

Joint guidance on the instruction of Independent Mental Capacity Advocates (IMCA):-

**NHS Great Yarmouth and Waveney.
Ipswich Hospital NHS Trust
James Paget Hospital NHS Trust
Norfolk and Suffolk NHS Foundation Trust
Suffolk County Council
NHS Suffolk
West Suffolk Hospital NHS Trust**

(THIS GUIDANCE MUST BE READ IN CONJUNCTION WITH CHAPTER 10 OF THE MENTAL CAPACITY ACT CODE OF PRACTICE)

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

1.1 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 Suffolk, this service is provided by VoiceAbility www.voiceability.org/in_your_area/suffolk/independent_mental_capacity_advocacy_imca

1.2 The purpose of the IMCA service is to help people who lack the capacity to make important decisions about serious medical treatment and changes of long-term accommodation. It **must be (statutory obligation)** 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 by Regulation to include two further situations (adult protection and accommodation care reviews) where an IMCA **may be** instructed.

1.3 The IMCA service provides additional safeguards for people aged 16 or older who:

- Have been formally assessed to be lacking mental capacity (*to make specific decisions for issues as set out in 1.2*),
- Are un-befriended.
- Reside in the County of Suffolk at the time the decision needs to be made.

1.4 An IMCA is someone instructed by a health or care professional, to support and represent a person who lacks capacity to make certain serious decisions. Their role is to gather information, provide support to the customer/patient involved in the decision and make representations about that person's wishes, feelings, beliefs and values (see section 3 of this guidance).

The IMCA must also bring to the attention of the decision-maker (e.g. Adult and Community Services assessor or relevant health professional) all of the factors that are relevant to the decision. The IMCA is able to challenge the decision-maker.

2. In what situations should an IMCA be instructed?

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

- A decision needs to be made about providing, withholding or stopping serious medical treatment provided by the NHS (but excluding treatment regulated under Part 4 of the Mental Health Act 1983).
- The County Council or the Primary Care Trust propose that a person should be moved into or between long-term care accommodation (which is defined as more than 28 days in the case of a hospital and likely to be more than 8 weeks in the case of a care home), as long as the move to this accommodation is not a requirement of the Mental Health Act 1983.

2.2 In addition to the situations described in 2.1, the County Council or the appropriate NHS body **may** involve an IMCA in care reviews and adult protection cases where the person lacks 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 protection cases the requirement that the person has no family or friends does not apply.

3. What is an IMCA's role?

3.1 In carrying out their responsibilities an IMCA:

- Must confirm that the person instructing them has the authority to do so.
- Should, if possible, interview or meet in private with the person who lacks capacity.
- 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 the views of professionals and paid workers providing care or treatment for the person who lacks 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 capacity.
- Should obtain any other information they think will be necessary.
- Must find out what support a person lacking 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 s/he had capacity.
- Should find out what alternative options exist.
- Should consider whether getting another medical opinion would help the person who lacks capacity.
- Must write a report on their findings for the Decision Maker who is acting on behalf of the County Council or the responsible NHS Body.

The decision maker must take any information and/or report provided by an IMCA into account and notify VoiceAbility in writing of the best interest decision(s) that has been made, in a timely manner.

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

4.1 When a Consultant / Doctor or other healthcare professional is proposing to provide, withhold or stop serious medical treatment for someone who lacks capacity to give consent and there is nobody appropriate to consult, other than paid staff, there is a **statutory obligation** to instruct an IMCA.

4.2 For decisions about serious medical treatment, the responsible body is **the NHS organisation providing the person's healthcare or treatment**. **Section 37** of the Act imposes a duty on the NHS bodies to instruct an IMCA - this 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.

4.3 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:

- A single treatment is proposed but there is a fine balance between the likely benefits/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. The Code of Practice defines serious consequences as those actions that "could have a serious impact on the patient, 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).

4.4 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.

The Code of Practice emphasises that this list is illustrative and that there are “many more treatments which will be defined as serious medical treatments.”

4.5 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 or withholding of artificial nutrition and hydration from patients in a permanent vegetative state
 - Cases involving organ or bone marrow donation by a person lacking capacity to consent
 - Cases involving the proposed non-therapeutic sterilisation of a person who lacks 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 capacity.

4.6 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.

4.7 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 **statutory** 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 capacity).

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

5.1 Where a person lacks 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 in long-term hospital (*NHS or an Independent hospital*) accommodation for more than 28 days, **or** move them within the hospital complex **or** to a different hospital for more than 28 days.
- The County Council or the responsible NHS body are proposing to place a person in a care home for more than 8 weeks **or** move them to a different 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 by 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 accommodation.

5.2 The MCA states that “care home” has the meaning given in the Care Standards Act 2000 i.e. “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. In order to ensure that there is independent input into decisions about long-term care accommodation where people lack capacity and have no friends or relatives to consult, the County Council and relevant NHS bodies in Suffolk have decided to adopt

the Code of Practice definition of long-term care accommodation where decisions about instructing IMCA's are concerned.

