

Guidance to support advocates in challenging decisions or actions with or on behalf of individuals



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Disclaimer: This document is based upon the law as it stands as at 1st April 2015; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

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Foreword

Throughout my family, professional and political life I have worked to ensure that people have the support that they need to live a life of their choice. It makes an immeasurable difference for people to be supported to know what choices they have, to express their views and be in control of their own lives.

Sadly, I know what happens when people's views are not sought or when they are ignored or misinterpreted. A failure to listen to people or to give weight or credence to what they say lies at the heart of many of the tragedies which have shamed social care and health services over recent decades. It is for this reason that it is vital for people to get the support that they need to express their views.

All too often I have seen decisions taken which conflict with the person's views, wishes or needs. Advocates, family members and others often take on the crucial role of supporting people to raise their own concerns and challenging decisions on their behalf where necessary.

By guiding people through the skills and knowledge needed to challenge decisions, I believe that this publication makes an important contribution towards improving the lives, and securing the rights, of people who use social care and health services.



Professor the Baroness Hollins
House of Lords

Introduction

Advocacy helps to ensure that individual men and women are in control of their own lives and are supported to make their own decisions. So it is no surprise that people often seek advocacy support when their voice is not being heard or when they fear that their rights are being disregarded. Where people face life-changing decisions that they do not agree with, and which may have disastrous consequences, supporting the person to challenge those decisions is integral to advocacy.

Some people, including many men and women with advanced dementia or profound and multiple learning disabilities, may find it difficult to articulate their concerns in such a way that they are properly considered, irrespective of the level of support provided. Having an advocate can help provide a level of protection, ensuring that decisions taken are properly tested and based, as far as possible, on the person's wishes and views. It can be necessary for an advocate to challenge decisions on the person's behalf, if they are not able to do so themselves.

An advocate's duty to support a person to challenge decisions, and where necessary to do so on the person's behalf, is now enshrined in law under the Care Act (2014).

Yet knowing the best way to challenge decisions is not always straight-forward. There is rarely just one way to do this and it is important that people and their advocates know what the options are and the pros and cons of each. Until now there has been no comprehensive Guidance to assist advocates in fulfilling this duty.

This guide aims to increase advocates' knowledge and confidence and to provide essential reference material for when it is most needed. It will help advocates to develop a 'tool-kit' of different approaches to take, dependent on the person's views and the situation. The spectrum of methods to resolve issues from informal discussion through to mediation, formal complaint processes, judicial review and the Court of Protection are addressed. It considers both the channels by which to challenge decisions and the skills which can help to do so successfully - including negotiating and influencing.

The guide may also be helpful to advocates wishing to identify where they may need to develop their understanding and abilities as well as to people outside of this profession wondering how to resolve their own concerns or needing to support a friend or relative to do so.

Advocacy Essentials

Independent advocacy aims to support individuals to make their own informed decisions and to express their views and needs. Advocates support and enable people to:

- access information, services and support;
- understand and secure their rights;
- express their views and concerns;
- explore choices and options.

Advocates:

- take action to help people say what they want, secure their rights, represent their interests and obtain the support they need;
- work in partnership with the person they support and take their side;
- listen to what the person is telling them and help them to get others to listen and take action;
- support the person to understand their choices and the potential consequences of what they choose;
- support the person to challenge decisions that others have made or where their rights have not been respected;
- support self-advocacy and empowerment through their work.

Sometimes an advocate may represent a person who cannot request advocacy support. They may support and represent someone who finds it difficult to express their views, ensuring that decisions to be taken involve the individual, are person-centred, and that the rights and views of people who cannot easily assert these are nevertheless heard and responded to.

Advocates are frequently in a position where the support they offer can help individuals to resolve issues. This is a key part of their role.

Where possible, and appropriate, issues should be resolved informally. There are many reasons for this which include:

- possible resolution at an early stage without the need to use formal processes;
- formal methods are often time-consuming and can be costly;
- informal methods can be used to good effect to resolve a range of issues quickly;
- an advocate can support the individual to develop skills that will further empower the person to solve issues in the future;
- formal methods can become quite adversarial and positions can become more entrenched.

Is an informal approach always appropriate?

- 1.1. It is always worth considering if there could be an informal way of resolving an issue. While the formal methods of problem solving always remain an option, an early approach to identifying the problem can often result in a successful outcome for an individual.

There are situations that may arise where it may not be appropriate to take an informal route to challenge. Examples of these include:

- a violation of an individual's human rights or rights to appeal against detention;
- where the issues are serious and a person is at immediate risk of harm and there is no time to try an informal approach to resolution;
- where using a formal method is necessary in order to delay a decision so that further discussion can take place.

