

WOLVERHAMPTON

MENTAL CAPACITY ACT 2005

PRACTICE GUIDANCE

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Using this document

This document provides information about the Mental Capacity Act (MCA) 2005 and how its implemented in Wolverhampton. The Act was fully implemented in October 2007. In this document:

Sections 1 – 5 provide information about the Act, the key principles and the framework for practice.

Appendix i: The decision making flow chart – essentially the sequence operational staff will use to make decisions concerning mental capacity.

Appendix ii Notes of guidance for those key decisions.

1.0 Foreword

- 1.1 The MCA will apply to everyone who works in health and social care and is involved in the care, treatment or support of people over 16 years living in England and Wales, who are unable to make all or some decisions for themselves. The inability to make a decision could be caused by a psychiatric illness (for example, dementia), a learning disability, mental health problems, a brain injury or a stroke.
- 1.2 People who work in health and social care such as doctors, nurses, dentists, psychologists, occupational, speech and language therapists, social workers, residential and care home managers, care staff (including domiciliary care workers), support workers (including people who work in supported housing) and any other health and social care worker's re affected by the MCA and need to know about its impact on the people we care for and support.

The Act has been accompanied by a statutory Code of Practice which explains how the MCA works on a day to day basis and provides guidance to all those working with, or caring for, people who lack capacity. If you work with people who lack capacity in a professional or paid role you have a legal duty to have regard to the Code of Practice.

It can be found online at: www.dca.gov.uk/legal-policy/mental-capacity/index.htm

- 1.3 This Act is not about detention or compulsory treatment under the Mental Health Act 1983. The 1983 Act is primarily about people who are diagnosed as having a mental health problem which requires that they be detained or treated in the interests of their own health or safety or with a view to protecting other people.
- 1.4 The Act is based on existing best practice and creates a single, coherent framework for dealing with mental capacity issues and an improved system for settling disputes, dealing with personal welfare issues and the property and affairs of people who lack capacity.

It puts the individual who lacks capacity at the heart of decision making and places a strong emphasis on supporting and enabling the individual to make his/her own decisions. If they are unable to do this, the emphasis is that they should be involved in the decision making process as far as possible.

It introduces new safeguards for people who lack capacity and the people who work with, support or care for them.

The MCA is underpinned by five principles, diagnostic and functional capacity tests, and the concept of "best interests".

- 1.5 Mental capacity is often a key consideration in adult protection situations. The adult protection unit is an essential point of contact for anyone who suspects abuse or ill treatment of a vulnerable adult.

Note: This document provides guidance on the practice in Wolverhampton. For more detailed guidance and information please refer to the Statutory Code of Practice:
www.dca.gov.uk/legal-policy/mental-capacity/index.htm

2.0 The Changes Introduced by Mental Capacity Act

The changes brought in by the Mental Capacity Act are:

- There must always be the presumption that people you provide care or treatment for have capacity to make decisions for themselves.
- There is a single clear test for assessing whether a person lacks capacity to make a decision (see section 4: The Test for Mental Capacity).
- It establishes a non-exhaustive check list to help determine what is in the 'best interests' of a person lacking capacity (see section 5: Working in a Person's Best Interests).
- It provides several ways that people can influence what happens to them if they are unable to make particular decisions in the future, including advance decisions to refuse medical treatment, written statement of wishes and feelings, and creating a Lasting Power of Attorney (LPA).
- It clarifies the actions you can take if someone does lack capacity, and the legal safeguards that will govern this.
- It establishes an obligation for you to consult people who are involved in caring for the person who lacks capacity and anyone interested in their welfare (for example family members, friends, partners and carers) about decisions affecting that person. If there is an attorney under an LPA, a deputy appointed by the Court or named person, you also have an obligation to consult them.
- A new advocacy service called the Independent Mental Capacity Advocate (IMCA) service. An IMCA is only normally involved if there are no family or friends who can be consulted.
- A new criminal offence of ill-treatment or neglect.
- New safeguards for undertaking research involving people who lack capacity.
- A new Court of Protection and a new public official (the Public Guardian) who will be supported by the Office of the Public Guardian (OPG).
- The ability for a person to make advanced decisions to refuse medical treatment (formerly known as "living wills").

3.0 The Five Principles of the Act

The MCA has five key principles which emphasise the fundamental concepts and core values of the MCA. You must always bear these in mind when you are working with, or providing care or treatment for people who lack capacity.