- 5.3 In situations where a placement or move is urgent, the NHS Bodies / PCT 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.
- 5.4 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.
- 5.5 IMCA's 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.
- 5.6 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 an IMCA if the County Council assess them as requiring accommodation in a care home, even when the person pays their own fees.

6. When may an IMCA be instructed in the case of care reviews?

6.1 An IMCA **may** be instructed to represent a person in a care review in the following circumstances:

- Following “best interest” decisions resulting in an accommodation move, this provides a second opportunity to review the accommodation move and check that it had really been in the “best interest” of the person, who had not been able to consent to the move.
- 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 (as in 5.2 above), and
- The person does not have capacity to participate in the proposed review and
- Has been in the accommodation continuously for 12 weeks or more 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).

6.2 An individual decision on whether to instruct an IMCA **must** be made in **each case** that meets the criteria at 6.1. 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 e.g. a change of room or a move to another unit within a care home.
- Changes to the person’s care package are going to be considered which may have implications for his/her quality of life, e.g. special staffing arrangements for the person are going to be introduced or stopped.
- 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 customer and the assessor.

- Changes are being made to charging arrangements that will have an impact upon the customer.
- Additional sanctions or controls in relation to a customer's behaviour are going to be discussed.
- Restraint has been applied to any customer.

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.

6.3 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.

7. When may an IMCA be instructed in cases of adult protection?

There is a requirement to consider whether an IMCA should be instructed in Adult Safeguarding cases. The responsibility for this decision sits with the Safeguarding Manager who must make a decision about instructing an IMCA at the strategy discussion/ meeting, case conference/ safeguarding planning and safeguarding review stages. Involving an IMCA early will ensure independent representation during all decisions.

The Safeguarding Manager should ensure that a referral for an IMCA is considered for all people at risk or whether an IMCA already working with that person be additionally instructed to include safeguarding adult's issues, **when protective measures are being considered and the person is assessed as lacking capacity in regard to one or more of the protective measures.**

The IMCA will focus on decisions concerning the protective measures including any decision not to take protective measures. Their role will be to support and represent the person in relation to these decisions, which must comply with the Mental Capacity Act.

Where a person at risk already has an independent advocate, this may be considered sufficient, depending upon the capacity of that service to provide advocacy support during the safeguarding adult's process

- 7.1 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 capacity is being, or has been abused or neglected, **or**
 - Where a person lacking capacity is, or has been abusing another person.

An IMCA can **only** be instructed where protective measures have been taken, are proposed, or interim measures are put in place in accordance with the statutory guidance in "No Secrets."

An IMCA may be instructed in adult protection cases even if the person has family or friends who can be consulted. The safeguarding manager should ensure that independent support and representation is available to the person at risk if one of the following applies:

- There is serious exposure to risk of death, serious physical injury or illness (or serious deterioration in physical or mental health), or serious emotional distress.
- A life changing decision is involved and consulting family or friends is compromised by the reasonable belief that they would not have the person's best interests at heart.
- There is a conflict of views between the decision makers regarding the best interests of the person
- There is a risk of financial abuse which could have a serious impact on the welfare of the person at risk.

An IMCA instruction is just one way that the person at risk may access independent representation. This could be provided by involving an independent advocate or by an appropriately skilled independent advocate already providing support to the person. The following should be considered when deciding whether an IMCA should be specifically instructed in addition to or as an alternative to other forms of representation:

- Whether the person could benefit from advocacy support on issues other than those related to safeguarding adults.

- Whether an IMCA has been or should be instructed for any other matter.
- Whether the IMCA's right to access relevant records will make a significant difference for the person.
- The availability of the IMCA or other appropriately skilled advocacy service to support the person during the safeguarding adult's process.
- Whether the decision regarding protective measures go beyond or are different to the reason for any existing IMCA instruction.
- If moving the person at risk is being considered as a protective measure, there may be a requirement to instruct an IMCA for an accommodation decision, where there is no one appropriate to consult.

Where both the alleged perpetrator and alleged victim of abuse could benefit from independent representation, conflict of interest should be minimised or avoided by a different advocate or IMCA representing each person. Where possible the two independent representatives will come from different organisations.

Once an IMCA or advocate has been instructed, it is the responsibility of the Safeguarding Manager to ensure that they are invited to **all safeguarding meetings**.

7.2 In some situations a case may begin as an adult protection matter where an IMCA **may** be involved in line with the criteria at 7.1. However, where decisions have to be made about moving a person (e.g. into a care home) an IMCA **must** be involved if the person has no friends or family whom it is appropriate to consult.

7.3 An individual decision **must** be made in each case that meets the criteria at 7.1 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 capacity or between the person lacking capacity and the professional decision-maker.
- Where there is a 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 protection conference involves a life-changing decision or serious exposure to risk.

For further information on IMCA practice in Adult Safeguarding cases, please see SCIE Guidance 32.

www.scie.org.uk/publications/guides/guide32/index.asp

8. IMCA's and Enduring or Lasting Power of Attorney or deputies of the Court of Protection

8.1 The Mental Capacity Act has been amended to allow IMCA instruction where the person has a Lasting Power of Attorney or Court appointed Deputy. They must also satisfy the other eligibility criteria.

