OPG606

Department of Health

Office of the Public Guardian

Making decisions

The Independent Mental Capacity Advocate (IMCA) service

The Mental Capacity Act

DH INFORMATION READER BOX

Policy	Estates
HR/Workforce	Commissioning
Management	IM & T
Planning/Performance	Finance
Clinical	Social Care/Partnership Working

Document purpose	For information
Gateway reference	11475
Title	Making Decisions: The Independent Mental Capacity Advocate (IMCA) Service
Author	
Publication date	March 2009
Target audience	PCT CEs, NHS Trust CEs, SHA CEs, Care Trust CEs, Foundation Trust CEs, Local Authority CEs, Directors of Adult SSs
Circulation list	PCT CEs, NHS Trust CEs, SHA CEs, Care Trust CEs, Foundation Trust CEs, PCT PEC Chairs, PCT Chairs, NHS Trust Board Chairs
Description	This document sets out the role and responsibilities of the Independent Mental Capacity Advocate (IMCA) under the Mental Capacity Act 2005. This edition has been updated to reflect the requirements of the MCA and MCA DOLS legislation.
Cross ref	MCA 2005 Deprivation of Liberty Safeguards Code of Practice
Superseded docs	Making Decisions: The Independent Mental Capacity Advocate (IMCA) Service: 2007 edition
Action required	None
Timing	**N/A**
Contact Details	Kate Hardy SCPI-DQ Unit 124, Wellington House 133-155 Waterloo Road London SE1 8UG
For recipient's use	

This document has been produced by:

This booklet provides information on the Independent Mental Capacity Advocate (IMCA) service established by the Mental Capacity Act.
It is not a statutory Code of Practice issued under the Mental Capacity Act 2005 and is not a guide to how the law will apply to specific situations.

Acknowledgements

Sue Lee from Speaking Up, as in the first two editions, wrote the text about the Mental Capacity Act (MCA), which described both the MCA and the IMCA roles prior to the MCA being amended to include the Deprivation of Liberty Safeguards. We are grateful to her and the rest of the team at Speaking Up. The additional text for this third edition, which summarises the amendments made to the MCA that have introduced the Deprivation of Liberty Safeguards, and significantly extended the original roles of IMCAs, has been provided by the Department of Health.

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1. Introduction

IMCA stands for Independent Mental Capacity Advocate.

IMCAs provide a new type of statutory advocacy introduced by the Mental Capacity Act 2005 (MCA). The MCA gives some people who lack capacity a right to receive support from an IMCA.

Local authorities have commissioned IMCA services in England and local health boards have commissioned them in Wales. Responsible bodies, the NHS and local authorities all have a duty to make sure that IMCAs are available to represent people who lack capacity to make specific decisions, so staff affected will need to know when an IMCA must be involved.

IMCA services are provided by organisations that are independent from the NHS and local authorities.

The aim of this booklet is to explain:

- what advocacy is
- the role of an IMCA
- how the IMCA service works in practice
- who will benefit from the IMCA service
- how to make a referral to the IMCA service.

2. Advocacy

What is advocacy?

Advocacy is taking action to help people to:

- express their views and wishes
- secure their rights
- have their interests represented
- access information and services
- explore choices and options.

Advocacy promotes equality, social justice and social inclusion. It can empower people to speak up for themselves.

Advocacy can help people to become more aware of their own rights, to exercise those rights and to be involved in and influence decisions that are being made about their future.

In some situations an advocate may need to represent another person's interests. This is called non-instructed advocacy, and is used when a person is unable to communicate their views.

Who needs advocacy?

Anyone who needs support to:

- make changes and take control of their life
- be valued and included in their community
- be listened to and understood.

A person accessing advocacy could, for example, be someone with a learning difficulty or an older person who has dementia.

What is an advocate?

An advocate is someone who supports a person so that their views are heard and their rights are upheld.

They can help a person to put their views and feelings across when decisions are being made about their life.

They can give support that will enable a person to make choices, and they inform people of their rights.

An advocate will support a person to speak up for themselves or, in some situations, will speak on a person's behalf.

Advocates are independent: they are not connected to the carers or services that are involved in supporting the person.

An advocate works one-to-one with a person to develop their confidence wherever possible and will try to ensure that that person feels as empowered as possible to take control of their own life.

Non-instructed advocacy

The majority of service users who access the IMCA service are people with learning disabilities, older people with dementia, people who have an acquired brain injury or people with mental health problems. But IMCAs also act when people have a temporary lack of capacity because they are unconscious or barely conscious – whether due to an accident, being under anaesthetic or as a result of other conditions.

Many have significant barriers to communication and are unable to instruct the advocate themselves. In addition, many people using the service will be unable to express a view about the proposed decision.

A non-instructed advocate will always attempt to get to know the person's preferred method of communication and will spend time finding out if a person is able to express a view. IMCAs are experienced at working with people who have difficulties with communication.

If the person is unable to communicate their views and wishes relating to the decision to be made, an advocate uses non-instructed advocacy.

'Non-instructed advocacy is taking affirmative action with or on behalf of a person who is unable to give a clear indication of their views or wishes in a specific situation. The non-instructed advocate seeks to uphold the person's rights; ensure fair and equal treatment and access to services; and make certain that decisions are taken with due consideration for their unique preferences and perspectives.' Action for Advocacy, 2006.

The key principles of non-instructed advocacy

- The client does not instruct the advocate.
- The advocacy is independent and objective.
- People who experience difficulties in communication have a right to be represented in decisions that affect their lives.
- The advocate protects the principles underpinning ordinary living, which assume that every person has a right to a quality life.

There are a number of approaches that an advocate uses when undertaking non-instructed advocacy. One approach, the 'watching brief' approach, was devised by ASIST, an advocacy organisation, and can be used when the person is unable to communicate a view and therefore the advocate cannot find out what the person might want.

It sets out a process whereby the advocate can ask how particular aspects of a person's life will be enhanced or worsened by the proposed decision. It protects or argues for ordinary life principles and works from the basis that every human being is entitled to have a quality of life. It sets out eight quality of life domains that

are used as a basis for the advocate to ask questions of whoever is proposing to make a decision. The advocate does not offer an opinion or express a view on a particular course of action.

The strength of this approach lies in the fact that service providers are required to think about why they are making the specific decision and to justify the actions proposed. In other words, asking 'why?' can be very powerful. An advocate actively probes the process by which providers reach a decision.