The five principles are:

1. Every adult has the right to make his or her own decisions and must be assumed to have capacity to do so unless it is proved otherwise. This means that you cannot assume that someone cannot make a decision for themselves just because they have a particular medical condition or disability.
2. People must be supported as much as possible to make their own decisions before anyone concludes that they cannot make their own decisions. This means that you should make every effort to encourage and support the person to make the decision for himself/herself. If a lack of capacity is established, it is still important that you involve the person as far as possible in making decisions.
3. People have the right to make what others might regard as unwise or eccentric decisions. Everyone has their own values, beliefs and preferences which may not be the same as those of other people. You cannot treat them as lacking capacity for that reason.
4. Anything done for or on behalf of a person who lacks mental capacity must be done in their best interests.
5. Anything done for, or on behalf of, people without capacity should be the least restrictive of their basic rights and freedoms. This means that when you do anything to or for a person who lacks capacity you must choose the option that is in their best interests and interferes the least with their rights and freedom of action.

4.0 The Test for Mental Capacity

The first test is diagnostic:

In order to decide whether an individual has the mental capacity to make a particular decision, you must first decide whether there is an impairment of, or disturbance in, the functioning of the person's mind or brain (it does not matter if this is permanent or temporary).

The second test is functional:

The person will be unable to make the particular decision if after all appropriate help and support to make the decision has been given to them (the second of the 5 principles) if they cannot do one of the following:

1. Understand the information relevant to that decisions
2. Retain that information
3. Use or weigh that information as part of the process of making the decision
4. Communicate their decision (whether by talking, using sign language or any other means).

Mental Capacity is decision specific

This means that a person may be capable of making a decision on say a more simple issue, but not one of a more complex nature. Each decision the person is being invited to make should be individually assessed as to their ability to make it.

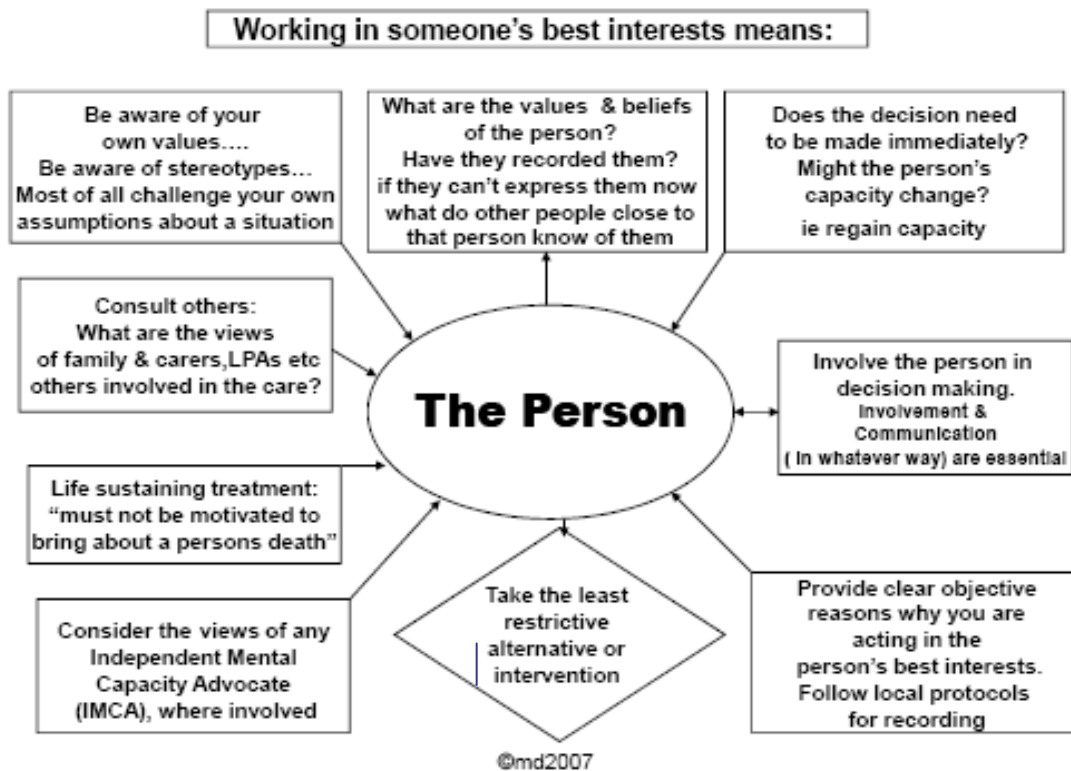
5.0 Working in a Person's Best Interests

