessary Parliamentary processes, on 19th April. From this point it should be followed by those who must have regard to it in situations where an IMCA is involved, or in relation to the criminal offence. It will also be available as a good practice guide for all those working with people who may lack capacity. Once the rest of the Act's provisions come into force in October 2007, it will become the statutory guidance for all of the Act.

October 2007

- All other parts of the Act are expected to come into force including the IMCA Service in Wales.
- The Code of Practice will have statutory force for all of the Act when it comes into force not solely in relation to where an IMCA is to be involved and / or the criminal offence

The Independent Mental Capacity Advocate (IMCA) Service

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

- The IMCA service is a new statutory advocacy service, introduced in the Mental Capacity Act 2005 and developed further by regulations.

- The purpose of the IMCA service is to help particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation. It is available to those people who have no family or friends whom it would be appropriate to consult about those decisions. The service was extended by regulation to include two further situations, adult protection cases and care reviews – where an IMCA may be instructed.

CHECKLIST Point 1: Everyone in local authorities (LAs) or in the NHS making decisions about (i) serious medical treatment or (ii) decisions about changes of accommodation or (iii) arranging care reviews or (iv) involved in adult protection measures needs to know what the IMCA service is. LAs and NHS Trusts need to identify who these staff are in order to target information and training about their new responsibilities.

2.1 What is an Independent Mental Capacity Advocate (IMCA)?

- An Independent Mental Capacity Advocate (IMCA) is someone instructed to support and represent a person who lacks capacity to make certain serious decisions. They need to be approved by the LA to undertake their role, which is to gather information, provide support to the person concerned and make representations about that person's wishes, feelings, beliefs and values, at the same time as bringing to the attention of the decision-maker all factors that are relevant to the decision. They will also be able to challenge the decision-maker.

2.2 In what situations should an IMCA be instructed?

- In cases where a person who lacks capacity does not have friends or relatives to consult, decision-makers in local authorities and NHS Trusts (for example social workers and doctors) will have a duty to consult an IMCA where :

a) the decision is about serious medical treatment provided by the NHS (but excludes treatment regulated under Part 4 of the Mental Health Act 1983).
b) it is proposed by an NHS body or a LA that the person be moved into long-term care of more than 28 days in a hospital or 8 weeks in a care home (where that accommodation or move is not a requirement of the Mental Health Act 1983)
c) a long-term move (8 weeks or more) to different accommodation is being proposed by an NHS body or LA for example, to a different hospital or care home

(where that accommodation or move is not a requirement of the Mental Health Act 1983)

- In addition, regulations on the expansion of the IMCA service provide that local authorities and NHS bodies may involve an IMCA in a care review if a change of accommodation that was arranged by the LA or NHS is being considered (and the person has already been in that accommodation for 12 weeks or longer).

- Regulations also provide that local authorities and NHS bodies may involve an IMCA in adult protection cases. In these cases alone, the requirement, discussed below, that the person has no one whom it would be appropriate to consult does not apply.

- In both of the additional cases, the LA or NHS body must be satisfied that it would be of particular benefit to the person to be represented by an IMCA.

- The IMCA's report must be taken into account in the decision.

- The lack of capacity may be temporary or permanent and will include people with dementia, with brain injury, with learning disability and mental health needs, and those who are unconscious or barely conscious whether due to an accident, being under anaesthetic or as a result of other conditions

2.3 Who will get an Independent Mental Capacity Advocate?

Apart from adult protection cases, an IMCA will be instructed only in the circumstances discussed at 2.2 above where they have no one such as friends or family to support them, other than a paid carer, whom it would be appropriate to consult.

The Act says that IMCAs cannot be instructed if:

- a person who now lacks capacity previously named a person that should be consulted about decisions that affect them, and that person is available and willing to help
- the person who lacks capacity has appointed an Enduring Power of Attorney (EPA) and the attorney continues to manage the person's affairs
- the Court of Protection has appointed a deputy who continues to act on a person's behalf
- the person who lacks capacity has appointed a Lasting Power if Attorney and the attorney continues to manage a person's affairs

The latter two provisions, concerning deputies and LPAs, will only be relevant from 1st October as the provisions relating to them will not come into effect until that point.

