



Where does the responsibility lie to appoint an advocate in cases where the person lacks the capacity to make decisions?

At Irwin Mitchell, we aim to provide our clients with the best support required, this factsheet details the changes in regulations to the Care Act 2014, and requirement of local authorities to appoint advocates.

Some people who lack capacity to make decisions in relation to their care or residence for example, may have an advocate appointed for them under the Mental Capacity Act 2005 (an Independent Mental Capacity Advocate, or IMCA). The purpose of having such an advocate is to ensure that the individual has “a voice” when considering that person’s best interests.

For the first time, the Care Act 2014 also sets out statutory duties for local authorities to provide advocates in certain circumstances where a person’s best interests are not necessarily in dispute, but where somebody may need assistance in making decisions relating to care and support.

Duty to provide advocacy support

Under section 67 of the Care Act, local authorities will be under a duty to provide an independent advocate where an adult may have “substantial difficulty” in doing one of the following:

- Understanding relevant information
- Retaining that information
- Using or weighing up that information
- Communicating their views, wishes or feelings.

The duty to provide an advocate does not apply where there is an appropriate person to represent and support the individual, for example a family member.

However there are two important exceptions to this rule under the Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014, where an advocate must be appointed even where a suitable individual is able to assist the disabled adult or carer in making decisions:

1. The assessment or care plan is likely to result in an NHS body making arrangements for the provision to that individual of accommodation in a hospital for 28 days or more, or a care home for 8 weeks or more, and where the local authority is satisfied that it is in the person’s best interests to have an advocate appointed
2. There is a disagreement on a material issue between the individual supporting the disabled adult/carer and the local authority, and where it is agreed that providing an advocate would be in the best interests of the disabled adult/carer.

When should an advocate be appointed?

The local authority will have to consider whether somebody has substantial difficulty in understanding matters and whether an advocate is therefore required in a number of scenarios including:

- Carrying out needs assessments
- Carrying out carer’s assessments
- Preparing care and support plans for adults
- Preparing support plans for carers
- Revising care and support plans/support plans
- Carrying out child’s needs assessment
- Carrying out child’s carer’s assessment; and
- Carrying out young carer’s assessments.

Role of the independent advocate

The independent advocate must assist the individual with obtaining care and support, and is under a duty to promote their well-being.

As long as the person consents (if they are able to do so), the advocate should meet the individual in private and ascertain their wishes, views and feelings in relation to their care and support.

They should assist them in making decisions about their care and support, help them to understand what they may be entitled to, and help them to challenge the local authority's decisions if the individual so wishes.

The advocate must try to ensure that the person they are supporting accesses the support they are entitled to. In Regulation 5 of the act, it states that where necessary the advocate should make representations on behalf of the individual in relation to their care and support entitlement, and if they have concerns they should prepare a written report for the local authority's review.

The local authority is under a duty to consider any written report from an advocate and respond in writing. It must also take into account the advocate's views when making decisions in relation to the individual in question.

An advocate may also be under a duty to bring legal proceedings on behalf of an individual that they represent, if disputes cannot be resolved with the local authority.

“They’ve kept me completely in the loop and someone’s always got back to me quickly; I’ve never felt like I’ve been in the dark and I’ve always felt like my case has been a priority for them.”

– Anonymous

To talk to a specialist advisor today simply call **0800 028 1943**
You can also follow us on Twitter **@IMPUBLICLAW**

📞 0800 028 1943

💻 www.irwinmitchell.com

🐦 @irwinmitchell

For a list of our offices visit our website

Irwin Mitchell LLP is a limited liability partnership registered in England & Wales, with number OC343897, and is authorised and regulated by the Solicitors Regulation Authority. All Scottish cases will be handled by a separate Scottish legal practice, Irwin Mitchell Scotland LLP, which is regulated by the Law Society of Scotland.

PLS-PL-0025-FS