Determining what is in the best interest of a person who lacks the capacity to make a decision requires the 'decision maker' to:

- Consider the person's present and past wishes and feelings.
- Be aware of influencing beliefs and values the person holds
- Consult other people when it is appropriate to do so

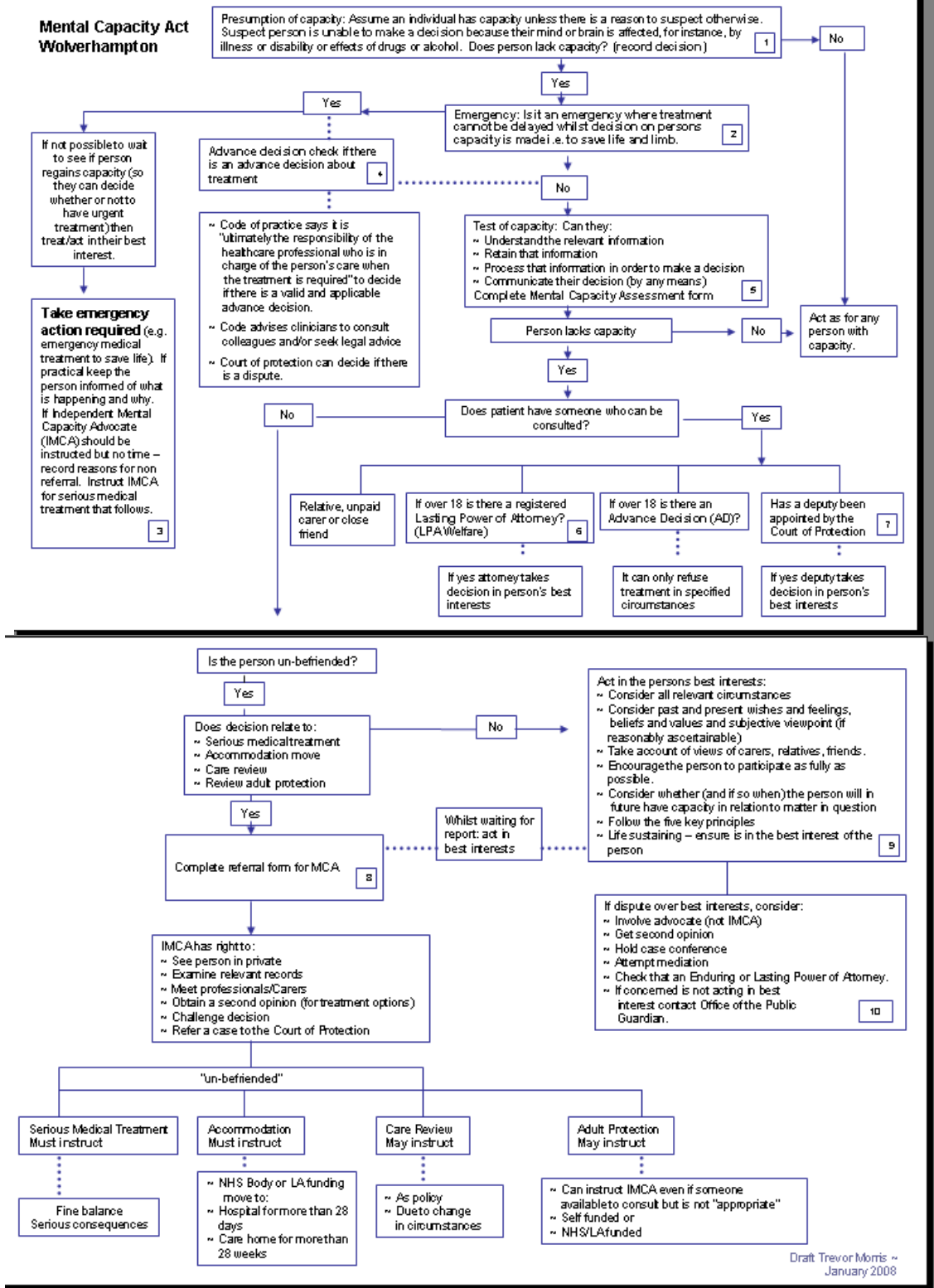
Those decision makers will normally be:

- The carer responsible for day-to-day care
or
- A professional such as a doctor, nurse or social worker
and
- Decisions about medical treatment, care arrangements or accommodation have to be made.



Appendix i

This flow chart sets out the decision making process for application of the Mental Capacity Act.



