

Draft Regulations laid before Parliament under section 65(4) of the Mental Capacity Act 2005, for approval by resolution of each House of Parliament.

DRAFT STATUTORY INSTRUMENTS

2006 No.

MENTAL CAPACITY, ENGLAND

The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Role) Regulations 2006

Made - - - -

Coming into force in accordance with regulation 1(2)

The Secretary of State makes these Regulations in exercise of the powers conferred on her by sections 41(1) and (2), 64(1) and 65(1) of the Mental Capacity Act 2005(1).

A draft of this instrument has been laid before Parliament in accordance with section 65(4) of the Mental Capacity Act 2005 and approved by resolution of each House of Parliament.

Citation, commencement, extent and interpretation

1.—(1) These Regulations may be cited as the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Expansion of Role) Regulations 2006.

(2) These Regulations shall come into force—

- (a) for the purpose of enabling the Secretary of State to make arrangements by virtue of regulation 2, on 1st November 2006, and
- (b) for all other purposes, on 1st April 2007.

(3) These Regulations apply in relation to England only.

(4) In these Regulations—

“the Act” means the Mental Capacity Act 2005;

“IMCA” means an independent mental capacity advocate; and

“NHS body” means a body in England which is—

- (a) a Strategic Health Authority;
- (b) an NHS foundation trust;
- (c) a Primary Care Trust;
- (d) an NHS Trust; or

(1) 2005 c.9. Section 64(1) is cited because of the meaning there given to “prescribed”.

(e) a Care Trust.

(5) In the definition of “NHS body” in paragraph (4)—

“Care Trust” means a body designated as a Care Trust under section 45 of the Health and Social Care Act 2001(2);

“NHS foundation trust” has the meaning given in section 1 of the Health and Social Care (Community Health and Standards) Act 2003(3);

“NHS trust” means a body established under section 5 of the National Health Service and Community Care Act 1990(4);

“Primary Care Trust” means a body established under section 16A of the National Health Service Act 1977(5); and

“Strategic Health Authority” means a Strategic Health Authority established under section 8 of the National Health Service Act 1977(6).

Adjustment of the obligation to make arrangements imposed by section 35 of the Act

2. Arrangements made by the Secretary of State under section 35 of the Act may include such provision as she considers reasonable for the purpose of enabling IMCAs to be available to represent and support persons in the circumstances specified in regulation 3 or 4.

Review of arrangements as to accommodation

3.—(1) The circumstances specified in this regulation are where—

(a) qualifying arrangements have been made by an NHS body or local authority as to the accommodation of a person (“P”) who lacks capacity to agree to the arrangements;

(b) a review of the arrangements is proposed or in progress (whether under a care plan or otherwise);

(c) the NHS body is satisfied, or the local authority are satisfied, that there is no person, other than a person engaged in providing care or treatment for P in a professional capacity or for remuneration, whom it would be appropriate to consult in determining what would be in P’s best interests;

(d) none of the following exist—

(i) a person nominated by P (in whatever manner) as a person to be consulted in matters affecting his interests,

(ii) a donee of a lasting power of attorney created by P,

(iii) a deputy appointed by the Court of Protection for P, or

(iv) a donee of an enduring power of attorney (within the meaning of Schedule 4 to the Act) created by P; and

(e) sections 37, 38 and 39 of the Act do not apply.

(2) In this regulation—

“accommodation” means—

(2) 2001 c.15.

(3) 2003 c.43.

(4) 1990 c.19. Section 5 is amended by paragraph 69(1)(b) and (d) of Schedule 1 to the Health Authorities Act 1995 (c.17), paragraph 65(2) of Schedule 2 to the National Health Service (Primary Care) Act 1997 (c.46) and sections 13(1) and (10) and 14 of the Health Act 1999 (c.8).

(5) 1977 c.49. Section 16A is inserted by section 2(1) of the Health Act 1999.

(6) Section 8 of the National Health Service Act 1977 is substituted by section 1(2) of the National Health Service Reform and Health Care Professions Act 2002 (c.17).

- (a) accommodation in a care home or hospital, or
 - (b) residential accommodation provided in accordance with—
 - (i) section 21 or 29 of the National Assistance Act 1948(7), or
 - (ii) section 117 of the Mental Health Act 1983(8),as the result of a decision taken by a local authority under section 47 of the National Health Service and Community Care Act 1990(9);
- “care home” and “hospital” have the same meaning as in section 38 of the Act; and
- “qualifying arrangements” means arrangements—
- (a) under which accommodation has been provided for P for a continuous period of 12 weeks or more, and
 - (b) which are not made as a result of an obligation imposed on P under the Mental Health Act 1983.

Adult protection cases

- 4.—(1) The circumstances specified in this regulation are where—
- (a) an NHS body proposes to take or has taken, or a local authority propose to take or have taken, protective measures in relation to a person (“P”) who lacks capacity to agree to one or more of the measures;
 - (b) the proposal is made or the measures have been taken—
 - (i) following the receipt of an allegation or evidence that P is being, or has been, abused or neglected by another person or that P is abusing, or has abused, another person, and
 - (ii) in accordance with arrangements relating to the protection of vulnerable adults from abuse which are made pursuant to guidance issued under section 7 of the Local Authority Social Services Act 1970(10); and
 - (c) none of the following provisions apply—
 - (i) section 37, 38 or 39 of the Act, or
 - (ii) regulation 3 of these Regulations.