In such situations it may be appropriate to move immediately to a formal process, such as a formal complaint. It may also be necessary to consider legal challenges that can include an application to the Court of Protection or an application for judicial review. Advocates, instructed under s39D and/or acting as a paid representative of the Mental Capacity Act 2005, representing an individual who has been deprived of their liberty have a duty to ensure that where a person objects to their detention, any challenge to the deprivation of liberty authorisation is brought before the Court of Protection 'expeditiously'¹. It is also important to note that there is a strict three month time limit for bringing applications for judicial review.

Examples of moving straight to formal processes are:

- An advocate visits a client and becomes aware that due to changes in care arrangements made by the Local Authority, the person has not eaten for days and has been unable to go to bed. The advocate raises a safeguarding alert.
- A new client shows the advocate letters that indicate the person will be evicted from their home imminently. The advocate has concerns that the correct process for eviction has not been followed. The advocate supports the client to access legal advice.
- A client's funding for support is to be considerably reduced and has been confirmed in writing by the Local Authority. He has concerns that this will mean he won't be able to leave his flat. The advocate supports him to write a letter of complaint to the Local Authority.



Case Example: When an informal approach is not appropriate

The advocate meets Clare, a young mother with a learning disability, for the first time. Clare has referred herself to the advocacy service because the Local Authority has told Clare about the concerns they have about the way she cares for her children and after working with Clare for some time, the Local Authority has started care proceedings.

At this meeting the advocate is extremely concerned about how far advanced the proceedings are and that the Local Authority appears not to have followed due process and Clare has not contacted a solicitor.

The advocate explains Clare's options, including making a formal complaint and explains the importance of finding a solicitor and how she can do this.

Preparing to take an informal approach

- 1.2. Preparation is important when taking an informal approach, whether this is verbal discussions or presenting the issues in writing. Good preparation can help the process to run smoothly and can lay down important foundations should it be necessary to move to a more formal process. Preparation should include:

Identifying the problem

This is key to problem resolution as it is important to be clear and exact when defining the issues. The narrower the definition, the more likely that resolution will be achieved.

Gather information about the issue

Ensure that you have the information needed to explain the issue. If working as an instructed advocate, support the individual to be clear about the facts and how they feel. If working as a non-instructed advocate, be sure of gathering information from a number of sources to evidence the issue and how it is impacting on the individual. If you believe that a decision is not in the best interests of an individual under the Mental Capacity Act 2005, or does not promote their well-being under the Care Act 2014, be prepared to explain why.

Identify possible solutions

Try to think of reasonable solutions to the problem or a different decision that could be taken that is more in line with what the individual wants or, if they cannot express this, is in their evidenced best interests or promotes their well-being.

Be clear in your communication

It can be helpful to prepare statements beforehand so that the setting out of the issue and the facts are to hand, and the effect on the individual is clear. Any questions that the person wants answered can also be listed.

Identify if there are other people who can help solve the problem

Is there anyone not currently involved, for example, a Speech and Language Therapist or an Occupational Therapist, who may be able to offer support or influence the decision? Is there someone who knows the individual's situation and can help?



Case Example: Using informal methods to resolve an issue

Anthony lives in supported housing and has indicated to his advocate that he does not want to be supported by a particular member of staff. He wants the advocate's support to make sure that this particular person never supports him.

Anthony and his advocate prepare for a meeting with the housing manager. The advocate works with Anthony to help him express his views and they discuss a solution to put to the manager. They tell the manager that they appreciate it must be difficult to draw up shifts when someone says they don't want a member of staff to support them. Anthony explains that the member of staff has done nothing wrong but he reminds him of somebody who bullied him in the past and he can't put that out of his mind when he is near him.

Initially the manager is resistant to agreeing to Anthony's request and says that she can't see how it will work. Anthony and the advocate explain that it is just a matter of ensuring that the staff member is not allocated to Anthony's particular flat. The manager sees that this may possibly work and agrees to a trial. She wants to start the trial when the current rota expires but she is persuaded to start it the next week.

The role of negotiation and persuasion

Negotiation

- 1.3. Negotiation involves discussion where the aim is to reach a mutually satisfactory agreement. Skillful negotiating can reach an agreement without harming working relationships. Negotiation will typically have an element of compromise with each side giving ground in order to achieve an outcome that is satisfactory to the parties involved. Key elements of negotiation are:
- getting an agreement acceptable to both sides
 - listening carefully and acknowledging the other side's position
 - identifying the key issues
 - identifying any areas of common ground
 - being clear on your position and the reasons for it
 - clearly describing an alternative proposal
 - describing how the alternative proposal benefits the individual
 - predicting and countering the other side's possible objections
 - knowing when to compromise
 - using assertive rather than aggressive behaviour

How you communicate is an important element of negotiation. Try to use open and encouraging body language such as mirroring the other person's movements. Consider the words you choose and act with tact and diplomacy. Ask questions to clarify issues and the other person's perception of the situation.

