

**2022 No. (W.)**

**MENTAL CAPACITY, WALES**

**The Mental Capacity Act 2005  
(Independent Mental Capacity  
Advocates) (Wales) (Amendment)  
Regulations 2022**

**EXPLANATORY NOTE**

*(This note is not part of the Regulations)*

The Mental Capacity (Amendment) Act 2019 (c. 18) (“the 2019 Act”) amended the Mental Capacity Act 2005 (c. 9) (“the 2005 Act”) to provide for a new process for authorising arrangements to enable the care or treatment of persons who lack capacity to consent to the arrangements, which give rise to a deprivation of their liberty (“the arrangements”). In particular, the 2019 Act inserts a new Schedule AA1 into the 2005 Act, which contains the new administrative scheme for the authorisation of those arrangements (“Liberty Protection Safeguards”). The Liberty Protection Safeguards will replace the deprivation of liberty safeguards scheme set out in Schedule A1 to the 2005 Act.

Regulation 2 of these Regulations amends the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007 (S.I. 2007/852 (W. 77)) in consequence of the implementation of the new system of Liberty Protection Safeguards introduced by the 2019 Act.

In particular, the amendments ensure that persons appointed as Independent Mental Capacity Advocates (“IMCAs”) in the new Liberty Protection Safeguards system will be subject to the same appointment requirements as IMCAs are currently and that those so appointed will be authorised to carry out functions appropriate to the requirements imposed by the 2019 Act.

The Welsh Ministers’ Code of Practice on the carrying out of Regulatory Impact Assessments was considered in relation to these Regulations. As a result a regulatory impact assessment has been prepared as to

the likely costs and benefits of complying with these Regulations. A copy can be obtained from the Mental Health, Substance Misuse and Vulnerable Groups Division, Welsh Government, Cathays Park, Cardiff CF10 3NQ.

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<i>Made</i>	xxx 2022
<i>Laid before Senedd Cymru</i>	xxx 2022
<i>Coming into force</i>	xxx 2022

The Welsh Ministers make these Regulations in exercise of the powers conferred by sections 35(2) and (3) and 36 of the Mental Capacity Act 2005(1).

**Title and commencement**

1.—(1) The title of these Regulations is the Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) (Amendment) Regulations 2022.

(2) These Regulations come into force on [xxx 2022].

**Amendment of the Mental Capacity Act 2005  
(Independent Mental Capacity Advocates) (Wales)  
Regulations 2007**

2.—(1) The Mental Capacity Act 2005 (Independent Mental Capacity Advocates) (Wales) Regulations 2007(2) are amended as follows.

(2) In regulation 2 (interpretation)—

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- (1) 2005 c. 9. Sections 35 and 36 of the Mental Capacity Act 2005 (“the Act”) are amended respectively by paragraphs 3 and 4 of Schedule 2 to the Mental Capacity (Amendment) Act 2019 (c. 18) (“the 2019 Act”). Section 35(7) of the Act defines “the appropriate authority” as the Welsh Ministers in relation to Wales. Section 64(1) of the Act defines “prescribed”.
- (2) S.I. 2007/852 (W. 77), amended by S.I. 2009/266 (W. 29) and S.I. 2016/211 (W. 84).

- (a) in paragraph (1), at the appropriate places insert—
    - ““arrangements” (*“trefniadau”*) means the arrangements to which Schedule AA1 to the Act(1) applies as defined by paragraph 3 of Schedule AA1 to the Act;”;
    - ““responsible body” (*“corff cyfrifol”*) means the responsible body as defined by paragraph 3 of Schedule AA1 to the Act.”;
  - (b) in paragraph (2), for “39, 39A, 39C and 39D of” substitute “and 39 of, and paragraphs 42 and 43 of Schedule AA1(2) to,”.
- (3) In regulation 5(3) (appointment of independent mental capacity advocates)—
- (a) in paragraph (1)—
    - (i) for “Assembly” substitute “Welsh Ministers(4)”;
    - (ii) for “sections 37, 38, 39, 39A, 39C or 39D of the Act” substitute “sections 37, 38 or 39 of, or Part 5 of Schedule AA1 to, the Act”;
  - (b) in paragraph (6)(c), after “sections 37, 38 or 39 of” insert “, or Part 5 of Schedule AA1 to,”;
  - (c) in paragraph (7), for “Assembly” substitute “Welsh Ministers”.
- (4) In regulation 6 (functions of an independent mental capacity advocate)—
- (a) for paragraph (1) substitute—
    - “(1) This regulation applies where a person is instructed to act as an IMCA to represent and support a person (“P”) by—
      - (a) an NHS body,
      - (b) a local authority, or
      - (c) a responsible body.”;
  - (b) in paragraph (3)(a), for “an NHS body or a local authority” substitute “an NHS body, a local authority or a responsible body”;
  - (c) after paragraph (3) insert—
    - “(3A) Paragraphs (4) to (6) apply only in respect of an IMCA referred to in paragraph (1)(a) or (b).”;
  - (d) after paragraph (6) insert—

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(1) Schedule AA1 to the Act as inserted by section 4A(5) of the 2019 Act.

