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INDEPENDENT MENTAL CAPACITY ADVOCATE PROCEDURE (Mental Capacity Act 2005)

Introduction and Aim

This procedure explains what Independent Mental Capacity Advocates (IMCA) are and the legal duties of Cardiff and Vale University Health Board (UHB) in relation to IMCA.

The Mental Capacity Act 2005 (MCA) makes provision for the IMCA service and the **legal duty** to instruct the IMCA service about certain decisions where patients

- aged 16 years and over lack mental capacity to make those decisions
- have no-one (apart from paid carers) whom it would be appropriate to consult with about their best interests

The decisions are: serious medical treatment and a move to, or a change in, long term accommodation. The UHB may also wish to instruct an IMCA in safeguarding adults (adult protection) cases and care reviews.

Under the Deprivation of Liberty Safeguards (DoLS) provisions, there is also a requirement for the Supervisory Body (UHB) to appoint IMCA in certain circumstances.

This procedure provides further information and detail in support of sections 8.50 – 8.53 (Independent Mental Capacity Advocates) of the UHB Consent to Examination or Treatment Policy.

The MCA Code of Practice states (para 10.14) that organisations should have procedures for staff regarding IMCA.

Objectives

- Adherence to this procedure means that health professionals will be acting lawfully when providing patients with impaired mental capacity with treatment and care
- The UHB will be acting lawfully with respect to the DoLS provisions

Scope

This procedure applies to all health professionals employed by the UHB, including those on honorary contracts, who make decisions about

- Providing serious medical treatment
- Admissions to and discharges from hospital
- Safeguarding adults (adult protection)

- Care reviews of patients in NHS funded accommodation

It also applies to UHB staff who undertake the duties of the Supervisory Body in accordance with the DoLS provisions.

Equality Health Impact Assessment	An Equality and Health Impact Assessment (EHIA) has not been completed, as this procedure has been developed in support of the Consent to Examination or Treatment Policy.
Documents to read alongside this Procedure	Consent to Examination or Treatment Policy, 2023 Mental Capacity Act 2005 Code of Practice Mental Capacity Act 2005 Deprivation of Liberty Safeguards Code of Practice
Approved by	

Accountable Executive or Clinical Board Director	Executive Nurse Director
Author(s)	LPS Project Lead

Disclaimer

If the review date of this document has passed please ensure that the version you are using is the most up to date either by contacting the document author or the Governance Directorate.

Summary of reviews/amendments

Version Number	Date of Review Approved	Date Published	Summary of Amendments
2	29/11/17	13/12/17	• Minor amendments – e.g. changes of word order, updating references to other documents, etc • Inclusion of para 7.3 – DoLS Relevant Person's Representative
3			• Minor amendments – changes to page numbers, titles, references and contacts updated

CONTENTS

1. RESPONSIBILITIES

Executive responsibility for this procedure lies with the Executive Nurse Director.

Clinical Board Directors are responsible for ensuring that staff are aware of this procedure, how to access it and what to do if they have queries about it.

All staff who make decisions (i.e. the decision-makers) about

- Providing serious medical treatment
- Admissions to and discharges from hospital
- Safeguarding adults (adult protection))
- Care reviews of patients in NHS funded accommodation

have a responsibility to familiarise themselves with, and follow the content of, this procedure and to ensure that they remain up to date with regard to relevant legislation, case law and guidance regarding IMCA.

Staff who undertake Supervisory Body duties under DoLS are also required to comply with this procedure.

The Mental Capacity Team is responsible for ensuring that this procedure is updated as necessary; that relevant training is available; and to provide information, support and training to UHB staff as required.

NOTE: Where staff are unsure about the legal aspects of IMCA in a particular case, they must seek advice from the Mental Capacity Team in the first instance. If this does not resolve the matter and legal advice is needed, staff must contact the Head of Risk and Regulation in order to arrange this. Please see Appendix A for contact details.

2. RESOURCES

No extra resources are required to implement this procedure.

3. TRAINING

Specific training is not required for this procedure. However, the Mental Capacity Team can provide training on this procedure, or as part of more general Mental Capacity Act training, if required.

4. IMPLEMENTATION

Clinical Board Directors are responsible for ensuring that staff who work within their Clinical Boards are familiar with and follow this procedure, where necessary. The Mental Capacity Team will provide support as required.

5. THE ROLE OF IMCA

The IMCA's role is to represent and support the person in question.