Structured approach to negotiation

- 1.4. In order to achieve a good outcome, even if the negotiation is relatively informal, it may be useful to know the stages involved in a structured approach.

Preparation

This stage involves ensuring that all the facts of the situation are known in order to clarify the person's position. It may also be helpful to agree a time-scale for resolving the issue. If it is instructed advocacy, the advocate would want to establish the type of support the individual wants in taking part in the negotiating process or whether they want the advocate to speak on their behalf.

Discussion

The individual or their advocate puts forward their case describing the situation and the issues that have arisen. Each person present has an equal opportunity to present their case. This is essentially about listening to everyone's point of view and asking questions to clarify points as they arise.

Clarification of goals

It is helpful to clarify the viewpoints, interests and goals from both sides and through this to establish some common ground so as to minimise any misunderstandings.

Negotiate a win-win situation

It may not always be possible to achieve a win-win outcome where both sides feel they have gained something positive from the process. However, it is important that everyone feels that his or her point of view has been taken into consideration. It may be necessary to consider a compromise at this stage. Compromises can be a positive way to achieve an acceptable outcome for the individual rather than holding on to an original position that cannot be accommodated.

Agreement

Agreement may be reached on the issues that are acceptable to everyone involved. There may also be a compromise that is acceptable to the individual or to the advocate in the case of non-instructed advocacy.

Implementation

It is important to know, following agreement, how a course of action will be implemented and time scales agreed.



Case Example: Using negotiation to resolve issues

Gerald has just moved to a care home from hospital. He was knocked down by a car whilst wandering near his home. A care worker has referred Gerald for advocacy as she is aware that his money has not as yet been sorted out and also Gerald does not have any of his possessions at the care home. Gerald has no family.

The advocate talks to Gerald but he can't remember how he came to be at the care home or where he had lived previously. She asks him where his things are as his room is mostly empty and he talks about his wife's photograph and that he can't think where it's gone. She speaks to Gerald's social worker who says that she can't get Gerald's things because he lacks capacity to consent to her going into his house.

The advocate explains that Gerald is particularly missing his photographs and is asking where they are and then explains the impact of this on Gerald. The social worker initially says that it's not her role but then agrees that it isn't good that Gerald doesn't have his possessions at the care home. The advocate suggests that there are 2 solutions – either the social worker could take Gerald back to his home and he could be supported to collect his photographs or a neighbour who holds a key could be asked to bring the photographs to the care home. Eventually there is an agreement that the social worker will contact the neighbour and go with her to collect the photographs and a plan put in place regarding the rest of Gerald's possessions.

Persuasion

- 1.5. Persuasion involves being able to convince others to make a particular decision or to take a particular action. It is when someone uses language and gives out messages that will influence the other person to change their mind. It is the 'persuasive message' that is key. Through the use of good persuasive arguments an advocate can appeal to another person who will be persuaded to concede to the arguments put forward. This can be particularly useful when an advocate is putting forward the views of the person and communicating the effects of particular actions or decisions on them.

Much has been written about the psychology of persuasion but in the context of advocacy, it may be helpful to know the key elements that should be considered when preparing persuasive arguments. Persuasion skills can be learnt and they are a key part of being able to influence others.

Credibility	This includes your professionalism and experience as an advocate, including how you support your client to speak up for themselves. Other elements include being sincere, knowledge (for example, of your client's situation) and a positive communication style. The person receiving the communication should feel that they can trust you.
Understanding the decision-maker's point of view and their agendas	Understand the position they have taken, what has influenced this and any other agendas. Listen to the 'other side' attentively. Let the decision-maker know that you can see how it is from their point of view: "I appreciate that you are in a difficult position, however..."
A solid argument backed up with appropriate evidence	Be sure to know the facts and argue a case with logic and credible evidence. Supporting your client to present matters from their perspective or if using non-instructed advocacy, using evidence that you have gathered such as what the person actually said or written submissions.
Effective Communication	Use positive language such as "That's true, however..." Building rapport is important so that people may be more open to suggestions and alternatives.

Supporting an individual to challenge informally - Instructed Advocacy

- 1.6. The majority of instructed advocacy will involve an issue that the individual wants to resolve. They may feel that they have been treated unfairly or that a decision has been made without taking their views or particular circumstances into account. Challenging informally will not involve formal processes, such as complaints procedures, however, it is important to take a staged approach in striving to achieve the best possible outcome.

The stages of advocacy* – informal challenge

Stage 1: Presentation of the problem

Where the individual describes the issue and how it affects them. Ascertaining their views, wishes and feelings on the issue.

