



‘Safeguarding the Rights of Those Who Lack Capacity’



Derbyshire IMCA Service Profile

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Introduction

The Mental Capacity Act 2005 established a new statutory scheme, introduced on 1st April 2007, known as Independent Mental Capacity Advocacy (IMCA). This provides additional safeguards for people who lack capacity to take decisions in certain specific, important situations and who are particularly vulnerable because they have no close relatives, friends or any other person to help to protect their interests.

The act also introduced a legal duty on Local Authorities and NHS Bodies to refer eligible people to the IMCA service.

Derbyshire Mind have been delivering IMCA services in Derbyshire since April 2007. From the 1st April 2009 we were also commissioned to fulfill the new statutory IMCA roles and responsibilities introduced by the Deprivation of Liberty Safeguards (DOLS) and from the 1st February 2010 we were commissioned by Derbyshire Council Council to provide a Paid Representative service in the County. This is a separate and distinct role to that of an IMCA and was also introduced by the Deprivation of Liberty Safeguards.

Which decisions require an IMCA?

Serious Medical Treatment (SMT)

This can be providing treatment, stopping treatment already being provided or deciding not to start treatment that could be offered and one or more of the following apply:

- A single treatment is proposed and there is a fine balance between the benefits, burdens and risks
- There is a choice of treatments and the decision as to which one to use is finely balanced
- What is involved is likely to have serious consequences for the person

Examples of SMT may include Chemotherapy, major surgery, ECT for non-detained patients or decisions about withdrawing/withholding life sustaining treatments.

For more information see MCA Code of Practice 10.42

Long Term Accommodation Moves (LTAMs)

This means proposals to move a person into a hospital for more than 28 days or alternative accommodation for more than 8 weeks.

There are two further types of decisions where the decision maker may instruct an IMCA if they feel it will be of particular benefit to the person but there is no legal requirement to refer.

Care Reviews

Where the Local Authority or NHS Body has arranged the original accommodation for the person lacking capacity, they intend to review those arrangements and there are no family or friends to consult, they may instruct an IMCA if it is felt that this would be of particular benefit to the person.

Safeguarding Adults at Risk

Where Safeguarding Adults at Risk procedures have been instigated and the Local Authority or NHS body proposes to take or has taken protective measures and the person has been assessed as lacking capacity to agree to those measures an IMCA may be instructed if the decision maker feels it will be of particular benefit to the person to have an IMCA involved. Local guidance states that the involvement of IMCAs in safeguarding should be reserved for complex cases.

The guidance defines complex cases as those where:

- There is a serious exposure to risk eg, death, serious physical injury or illness

- A life-changing decision is involved
- There is a conflict of views regarding the best interests of the person particularly within the family or views of important others. This may be where there is a Deprivation of Liberty in place restricting contact with the significant others and this is being challenged.
- There is a likelihood that the safeguarding case will progress to the Court of Protection.
- There is a risk of financial abuse which could have a **serious impact** on the person's welfare. Eg, where the loss of money would mean they would be unable to afford to live in their current accommodation or to pay for valued opportunities.

Where a person at risk is already supported by an advocate it is unlikely that an IMCA will be needed.

Who qualifies for an IMCA?

People who:

- Have been assessed as lacking capacity in relation to one of the decisions or acts described above, and
- Are un-befriended i.e. have no-one close to them who it would be practical or appropriate to consult (other than paid workers). , and
- Have not previously named someone who could help with a decision, and
- Have not made a Lasting Power of Attorney or Enduring Power of Attorney. However, if an attorney or deputy has been appointed solely to deal with the person's property and affairs they should not be denied access to an IMCA if all other qualifying criteria are met.

What does the Act mean by 'appropriate to consult'?

IMCA is primarily intended for people who have no-one other than paid carers who can be consulted about a decision. However, if there are family or friends but they have very limited contact with the person, know little about their wishes and views, do not want to be involved or are implicated in any safeguarding allegations then a referral to IMCA should be made.

What is the IMCA's Role?

It is the IMCA's role to make representations about the client's wishes, feelings, beliefs and values and to bring to the attention of the decision maker all factors that are relevant to the decision. This can include ascertaining alternative courses of action and seeking second medical opinions if necessary.

An IMCA's involvement with a client will be short term and decision specific. They will arrange to see the person and talk to all other people relevant to the decision in the most practical and appropriate manner. This may be by calling a 'best interests' meeting for all relevant paid professionals, by arranging individual meetings with professionals or by conducting telephone interviews. They will also examine and take copies of relevant health or social care records where necessary.

In the case of a Serious Medical Treatment decision the IMCA may request a Second Medical Opinion where necessary.

Once all information has been gathered and evaluated the IMCA is required to write a report on their findings and present this to the decision maker. The decision maker must have regard to this report when making their final decision. They must also notify the IMCA of the final decision once this has been reached.

Who is the decision maker?

The decision maker is the individual within either the Local Authority or NHS who is responsible for making certain important decisions on behalf of a person who at that time has been assessed as lacking capacity to make the decision themselves. Examples of decision makers may include a Medical Consultant, Social Worker, GP or Care Manager.

Challenging Decisions & Resolving Disagreements

There may be times when the IMCA thinks that a decision maker has not paid enough attention to their report and other relevant information and they are particularly concerned about the decision that has been made and wish to challenge it.