9. Defining whom it is "appropriate to consult."

9.1 Instructing an IMCA is a safeguard for people who lack capacity and have no one close to them whom it would be "practicable and appropriate to consult" (excluding adult protection cases). The Act does not define "practicable and appropriate to consult" (MCA), but does say that consultation about a person's best interests could be with someone:

- named by the person as someone to be consulted on a relevant decision.
- engaged in caring (unpaid) for them
- interested in their welfare

The decision-maker must determine if it is possible and practical to speak to the people above or any of the people described at 2.3 of this guidance. If it is not possible, practical or appropriate to consult any of these people an IMCA should be instructed.

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

- An older person with dementia may have an adult child who lives in Australia.
- 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 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 may 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.

10. The Decision Makers role and responsibilities

- Contact VoiceAbility if the conditions for a referral are met and submit the IMCA Referral Form and the Functional Test of Capacity.
- Decision Makers let all relevant people know when an IMCA is working on a person's case.
- Part of the IMCA role is to obtain and evaluate information. IMCA's have a legal right to take copies of, or examine any records (NHS, local authority or care home) which the record holder considers relevant to the IMCA's role.
- IMCA has to ascertain any alternative courses of action available; to do this the IMCA has the right to obtain further medical opinion, if it is considered necessary.
- Ensure that the IMCA is involved / invited to appropriate care planning meetings, adult protection meetings and Best Interest meetings to enable them to gather information and submit their findings.
- Make sure that the IMCA gets information about changes that may affect the support and representation the IMCA provides.

- Consider the details contained within the IMCA's Report(s). Record an IMCA's involvement in a case and any information the IMCA provides to help decision making.
- Also record that you (the Decision Maker) has taken into account the IMCA report and information as part of the process of working out the persons best interests (this should include reasons for disagreeing with that advice, if relevant)
- Make a decision, considering the details contained in the IMCA's Report.
- Consider the other points highlighted within the IMCA's Report.
- Keep the IMCA informed of the final decision taken and the reason for it.
- Forward the Decision-Makers Report to VoiceAbility service within 10 days of the decision being made.
- Submit the VoiceAbility Feedback Form

11. IMCA roles within the Deprivation of Liberty Safeguards (DoL's).

Under Deprivation of Liberty Safeguards (DOLs), an IMCA must be appointed by the Supervisory Body in specified circumstances:

- A section 39A IMCA must be appointed immediately to represent the relevant person, if there is nobody to represent them during the assessment process other than a professional or paid carer.
- IMCA acting as an interim RPR. A person who is being deprived of their liberty must have someone to represent their interests at all times. This is the role of the relevant person's representative (RPR), usually a friend or family member, who should be consulted and informed about all matters relating to the care or treatment of their friend or family member while the authorisation lasts. If the RPR has to give up their position for any reason, and a new RPR is not appointed immediately, the managing authority must notify the supervisory body, who must instruct a section 39C IMCA to represent

the person, temporarily, until a new friend, family member or professional representative is appointed.

- Both the person who is deprived of liberty under a standard authorisation and their unpaid representative (RPR) have a statutory right of access to an IMCA under section s39D IMCA). If a relevant person or their unpaid representative requests such advocacy support, the supervisory body must instruct an IMCA who will:

The role of IMCA's for people under Dol's is different to the IMCA role when appointed in other situations, as follows:-

Assessment process

- Provide information to the Best interest Assessor (BIA) which must be taken into account – oral / written report.
- Receive copies of the assessments and Dol's authorisation
- Notified of any failed assessments
- Notified when urgent authorisations/ standard authorisations expire
- Notified when requests to extend urgent authorisation refused/ granted

Post assessment process

- Supports the detained person or their representative understand their rights, the reasons for and effects of, an authorisation given under Dol's.
- Support with requesting a review or exercising other rights
- Apply to the Court of Protection for permission to take the detained person to the court.
- The IMCA may provide support to the person or the representative if they wish to make an application to the court.

Clarifying roles

Advocates, including those already providing IMCA services, may be commissioned to provide paid RPR services too. In such circumstances, everyone involved in the governance and delivery of the advocacy service must distinguish between the roles that advocates fulfil as IMCAs and as RPRs as each role has its own particular statutory requirements.

12. Making a referral to an IMCA

The referral form to instruct an IMCA is attached as an Appendix to this guidance.

Contact details for VoiceAbility IMCA service, as follows:

VoiceAbility Head Office
Mount Pleasant House
Mount Pleasant
Huntingdon Road
Cambridge
CB3 0RN
Tel: 01223 555800
Fax: 0208 3306622

VoiceAbility (IMCA)
VoiceAbility Suffolk
Westbury House
630 Woodbridge Road
Ipswich
IP4 4PG
Ipswich 01473 857631 or 0845 0175198
ipswich@voiceability.org
Lowestoft 01502 561200
lowestoft@voiceability.org

Website:

www.voiceability.org/in_your_area/suffolk/independent_mental_capacity_advocacy_imca

To email referral forms and other information:

imca@voiceability.org