Stage 2: Information-gathering

Gathering relevant information and obtaining instructions from the client about how to proceed. Defining the individual's preferred outcome.
Go to stage 5 if no further research is required.

Stage 3: Research

Ascertaining information about rights, law, policy and procedures etc that may be relevant to the issue. Talking to others with the client's consent.

Stage 4: Interpretation and feedback to the client

Discussing the information gathered at the research stage, presenting options and deciding what to do next.

Stage 5: Strategy for resolving the issues

- Deciding whether this is to be done verbally or in writing, who to involve and whether the individual or the advocate does this or it is shared.
- Deciding what approach to use regarding how to influence using negotiation and/or persuasion.
- Making sure that the relevant preparation has occurred that is appropriate to the approach being taken.
- Supporting the individual to be involved in presenting his or her own case if that is what they want to do.
- Working with the individual to plan what to say/write that presents their situation in the best possible way that is likely to influence the outcome.

If the issues are serious or is one of those listed on page 9 it may be appropriate to miss out stage 5 and go straight to stage 6. If the issues are not resolved at stage 5 it may be appropriate to review the approach for stage 5 or to go on to stage 6.

Stage 6: Using formal route to resolve issues

This involves using a recognised process to formally resolve issues. For example, this may be making an official complaint using an organisation's procedure or supporting an individual to obtain legal advice. The full range of options for formal routes are in chapter 5, page 49.

* Adapted from Bateman, *Advocacy Skills for Health and Social Care Professionals*, 2000



Case Example: supporting an individual to challenge informally

Angela has referred herself for advocacy because she has received a letter suggesting that she has too many bedrooms in her housing association property. She cannot afford the reduction in Housing Benefit that has been proposed. Angela says she needs the bedroom when her Multiple Sclerosis (MS) is bad, which is when she needs 24 hour support. Angela tells the advocate that she is becoming very anxious.

Angela and the advocate discuss that an informal challenge is worth a try and if not successful, other formal approaches will need to be considered.

The advocate researches Angela's situation and finds out that there are emerging tribunal cases but there is a lack of clarity about situations where a bedroom is used irregularly for a carer staying overnight. However, she is sure that the Housing Benefit (Amendment) Regulations 2012 apply.

She works with Angela to prepare for a meeting with the Department of Work and Pensions (DWP) in which Angela will explain her situation including how a reduction in housing benefit will lead to her being in rent arrears. She plans to say that she understands that the Council has an obligation to consider everybody's situation under the 'Bedroom Tax' rules but she feels that they have not understood her particular situation fully as a carer will need to stay more regularly in the future. She stresses the importance of taking a long-term view as her condition will deteriorate. Angela also gathers relevant information about her condition and how it affects her.

Angela and the advocate attend the DWP offices as part of an initial stage in the process where she can present verbally why she wishes to challenge the decision. She receives a letter two weeks later to say they have reviewed her situation and there will be no reduction in Housing Benefit.

Informal discussion

- 1.7. Many issues can be resolved through informal discussion. The key point here is that preparation must still be thorough, evidence must be gathered, the individual's views, wishes and feelings and preferred outcome known (where possible) and the approach to be used should be considered. Telephone discussions should be treated in exactly the same way as a face-to-face meeting.

Meetings

- 1.8. Face to face meetings where the issue(s) can be presented to the person who has made or will be making a decision and has the power to change or stick to an original decision or action can be daunting for the person and challenging for the advocate. Before the meeting the advocate will need to gather all the relevant information from the person, carry out research and collate information from other people where appropriate, focusing all the time on how the individual can be empowered to be as fully involved in the meeting as possible. It can be helpful for the advocate, and individual who they are supporting, to prepare an opening statement that can be read out at the meeting.

The meeting will need to focus on:

- ensuring that the person has an opportunity to express their views (or their views are presented by the advocate);
- clarifying the issue(s);
- exploring the issues from the viewpoint of those present;
- explaining how the issues affect the person;
- offering a possible alternative solution;
- reaching an agreement;
- explaining the intention to go to a more formal method (if appropriate) if agreement not reached;
- agreeing any actions/follow up.

The advocate should record the agreement reached, and the agreed actions, and should confirm these in writing with the relevant professional. If agreement has not been reached, the advocate, in consultation with the person, should inform the relevant professional of the next steps the person (or the advocate on their behalf) intends to take.

Best Interests Meetings

- 1.9. Best interests meetings are a good way of making sure that a range of people involved in a person's life can come together to consider the options and issues that are relevant to an individual and what decisions or actions are in the best interests of that person, if the person lacks capacity to make that decision for themselves. They are very useful where there is a dispute about best interests and helpful in clarifying the decisions that need to be made. It also means that the decision-making process is more likely to be transparent. If a decision does eventually go to court, the court will expect to see evidence of professionals doing all they can to make a proper and objective assessment of best interests.