An advocate goes to meetings on the person's behalf and looks at any proposed decisions to make sure that:

- all options have been considered
- where a person's own preferences and dislikes can be identified, that these are taken into account
- no particular agendas are being pursued
- the person's civil, human and welfare rights are being respected.

Example

Emma, a 40-year-old woman who has high support needs, had lived at home with her father until his sudden death. A decision needed to be made about where Emma would live in the future and a referral was made to the IMCA service. The IMCA met with Emma's social worker and was told that she does not have any spoken language, that she is unable to sign and has very limited methods of communication. The IMCA met Emma and found that it was not possible to get a view from her about her future accommodation. The IMCA then used non-instructed advocacy.

IMCA advocacy is **not** best interests advocacy. The advocate does not offer their own opinion or make the decision.

3. The IMCA service

Why have an IMCA service?

In the past, many people who lacked the capacity to make decisions for themselves may not have been listened to. IMCAs safeguard the rights of those with nobody else to speak for them.

The benefits of an IMCA service

The main benefits for the person who lacks capacity are as follows:

- Having an independent person to review significant decisions being made.
- Having an advocate who is articulate and knowledgeable not solely in relation to the MCA but also about a person's rights, health and social care systems and community care law.
- Receiving support from a person who is skilled at helping people who have difficulties with communication to make their views known.
- Having an independent person who can support and represent them when certain serious decisions are being made and they have nobody else who can be consulted.

There are benefits also for decision-making bodies, as practitioners working in those bodies may find that

- the collaborative way in which IMCAs work means that practitioners are assisted in their decision-making processes by a person with a good knowledge of the MCA
- the information brought to the attention of the decision-maker by the IMCA may be extremely useful and can often save valuable time for the practitioner
- complex decisions can be made with more confidence and in many cases more quickly due to the involvement of an IMCA.

(Based on an evaluation of IMCA pilots by Cambridge University.)

What is mental capacity?

> Mental capacity is the ability to make a decision, or take action, at the time the decision or action needs to be taken.

The MCA covers situations where someone is unable to make a decision because the way in which their mind or brain works is affected – for instance by illness or disability. The lack of capacity may be temporary because they are unconscious or barely conscious whether due to an accident, being under anaesthetic or as a result of other conditions such as the effects of drugs or alcohol. It includes everyday decisions such as what to wear or when to take a bath, as well as more serious decisions such as where to live.

Does a person lack mental capacity?

The MCA requires 'decision-specific' assessments of capacity.

All staff and unpaid carers can and should make assessments of capacity for simple decisions – such as whether someone can decide what to wear or eat. Of course, the more serious the decision, the more formal the assessment of capacity should be.

A person is assessed as lacking the ability to make a decision, and needing an IMCA, if they cannot do one or more of the following:

- understand information given to them about the decision
- retain the information for long enough to make the decision
- use or weigh up the information as part of the decision-making process
- communicate their decision (by any means, such as talking, sign language or blinking).

The assessment must be specific to the decision that needs to be made – it is not a generic test of capacity. Whether and how such

assessments are recorded may vary according to the seriousness of the decision made. An IMCA should be instructed for the specific decisions outlined below.

What does an IMCA do?

An IMCA safeguards the rights of people who:

- are facing a decision about a long-term move or about serious medical treatment
- lack capacity to make a specified decision at the time it needs to be made
- have nobody else who is willing and able to represent them or be consulted in the process of working out their best interests, other than paid staff.

Regulations under the MCA give local authorities and NHS bodies powers to involve IMCAs in other decisions concerning:

- a care review
- adult protection procedures (even in situations where there may be family or friends to consult). (Note that adult protection procedures are now often referred to as 'safeguarding adults procedures'.)

IMCAs are independent and generally work for advocacy providers who are not part of a local authority or the NHS.

Who is the IMCA service for?

The IMCA service is provided for any person aged 16 years or older who has no one able to support and represent them and who lacks capacity to make a decision about any of the following:

- a long-term care move
- serious medical treatment

- adult protection procedures
- a care review.

Such a person will have a condition that is affecting their ability to make decisions.

Many factors can affect a person's capacity, such as:

- acquired brain injury
- learning disability
- mental illness
- dementia
- the effects of alcohol or drug misuse.

Capacity can also be affected by other factors such as trauma or illness.

A person's capacity may vary over time or may depend on the type of decision that needs to be made.

IMCAs should be available to people who are in prison, in hostels and on the streets and who lack capacity to make decisions about serious medical treatment or long-term accommodation.

Example

Alan, a 32-year-old man who has learning difficulties and autism, lives in a care home that is due to close. Alan will need to move to new accommodation.

Alan's social worker is aware that he does not have any family or friends to consult about the decision. She believes Alan lacks capacity to understand the decision that needs to be made, so she contacts the local IMCA service to make a referral.

When does an IMCA not need to be instructed?

IMCAs do not need to be instructed if:

- a person who now lacks capacity has nominated someone to be consulted specifically on the same issue
- a person has a personal welfare attorney who is authorised specifically to make decisions on the same issue
- a personal welfare deputy has been appointed by the Court with powers to make decisions on the same issue.

Where a person has no family or friends to represent them, but does have an attorney or deputy who has been appointed solely to deal with property and affairs, then an IMCA must be instructed.

Similarly, if the person has a personal welfare attorney or deputy who is not authorised to make the specific decision in question, an IMCA must be appointed.

What is meant by 'having nobody else who is willing and able to be consulted'?

The IMCA is a safeguard for those people who lack capacity who have no one other than paid staff who 'it would be appropriate to consult' (apart from adult safeguarding cases, where this criterion does not apply). The safeguard is intended to apply to those people who have no network of support, such as close family or friends, that takes an interest in their welfare.

Decision-makers in the NHS and local authorities need to determine whether there are family or friends who are willing and able to be consulted about the proposed decision. If it is not possible, practical and appropriate to consult anyone, an IMCA should be instructed.

The person who lacks capacity may have friends or family but there may be reasons why the decision-maker feels it is not practical or appropriate to consult with them.

Examples of situations where it may be appropriate to instruct an IMCA

- The family member or friend is not willing to be consulted about the best interests decision.
- The family member or friend is too ill or frail.
- There are reasons that make it impractical to consult with the family member or friend; for example, they live too far away.
- A family member or friend may refuse to be consulted.
- There is abuse by the family member or friend.