The Government has indicated that it is the intention, where a person has no family, friends, personal welfare deputy or personal welfare attorney (appointed under an LPA) to represent them that they should have access to an IMCA.

The Government is seeking to amend the Act, at the earliest opportunity, to ensure that, in such circumstances, an IMCA should always be appointed to represent the person's

views when they lack the capacity to make decisions relating to serious medical treatment or long-term accommodation moves.

CHECKLIST Point 2: Everyone in local authorities (LAs) or in the NHS making decisions about (i) serious medical treatment or (ii) decisions about changes of accommodation or (iii) arranging care reviews or (iv) involved in adult protection measures needs to know when to instruct an IMCA, the wide range of clients who may require an IMCA and the specific eligibility criteria for making a referral to an IMCA.

2.4 What are the functions of an IMCA?

An IMCA :

- must confirm that the person instructing them has the authority to do so
- should interview or meet in private the person who lacks capacity, if possible
- must act in accordance with the principles of the Act, particularly the duty to act in the person's best interests, and take account of relevant guidance in the Code
- may examine any relevant records that the Act gives them access to
- should obtain the views of professionals and paid workers providing care or treatment for the person who lacks capacity
- should obtain the views of anybody else who can give information about the wishes and feelings, beliefs or values of the person who lacks capacity
- should obtain any other information they think will be necessary
- must find out what support a person who lacks 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 the person had capacity
- should find out what alternative options there are
- should consider whether getting another medical opinion would help the person who lacks capacity, and
- must write a report on their findings for the local authority or NHS

An IMCA has the same rights to challenge a decision as any other person caring for the person or interested in his welfare. The right of challenge applies both to decisions about lack of capacity and a person's best interests.

CHECKLIST Point 3: Everyone in LAs or in the NHS making serious medical decisions or decisions about changes of accommodation or arranging care reviews or involved in adult protection measures needs to understand the functions of the IMCA including their right to examine health and social care records as part of their work.

2.5 How will the IMCA service be provided?

- The IMCA service will be commissioned locally by councils with social services responsibilities throughout England.

- The IMCA service will be provided by one or more independent advocacy organisation.

- It may be useful to set up a steering group/ advisory group for the IMCA service to function smoothly.

- Local IMCA providers and commissioners will agree and widely circulate the necessary contact details so that decision-makers in the NHS or local authority whose duty it will be to instruct the IMCA will be able to contact IMCA provider(s) when necessary.

CHECKLIST Point 4: The IMCA service must start operating on 1st April. It would benefit from local steering/ advisory groups to address any issues that arise. Methods of referral must be clear and widely available to all those who will be making referrals

3.0 When must an IMCA be instructed from April 2007, and how will Sections 1-4 come into force for IMCA cases only?

3.1 When must an IMCA be instructed in cases of proposed serious medical treatment?

From 1st April 2007, if a doctor or healthcare professional is proposing serious medical treatment for somebody who lacks the capacity to consent and there is nobody other than paid staff whom it is appropriate to consult, the NHS body responsible for that patient's treatment must instruct an IMCA .

Serious medical treatment is defined as treatment that involves 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 and there is a fine balance between the likely benefits and the burdens to the patient and the risks involved or
- a decision between a choice of treatments is finely balanced, or
- what is proposed is likely to have serious consequences for the patient[1].

If the treatment is urgent, the NHS body is not required to instruct an IMCA.

CHECKLIST Point 5: Doctors and healthcare professionals need to decide who is responsible for instructing an IMCA for serious medical treatment. In the pilot areas, some doctors chose to keep the responsibility themselves; others formally delegated the responsibility of making the referral to named nurses; others had not clarified whose responsibility the referral was. All clinical teams need to make decisions on what works best for them and communicate their position on this where NHS Trusts do not agree a policy that all teams will follow the same process.

3.2 When must an IMCA be instructed in relation to proposed moves?

[1]The Mental Capacity Act 2005 (Independent Mental Capacity Advocate) (General) Regulations 2006 SI: 2006 /No 1832 . The 'General Regulations'. These regulations set out the details on how the IMCA will be appointed, the functions of the IMCA, including their role in challenging the decision-maker and include definitions of 'serious medical treatment' and 'NHS body'.