It is not only Independent Mental Capacity Advocates (IMCAs) who attend best interests meetings as any advocate who is supporting and representing an individual who lacks capacity to make a particular decision may be invited to attend one. Any advocate who feels that the person's situation requires a best interests meeting to be held can ask decision makers to consider organising one.

The following are situations where it would be prudent to hold a best interests meeting where an assessment has concluded that an individual lacks capacity to make a particular decision and:

- the person themselves, family and/or friends, or other professionals disagree with the assessment findings;
- the decision that needs to be made is complicated or has serious consequences for the person;
- there is a lack of consensus amongst professionals regarding the best interests of an individual;
- the individual or their family and/or friends disagree with a decision that has been made or will be made.

This list is not exhaustive.

Involving the individual in a best interests meeting

- 1.10. In every case, the advocate should consider whether the individual could be supported to attend the best interests meeting, or a part of it, and can play a vital role in facilitating this, encouraging staff to make adaptations if this will enable the person to participate more fully. If the person is not able to attend, the advocate needs to pay particular attention to how the focus will be kept on the individual during the meeting, ensuring that professionals' practice is as person-centred as possible.

Often there may be some resistance from professionals to the person attending the meeting. It may be said that the person 'wouldn't cope' at the meeting or it would be too difficult to make the arrangements for them to attend. If this is the case, the advocate would want to:

- remind professionals of their responsibility to involve the person in the decision-making;
- find out the support the person would need to attend and ensure its put in place;
- find out what the barriers are to the individual attending and ask those arranging the meeting to address these;
- have in mind a strategy, prior arranged with the person and the professionals, for helping the person to indicate when they wish to leave the meeting or decide with the person a time limit.

The role of the advocate in best interests meetings

1.11. A best interests meeting represents a good opportunity for an advocate to present an individual's case and under the Mental Capacity Act, indicate a possible view of their best interests based on the evidence gathered, paying particular attention to the individuals' past and present wishes, feelings, beliefs and values. The key elements are no different to the factors listed in the meetings section above. Additionally the advocate will want to:

- present any evidence that supports the best interests of the individual including the pros and cons of any proposed decision;
- express any concerns about the capacity assessment (where relevant);
- highlight any areas of the 'best interests checklist' in the Mental Capacity Act (MCA) Code of Practice not already considered by the decision-maker;
- highlight if there is anybody relevant who has not already been consulted by the decision-maker;
- highlight any relevant case law.

Mediation

- 1.12. Mediation is a way of resolving issues and is a form of alternative dispute resolution. It involves an impartial independent person helping people to find a solution.

“The mediator can talk to both sides separately or together. Mediators do not make judgments or determine outcomes - they ask questions that help to uncover underlying problems, assist the parties to understand the issues and help them to clarify the options for resolving their difference or dispute.”

(Advisory, Conciliation and Arbitration Service (Acas)).

There are different styles of mediation:

- facilitative mediation – the mediator steers the process;
- evaluative mediation – the mediator may suggest a way of resolving the issues;
- rights-based – the mediator ensures that any agreement reflects any rights or legal entitlements of parties;
- transformative mediation – based on empowerment of the relevant parties and recognition by each party of the others’ point of view, needs and interests.

The different styles have the following factors in common:

- the mediator is always impartial;
- the mediator is independent;
- the parties involved make the decision(s);
- the process is private and confidential;
- it is voluntary.

Advocates cannot be mediators because they are not impartial – they are on the side of the person they are supporting. Advocates can encourage public bodies and others to consider mediation where attempts to resolve issues informally have been unsuccessful so far. Mediation can be extremely successful, less stressful for all parties involved, less costly and can offer a viable way of achieving agreement without, for example, the need to go to court.

What is the advocate’s role in the mediation process?

- 1.13. The advocate’s role is to ensure that the person’s views, wishes and feelings are heard by all relevant parties. The advocate should also support the person to work out the line they want to take. If it is instructed advocacy, the advocate will support the person to present their own case wherever possible or present it on the person’s behalf if that’s what’s agreed or in the case of non-instructed advocacy, the advocate presents the person’s case based on the evidence they have gathered if the person is unable or unwilling to attend. It is not the advocate’s role to arrange the mediation or to be a facilitator at the meeting.



Case Example – mediation in action

An advocate is supporting a 40-year-old man, Tom, who has an acquired brain injury. He lacks capacity to decide where he will live and his rehabilitation team are keen that he has independent support to enable him to take part in the decision-making process. Tom has a large extended family and individual family members disagree strongly with the various options under consideration. There is no clear option that is in Tom's best interests. The dispute is holding up the decision.

The advocate explores with the rehabilitation team the possibility of using mediation, explaining the benefits (including preventing the case possibly going to court) and its possible effectiveness as a means of dispute resolution.