Example

A decision needed to be made regarding future accommodation for a man who has mental health problems who had remained as an informal patient in a hospital for a number of years. He was assessed to lack capacity to make the particular decision and the care manager was uncertain about his eligibility for the IMCA service because his mother was named as next of kin.

On further investigation, the care manager discovered that the man's mother was elderly, had mental health problems herself, was currently unwell, and had not had any contact with her son for two years. Consequently, she decided that there was nobody who was able to support and represent the man and so she made a referral to the IMCA service.

If a person who lacks capacity already has an advocate, they may still be entitled to an IMCA, and the IMCA would consult with that advocate.

When is the IMCA service available?

The service is available for 52 weeks of the year during office hours, excluding public holidays and weekends.

Who has a duty to instruct IMCAs?

Staff in the NHS or a local authority, such as doctors, care managers and social workers, all have a duty under the MCA to instruct an IMCA where the eligibility criteria are met.

Who is the 'decision-maker'?

The decision-maker is the person who is proposing to take an action in relation to the care or treatment of an adult who lacks capacity, or is someone who is contemplating making a decision on behalf of that person. Who the decision-maker is will depend on the person's circumstances and the type of decision. For example, the decision-maker may be a care manager or a hospital consultant.

Staff working in statutory organisations – in the local authority or the NHS – who are involved in making best interests decisions, should know when a person has a right to IMCA and when they have a duty to instruct an IMCA.

4. How the service works

Who should be referred to the IMCA service?

Any person who meets the following criteria must be referred to the IMCA service.

- Is a decision being made about serious medical treatment or a change of accommodation? Or about a care review or adult protection procedures? (There will be local authority policy on care reviews and adult safeguarding.)
- Does the person lack capacity to make this particular decision?
- Is the person over 16 years old?
- Is there nobody (other than paid staff providing care or professionals) who the decision-maker considers willing and able to be consulted about the decision? (This does not apply to adult protection cases.)

What is serious medical treatment?

NHS bodies must instruct and then take into account information from an IMCA where decisions are proposed about 'serious medical treatment' where the person lacks capacity to make the decision and there are no family or friends willing and able to support the person.

Serious medical treatment is that which involves:

- giving new treatment
- stopping treatment that has already started, or
- withholding treatment that could be offered.

There must also be:

- a fine balance between the likely benefits and the burdens and risks of a single treatment
- a decision between or a choice of treatments that is finely balanced, or
- a likelihood that what is proposed will have serious consequences for the person.

A person has a right to an IMCA if such treatment is being contemplated on their behalf and the person has been assessed as lacking capacity to make the decision for themselves at that time.

An IMCA cannot be involved if the proposed treatment is for a mental disorder and that treatment is authorised under Part IV of the Mental Health Act 1983. However, if a person is being treated under the 1983 Act and the proposed treatment is for a physical illness such as cancer, an IMCA can be involved.

Example

William, who was detained under section 3 of the Mental Health Act, became physically unwell and diagnostic tests revealed that he had cancer. He was assessed to lack capacity to make a decision about the various options for treatment and had nobody who could be consulted about the decision. A referral was therefore made to an IMCA.

What is meant by serious consequences?

'Serious consequences' refers to those which could have a serious impact on the person. The term includes treatments that:

- cause serious and prolonged pain, distress or side effects
- have potentially major consequences for the patient (for example, major surgery or stopping life-sustaining treatment)

- have a serious impact on the patient's future life choices (for example, interventions for ovarian cancer).

Example

Peter was admitted to hospital having fallen at his nursing home. He was in the late stages of dementia and although clearly in pain was unable to tell the hospital staff where the pain was. Investigations showed that his hip was broken and a decision needed to be made about treatment; however, he lacked capacity to consent to or refuse medical treatment. An IMCA was appointed.

The only situation in which the duty under the MCA to instruct an IMCA need not be followed is when an urgent decision is needed – for example to save a person's life. However, if further serious treatment follows an emergency situation, then an IMCA must be instructed.

Treatment that is regulated by Part IV of the Mental Health Act 1983 (for patients who have been detained under that Act) cannot be included in the definition of 'serious medical treatment'.

How do IMCAs work with serious medical treatment decisions?

The IMCA:

- checks whether the best interests principle has been followed
- ensures that the person's wishes and feelings have been considered
- seeks a second medical opinion if necessary.

IMCAs and changes to accommodation

The local authority or the NHS must instruct an IMCA where decisions are proposed about a change in accommodation where

the person lacks capacity to make the decision and there are no family or friends who are willing and able to support them.

The right to an IMCA applies to decisions about long-term accommodation moves to or from a hospital or care home, or a move between such accommodation, if:

- it is provided or arranged by the NHS
- it is provided under sections 21 or 29 of the National Assistance Act
- it is part of the after-care services provided under section 117 of the Mental Health Act 1983, following a decision made under section 47 of the National Health Service and Community Care Act 1990.

Example

Bert, a man in his 80s, had a stroke while at home. This led to a stay in hospital lasting many weeks, but he was ready to be discharged. Bert had always lived an independent life up until his illness, but now his condition was such that his social worker had serious concerns about whether it would be in his best interests to return to his former home. After an assessment of his capacity to make the decision and enquiries about any family or friends who may be consulted about the decision, the social worker makes a referral to an IMCA.

What are 'long-term accommodation' moves?

This applies if an NHS organisation or local authority decides to place a person who lacks capacity:

- in a hospital (or to move them to another hospital) for a stay likely to last (or currently lasting) longer than 28 days
- in residential accommodation for a stay likely to last (or currently lasting) longer than eight weeks.

It applies to long-stay accommodation in a hospital or care home, or a move between such accommodation. This may be accommodation in a care home, a nursing home, ordinary and sheltered housing, housing association or other registered social housing, in private sector housing provided by a local authority or in hostel accommodation.

If the placement or move is urgent, an IMCA need not be instructed, but the decision-maker must involve an IMCA as soon as possible after making an emergency decision if the person is likely to stay or has already been in hospital longer than 28 days or longer than eight weeks in other accommodation.

There is no duty to involve an IMCA if the person is required to stay in the accommodation under the Mental Health Act 1983.

Involving IMCAs in adult protection cases and care reviews

When somebody meets the IMCA criteria, local authorities and the NHS have a duty to instruct an IMCA for changes in accommodation and serious medical treatment decisions. For care reviews and adult protection procedures, local authorities and the NHS have powers to appoint an IMCA where they consider that the appointment would be of particular benefit to the person concerned.