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- (7) [1948 c.29](#) (11&12 Geo 6). Section 21 is amended by paragraph 2(1) of Schedule 23 and Schedule 30 to the Local Government Act 1972 ([c.70](#)), paragraph 44 of Schedule 4 and Schedule 5 to the National Health Service Reorganisation Act 1973 ([c.32](#)), the Schedule to the Housing (Homeless Persons) Act 1977 ([c.48](#)), paragraph 13(1) of Schedule 14 to the National Health Service Act 1977, paragraph 11(1) of Schedule 13 to the Children Act 1989 ([c.41](#)), section 42(1) of, and paragraph 5(1) to (3) of Schedule 9 and Schedule 10 to, the National Health Service and Community Care Act 1990, section 1 of the Community Care (Residential Accommodation) Act 1998 ([c.19](#)), section 116 of the Immigration and Asylum Act 1999 ([c.33](#)), section 53 of the Health and Social Care Act 2001 and section 45(5) of the Nationality, Immigration and Asylum Act 2002 ([c.41](#)). Section 29 of the National Assistance Act 1948 is amended by section 1(2) of the National Assistance (Amendment) Act 1959 ([c.30](#)) (7&8 Eliz 2), paragraph 2(4) of Schedule 23 and Schedule 30 to the Local Government Act 1972, paragraph 3 of Schedule 3 to the Employment and Training Act 1973 ([c.50](#)), paragraph 6 of Schedule 15 to the National Health Service Act 1977, Part 1 of Schedule 10 to the Health and Social Services and Social Security Adjudications Act 1983 ([c.41](#)), paragraph 11(2) of Schedule 13 to the Children Act 1989 and section 44(7) of the National Health Service and Community Care Act 1990. There are other amendments to section 29 of the National Assistance Act 1948 but none is relevant to these Regulations.
- (8) [1983 c.20](#). Section 117 is amended by paragraph 107(1) and (8) of Schedule 1 to the Health Authorities Act 1995, paragraph 15 of Schedule 1 to the Mental Health (Patients in the Community) Act 1995 ([c.52](#)), paragraph 12(17) of the Crime (Sentences) Act 1997 ([c.43](#)) and paragraphs 42 and 47 of Schedule 2 to the National Health Service Reform and Health Care Professions Act 2002.
- (9) Section 47 of the National Health Service and Community Care Act 1990 is amended by paragraphs 65 and 81 of Schedule 1 to the Health Authorities Act 1995 and paragraphs 53 and 56 of Schedule 2 to the National Health Service Reform and Health Care Professions Act 2002.
- (10) [1970 c.42](#). Section 7 is amended by Schedule 30 to the Local Government Act 1972.

(2) The reference to protective measures in relation to P includes measures to minimise the risk that any abuse or neglect of P, or abuse by P, will continue.

Instructing an IMCA

5.—(1) In the circumstances specified in regulation 3 or 4, an NHS body or local authority may instruct an IMCA to represent P if the NHS body is satisfied, or the local authority are satisfied, that it would be of particular benefit to P to be so represented.

(2) An NHS body which instructs, or a local authority which instruct, an IMCA under paragraph (1) must—

- (a) in making any decision resulting from a review of arrangements as to P's accommodation, or
- (b) in making any decision, or further decision, about protective measures in relation to P, take into account any information given, or submissions made, by the IMCA.

Signed by authority of the Secretary of State for Health

7th July 2006

Rosie Winterton
Minister of State
Department of Health

EXPLANATORY NOTE

(This note is not part of the Regulations)

These Regulations adjust the obligation to make arrangements as to the availability of independent mental capacity advocates (“IMCAs”) which is imposed by section 35 of the Mental Capacity Act 2005 (“the Act”). Under the Regulations, the Secretary of State may also make arrangements to enable IMCAs to be available to represent a person (“P”) who lacks capacity to agree to the outcome of an accommodation review or to protective measures taken in adult protection cases.

Regulation 2 provides that arrangements under section 35 of the Act may extend to cover IMCAs who are instructed in the circumstances specified in regulation 3 or 4.

Regulation 3 specifies circumstances where an NHS body has made, or a local authority have made, arrangements as to P’s accommodation and it is then proposed to review those arrangements. In addition, P must not have capacity to participate in the review and there must be no one else who can be consulted as to matters affecting his best interests.

Regulation 4 specifies circumstances where it is alleged that P is or has been abused or neglected by another person or that he is abusing or has abused another person. In addition, protective measures affecting P must have been taken, or be proposed, by an NHS body or local authority in accordance with any adult protection procedures which have been set up pursuant to certain statutory guidance. The guidance current when these Regulations were made is entitled “No secrets: guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse”. A copy of the guidance can be obtained from the Department of Health website at <http://www.dh.gov.uk/PublicationsAndStatistics/Publications/PublicationsPolicyAndGuidance/>.

Regulation 5 provides that an NHS body or local authority may instruct an IMCA to represent P if the NHS body considers, or the local authority consider, that that would be of particular benefit to P. The NHS body or local authority must take account of information provided by the IMCA and of any submissions made by him.