Box 1

See section 4 The Test for Mental Capacity.

Box 2.

What happens in emergency situations?

Page 31, paragraph 3.6 of Code of Practice states:

Clearly, in emergency medical situations (for example, where a person collapses with a heart attack or for some unknown reason and is brought unconscious into a hospital), urgent decisions will have to be made and immediate action taken in the person's best interests. In these situations, it may not be practical or appropriate to delay the treatment while trying to help the person make their own decisions, or to consult with any known attorneys or deputies. However, even in emergency situations, healthcare staff should try to communicate with the person and keep them informed of what is happening.

Box 3

Decisions about serious medical treatment

Where a serious medical treatment decision is being considered for a person who lacks the capacity to consent, and who qualifies for additional safeguards, section 37 of the Act imposes a duty on the NHS body to instruct an IMCA. NHS bodies must instruct an IMCA whenever they are proposing to take a decision about 'serious medical treatment', or proposing that another organization (such as a private hospital) carry out the treatment on their behalf, if:

- The person concerned does not have the capacity to make a decision about the treatment, and
- There is no-one appropriate to consult about whether the decision is in the person's best interest, other than paid care staff.

Regulations for England and Wales set out the definition of 'serious medical treatment' for decisions that require an IMCA. It includes treatment for both mental and physical conditions.

Serious medical treatment is defined as treatment which involves giving new treatment, stopping treatment that has already started or withholding treatment that could be offered in circumstances where:

- If a single treatment is proposed there is a fine balance between the likely benefits and the burdens to the patient and the risk involved
- A decision between a choice of treatments is finely balanced, or
- What is proposed is likely to have serious consequences for the patient.

‘Serious consequences’ are those which could have a serious impact on the patient, either from the effects of the treatment itself or its wider implications. This may include treatments which:

- Cause serious and prolonged pain, distress or side effects
- Have potentially major consequences for the patient (for example, stopping life-sustaining treatment or having major surgery such as heart surgery), or
- Have a serious impact on the patient’s future life choices (for example, interventions for ovarian cancer)

It is impossible to set out all types of procedures that may amount to ‘serious medical treatment’, although some examples of medical treatments that might be considered serious include:

- Chemotherapy and surgery for cancer
- Electro-convulsive therapy
- Therapeutic sterilization
- Major surgery (such as open-heart surgery or brain/neuron-surgery)
- Major amputations (for example, loss of an arm or leg)
- Treatments which will result in permanent loss of hearing or sight
- Withholding or stopping artificial nutrition and hydration, and
- Termination of pregnancy

These are illustrative examples only, and whether these or other procedures are considered serious medical treatment in any given case, will depend on the circumstances and the consequences for the patient. There are also many more treatments which will be defined as serious medical treatments under the Act’s regulations. Decision-makers who are not sure whether they need to instruct an IMCA should consult their colleagues.

Understanding the role of the IMCA service

- The aim of the IMCA service is to provide independent safeguards for people who lack capacity to make certain important decisions and, at the time such decisions need to be made, have no-one else (other than paid staff) to support or represent them or be consulted.
- IMCAs must be independent.
- For Wolverhampton IMCAs are provided by POhWER – independent charity providing a National Advocacy Service.

Box 4

Advanced decisions

- An advance decision enables someone aged 18 and over, while still capable, to refuse specified medical treatment for a time in the future when they may lack the capacity to consent to or refuse that treatment.
- An advance decision to refuse treatment must be valid and applicable to current circumstances. If it is, it has the same effect as a decision that is made by a person with capacity: healthcare professionals must follow the decision.
- Healthcare professionals will be protected from liability if they:
 - stop or withhold treatment because they reasonably believe that an advance decision exists, and that it is valid and applicable
 - treat a person because, having taken all practical and appropriate steps to find out if the person has made an advance decision to refuse treatment, they do not know or are not satisfied that a valid and applicable advance decision exists.
- People can only make an advance decision under the Act if they are 18 or over and have the capacity to make the decision. They must say what treatment they want to refuse, and they can cancel their decision – or part of it – at any time.
- If the advance decision refuses life-sustaining treatment, it must:
 - be in writing (it can be written by someone else or recorded in healthcare notes)
 - be signed and witnessed, and
 - state clearly that the decision applies even if life is at risk
- To establish whether an advance decision is valid and applicable, healthcare professionals must try to find out if the person:

- has done anything that clearly goes against their advance decision
 - has withdrawn their decisions
 - has subsequently conferred the power to make that decision on an attorney, or
- would have changed their decision if they had known more about the current circumstances.