Local authorities in England should have a policy on how IMCAs will be involved in care reviews and adult protection procedures.

NHS bodies and local authorities in Wales will also be required to have such a policy in place.

IMCAs and adult protection procedures

Local authorities and the NHS have powers to instruct an IMCA to support and represent a person who lacks capacity to consent to the proposed measures where it is alleged that:

- the person is being or has been abused or neglected by another person
- the person is abusing or has abused another person.

Local authorities and the NHS can only instruct an IMCA if they propose to take, or have already taken, protective measures. This is in accordance with adult protection procedures set up under statutory guidance: *No secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse* in England (www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_4008486), and *In Safe Hands: Implementing Adult Protection Procedures in Wales* (www.ssiacymru.org.uk/media/pdf/e/k/safe-hands-update2003-e_1.pdf).

In adult protection cases, access to IMCAs is not restricted to people who have no one else to support or represent them. People who lack capacity who do have family and friends are still entitled to have an IMCA to support them in adult protection procedures. The decision-maker must be satisfied that having an IMCA will benefit the person.

Example

A young woman who has a learning disability lived at home with her family. Her care manager had evidence and consequently serious concerns that her needs were not being met and that she was at serious risk of harm and neglect. The care manager made a referral to the IMCA service and an IMCA was instructed to support and represent the young woman throughout the adult protection proceedings.

IMCAs and care reviews

A responsible body can instruct an IMCA to support and represent a person who lacks capacity when:

- they have arranged accommodation for that 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 a local authority/the NHS
- that are not the result of an obligation under the Mental Health Act 1983
- that do not relate to circumstances where sections 37 to 39 of the 1983 Act would apply.

Example

A man who is in his 70s and has dementia was placed in a care home following a long stay in hospital. His care manager had made a best interests decision that his family did not agree with and they had requested that he leave the care home, indicating that they may remove him.

Due to serious concerns about the man's safety, an adult protection strategy meeting was held and an IMCA instructed. Prior to attending the care review, the IMCA met with the man, who gave a clear indication that he was happy and did not want to leave the care home. The IMCA was able to communicate the man's views and wishes at the care review meeting. The care review meeting also looked at whether the circumstances in which his care and treatment would need to be given might amount to a deprivation of his liberty, as despite his willingness to be there he lacked the capacity to consent to those arrangements and his family wanted him to be elsewhere.

At this stage it was not considered necessary to seek a standard authorisation under MCA DOLS, but this will be kept under constant review (see Chapter 7 of this booklet).

Where the person is to be detained or required to live in accommodation under the Mental Health Act 1983 an IMCA will not be needed, since the safeguards available under that Act will apply.

The referral process

Staff working in local authorities or the NHS must be able to identify when a person has a right to an IMCA and must know how to instruct an IMCA.

The first step is to know which organisation has been commissioned to provide an IMCA service in the local authority (or local health board) area where the person currently is. This information can be provided by the local authority or by information and advice centres such as the Patient Advice and Liaison Service, the local Citizens Advice Bureau or Community Health Councils in Wales. The Department of Health also has an IMCA website where there are the details of all the IMCA providers (www.dh.gov.uk/en/SocialCare/Deliveringadultsocialcare/MentalCapacity/IMCA/index.htm).

Local arrangements will be in place with each IMCA service provider regarding the ways in which referrals can be made. Initial referrals may be made by phone or email.

At the time when the referral is made, it must be evident that:

- a person lacks the capacity to make the particular decision
- the decision is either concerned with serious medical treatment, a change in accommodation, a care review or an adult protection case
- there is nobody who can appropriately support and represent the person (this does not apply to adult protection).

The IMCA will:

- establish the referred person's preferred method of communication
- meet with the referred person and use a variety of methods, as appropriate, to ascertain their views
- consult with staff, professionals and anyone else who knows the person well who are involved in delivering care, support, and treatment
- gather any relevant written documents and other information
- attend meetings to represent the person, raising issues and questions as appropriate
- present information to the decision-maker verbally and via a written report
- remain involved until a decision has been made, and be aware that the proposed action has been taken
- audit the best interests decision-making process
- challenge the decision if necessary.

Limitations of the service

An IMCA cannot be involved if:

- a person has capacity
- the proposed serious medical treatment is authorised under the Mental Health Act 1983 and is therefore for a mental disorder rather than a physical condition
- the proposed long-term change in accommodation is a requirement under the Mental Health Act 1983
- there is no identifiable decision about a long-term change in accommodation or serious medical treatment, or decisions relating to a care review or adult protection procedures

- there is any other person (not in a paid capacity) who is willing and able to support and represent appropriately the person who lacks capacity
- decisions are being made in relation to a person's finances – unless there are adult protection procedures in which an IMCA is involved.

The IMCA will stop being involved in a case once the decision has been finalised and they are aware that the proposed action has been carried out. They will not be able to provide ongoing advocacy support to the person. If it is felt that a person needs advocacy support after the IMCA has withdrawn, it may be necessary to make a referral to a local advocacy organisation.

What if a person requiring an IMCA is receiving funding from outside the area where they are currently living?

Each IMCA service will cover a local authority or local health board area, and all eligible people in that area – whether on a permanent or temporary basis – must be referred to the local IMCA service. For example, if a person is living in a care home in Cambridgeshire but Essex County Council are providing the funding for that placement and there is a need to refer the person to IMCA, the Cambridgeshire IMCA service will provide the service.

Example

A man who has a learning disability and autism receives funding from the county where he originally lived as a child to live in a care home in a different area. The care home is closing and different accommodation needs to be identified. A care manager from the funding authority is involved and knows that the IMCA service provided in the area where the man currently lives is the right service.

5. How an IMCA works

Who can be an IMCA?

Individual IMCAs must:

- have specific experience (related to working with people who need support with making decisions, advocacy experience and experience of health and social care systems)
- have IMCA training
- have integrity and a good character
- be able to act independently.

All IMCAs must complete the IMCA training in order to work in that capacity, and must have enhanced checks with the Criminal Records Bureau that show no areas of concern.

An IMCA must be independent, and they cannot act as an IMCA if they are involved in the care or treatment of the person, or if they have links to the responsible body instructing them or to anyone else involved in the person's care or treatment (other than as their advocate).

How do IMCAs work?

The IMCA's role is to support and represent the person who lacks capacity and to audit the way decisions are being made. IMCAs do not make any decision on behalf of the person they are representing – the final decision will always be made by the decision-maker.

