WELSH STATUTORY INSTRUMENTS

2007 No. 852 (W.77)

MENTAL CAPACITY, WALES

The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007

Made - - - -	*13 March 2007*
Coming into force - -	*1 October 2007*

The National Assembly for Wales makes the following Regulations in exercise of powers conferred by sections 35(2) and (3), 36, 37(6) and (7), 38(8), 41, 64(1) and 65(1) of the Mental Capacity Act 2005(**1**) and by sections 12 and 204 of the National Health Service (Wales) Act 2006(**2**).

Title, commencement and extent

1.—(1) The title of these Regulations is the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007.

(2) These Regulations come into force on 1 October 2007 and apply to Wales.

Interpretation

2.—(1) In these Regulations—

"the Act" ("*y Ddeddf*") means the Mental Capacity Act 2005;

"IMCA" ("*EAGM*") means an independent mental capacity advocate;

"local authority" ("*awdurdod lleol*") means a county or county borough council in Wales;

"provider of advocacy services" ("*darparydd gwasanaethau eirioli*") means a body or person, including a voluntary organisation, that employs and makes available persons who may be instructed to act as an IMCA.

(2) In these Regulations, references to instructing a person to act as an IMCA are to instructions given pursuant to sections 37, 38 and 39 of the Act or to these Regulations.

Meaning of NHS Body

3. For the purposes of sections 37 and 38 of the Act, and for these Regulations "NHS body" means—

(**1**) 2005 c. 9. Section 64(1) sets out the meaning of "prescribed".
(**2**) 2006 c. 42.

(a) a Local Health Board;

(b) an NHS trust all or most of whose hospitals, establishments and facilities are situated in Wales;

(c) a Special Health Authority performing functions only or mainly in respect of Wales.

Definition 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 a person (P) and the burdens and risks it is likely to entail for P,

(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 P.

Appointment of independent mental capacity advocates

5.—(1) Subject to directions that may be given by the Assembly, a Local Health Board must make such arrangements as it considers reasonable to enable IMCAs to be available to act in respect of persons usually resident in the area for which the Local Health Board is established and to whom acts or decisions proposed under sections 37, 38 or 39 of the Act or under these Regulations relate.

(2) In making arrangements under paragraph (1) a Local Health Board may make arrangements with a provider of advocacy services.

(3) No person may be instructed to act as an IMCA unless that person is approved by the Local Health Board or is employed by a provider of advocacy services to act as an IMCA.

(4) Before approving any person under paragraph (3) a Local Health Board must be satisfied that the person satisfies the appointment requirements in paragraph (6).

(5) A Local Health Board must ensure that any provider of advocacy services with whom it makes arrangements under paragraph (2) is required, in accordance with the terms of that arrangement, to ensure that any person employed by that provider of advocacy services and who is made available to be instructed to act as an IMCA satisfies the appointment requirements in paragraph (6).

(6) The appointment requirements in paragraphs (4) and (5) are that a person—

(a) has appropriate experience or training;

(b) is of integrity and good character; and

(c) will act independently of any person who instructs him or her to act as an IMCA and of any person who is responsible for an act or decision proposed under sections 37, 38 or 39 of the Act or under these Regulations.

(7) In determining whether a person meets the appointment requirement in paragraph (6)(a) regard will be had to standards in guidance that may be issued by the Assembly.

(8) Before a determination is made for the purposes of paragraph (6)(b) in relation to any person, there must be obtained in respect of that person—

(a) an enhanced criminal record certificate issued pursuant to section 113B of the Police Act 1997(**3**); or

(**3**) 1997 c. 50. Sections 113A to 113D are inserted by section 163 of the Serious Organised Crime and Police Act 2005 (c. 14).

(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.

(9) In this regulation a person is employed by the provider of advocacy services if that person is—

(a) employed under a contract of service; or

(b) engaged under a contract for services.

Functions of an independent mental capacity advocate

6.—(1) This regulation applies where an NHS body or a local authority instructs a person to act as an IMCA to represent a person (P).

(2) The IMCA must determine in all the circumstances how best to represent and support P and must act in accordance with the requirements in paragraph (3).

(3) The IMCA must—

(a) verify that the instructions have been issued by an NHS body or a local authority;

(b) to the extent that it is practicable and appropriate to do so—

(i) interview P in private, 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.

(4) The IMCA must evaluate all the information that he or she has obtained for the purpose of—

(a) ascertaining the extent of the support provided to P to enable P to participate in making any decision about the matter in relation to which the IMCA has been instructed;

(b) ascertaining how P would feel, what P would wish and the beliefs and values that would be likely to influence P if P 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 P would be likely to benefit from a further medical opinion.

(5) The IMCA must prepare a report for the NHS body or the local authority who instructed him or her.

(6) The IMCA may include in the report such submissions as he or she considers appropriate in relation to P and the acts or decisions which are proposed in relation to P.

Challenges to decisions affecting persons who lack capacity

7.—(1) This regulation applies where an IMCA has been instructed to act and a decision (including a decision as to P's capacity) is made in relation to a person (P).

(2) The IMCA has the same rights to challenge the decision as if he or she were a person (other than an IMCA) who—

(a) was entitled, in accordance with section 4(7)(b) of the Act, to be consulted in relation to a matter about which the IMCA is now instructed; or