From 1st April 2007, if

- an NHS body is proposing to arrange accommodation in a hospital or care home (as in 2.4 b) and c) above) of somebody who lacks the capacity to consent or

- a LA is proposing to arrange residential accommodation for someone who lacks the capacity to consent[2]
- and there is nobody other than paid staff whom it is appropriate to consult, the NHS body or LA must instruct an IMCA

If the arrangements need to be made as a matter of urgency and there is no time to instruct an IMCA, then one need not be instructed. However, in accommodation cases if the person is then expected to be more than 28 days in hospital or 8 weeks in a care home or its equivalent then an IMCA must be instructed as soon as possible after the move.

CHECKLIST Point 6: Hospitals may want to add a 'Need to instruct an IMCA' question to the relevant part of a patient's healthcare record or other documentation including patient discharge forms. Local authorities may want to add a 'Need to instruct an IMCA' question to relevant care planning documentation.

3.3 How is a person who lacks capacity defined by the Mental Capacity Act?

The Act defines a person who lacks capacity and this should be considered between April and October 2007 where the question arises as to the person's capacity and a decision has to be made in cases involving serious medical treatment or care moves and there is nobody appropriate to consult other than paid staff.

Sections 2 and 3 of the Mental Capacity Act set out the definition of a person who lacks capacity.

These sections of the Act say that a person lacks capacity if he or she

- has a temporary or permanent impairment of or a disturbance in the functioning of the mind or brain when the decision needs to be made.

and as a result is unable to -

- understand the information relevant to that decision
- retain that information
- use or weigh that information as part of the process of making the decision

[2] 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, that following an assessment of the person under the NHS and Community Care Act 1990 has been decided may be necessary.

or

- communicate his / her decision (whether by talking, using sign language or any other means

These sections also provide:

- that a lack of capacity cannot be established merely by reference to a person's age or appearance or a condition or an aspect of their behaviour which might lead others to make unjustified assumptions about his / her capacity

- that whether a person lacks capacity is decided on the balance of probabilities

- that a person is not to be regarded as unable to understand the information relevant to a decision if he / she is able to understand an explanation of it given to him / her in a way that is appropriate to his / her circumstances (using simple language, visual aids or any other means)

- the fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him / her from being regarded as able to make the decision and

- that the information relevant to a decision includes information about the reasonably foreseeable consequences of either deciding one way or another or failing to make the decision.

If:

- **a person lacks capacity using the criteria in Sections 2 and 3 of the Act and**
- **serious medical treatment and / or a move is being proposed and**
- **there is nobody other than paid staff to consult with on behalf of the person who lacks the capacity to consent**

then the relevant NHS body or LA must, from 1st April 2007, instruct an IMCA.

Staff should record that they believe the person lacks capacity in line with the Act and that because it is a serious medical treatment matter or care move they are now instructing an IMCA. They will need to await that IMCA's "report" before they can proceed to a best interests decision (unless it is urgent or an emergency)

3.4 What principles do people need to follow when making decisions?

Any act done or decision made on behalf of a person who lacks capacity must comply with the five principles set out in Section 1 of the Act.

Once an IMCA has been instructed and until a best interests decision is taken the decision maker must follow the Act's five principles in relation to that decision making process.

Section 1 – the five principles

- Section 1(2) states that a person must be assumed to have capacity unless it is established that he lacks capacity. Healthcare and social care staff should regularly review that the person who lacked capacity when the IMCA was originally instructed continues to do so otherwise he / she is able to now consent or refuse as a person with capacity.

- Section 1(3) states that a person is not to be treated as unable to make a decision unless all practicable steps to help him or her do so have been taken without success. Even though an IMCA has been instructed, all practicable steps should continue to be taken in an effort to enhance the person's capacity.

- Section 1(4) states that a person is not to be treated as unable to make a decision merely because he or she makes an unwise decision. Those instructing IMCAs will need to confirm that a decision that others might consider to be unwise but made by a person who does in fact have the capacity to make it was not the reason for their instructions. If it were an IMCA would not be able to act because the person would have capacity - and would be free to make whatever decision they wish.

- Section 1(5) states that any act done or decision made on or on behalf of a person who lacks capacity must be done, or made, in his or her best interests, of which more below and

- Section 1(6) states that before the Act is done or the decision made, regard must be had to whether the purpose for 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. You must therefore consider whether the proposed serious medical treatment and / or the proposed move achieve this?