The IMCA will:

- be independent of the person making the decision
- provide support for the person who lacks capacity
- represent the person without capacity in any discussions on the proposed decision

- provide information to help work out what is in the person's best interests
- raise questions or challenge decisions that appear not to be in the best interests of the person.

The IMCA service builds on good practice in the independent advocacy sector; however, IMCAs have a different role from many other advocates. Unlike some other advocates, they have rights and duties under the Mental Capacity Act to:

- provide statutory advocacy
- support and represent people who lack capacity to make decisions on specific issues
- meet in private the person they are supporting
- access relevant health and social care records
- provide support and representation specifically while the decision is being made
- act quickly so that their final report can form part of the decision-making process.

The main elements of IMCA work

There are four main elements to the IMCA work, which can broadly be summarised as follows.

1. Ascertaining the views, feelings, wishes, beliefs and values of the person, using whichever communication method is preferred by the client and ensuring that those views are communicated to, and considered by, the decision-maker.
2. Non-instructed advocacy: Asking questions on behalf of the person and representing them. Making sure that the person's rights are upheld and that they are kept involved and at the centre of the decision-making process.
3. Investigating the circumstances: Gathering and evaluating information from relevant professionals and people who know the person well. Carrying out any necessary research pertaining to the decision.
4. Auditing the decision-making process: Checking that the decision-maker is acting in accordance with the MCA and that the decision is in the person's best interests. Challenging the decision if necessary.

Finding out the person's wishes, feelings, values and beliefs

An IMCA will try to find out what the person's wishes, feelings, values and beliefs are. They will find out what method of communication the person prefers to use and will be experienced at communicating with people who have difficulties with communication. The person may use sign language such as Makaton or BSL, or need information to be presented using pictures or photographs. An IMCA will also talk to staff or anyone who knows the person well and will examine copies of relevant health

and social care records or any written statements made by the person when they still had the capacity to do so.

Where possible, decision-makers should make decisions based on a full understanding of a person's past and present wishes. An IMCA should provide the decision-maker with as much of this information as possible, as well as anything else they think is relevant.

Example

A young woman who has learning difficulties moved temporarily in to short-break accommodation after leaving the family home and now permanent accommodation needs to be found. She was able to communicate very clearly to the IMCA what kind of accommodation she would prefer, expressing a wish to have a quiet environment and a garden. The IMCA was able to support her to put forward her views to the people who would be making the decision.

Finding and evaluating information

IMCAs have a right to:

- meet in private the person who lacks capacity
- examine and take copies of any records that the person holding the record thinks is relevant to making a best interests decision.

The IMCA may also talk to other people who know the person who lacks capacity well or who are involved in their care or treatment who may have information relevant to the decision. In investigating the person's circumstances, the IMCA will be able to gather together information to give to the decision-maker.

In most cases, a decision by the decision-maker regarding the person's best interests will be made through discussion involving all the relevant people who are providing care or treatment, as well as the IMCA.

Considering alternative courses of action

The IMCA needs to check whether the decision-maker has considered all possible options and that the proposed option is, according to the Mental Capacity Act, the least restrictive of the person's future choices, allowing him or her the most freedom. The IMCA may suggest alternatives where there is evidence that these are more consistent with the wishes and feelings of the person.

Representing and supporting the person who lacks capacity

The IMCA should find out whether the person has been given the appropriate support to enable them to be as involved as possible in the decision-making process.

They will attend meetings to represent the person and will use non-directed advocacy approaches to ask questions about the proposed decision. The IMCA will make sure that the decision-maker knows about the views, feelings, values and wishes of the person, as well as any other relevant information, such as religious and cultural factors.

Example

An IMCA is appointed for a serious medical treatment decision. While carrying out their investigations, the IMCA discovers that the person is a practising Jehovah's Witness; the IMCA realises that this is a significant factor that will need to be brought to the attention of the person proposing the treatment.

Sometimes an IMCA might not be able to get a good picture of what the person might want. They should still try to make sure that the decision-maker considers all relevant information by:

- raising relevant issues and questions
- providing additional, relevant information to inform the final decision.

Getting a second medical opinion

The IMCA has the right to seek a second medical opinion on behalf of a person who lacks capacity when a decision is being made about serious medical treatment. This puts the person who lacks capacity in the same position as a person who has capacity who has a right to request a second medical opinion.

Auditing the decision-making process

Throughout the decision-making process, the IMCA will be ensuring that:

- the principles of the MCA are being followed
- the person is being supported to participate in the decision-making process as fully as possible
- the person is at the centre of the process
- the best interests checklist as set out in section 4 of the MCA is being followed
- the decision-maker is giving clear, objective reasons for making a particular decision about what is in the person's best interests
- anyone making a decision in the best interests of a person who lacks capacity is not making that decision based on assumptions that cannot be justified.

Communicating the IMCA's findings

An important part of the IMCA's role is to communicate their findings; this means that there will often need to be continual dialogue between the IMCA and the decision-maker.

The IMCA will submit a report to the decision-maker that gives details of their investigations, providing as much relevant information as possible. The report may include questions about the proposed action or may include suggested alternatives if there is evidence that these might be better suited to the person's wishes and feelings.

The decision-maker must take into account the information from the IMCA when working out what decision is in the best interests of the person who lacks capacity.

There may sometimes be situations where an IMCA thinks that the decision-maker has not paid enough attention to their report and to relevant information and therefore has concerns about the decision made. They may then need to challenge the decision.

How do IMCAs challenge a decision?

The IMCA may initially use informal methods and may ask for a meeting with the decision-maker to explain any concerns and request a review of the decision.

Where there are serious concerns about the decision made, an IMCA may decide to use formal methods to challenge the decision.

Examples of formal methods are:

- using the relevant complaints procedure
- referring to the Independent Complaints Advocacy Service
- consulting the Patient Advice and Liaison Service in England or Community Health Councils in Wales
- referring the case to the Court of Protection
- approaching the Official Solicitor.

In particularly serious or urgent cases, the IMCA may approach the Official Solicitor or seek permission to refer a case to the Court of Protection for a decision. If an IMCA wants to challenge the way in which a particularly serious decision has been made, they can seek legal advice and consider applying for a judicial review.

6. The IMCA's roles and responsibilities under the new Mental Capacity Act 2005 Deprivation of Liberty Safeguards (MCA DOLS)

This chapter explains the key roles and responsibilities of IMCAs under the terms of the Mental Capacity Act 2005 Deprivation of Liberty Safeguards (MCA DOLS).

