**SOCIAL SERVICES AND WELL-BEING (WALES) ACT**

**HANDOUT**

**Mental Capacity Act 2005**

# Introduction

The Mental Capacity Act (MCA) is about protecting and promoting the rights of individuals (adults and children aged 16 or 17) who lack capacity to make a particular decision or take a particular action for themselves at the time the decision or action needs to be taken i.e. it is ‘decision specific’. This reflects the fact that people may lack capacity to make some decisions for themselves, but will have capacity to make other decisions. It also reflects the fact that their lack of capacity may be temporary. This may be because they have an illness or condition that means their capacity changes or it may be because at the time the decision needs to be made they are unconscious or their ability to make a decision may be affected by the influence of alcohol or drugs for instance. The underlying philosophy of the MCA is to ensure that any decision made, or action taken, on behalf of someone who lacks the capacity to make the decision or act for themselves is made in their best interests.

All practitioners providing advice and assistance, assessing care and support needs, and undertaking care planning and reviews, as well as safeguarding enquiries are expected to understand the MCA and to apply it, including understanding how the MCA interfaces with the Social Services and Well-being (Wales) Act 2014. They must be able to:

* evidence that they are using the MCA principles
* understand supported decision making; and the importance of considering least restrictive interventions
* understand how capacity assessments are made; how best interests decisions are made, and what a deprivation of liberty is

They are expected to have some knowledge of relevant case law and key messages from the Court of Protection.

# Independent Mental Capacity Advocates

The MCA introduced Independent Mental Capacity Advocates (IMCAs). Under the MCA, when people meet 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 it beneficial).

IMCAs are independent and work for advocacy providers who are not part of a local authority or the NHS. The MCA requires ‘decision-specific’ assessments of capacity. 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 on-going 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.

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 accommodations (and serious medical treatment decisions). An IMCA safeguards the rights of people who:

are facing a decision about a long-term move; **and**

lack capacity to make a specified decision at the time it needs to be made; **and**

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.

An IMCA cannot be involved if a person has capacity (or the proposed long-term change in accommodation is a requirement under the Mental Health Act 1983).

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

They must also understand how to support and represent people who have dementia and learning disabilities or other mental impairments, which mean that the person’s decision making is impaired.

# Interface with the Social Services and Well-being (Wales) Act 2014

There are similarities with independent advocacy under both Acts, however, the duty to provide independent advocacy under the Social Services and Well-being (Wales) Act 2014 is broader and applies to a wider set of circumstances. The 2014 Act provides independent advocacy support to:

people who have capacity, but who would experience barriers in participating fully in the key care and support processes unless there is someone available to support and represent them, as well as those who lack capacity

people in relation to their assessment and/or care and support planning regardless of whether a change of accommodation is being considered

people in relation to the review of a care and/or support plan (as a duty not a power)

people in relation to safeguarding processes (though IMCAs may be involved if the authority has exercised its discretionary power under the MCA)

carers who themselves would experience barriers in participating fully whether or not they have capacity

people for whom there is someone who is appropriate to consult for the purpose of best interests decisions under the MCA, but who is not able and/or willing to facilitate the person’s participation in the local authority’s care and support processes

The role of an independent professional advocate under the 2014 Act is less about informing best interests decisions and more about actively supporting the person to make the decision for themselves and participate fully in care and support processes, and then representing their interests if this is required. The code of practice is framed in terms of helping a person to understand and exercise their rights, and also challenging decisions where necessary.

There are likely to be people who qualify for independent advocacy under the 2014 Act, but not an Independent Mental Capacity Advocate (IMCA). However, most of the people who qualify for independent advocacy under the Mental Capacity Act 2005, in relation to care planning and care review, will also qualify for independent advocacy under the 2014 Act. Both the 2014 Act and the MCA recognise the same areas of difficulty. The test under the MCA is whether the person ‘lacks capacity’ to make specific decisions whereas in the new Act the test is whether the person experiences barriers in fully participating that can only be overcome if there is someone available to support and represent them (and they have no ‘appropriate individual’ who is willing and able to represent them).

To enable the person to receive seamless advocacy and not to have to repeat their story to different advocates, the same person could provide support as an independent professional advocate in both roles, if trained, qualified and with the appropriate skills to do both. However, under whichever legislation the advocate providing support is acting, they should meet the appropriate requirements for an independent professional advocate under that legislation.

The local authority must meet its duties in relation to working with an IMCA provided under the MCA as well as those in relation to an independent professional advocate under the Social Services and Well-being (Wales) Act 2014 when the advocate is acting in both roles.