Mediation is arranged and the mediator conducts the meeting skillfully, allowing each person to have their say in a tense meeting. Tom does not want to attend so the advocate prepares what to say with Tom, being sure to bring any views that Tom can express to the meeting as well as evidence gathered about his best interests. Agreement is reached in the meeting about where Tom will live.

Supporting an individual to write to their local MP

- 1.14. It may be appropriate for advocates to support an individual to access their local Member of Parliament (MP) who may be able to raise an issue with an organisation on the person's behalf. Most MPs hold regular local surgeries.

Every individual has a right to raise the issues affecting them with their local MP. The UK Parliament website² offers advice on issues an MP can deal with, namely those that the government has responsibility for such as the NHS, immigration and benefits.

Advocates' Report Writing

Non Instructed Advocacy (NIA) report - Mental Capacity Act (MCA)

- 1.15. Prior to the role of Independent Mental Capacity Advocates (IMCA), advocates rarely wrote reports by way of representation but the MCA established this as an important factor as part of best interests decision-making. Indeed the MCA states the decision maker must consider an IMCA report before they make a decision on behalf of the person.

So can we learn from this practice and ensure that it becomes part of all non-instructed advocacy? The benefits to the person can be far reaching:

- A report can be a formal record of the person's wishes, feelings, preferences and views. Whilst this in some circumstances may be specific to the decision at hand, a report will usually contain very person-centred information that offers a sense or a picture of who they are.
- A report offers a formal representation from the advocate that ensures the person remains at the heart of decision-making.
- The report, or elements of it, can be shared with others with the person's consent, or in the person's best interests if they lack mental capacity to consent, who may provide care and treatment for them to enable them to have some understanding and information about them.
- The report can formally ask questions and document key issues about the person or decision.
- A report can be sent in advance to decision makers to ensure they have adequate time to consider it or, in situations where the advocate cannot attend a meeting, there is still some form of representation.
- A report can also act as a training or awareness raising tool with regards to advocacy so that others more fully understand the role, in particular of non-instructed advocacy.
- A report can be used to challenge a decision, for example where representations have been made verbally without a satisfactory outcome, a report can reiterate concerns; ask for consideration to be given to certain factors or highlight elements of relevant legislation or policy.

Best Practice

- 1.16. Best practice for writing NIA reports is that they contain:
- details of the person, including the decision they have been deemed to lack capacity on and why;
 - actions taken by the advocate including who they spoke to, notes they accessed and dates when they carried this out;
 - views, wishes, feelings of the person about their current circumstances i.e. what is the issue/decision that the advocate is representing them on;
 - views of others on this decision or the person's circumstances;

- conclusion – which should be a summary that provides an analysis of best interests within the meaning of the Mental Capacity Act and any other relevant legislation or codes of practice such as the Human Rights Act, Mental Health Act etc., using the evidence gathered.

How to make a report robust

- 1.17. Ensure there is a clear direction i.e. what are you advocating for? There are few people who will not be able to express what their wishes are or what is important to them. Regardless of the person's capacity or ability to action a decision, their views must be communicated.

Where the person is unable to express any views or offer any information about their past and there is no one else that is able to do this, decision making must follow the Mental Capacity Acts' principles and best interests checklist³. These must be followed regardless of the person's ability to express themselves but in terms of advocacy representation, consideration can be given to the principles and the person's individual circumstances at the time.

Use the statutory principles of the Mental Capacity Act, or guiding principles of the Mental Health Act or Care Act to highlight the point being made, for example the 'least restrictive' principle.

Refer to relevant case law or policy that can be used to emphasise where the focus needs to be with regards to decision-making or what needs to be considered before making a decision.

Highlight concerns where applicable and ask for a response to these e.g.

'It seems important to note that consideration has not yet been given as to how the move from unit A to unit B could occur when it is clear Mrs. Z has not yet visited unit B. I would therefore ask for further discussion to be had about this issue and how this can be resolved.'

Include information that the person making the decision may already be aware of e.g. how or why the decision came about. Do not assume that the decision maker will fill in the gaps or that this information it is not useful.

Consider how the report reads if written by another advocate i.e. would you get a sense of the person, an understanding of the circumstances and relevant factors. Could you come to a view about what is in the person's best interests?

If you have gathered information that is not in line with assessments to date, highlight this e.g.

'Mr. A has been assessed as lacking capacity to make this decision but on the four occasions I've visited he has understood and retained the information, been able to use and weigh this information up. I have therefore asked that a further capacity assessment is carried out'

The advocate would have raised this prior to the submission of a report and would record this in the report. The advocate would also want to highlight any factors that would help the person during the assessment, for example, if they need questions to be asked slowly or repeated, or if they are always more alert in the mornings.