(2) Paragraphs 42 and 43 of Schedule AA1 to the Act as inserted by section 4A(5) of the 2019 Act are not yet in force.

(3) Regulation 5 as amended by S.I. 2009/266 (W. 29).

(4) The functions of the Assembly were transferred to the Welsh Ministers under paragraph 30(1) of Schedule 11 to the Government of Wales Act 2006 (c. 32).

“(7) Paragraph (8) applies only in respect of an IMCA referred to in paragraph (1)(c) in a case to which paragraph 42 of Part 5 of Schedule AA1 to the Act applies.

(8) The functions of an IMCA include—

- (a) assisting P as far as practicable in participating in any decision relating to the arrangements or proposed arrangements;
- (b) ascertaining P’s past and present wishes and feelings about the arrangements or proposed arrangements and the beliefs and values that would be likely to influence P, if P had capacity in relation to the arrangements or proposed arrangements;
- (c) ascertaining what alternative courses of action are available in relation to P, including any less restrictive alternatives;
- (d) where appropriate, preparing a report for the responsible body referred to in paragraph (1)(c) in relation to the arrangements or proposed arrangements, in which such submissions about the arrangements or proposed arrangements as are considered appropriate by the IMCA may be included;
- (e) maintaining such contact with P throughout the period of the appointment as the IMCA and the responsible body consider is practicable and appropriate.

(9) Paragraph (10) applies only in respect of an IMCA referred to in paragraph (1)(c) in a case to which paragraph 43 of Part 5 of Schedule AA1 to the Act applies.

(10) The IMCA must support the appropriate person<sup>(1)</sup> in—

- (a) assisting P as far as practicable to participate in any decision relating to the arrangements or proposed arrangements;
- (b) ascertaining P’s past and present wishes and feelings about the arrangements or proposed arrangements and the beliefs and values that would be likely to influence P, if P had capacity in relation to the

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(1) See paragraph 42(5) of Schedule AA1 to the Act.

- arrangements or proposed arrangements;
- (c) ascertaining what alternative courses of action are available in relation to P, including any less restrictive alternatives;
- (d) making representations to the person carrying out the pre-authorisation review under paragraph 24 of Schedule AA1 to the Act;
- (e) where appropriate, seeking a review of the authorisation under paragraph 38(3)(b) of Schedule AA1 to the Act or making a request for such a review themselves;
- (f) making any representations that are necessary for the purpose of securing P's rights in relation to the arrangements or proposed arrangements;
- (g) maintaining such contact with P throughout the period of the appointment as the IMCA and the responsible body consider is practicable and appropriate;
- (h) where appropriate, making an application to the Court of Protection under section 21ZA of the Act<sup>(1)</sup>.

(11) In this regulation, “appropriate person”, in relation to a cared-for person, means a person within paragraph 42(5) of Schedule AA1 to the Act.”

(5) In regulation 7 (challenges to decisions affecting persons who lack capacity), after paragraph (2) insert—

“(3) Where the IMCA is appointed in a case to which paragraph 42 of Schedule AA1 to the Act applies, the IMCA may, in any case where the IMCA considers it appropriate—

- (a) make representations to the person carrying out the pre-authorisation review under paragraph 24 of Schedule AA1 to the Act;
- (b) assist P in seeking a review of the authorisation under paragraph 38(3)(b) of Schedule AA1 to the Act or make a request for such a review themselves;

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(1) Section 3 of the 2019 Act inserts a new section 21ZA into the Act. Section 21ZA will replace section 21A of the Act. The 2019 Act came into force on 16 May 2019 for the limited purpose of enabling the exercise of any power to make regulations but is not yet in force otherwise.

- (c) make any representations that are necessary for the purpose of securing P's rights in relation to the arrangements or proposed arrangements;
- (d) make an application to the Court of Protection under section 21ZA of the Act or assist P to do so."

*Name*

Minister for Health and Social Services, one of the  
Welsh Ministers

Date