Box 5

Where a professional has carried out an assessment of a person's mental capacity to make a particular decision this should be recorded in full on the MCA assessment form. Doctors and healthcare professionals are expected to record in the patient's clinical notes that an MCA assessment form has been completed. Social care staff will keep records according to their area of work (e.g. within the Care Programme Approach or relevant assessment process).



Mental Capacity Assessment and Best Interests Decision

Name of service user/patient.....
NHS/Care First Number [if known].....

The Mental Capacity Assessment

A. The Principles

The first three of the five statutory principles are:

1. A person must be assumed to have capacity unless it is established that they lack capacity.
2. A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.
3. A person is not to be treated as unable to make a decision merely because he makes an unwise decision.

Having taken account of these principles do you believe there is a need to undertake an assessment of mental capacity?

Yes No

If Yes

What is the specific decision that needs to be made?

Please specify decision

Who has been consulted?

So as to contribute to your assessment of **mental capacity** in respect of this specific decision

Please list consultees who provided information on person's skills/communication needs:

B. The First Test of Capacity is Diagnostic

- ***Does the person have an impairment of, or a disturbance in the functioning of, their mind or brain?***

Proof is required, on the balance of probabilities, that the person has an impairment of the mind or brain, or some sort of or disturbance, permanent or temporary, that affects the way their mind or brain works.

Yes No

Indicators of impairment of, or disturbance in, the mind or brain:

C. The Second Test of Capacity is Functional

- ***Does the impairment or disturbance mean that the person is unable to make the specific decision required when they need to?***

Is the person able to:-

1. Understand relevant information about the decision to be made?

Relevant information must be provided in an appropriate manner e.g. is an interpreter needed, should written information be provided, is there a better time to provide this information?

Yes No

Indicators of understanding the decision/not understanding

2. Retain that information in their mind?

The person must be able to hold the information in their mind long enough to use it to make an effective decision

Yes No

Indicators of retention of information/or not

3. Use or weigh that information as part of the decision-making process?

The impairment or disturbance may lead to a person making a specific decision without understanding or using the information they have been given. Did they in your opinion use /weigh up the information?

Yes No

Indicators of using or weighing up the information

These three points should be applied together. If a person cannot do any of these three things, they will be treated as unable to make the decision. The fourth point only applies in situations where people cannot communicate their decision in any way.

4. Communicate their decision?

If a person cannot communicate their decision in any way at all, the Act says that they are to be treated as unable to make that decision.

Yes No

Describe communication method

Does the person therefore lack capacity to make the specific decision in question?

Yes No

Worker..... Role.....

Team/Organisation.....Telephone

Signature..... Date.....

The Best Interests Decision

If it has now been determined that the person lacks capacity to make the specific decision needed, the decision maker next needs to make that decision on the person's behalf - in their best interests.

A. Is an IMCA referral required?

Service users and patients may lack the capacity to make a specific decision about accommodation moves between care homes and/or hospitals, yet have no one appropriate to support them, such as family members, friends, a person or persons given Lasting Powers of Attorney, or a Court of Protection appointed Deputy. In these circumstances an IMCA needs to be appointed to provide independent safeguards. An IMCA may also be required for some care home reviews and Safeguarding Adult situations.

Yes **No**

If required, please complete an IMCA referral form and e mail or post it to the IMCA Service.

B. The Mental Capacity Act requires that common factors have been taken into account in arriving at the decision required. These factors, taken from Chapter 5 of the Code of Practice, make up the following checklist:

What are the values and beliefs of the person?

If they cannot be expressed now what do other people close to that person know of them [have they been previously recorded by others if unable to express these]?

What are the views of others involved in the person's care e.g. family, carers, Lasting Powers of Attorneys, Court of Protection Deputies, professional colleagues, multi-disciplinary team members etc?

Is this the least restrictive alternative or intervention [Principle 5]?

Have you involved the person in the specific decision to be made [for serious medical treatment decisions-is there a valid advance decision to refuse medical treatment]?

Can you provide clear objective reasons why you are acting in the person's best interests [Principle 4]?

Does a decision need to be made immediately-could the person regain mental capacity?

Have you considered the views of any Independent Mental Capacity Advocate (IMCA), where involved?

C. Having completed the checklist, do you believe that the decision required can now be taken in the best interests of the person concerned?

Yes No

Conclusions

Worker.....Role.....