3.5 Best Interests

Once an IMCA has been instructed, NHS bodies and LAs must take into account any information given, or submissions made, by the IMCA. Any decision taken before proceeding with serious medical treatment or a move must also be made in the person's 'best interests'

Section 4 of the Act provides a checklist of matters to be considered as part of any determination of the person's best interests. This requires among other things that:

- a best interests determination must not be made merely on the basis of the person's age or appearance or his or her condition or an aspect of his / her behaviour which might lead to unjustified assumptions about what might be in the person's best interests

- all relevant circumstances must be considered ('relevant circumstances' are defined as those "of which the person making the (best interests) determination

is aware and which it would be reasonable to regard as relevant.")

- consideration must be given as to whether it is likely that the person will at some time have capacity in relation to the matter in question and if it appears likely that he / she will when that is likely to be.

- so far as reasonably practicable the person assessed as lacking capacity must be permitted and encouraged to participate, or to improve his / her ability to participate as fully as possible in any act done for him / her and any decision affecting him / her

- in a case involving life sustaining treatment there must be no motivation to bring about the person's death. Life sustaining treatment is defined in 4(10) as treatment which in the view of a person providing health care for the person concerned is necessary to sustain life.

- the past and present wishes and feelings of the person lacking capacity (and, in particular, any relevant written statement made by them when they had capacity) where ascertainable must be considered as must any beliefs and values that would be likely to influence his / her decision if he / she had capacity as must any other factors that the person lacking capacity would be likely to consider were he / she able to do so

- account must be taken if practicable and appropriate of the views of anyone named by the person as someone to be consulted (although this will be rare in cases where it has been necessary to appoint an IMCA); and of anyone engaged in caring for the person in a paid capacity.

4.0 What are the circumstances in which NHS bodies and LAs will have additional powers to instruct an IMCA from April 2007?[3]

They are able to do so either when a review of the accommodation arrangements is proposed or in adult protection cases.

4.1 Reviews of accommodation

- Where an NHS body or a local authority has made arrangements for the accommodation of a person who does not have capacity to participate in the review that is proposed of those arrangements and
- he / she has been in that accommodation for 12 weeks or more (continuously) and the accommodation is not provided under an obligation required by the Mental Health Act 1983 and
- there is nobody other than a paid carer to support and represent him / her
- the NHS body or LA may instruct an IMCA if it is satisfied that it would be of particular benefit to him / her to be so represented and

[3] The Mental Capacity Act 2005 (Independent Mental Capacity Advocate) (Expansion of Role) Regulations 2006 SI:2883. The 'Expansion Regulations'. These regulations specify the circumstances in which local authorities and NHS bodies may provide the IMCA service on a discretionary basis. These include involving the IMCA in a care review and in adult protection cases.

- before making any decision resulting from the review of arrangements as to P's accommodation must take into account any information given, or submissions made by the IMCA.
- In so doing, paragraphs 3.3 – 3.5 above will all apply.

CHECKLIST Point 7: The regulations require LAs to consider whether each person who qualifies in accommodation reviews should have an IMCA. In practice, LAs are encouraged to develop a policy which identifies those who should be referred to an IMCA because they would particularly benefit from their support during a care review.

4.2 Adult protection cases

- Where it is alleged or there is evidence that a person lacking capacity is or has been abused or neglected or that he / she is abusing or has abused another person and
- protective measures have been taken or are proposed by an NHS body or LA in accordance with any adult protection procedures that are set up in response to statutory guidance, which is currently outlined in "No Secrets"[4]
- the NHS body or LA may instruct an IMCA if it is satisfied that it would be of particular benefit to him / her to be so represented, even if he or she has family or friends who can be consulted and
- before making any decision, or further decision, about protective measures any information given, or submissions made by the IMCA must be taken into account
- In so doing, paragraphs 3.3 – 3.5 above will all apply.

CHECKLIST Point 8: The regulations require LAs to consider whether each person who qualifies in adult abuse cases should have an IMCA. In practice, LAs are encouraged to develop a policy which identifies those who should be referred to an IMCA because they would particularly benefit from their support during adult protection procedures.