IMCAs should (this list is not exhaustive)

- Confirm that the person instructing them from the UHB has the authority to do so (i.e. is the decision-maker – the person who needs the decision made, or someone the decision maker has asked to instruct the IMCA on their behalf)
- Where possible, meet and talk to the person in question
- Discuss the person and their situation with the healthcare team and other paid staff who look after the person
- Obtain the views of anyone else who can provide information about the wishes, feelings, values and beliefs of the person in question
- Find out what, if any, alternative options there are for the person
- Where appropriate, seek a second medical opinion
- Support the patient to access the safeguards enshrined in the MCA

The IMCA must provide a report on their findings to the decision maker.

6. CIRCUMSTANCES IN WHICH AN IMCA MUST BE INSTRUCTED

6.1 Serious Medical Treatment

The UHB (in practice, the healthcare professional who needs to make the decision) has a duty to instruct an IMCA where decisions are being made about "serious medical treatment" where the person (aged 16 years and over)

- Lacks mental capacity to make the decision, and
- Has no-one, other than paid care staff, with whom it is appropriate to consult about whether the decision is in the person's best interests,

Serious medical treatment is that which involves giving new treatment, stopping treatment that has already started or withholding treatment that could be offered where

- There is a fine balance between the likely benefits and the burdens and risks of a single treatment

- A decision between a choice of treatments is finely balanced,
- What is proposed is likely to involve serious consequences for the patient

Serious consequences are those which could have a serious impact on the person. It could include treatments which

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

Whether the treatment is "serious" will depend on the individual patient's situation and circumstances, but may include

- Cancer surgery and chemotherapy
- Electro-convulsive therapy
- Therapeutic sterilisation
- Major surgery (e.g. heart, brain surgery)
- Amputation
- Treatment that involves permanent loss of hearing or sight
- Withholding or stopping artificial nutrition and hydration
- Termination of pregnancy

Where an urgent decision is needed – e.g. to save the person's life - an IMCA does not need to be instructed. This reason for non-referral must be recorded. However, if serious medical treatment is required after the emergency treatment, an IMCA must be instructed.

There is no duty to instruct an IMCA if the proposed treatment is for a mental disorder and that treatment is authorized under the Mental Health Act 1983. However, if a person is subject to the Mental Health Act and the proposed treatment is for physical illness e.g. cancer, an IMCA must be instructed.

6.2 Change of Accommodation

An IMCA must be instructed where a decision is needed about a move to or a change in accommodation, arranged or provided by the NHS (including residential care that is provided under s.117 of Mental Health Act 1983)

- Where the person lacks capacity to make the decision, and
- There are no family or friends who it is appropriate to consult about the person's best interests, and
- The move is likely to be for a period of 28 days or more in hospital, or

8 weeks or more in a care home

If the person's stay is longer than was expected and so exceeds the time periods above, an IMCA must be instructed.

If the placement or move is urgent, an IMCA need not be instructed, but the decision-maker (i.e. the person who needs the decision made) must involve an IMCA as soon as possible if the person is likely to stay in hospital longer than 28 days, or longer than 8 weeks in a care home.

6.3 Deprivation of Liberty Safeguards (DoLS)

The Deprivation of Liberty Safeguards (DoLS) provide a legal framework for depriving a person who, because of mental disorder, is unable to consent to their accommodation in a hospital (other than under the Mental Health Act 1983) or care home in order to receive treatment and care. In certain circumstances, a person who is subject to DoLS must have an IMCA instructed for them.

An IMCA must be appointed in the following circumstances -

a) Section 39A of MCA

This applies where

- An urgent authorisation is given, or
- A standard authorisation is requested and there is not an existing authorisation in force, or
- An assessment is being undertaken to decide whether there is an unauthorised deprivation of liberty

The Managing Authority (the part of the UHB that is providing the care – i.e. the ward) must ascertain whether there is anybody, other than people engaged in providing care or treatment in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in the best interests of the person to whom the request for the authorisation relates.

If there is not, the Managing Authority must notify the Supervisory Body, and the Supervisory Body must instruct an IMCA to represent the person.

b) Section 39C of MCA

This provides for the appointment of an IMCA if the relevant person's representative's (RPR) appointment ends and the Managing Authority is satisfied that there is nobody, other than people engaged in providing care or

treatment in a professional capacity or for remuneration, whom it is appropriate to consult in determining what would be in the person's best interests. Again, the Managing Authority must notify the Supervisory Body that this is the case, and the Supervisory Body must then instruct an IMCA to represent the person.