Seek Guidance and another opinion in terms of how the report reads. Often when working on an issue with one person it can be valuable for someone else who doesn't know them to review the report and suggest points that have yet to be considered.

Report writing under the Care Act

- 1.18. Where an advocate has concerns about the decisions a local authority has made or proposed, or the actions it has taken, the advocate must write a report outlining their concerns (see Advocates Report, page 47). The local authority must consider the concerns raised, should arrange to meet with the advocate and provide a written response to the report. Reports should be co-written where the person being supported by the advocate has capacity to decide what goes in the report.

The Care Act Statutory Guidance states that:



'Where a person has been assisted and supported but nevertheless remains unable to make their own representations or their own decisions, the independent advocate must use what information they have collected and found, and make the representations on behalf of the person.' (7.52)

The advocate will need to focus on:

- the Care Act's well-being principle and how particular decisions or actions will impact on the well-being of the individual they are supporting or representing;
- other relevant legislation such as the Mental Capacity Act where appropriate;
- the views of the individual.

This is also the case where a person lacks capacity to make a decision about how their care and support should be provided and is different to discussions about best interests.

The well-being principle

- 1.19. Local authorities must promote an individual's well-being where a local authority is carrying out a care and support function, such as assessing a person's care and support needs.

'Well-being' is a broad concept, and it is described as relating to the following areas in particular:

- personal dignity (including treatment of the individual with respect);
- physical and mental health and emotional well-being;
- protection from abuse and neglect;
- control of the individual over day-to-day life (including over care and support provided and the way it is provided);
- participation in work, education, training or recreation;
- social and domestic well-being;
- domestic, family and personal life;
- suitability of living accommodation;
- the individual's contribution to society.

For further information about what should be included in a report, see page 45 on [routes to challenge under the Care Act](#).

Challenging an assessment of capacity

Sometimes advocates will have concerns about the assessment of an individual's capacity to make the decision at hand and will want to raise this at the earliest opportunity with the reasons for believing that the assessment is not accurate. This should be followed up with putting the reasons in writing and also recording via the report (see Advocate's Report Writing, page 22). Ultimately an individual's capacity to make a particular decision can be decided by the court.

Deprivation of Liberty Safeguards (DoLS)

- 2.2 Advocates and those acting as the Relevant Person's Representative (RPR) should keep up to date with case law relating to DoLS. In particular they will want to be familiar with cases where unlawful detention was found. For example:

Case Details	Reference
X v A Local Authority and an NHS Trust [2014]	EW COP 29
Somerset v MK (Court of Protection Deprivation of Liberty: Best Interests Decisions: Conduct of a Local Authority) [2014]	EW COP 25
The Local Authority v Mrs. D & Anor [2013]	EW HC B34 (CoP)
Essex County Council v RF & Ors (Deprivation of Liberty and damage) [2015]	EW COP 1
AJ v A Local Authority [2015] – Relevant for IMCAs	EW COP 5
Milton Keynes Council v RR [2014]	EW COP B19
LB Hillingdon v Steven Neary [2011]	EW COP 1377

All the above cases can be accessed on BAILII - <http://www.bailii.org/>

Concerns about the DoLS process or an authorisation

- 2.3 It is good practice for advocates and paid RPRs to attempt to resolve any issues informally. Where this has not been possible, the advocate will want to consider the most appropriate formal method.

The options for formal action are:

- making a complaint, for example, to the managing authority or the supervisory body;
- raising a safeguarding adult alert;
- requesting a review for the person where a standard authorisation is in place;
- making an application to the Court of Protection.

Advocates must refer to any multi-agency policy and procedures written by the appropriate Local Authority if there is any doubt about whether an alert should be made. Advocates who are employed by an organisation should also look at their own safeguarding policy.

SCIE's helpful Guidance on IMCA and the paid Relevant Person's Representative roles in the Mental Capacity Act Deprivation of Liberty Safeguards⁴ has detailed sections on the options for taking formal action.

Objections to an Authorisation

2.4 The European Convention on Human Rights 5(4) states that:



"Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A person subject to a standard authorisation under the DoLS can exercise that right by applying to have their detention reviewed by the Court of Protection under section 21A of the MCA. The Court may consider:

- whether the qualification requirements for the DoL have been met;
- the duration of the authorisation;
- the purpose of the authorisation;
- any conditions set;
- varying or terminating the authorisation;
- whether the DoL is in the person's best interests;
- whether the person has capacity to decide on the restrictions;
- termination of the DoL.

In situations where a person objects to their detention under a DoL, it is essential that those acting as 39D IMCAs fulfill their responsibilities to support a person to exercise their rights of review under section 21A of the Mental Capacity Act and application to the Court of Protection. Whether the IMCA or the Relevant Person's Representative (RPR) believe that the DoL is in the person's best interests is not relevant to taking action to secure their rights.