Team/Organisation.....Telephone

Signature..... Date.....

Box 6

The standard form for personal welfare LPAs allows attorneys to make decisions about anything that relates to the donor's personal welfare. But donors can add restrictions or conditions to areas where they would not wish the attorney to have the power to act. For example, a donor might only want an attorney to make decisions about their social care and not their healthcare. There are particular rules for LPAs authorizing an attorney to make decisions about life-sustaining treatment.

Box 7

The rules for appointing Deputies:

Sometimes it is not practical or appropriate for the court to make a single declaration or decision. In such cases, if the court thinks that somebody needs to make future or ongoing decision for someone whose condition makes it likely they will lack capacity to make some further decisions in the future, it can appoint a deputy to act for and make decisions for that person. A deputy's authority should be as limited in scope and duration as possible.

In the majority of cases, the deputy is likely to be a family member or someone who knows the person well. But in some cases the court may decide to appoint a deputy who is independent of the family (for example, where the person's affairs or care needs are particularly complicated). This could, for example, be the Director of Adult and Community Services in Wolverhampton or a professional deputy. The Office of the Public Guardian (OPG) has a panel of professional deputies (mainly solicitors who specialize in this area of law) who may be appointed to deal with property and affairs if the court decides that would be in the person's best interests.

Box 8

Understanding the role of the IMCA service

- The aim of the IMCA service is to provide independent safeguards for people who lack capacity to make certain important decisions and, at the time such decisions need to be made, have no-one else (other than paid staff) to support or represent them or be consulted.
- IMCAs must be independent.
- For Wolverhampton IMCAs are provided by POhWER – independent charity providing a National Advocacy Service.

IMCA Referral Form Sandwell, Walsall & Wolverhampton

Client Name:			
Date of Birth:			
Home Address & Location: Address, postcode, tel.			
Date referral made:			
Sandwell		Walsall	Wolverhampton

Reason for Referral (please tick)

Serious Medical Treatment	
Move to accommodation (NHS body)	
Move to accommodation (Local Authority)	
Safeguarding Vulnerable Adults Procedure (LA)	
Care Review (NHS or LA)	

State Specific Decision (Proposed Options)

Significant dates

When does the decision need to be made by?	
Please give details of any impending meetings or deadlines	

Referrer and Decision Maker's Contact Details:

	Referrer	Decision Maker (If not referrer)
Name:		
Job Title & Team:		
Address:		
Postcode:		
Tel:		
Mobile:		
Email:		
Contact person for access to records		

Specific Cultural and Communication Needs

Language		Ethnicity	
Gender		Religion	
Sexuality		Disability	
Other (Please Specify)			

Decision Maker's Confirmation

The decision maker is designated by the Local authority or NHS body who has the responsibility for Mental Capacity assessments and best interest decisions on issues of change of accommodation, serious medical treatment and safeguarding adults or care reviews. Therefore only the decision maker is able to confirm the following. *

***I confirm that for the above issue I am the Decision Maker on behalf of** (*insert NHS body or local authority*)
for decisions regarding (*insert client name*).....

Name	Signature	Date

***I also confirm that I deem** (*insert client name*) **to lack capacity to make the decision, and that they are unbefriended, with no-one appropriate to consult regarding this issue. (The exception being those referred under the safeguarding procedures)**

My assessment is the person cannot:

Yes/No

Understand the relevant information	
Retain that information	
Process that information in order to make a decision	
Communicate their decision (by any means)	

Name	Signature	Date

Please give details of any family or friends and the reasons why you have deemed them inappropriate to consult:

Name/relationship	Reason for not consulting

Counter-signatory (Care Review or Safeguarding Vulnerable Adults Procedure only)		
Name	Signature	Date

Please return this form to the IMCA team by fax to 0845 337 3052 or by email to IMCA@pohwer.net or post to POhWER IMCA iBIC Holt Court South, Jennens Road, Aston Science Park, Birmingham, B7 4EJ. If you have any queries please contact the IMCA duty team by phone on 0845 223 0438. Thank you.

Box 9

See section 5: Working in a person's best interest.

Box 10

The Public Guardian is an officer established under Section 57 of the Act. The Public Guardian will be supported by the Office of the Public Guardian, which will supervise deputies, keep a register of deputies, Lasting Powers of Attorney and Enduring Powers of Attorney, check on what attorneys are doing, and investigate any complaints about attorneys or deputies. The OPG replaces the Public Guardianship Office (PGO) that has been in existence for many years.