The MCA DOLS provide protection for vulnerable people accommodated in hospitals or care homes in circumstances that amount to a deprivation of their liberty, and who lack capacity to consent to the care or treatment they need. In such cases, the MCA DOLS provide a lawful way in which to care for people without their consent, provided that:

- it is in their own best interests
- it is necessary to keep them from harm
- it is a proportionate response to the likelihood and seriousness of harm.

IMCAs and the MCA DOLS

Under the MCA DOLS, there are a number of circumstances when IMCAs must act. These include the following:

- When the hospital or care home has requested an assessment about depriving a person of their liberty, if there is no one else to represent that person. The IMCA then serves to represent the person during the assessment process.
- When a hospital or care home has deprived a person of their liberty and that person (or their representative) requests the support of an IMCA in order to ensure that they understand their rights.
- When a hospital or care home has deprived a person of their liberty and there is (temporarily) nobody available to act as that person's representative.

Chapter 7 explains each of these circumstances in more detail. In particular, it states:

- the IMCA's rights
- who is responsible for instructing the IMCA
- where the IMCA can get further information.

The IMCA's legal duty of regard

Any IMCA acting under the MCA DOLS has a legal duty of regard to the MCA DOLS Code of Practice, which is available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_085476

This is in addition to their legal duty of regard to the Mental Capacity Act Code of Practice (www.opsi.gov.uk/acts/acts2005/related/ukpgacop_20050009_en.pdf). The two documents are complementary.

7. What are the MCA 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.

Who is covered by the MCA DOLS?

The MCA DOLS cover anyone who is accommodated in a hospital or care home in circumstances that amount to a deprivation of their liberty and who lacks the capacity to consent to the care or treatment they need.

It is anticipated that the majority of people who will require the protection of the MCA DOLS are those with more severe learning disabilities, older people with the range of dementias or people with neurological conditions such as brain injuries.

Why were the MCA DOLS introduced?

They were introduced following the legal judgment given by the European Court of Human Rights (ECtHR) in the case of HL v United Kingdom (commonly referred to as the Bournewood judgment).[1] This case concerned an autistic man ('HL') with a learning disability, who lacked the capacity to decide whether he should be admitted to hospital for treatment. He was admitted to hospital on an informal basis under common law but was prevented from leaving the hospital with his carers. This decision was challenged by HL's carers and the ECtHR found that there had been a breach of HL's rights under the ECHR.

The MCA DOLS were introduced to prevent further breaches of the ECHR.

1 (2004) Application No: 00045508/99

When can someone be deprived of their liberty?

The MCA DOLS set out clear guidelines on when someone can be deprived of their liberty.

1. Every effort should be made to prevent deprivation of liberty occurring. If deprivation of liberty cannot be avoided, it should be for no longer than is necessary.
2. A person may be deprived of liberty in order to provide a specific treatment or care plan that is in their best interests.
3. Specially trained assessors must be satisfied that there is no suitable alternative care plan that would not deprive the person of their liberty.
4. The managing authority (the hospital or care home where the person is) must apply to its supervisory body (the primary care trust or local authority responsible for the care home) for authorisation to begin the care plan.
5. The supervisory body must conduct six assessments to confirm that deprivation of liberty is lawful and appropriate.

Deprivation of liberty and restraint

There is no simple definition of '**deprivation of liberty**'. Instead, it is defined through previous court cases. However, in general it refers to situations where a person who is in a hospital or care home is not allowed to make choices about things such as their treatment, where they live or who they see.

Deprivation of liberty is different from **'restraint'**, which the courts recognise as appropriate when it is used to prevent harm to the person who lacks capacity and it is a proportionate response to the likelihood and seriousness of harm. For example, preventing a person from leaving a care home or hospital unaccompanied because there is a risk that they would try to cross a road in a dangerous way, for example, is likely to be seen as a proportionate restraint to prevent the person from coming to harm. Paragraphs 6.40 to 6.48 of the main MCA Code contain guidance about the appropriate use of restraint.

The ECtHR, in its judgment on the Bournewood case, said: 'the distinction between a deprivation of, and restriction upon, liberty is merely one of degree or intensity and not one of nature or substance.'

So where the restriction or restraint is frequent, cumulative and ongoing, or if there are other factors present, then care providers should consider whether this has gone beyond permissible restraint, as defined in the Mental Capacity Act (section 6 (4)). If so, then they must either apply for authorisation under the MCA DOLS or change their care provision to reduce the level of restraint.

For more information about deprivation of liberty, including a number of examples of case law, read chapter 2 of the MCA DOLS Code of Practice.

How does the assessment process work?

Before issuing an MCA DOLS authorisation, the supervisory body must conduct the six assessments listed below.

- **Age assessment:** to establish whether the person being deprived of liberty is aged 18 or over.
- **No refusals assessment:** to ensure that the authorisation being requested does not conflict with a valid decision already made by an attorney or deputy and is not for the purpose of giving any treatment that would conflict with a valid and applicable advance decision previously made by the relevant person.
- **Mental capacity assessment:** to assess whether the person being deprived of liberty lacks capacity to decide whether to be admitted to, or remain in, the hospital or care home in which they are being, or will be, deprived of liberty.
- **Mental health assessment:** to assess whether the person being deprived of liberty is suffering from a mental disorder within the meaning of the Mental Health Act 1983, but disregarding any exclusion for people with learning disabilities.
- **Eligibility assessment:** to assess whether the person is eligible to be deprived of liberty under the MCA DOLS. Broadly, a person is eligible unless they:
  - are detained under the Mental Health Act 1983;
  - are subject to a requirement under the Mental Health Act 1983 that conflicts with the authorisation being requested (such as a guardianship order requiring them to live somewhere else); and
  - object to being in hospital for the purpose of treatment of a mental disorder, or to being given some or all of the treatment in question, and they meet the criteria for detention under the Mental Health Act 1983.

- **Best interests assessment:** to establish whether there is a deprivation of liberty and, if there is, whether it is:
  - in the best interests of the person to be subject to the authorisation
  - necessary in order to prevent them from coming to harm
  - a proportionate response to the likelihood of suffering harm and the seriousness of that harm.

If the answer is Yes to all six assessments, then an authorisation will be granted to carry out the proposed care plan or treatment.