The IMCA's role in this case comes to an end upon the appointment of a new RPR for the person.

c) Section 39D of MCA

This provides for the instruction of an IMCA by the Supervisory Body where

- The relevant person does not have a paid RPR, and
- The person themselves or their representative requests that an IMCA is instructed to help them, or
- The Supervisory Body believes that instructing an IMCA will help to ensure that the person's rights are protected.

7. CIRCUMSTANCES IN WHICH AN IMCA MAY BE INSTRUCTED

7.1 Safeguarding Adults (Adult protection)

The NHS has powers to instruct an IMCA for a person who lacks capacity where it is alleged that

- The person is being or has been abused or neglected by another person, or
- The person is abusing or has abused another person

In such cases, an IMCA can be instructed even if the person in question has family and friends who are available to be consulted about the person's best interests. The decision-maker must be satisfied that the involvement of IMCA will benefit the person.

An IMCA can only be instructed if the health care professional proposes to take, or has already taken, protective measures.

Responsibility for deciding whether an IMCA should be instructed sits with the professional leading the safeguarding investigation. They must consider whether an IMCA should be instructed for all people at risk. They must also make a decision about instructing an IMCA at both the strategy discussion/meeting and the case conference/safeguarding planning stages. Their reasons for not instructing IMCA must be recorded.

If, as a result of the safeguarding process, it is proposed that the person in question be moved to alternative accommodation and there are no family or friends who it would be appropriate to consult, an IMCA must be instructed.

7.2 Care Reviews

A healthcare professional can instruct an IMCA when

- They have arranged accommodation for the incapacitated person
- They aim to review the arrangements (as part of a care plan or otherwise)
- There are no family or friends whom it would be appropriate to consult

Reviews should relate to decisions about accommodation

- For someone who lacks capacity to make a decision about accommodation that will be provided for a continuous period of more than 12 weeks and has been arranged by the UHB
- That are not the result of an obligation under the Mental Health Act 1983

Involvement of an IMCA should be considered at each initial care review following a change of accommodation and subsequently if there is still uncertainly about the placement. An IMCA must be involved if an IMCA was involved in the initial placement.

The decision maker's reasons for not instructing IMCA must be recorded in the patient's notes.

7.3 DoLS Relevant Person's Representative (RPR)

If no-one can be found who is suitable and eligible to act as a patient's RPR under DoLS, then IMCA may be appointed.

The role of the RPR is to

- Maintain contact with the patient
- Represent and support the patient with regards to DoLS – such as, where appropriate, asking for a review of the authorisation, making a complaint, or appealing to court against the authorisation

8. WORKING WITH IMCA

The decision-maker (except where IMCA is appointed as RPR)

- Must identify those occasions where they have a duty to instruct IMCA and those situations where they have discretion to instruct an IMCA (If the decision maker is unsure about whether an IMCA should be instructed in any particular case, they should contact the IMCA office for advice (Tel: 029 2054 0444)
- Must instruct IMCA by completing the IMCA referral form - http://www.ascymru.org.uk/english/contact-us (scroll down the page to find the IMCA referral form link) and emailing or faxing the form to the IMCA office (details on the form)
- Must let all relevant people know when an IMCA is involved in a case
- Must record the IMCA's involvement in the case
- Must give the IMCA access to relevant medical records
- Must, on receipt of the IMCA's report, consider it in determining the best interests of the person in question
- Must record how they have taken the IMCA's report into consideration, including any reason for disagreeing with the IMCA's findings
- Must inform the IMCA of the final decision taken and the reason for it.

In the event of disagreement about the person's best interests, the decision maker and IMCA should try to settle the disagreement through discussion as soon as possible. If they cannot achieve resolution, then the matter must be dealt with through the Concerns system.

If there is no other way of resolving the dispute, an application may need to be made to the Court of Protection.

9. AUDIT

Adherence to this procedure will be monitored by a variety of processes, which may include structured and ad-hoc case note review and as part of the UHB and Clinical Board/Directorate clinical audit plan.

Related clinical audit activity which may include monitoring compliance with this procedure, will be reported to Clinical Board Quality, Safety and Experience Groups and the UHB's Mental Health Legislation and Mental Capacity Act Committee.

10. DISTRIBUTION

This procedure will be made available on the UHB intranet, Clinical Portal and internet site.

11. REVIEW

This procedure will be reviewed every 3 years or sooner if appropriate.

APPENDIX A

Useful contact details

Mental Capacity Team, Tel. 029 2183 2001

Aaron Fowler, Head of Risk and Regulation, Tel. 029 2183 6012 (in relation to accessing legal advice)

DoLS Team, Tel. 01446 704849