5.0 Training materials

Once Parliament has approved the Code of Practice, training materials in hard copy and electronic formats will be available free of charge. There will be five sets

a) A generic set for all health and social care workers.

b) Those working in "acute" hospitals that will need, particularly, a good understanding of the issues of consent and of advance decisions, including the refusal of life sustaining treatment. These materials are aimed primarily at those in NHS and NHS Foundation Trusts and at independent hospital providers.

c) Those working in mental health services that will need, particularly, to understand the issues at the interface of the 1983 Mental Health Act and the Act. These materials are aimed at NHS Mental Health Trusts, those

[4] http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/PublicationsPolicyAndGuidanceArticle/fs/en?CONTENT_ID=4008486&chk=7WOgjo

working in integrated mental health services and at independent hospital providers.

d) Those working in care homes, nursing homes and other environments where people are supported to live that will need, particularly, to understand what decisions can be taken in someone's best interests. These materials are aimed at a wide range of staff working in statutory, voluntary and independent sector provision.

e) Those working to support people to live independently in the community who may as domiciliary care practitioners need to be particularly aware of best interest decisions or as primary care practitioners aware of issues relating to consent. These materials are aimed at a wide range of staff working in statutory, voluntary and independent sector provision.

It is currently anticipated that those materials will be available in late April 2007.

5.1 Information booklets

The Mental Capacity Implementation Programme has provided a range of information to complement the Code of Practice both in hard copy and in downloadable formats. For further information see:
http://www.dca.gov.uk/legal-policy/mental-capacity/publications.htm#booklets

Further information

- Further information on the IMCA service can be found at: www.dh.gov.uk/imca
- Further information on the Mental Capacity Act can be found at: www.dca.gov.uk/legal-policy/mental-capacity
- If you would like further advice please email: IMCA@dh.gsi.gov.uk

- The Code of Practice for the Act will be formally issued, after it has completed the necessary Parliamentary processes, on 19th April. From this point it should be followed by those who must have regard to it in situations where an IMCA is involved, or in relation to the criminal offence. It will also be available as a good practice guide for all those working with people who may lack capacity. Once the rest of the Act's provisions come into force in October 2007, it will become the statutory guidance for all of the Act.

CHECKLIST

1. Everyone in local authorities (LAs) or in the NHS making decisions about (i) serious medical treatment or (ii) decisions about changes of accommodation or (iii) arranging care reviews or (iv) involved in adult protection measures needs to know what the IMCA service is. LAs and NHS Trusts need to identify who these staff are in order to target information and training about their new responsibilities.

2. Everyone in local authorities (LAs) or in the NHS making decisions about (i) serious medical treatment or (ii) decisions about changes of accommodation or (iii) arranging care reviews or (iv) involved in adult protection measures needs to know when to instruct an IMCA, the wide range of clients who may require an IMCA and the specific eligibility criteria for making a referral to an IMCA.

3. Everyone in LAs or in the NHS making serious medical decisions or decisions about changes of accommodation or arranging care reviews or involved in adult protection measures needs to understand the functions of the IMCA including their right to examine health and social care records as part of their work.

4. The IMCA service must start operating on 1st April. It would benefit from a steering/ advisory group to address any issues that arise. Methods of referral must be clear and widely available to all those who will be making referrals

5. Doctors and healthcare professionals need to decide who is responsible for instructing an IMCA for serious medical treatment. In the pilot areas, some doctors chose to keep the responsibility themselves; others formally delegated the responsibility of making the referral to named nurses; others had not clarified whose responsibility the referral was. All clinical teams need to make decisions on what works best for them and communicate their position on this where NHS Trusts do not agree a policy that all teams will follow the same process.

6. Hospitals may want to add a 'Need to instruct an IMCA' question to the relevant part of a patient's healthcare record or other documentation including patient discharge forms. Local authorities may want to add a Need to instruct an IMCA' question to relevant care planning documentation.

7. The regulations require LAs to consider whether each person who qualifies in accommodation reviews should have an IMCA. In practice, LAs are encouraged to develop a policy that identifies those who should be referred to an IMCA because they would particularly benefit from their support during a care review.

8. The regulations require LAs to consider whether each person who qualifies in adult protection cases should have an IMCA. In practice, LAs are encouraged to develop a policy that identifies those who should be referred to an IMCA because they would particularly benefit from their support during adult protection procedures.