What happens once an MCA DOLS authorisation is granted?

The supervisory body will determine how long the authorisation will last. This should be for as short a time as possible (and for a maximum of 12 months).

The care plan or treatment can then be given.

If at any point while the authorisation lasts, the person no longer needs to be deprived of their liberty or their circumstances change, then the authorisation should be reviewed and, where appropriate, end.

Urgent authorisations

In some cases, a hospital or care home may think it is necessary to deprive someone of their liberty immediately – for example, if the person's circumstances change and a particular treatment is needed urgently.

In this situation, the managing authority can itself issue an urgent authorisation. This does not require any assessments and can last for up to seven calendar days. During this time, it must apply for a standard authorisation if it wants to continue to deprive the person of their liberty.

Once an authorisation has been issued, every person deprived of their liberty has to have a relevant person's representative (RPR). This will usually be a family member or friend, but where no such person is available the supervisory body has to appoint a 'professional' representative who can be paid.

Where the relevant person does not have a paid 'professional' representative, the relevant person and the RPR both have the right to request the support of an IMCA. Managing authorities must inform the person and their RPR of this right.

When should authorisations be reviewed?

Supervisory bodies are legally required to review authorisations if:

- the person, their RPR or any section 39A IMCA representing the individual requests one
- the person no longer meets the age, no refusals, mental capacity, mental health or best interests requirements
- the person no longer meets the eligibility requirement because they object to receiving mental health treatment in hospital and they meet the criteria for an application for admission under section 2 or 3 of the Mental Health Act 1983
- there has been a change in the person's situation and, because of the change, it would be appropriate to amend or delete an existing condition of the authorisation or add a new condition
- the reasons the person now meets the qualifying requirements are different from the reasons recorded at the time the authorisation was given.

If a review is requested, the supervisory body must assess which, if any, of the qualifying requirements should be reviewed and record its decision and commission the relevant assessments.

If the person no longer meets the qualifying requirements for being deprived of their liberty, the authorisation must be terminated. If the assessments show that deprivation of liberty is still necessary, the supervisory body must consider whether the conditions attached to the authorisation should be amended.

What happens when an authorisation comes to an end?

If an authorisation is terminated for any reason, the person should cease to be deprived of their liberty immediately.

If a managing authority believes that deprivation of liberty needs to continue beyond the initial authorisation period, it should seek a new authorisation. This will decide if continued deprivation of liberty remains in the person's best interests based on a new set of assessments.

8. The roles of IMCAs under the MCA DOLS

This chapter explains the different roles IMCAs can play under the MCA DOLS, depending on the circumstances in which they are instructed.

Instructing an IMCA during the assessment process

As part of the best interests assessment, friends, family members or other representatives of the relevant person must be consulted to see if they agree that the proposed care plan or course of treatment is in the best interests of the relevant person.

If there is nobody to represent the relevant person other than a professional or paid carer,[2] the managing authority must notify the supervisory body when it applies for deprivation of liberty authorisation. The supervisory body must then instruct a section 39A IMCA immediately to represent the person.

The IMCA must then be consulted during the best interests assessment and provide support to the relevant person (acting on their behalf, where necessary) during the whole assessment process.

IMCAs will need to:

- familiarise themselves with the relevant person's circumstances
- consider what information may be relevant to assessors during the assessment process
- consider if there are any concerns about the outcome of the assessment process.

2 A friend or family member is **not** considered to be acting in a professional capacity simply because they have been appointed as the person's representative for a previous authorisation.

If an IMCA is instructed at this early stage of the deprivation of liberty process, they have additional rights and responsibilities compared with IMCAs instructed under the original Mental Capacity Act 2005. These enable IMCAs to:

- provide relevant information to assessors as appropriate
- receive copies of any assessments from the supervisory body
- receive a copy of any standard authorisation given by the supervisory body
- be informed by the supervisory body if a standard authorisation has been refused because one or more of the deprivation of liberty assessments did not meet the qualifying requirements
- take cases relating to the giving or refusal of an authorisation to the Court of Protection.

IMCAs and urgent authorisations

It is particularly important that IMCAs are instructed quickly where urgent authorisations have been given. This ensures they have a meaningful input from the earliest stages of the process. In addition to the rights above, where an urgent authorisation has been given, the IMCA is entitled to receive copies of:

- the urgent authorisation from the managing authority
- any notice declining to extend the duration of an urgent authorisation from the managing authority
- any notice that an urgent authorisation has ceased to be in force from the supervisory body.

If an IMCA has concerns about an urgent authorisation, it may be appropriate to challenge this authorisation in the Court of Protection.

Resolving differences of opinion between IMCAs and MCA DOLS assessors

If an IMCA disagrees with the opinion of an assessor, they should try to resolve it while the assessment process is still in progress. If disagreements cannot be resolved informally, the supervisory body should be informed before the assessment is finalised. The supervisory body should then consider what action might be appropriate.

By resolving differences of opinion informally, IMCAs can help to minimise the number of applications made to the Court of Protection. However, no IMCA should feel discouraged from making an application to the Court of Protection if they consider it necessary.

Instructing an IMCA to support the relevant person and their RPR

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 39D (s39D IMCA).

If a relevant person or their unpaid representative requests such advocacy support, the supervisory body must instruct an IMCA who will:

- provide extra support to the relevant person or a family member or friend acting as their representative if they need it
- help them make use of the review process or access the Court of Protection.

There is a standard form (Form 30) for a supervisory body, in England, to make a referral to an IMCA service. This is available at: www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_089772

Both the person and their unpaid representative must be told about the IMCA service and how to request an IMCA and their right to request support from an IMCA more than once during the period of the authorisation. They might choose, for example, to ask for help at the start of the authorisation and then again later in order to request a review.

Where the relevant person has a paid 'professional' representative, the need for additional advocacy support should not arise and so there is no requirement for an IMCA to be provided.

If a supervisory body believes that the review and Court of Protection safeguards might not be used without the support of an IMCA, then they must instruct an IMCA. For example, if the supervisory body is aware that the person has selected an unpaid representative who needs support with communication, it should consider whether an IMCA is needed.

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 relevant person will be in a vulnerable position. In these situations, an IMCA must be instructed immediately to support the relevant person.

In such circumstances, 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.

In such circumstances, the role of the IMCA will be essentially the same as that of the RPR. IMCAs are responsible for representing the relevant person and, in particular, for helping them to understand:

- the effect of the authorisation
- what it means
- why it has been given
- why they meet the criteria for authorisation
- how long it will last
- any conditions to which the authorisation is subject
- how to trigger a review or challenge in the Court of Protection.