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

An IMCA will make every effort to resolve disagreements informally by talking to the decision maker or any other relevant person. If there is a disagreement about the person's capacity they may request a second opinion on this or a further capacity assessment.

If it is not possible to resolve the issue informally, the IMCA has available to them all avenues that any other person would have such as NHS complaints procedures, PALS services, Local Authority complaints procedures and the Independent Complaints Advocacy Service (ICAS).

In particularly serious or urgent cases or where issues have not been resolved through other avenues, an IMCA may seek permission to refer a case to the Court of Protection.

Deprivation of Liberty Safeguards (DOLS)

The MCA DOLS were introduced via the Mental Health Act 2007, which has amended the Mental Capacity Act 2005. They provide legal protection for vulnerable people who may be deprived of their liberty within the meaning of Article 5 of the European Convention on Human Rights (ECHR) in a hospital (other than under the Mental Health Act 1983) or care home, whether placed there under public or private arrangements.

The hospital or care home where the deprivation may be occurring is known as the 'Managing Authority'. The Local Authority responsible for considering requests for authorisation of a Deprivation of Liberty is known as the 'Supervisory Body'

The Deprivation of Liberty Safeguards introduced a number of new roles for IMCAs. These are known as 39A, 39C and 39D roles. IMCAs can only be instructed by the Supervisory Body to carry out these roles.

39A

Section 39A IMCAs may only be instructed when a standard authorisation is not in place. There are two possibilities:

A request has been made for a standard authorisation.
A best Interests assessor has been appointed by the Supervisory Body to check whether a person is being unlawfully deprived of their liberty.

The 39A IMCA's role is to represent the person in the assessments which will be carried out. In both cases the person should have no one appropriate to

consult. The Best Interest Assessor (BIA) is required to take account of any representations made by the IMCA.

39C

One of the key safeguards for people who are deprived of their liberty is the Relevant Person's Representative (RPR). The expectation is that there will be a family member or friend who is willing and able to take on this role. The role of a 39C IMCA is to fill any gaps in the appointment of an RPR. 39C IMCAs must be instructed when a standard authorisation is in place if the appointment of a RPR ends and there is no one appropriate to consult who could represent the person's best interests.

39C IMCAs have the powers of the RPR to demand a review and non-means tested access to the Court of Protection. Instructing a 39C IMCA allows people who are deprived of their liberty under the safeguards to always have someone independent to represent their interests.

A 39C IMCA may be required, for example, if a sister appointed as an RPR dies and there is no other family member or friend who can represent the person.

Where there are good commissioning arrangements in place so that Supervisory Bodies can appoint paid representatives promptly, the need for the 39C IMCA role is rare.

39D

The role of a 39D IMCA is to support the person and/or their RPR to understand the DOLS authorisation and their rights in relation to this. A 39D IMCA is instructed where the person or their RPR has requested this or where the Supervisory Body believes that they would benefit from the support of an IMCA.

The Paid Representative

If a person deprived of their liberty under the safeguards does not have anyone who can or wants to fulfill the role of RPR the Supervisory Body is required to appoint a Paid Representative who must be independent of the Local Authority or Primary Care Trust who appoints them.

The role of the representative is set out in Paragraph 140 of Schedule A1 of the amended MCA, and described in the DOLS Code of Practice (Paragraph 7.2) as:

'to maintain contact with the relevant person, and

'to represent and support the relevant person in all matters relating to the Deprivation of Liberty Safeguards, including, if appropriate, triggering a review, using an organisation's complaints procedures on the person's behalf or making an application to the Court of Protection.'

The role involves supporting the relevant person to understand the Deprivation of Liberty authorisation and their rights in relation to this. It also involves monitoring any conditions set out in the authorisation by talking to relevant people and examining relevant records.

Where conditions are not being met or there has been a change in circumstance, perhaps in relation to the person's capacity the Paid Representative will request a review of the DOL. Where appropriate, the Paid Representative will raise complaints on behalf of the person or make an application to the Court of Protection.

The Role of Litigation Friend

It is the role of the Official Solicitor to act as Litigation Friend for people who lack capacity within the meaning of the Mental Capacity Act 2005 to conduct the litigation in question.

He usually becomes formally involved when appointed by the court, and either acts himself, or instructs a private firm of solicitors to act for him. However, the Official Solicitors office has reached capacity and is experiencing lengthy waiting lists. It is becoming more and more common for IMCAs and Paid Representatives to be appointed by the Court to act as litigation friend in Court of Protection proceedings.

A Litigation Friend acts on the person's behalf throughout their claim. The suitability of a Litigation Friend to act for a Claimant must be confirmed by the Court to ensure that they act in the best interests of the person and that there is no conflict of interest. A Litigation Friend must also be in regular contact with the person because all instructions for their solicitor are given by them and they will also deal with all correspondence on their behalf.

How to Refer?

Referrals can be made by:

Tel: 01332 380224

Post: Sarah Harrison
Service Manager
Derbyshire IMCA Service
c/o Derbyshire Mind
Albany House
Kingsway Hospital
Derby DE22 3LZ

Email: advocacy@derbyshiremind.org.uk

Referral forms can be downloaded from the website
www.derbyshiremind.org.uk