

# What is independent advocacy?

This factsheet provides information on independent advocacy, specifically within the context of social care and the Care Act 2014.

In certain situations, local authorities must arrange independent advocacy support to facilitate the involvement of a person in their assessment, in the preparation of their care and support plan, in a review of their care and support plan, as well as in safeguarding enquiries.

Note – independent advocacy under the Care Act 2014 is distinct from the following types:

- Independent Mental Capacity Advocate (IMCA) – Provides a legal safeguard for people who lack the capacity to make specific decisions; for example, where they live and about serious medical treatment options.
- Independent Mental Health Advocate (IMHA) – Provides an additional safeguard for people who are subject to the Mental Health Act; for example, those detained in hospital or subject to a Community Treatment Order (CTO).
- Instructed advocacy – Where the individual tells the advocate what they would like them to say and do; and / or support them in what they want to achieve.
- Non-instructed advocacy – Where the individual lacks the capacity to tell the advocate what to say, the advocate makes sure their best interests are upheld.



## **Under what circumstances should local authorities arrange an independent advocate?**

People with social care needs may sometimes find it difficult to understand the intricacies of the care and support processes and voice their own beliefs and concerns. The role of an independent advocate is to support and represent the person and to facilitate their involvement in the key processes and interactions with the local authority; and other organisations as required. There are two criteria to qualify for an independent advocate. A person should meet both criteria to be eligible for support through independent advocacy:

1. That the person would have 'substantial difficulty' in being fully involved in the process without the provision of an independent advocate; and
2. That there is no appropriate individual available to support and represent the person's wishes who is not paid or professionally engaged in providing care or treatment to the person or their carer. An appropriate individual may be a family member or friend who is able to understand the complexities of the social care processes.

A local authority is under a duty to provide an independent advocate if both criteria are met.

## **At what stage in the social care process should an independent advocate be arranged?**

Before approaching the local authority, some people need independent advocacy to access any information and advice, therefore the service must be accessible. This means that local authorities must first consider any advocacy needs. The advocacy duty applies from the point of first contact with the local authority and continues throughout the process.

Once a person has contacted the local authority, or come to the local authority's attention because of a safeguarding concern, they must be actively involved in the following:

- identifying their needs through assessment;

- in developing their care and support plan, and in leading their care reviews, where relevant; and
- being involved in any safeguarding enquiry or Safeguarding Adults Review.

The aim of the duty to provide advocacy is to enable people who have 'substantial difficulty' in being involved in these processes. This is to support their involvement, and where necessary, to speak on their behalf as their advocate.

No matter how complex a person's needs, local authorities must involve people, help them express their wishes and feelings, support them to weigh up options, and to make their own decisions. Arranging an advocate can help people to do this.

The main processes involved under the Care Act 2014 are:

- a needs assessment under section 9 of the Care Act
- a carer's assessment under section 10
- the preparation of a care and support plan or support plan under section 25
- a review of care and support plan or support plan under section 27
- a child's needs assessment under section 58
- a child's carer's assessment under section 60 (therefore some people below 16 years of age)
- a young carer's assessment under section 63
- safeguarding under section 68

## **Does the advocacy duty apply equally to all people, regardless of where they live?**

Yes. The duty applies in all settings, including for those people living in the community, in care homes or – apart from safeguarding enquiries and Safeguarding Adult Reviews – in prisons. Prisons have a separate and internal policy on safeguarding advocacy.

## What is ‘substantial difficulty’?

The Care Act defines four areas, in any one of which a ‘substantial difficulty’ might be found, which are set out below.

### **(1) Understanding relevant information**

Many people can be supported to understand relevant information, if it is presented appropriately and if time is taken to explain it. Some people, however, will not be able to understand relevant information

### **(2) Retaining information**

If a person is unable to retain information long enough to be able to weigh up options and make decisions, then they are likely to have ‘substantial difficulty’ in engaging and being involved in the process.

### **(3) Using or weighing the information as part of engaging**

A person must be able to weigh up information in order to participate fully and express preferences for or choose between options. For example, they need to be able to weigh up the advantages and disadvantages of moving into a care home or terminating an undermining relationship. If they are unable to do this, they will have ‘substantial difficulty’ in engaging and being involved in the process.

### **(4) Communicating their views, wishes and feelings**

A person must be able to communicate their views, wishes and feelings whether by talking, writing, signing or any other means, to aid the decision process and to make priorities clear. If they are unable to do this, they will have ‘substantial difficulty’ in engaging and being involved in the process.

For example, a person with significant learning disabilities may be considered to have ‘substantial difficulty’ in communicating their views, wishes and feelings. Equally a person with Asperger’s may have ‘substantial difficulty’; as may a frail older person who does not have any diagnosis but is confused because of an infection. It also includes a

person who is near the end of their life and appears disengaged from involvement and decision-making.

Within this context, it is the person's ability to communicate their views, wishes and feelings which is fundamental to their involvement rather than the diagnosis or specific condition.

Both the Care Act and the Mental Capacity Act recognise the same areas of difficulty, and both require a person with these difficulties to be supported and represented, either by family or friends, or by an advocate in order to communicate their views, wishes and feelings.

## **So, having 'substantial difficulty' is not the same as lacking mental capacity?**

That is correct. It is a common misconception that a person must be deemed as lacking mental capacity to qualify for an independent advocate.

As long as the person has 'substantial difficulty', and there is no appropriate individual to assist them, the person should be appointed an independent advocate.

## **What do local authorities consider when assessing the availability of 'appropriate individuals'?**

If it has been concluded that a person has substantial difficulty in being involved, a local authority must then consider whether there is an appropriate individual to facilitate the person's involvement.

This involves three considerations:

1. It cannot be someone who is already providing the person with care or treatment in a professional capacity or on a paid basis (regardless of who employs or pays for them). That means it cannot be, for example, the person's GP, nurse, key worker or care and support worker.

2. The person's wish not to be supported by that individual should be respected. Where a person does not wish to be supported by a relative – for example, perhaps because they wish to be moving towards independence from their family – then the local authority cannot consider the relative appropriate.

3. The appropriate individual is expected to support and represent the person and to facilitate their involvement in the processes. It is unlikely that some people will be able to fulfil this role easily; for instance, a family member who lives at a distance and who only has occasional contact with the person, a spouse who also finds it difficult to understand the local authority processes, a friend who expresses strong opinions of her own prior to finding out those of the individual concerned, or a housebound parent.

If there is no appropriate individual available, an independent advocate must be appointed. Access Social Care have produced a separate factsheet on 'Being refused as an appropriate person' and what to do in those circumstances.

## Case study

*Jacinta is 26 and lives with her mother and father. She has 2 siblings aged 28 and 23 who have left the family home. Jacinta would also like to move to living more independently. Jacinta has moderate learning disabilities and finds it hard to retain information. Jacinta's parents are very worried that she won't be able to cope living in her own home and are against her doing so. In these circumstances Jacinta's parents would not be 'an appropriate person' who could effectively represent and support her involvement.*

In this situation, an independent advocate would be appointed for Jacinta.

**Source: Care and Support Statutory Guidance**