IMCAs have the right to make submissions to the supervisory body on the question of whether a qualifying requirement should be reviewed, or to give information, or make submissions, to any assessor carrying out a review assessment.

The involvement of the IMCA will end as soon as a new RPR is appointed.

Clarifying roles

It is possible that 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. Each role has its own particular statutory requirements.

9. Rights to information for IMCAs

IMCAs have a right to certain information under the MCA DOLS. The rights accorded to each IMCA depend on the circumstances under which they were instructed.

Section 39A IMCA	
Right to receive information	Relevant paragraph of new Schedule A1 to the Mental Capacity Act 2005
Copy of standard authorisation from supervisory body.	57(2)(d)
Notice from supervisory body that they are prohibited from giving a standard authorisation.	58(2)(c)
Notice from the supervisory body that they have been asked to decide whether there is an unauthorised deprivation of liberty, whether they have decided to appoint an assessor to determine the matter and, if so, who the assessor is.	69(7) and (8)(d)
Copy of urgent authorisation from managing authority.	82(3)
Notification of extension of urgent authorisation from managing authority.	85(6)
Notification from managing authority that supervisory body has decided not to extend an urgent authorisation.	86(3)(b)
Notification from supervisory body that an urgent authorisation has ceased to be in force.	90(3)(b)
Copies of DOLS assessments from the supervisory body.	135(2)(c)
Notice from the supervisory body that it appears to a best interests assessor that there is an unauthorised deprivation of liberty.	136(3)(c)
Note: Paragraph 161 deals with the phasing out of the section 39A IMCA role once an RPR is appointed.	

Section 39C IMCA	
Right to receive information	Relevant paragraph of new Schedule A1 to the Mental Capacity Act 2005
Notice from the supervisory body that a review of a standard authorisation is to be undertaken.	159(4)(b)
Notice from the supervisory body of the outcome of a review.	159(4)(c)

Section 39D IMCA	
Right to receive information	Relevant paragraph of new Schedule A1 to the Mental Capacity Act 2005
The managing authority to give written information about the effect of a standard authorisation	59(8)
Notice from the supervisory body about cessation or suspension of a standard authorisation	95(3)(c)
Notice from the supervisory body of the outcome of a review	120(1)(d)

10. Complaints

What to do if you are not happy with the IMCA service

In the first instance, the person who is unhappy about the service should approach the IMCA providing the service or their manager. If matters are not resolved, the IMCA provider's complaints policy should be used. If after this there are still concerns, the person may want to approach the local authority (or local health board in Wales) that is responsible for commissioning the particular service.

11. What if I want to know more?

Subject	Available from
Further information on the IMCA service	www.dh.gov.uk/imca email: imca@dh.gsi.gov.uk
Information on the Mental Capacity Act 2005	www.publicguardian.gov.uk T 0845 330 2900 E customerservices@publicguardian.gsi.gov.uk
The Mental Capacity Act 2005	You can view this at: www.opsi.gov.uk/acts/acts2005/related/ukpgacop_20050009_en.pdf You can order a hard copy from TSO by calling 0870 600 5522 or emailing customerservices@tso.co.uk
The Code of Practice for the Mental Capacity Act	You can download this at: www.publicguardian.gov.uk/mca/code-of-practice.htm You can order a hard copy from TSO by calling 0870 600 5522 or emailing customerservices@tso.co.uk
Other information booklets like this one	You can view these at: www.publicguardian.gov.uk/forms/additional-publications-newsletters.htm

12. Some useful contacts

The following government departments work together to implement the Mental Capacity Act

Department	What it is/does	Contact
Office of the Public Guardian (OPG)	The Office of the Public Guardian supports and promotes decision-making for those who lack capacity or would like to plan for their future, within the framework of the Mental Capacity Act 2005	Archway Tower, 2 Junction Road, London N19 5SZ www.publicguardian.gov.uk T 0845 330 2900 E customerservices@publicguardian.gsi.gov.uk
Department of Health (DH)	Responsibilities include setting health and social care policy in England. The Department's work sets standards and drives modernisation across all areas of the NHS, social care and public health	Wellington House, 133-155 Waterloo Road, London SE1 3UG www.dh.gov.uk T 020 7210 4850
Welsh Assembly Government	Develops policy and approves legislation that reflects the needs of the people of Wales	Cathays Park, Cardiff CF10 3NQ www.wales.gov.uk T 029 2082 5111

The following organisations provide information about advocacy and/or provide advocacy services

Organisation	What it is/does	Contact
Action for Advocacy	A resource and support agency for the advocacy sector, offering information, training and advice	PO Box 31856, Lorrimore Square, London SE17 3XR T 020 7820 7868 F 020 7820 9947 E info@actionforadvocacy.org.uk www.actionforadvocacy.org
British Institute of Learning Difficulties	Works with government and other organisations to improve the lives of people in the UK with a learning disability. It trains staff, family carers and people with a learning disability. Also funds Speak Out, a project that provides advocacy for adults with learning disabilities	Campion House, Green Street, Kidderminster, Worcestershire DY10 1JL T 01562 723 010 F 01562 723 029 E enquiries@bild.org.uk www.bild.org.uk
Speaking Up	Provides advocacy services for people who experience learning difficulties, mental ill health and other disabilities. It also runs training courses and events with other organisations that want to understand, consult and involve disabled people	1a Fortescue Road, Cambridge CB4 2JS T 01223 566258 F 01223 518913 E info@speakingup.org www.speakingup.org

Other booklets in this series include:

OPG601 Making decisions about your health, welfare or finances. Who decides when you can t?

OPG602 Making decisions: A guide for family, friends and other unpaid carers

OPG603 Making decisions: A guide for people who work in health and social care

OPG604 Making decisions: A guide for advice workers

OPG605 Making decisions: An Easyread guide

OPG607 Deprivation of Liberty Safeguards: A guide for primary care trusts and local authorities

OPG608 Deprivation of Liberty Safeguards: A guide for hospitals and care homes

OPG609 Deprivation of Liberty Safeguards: A guide for relevant person s representatives

Making decisions booklets are available to download at:

www.publicguardian.gov.uk

OPG606 Making decisions: The Independent Mental Capacity Advocate (IMCA) service

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293718 1p 500k Mar 09 (HH)