In *AJ v A Local Authority*⁵, Baker J gave detailed Guidance as to the responsibilities of local authorities, RPRs and IMCAs, that those deprived of their liberty in care homes and hospitals are afforded effective access to the Court of Protection so as to secure their rights under Article 5(4) ECHR.



“Article 5 (4) gives AJ an unqualified right of access to the court. There is no place in Article 5(4) for a best interests decision about the exercise of that right since that would potentially prevent the involvement of the court” (para 77).

It is essential that advocates and others involved in supporting an individual who is or will be deprived of their liberty are familiar with this judgment.

In his conclusion (containing a number of wider lessons) Baker J emphasised:



“Sixthly, an IMCA appointed under section 39D must act with diligence and urgency to ensure that any challenge to an authorisation under schedule A1 is brought before the court expeditiously. Failure to do so will lead to the evaporation of P’s Article 5 rights.” (para 118)

If the individual wishes to challenge the DoL but the IMCA and the RPR do not initiate proceedings, the court has confirmed that it would then fall to the local authority to make enquiries of the IMCA as to why proceedings were not being brought, and ultimately to issue proceedings and bring the matter before the Court of Protection themselves if necessary. This is clearly a last resort, and IMCAs must identify cases where an individual wishes to challenge their detention, and ensure that they are able to bring those cases to court speedily via their RPR, and to raise any concerns with the local authority.

It is important to note that where the individual is challenging the lawfulness of their detention under the DoLS scheme, they are entitled to non-means tested legal aid, which will entitle them to legal representation at court. Therefore, legal advice can be sought on behalf of the individual at an early stage, provided that a standard, or urgent, authorisation is in place that the individual wants to challenge.

It is also important to bear in mind that if the individual successfully challenges their detention under section 21A MCA, on the basis that the standard authorisation to deprive them of their liberty was unlawful, they may be entitled to damages under the Human Rights Act, and specialist legal advice should be sought.

Lapsed DoLS

- 2.5 Advocates may become aware that a lapsed DoL authorisation is not being re-authorised in a situation where the Managing Authority has made the application and the Supervisory Body is aware of the situation. When this happens, the advocate should try to resolve this informally by approaching the Supervisory Body to ask when the situation will be resolved. If nothing happens, the advocate should move to a more formal process such as putting the issue in writing or making a formal complaint. If there is still no resolution, the advocate should approach a legal firm for advice on whether seeking Judicial Review is appropriate. A template letter for sending to the Supervisory Body can be found in [Appendix 1](#).

Litigation Friend

- 2.6 When a person is subject to proceedings within the Court of Protection they may lack the capacity to conduct the litigation themselves. In such a case a litigation friend must act on behalf of the person.

In many types of court case, such as judicial review cases or personal injury cases, it is often considered to be appropriate for a family member or friend to act as litigation friend. However, in cases concerning welfare issues before the Court of Protection, this is often considered to be unsuitable (as such proceedings often concern a difference of opinion between family members and others involved in the person's care and there is thus the potential for a conflict of interest) and family members will therefore often be parties in their own right. In such cases, the Official Solicitor (OS) or another suitable independent representative is often appointed as litigation friend.



Official Solicitor's Role & Litigation Friend

The Official Solicitor is appointed by the Lord Chancellor under section 90 of the Senior Courts Act 1981. One of his purposes is to prevent injustice to the vulnerable by:

- acting as last resort litigation friend, and in some cases solicitor, for adults who lack mental capacity and children (other than those who are the subject of child welfare proceedings) in court proceedings because they lack decision making capacity in relation to the proceedings;
- acting as last resort administrator of estates and trustee;
- acting as last resort property and affairs deputy in relation to Court of Protection clients.

An advocate may also be a litigation friend⁶ in an application made to the County Court to discharge a person's nearest relative when they are detained under the Mental Health Act 1983. There is further reference to this within the revised Mental Health Code of Practice⁷ (January 2015).

Why consider being an individual's Litigation Friend?

2.7 This section focuses on litigation friend and IMCAs in the Court of Protection, whilst litigation friends exist in other areas such as personal injury cases and as referred to above with regards displacing a nearest relative, the functions remain the same. The term 'IMCA' has therefore been used in this section but where another advocate is involved this may be as equally applicable to them, for example, where acting as a non-instructed advocate or a paid representative. For specific advice in carrying out the duties, advocates should seek legal advice where existing Guidance does not clarify issues.

Where a person lacks capacity to make a decision under the Mental Capacity Act, the Court of Protection may be the measure of last resort for deciding what is in a person's best interests:



"For cases about serious or major decisions concerning medical treatment ... the NHS Trust or other organisation responsible for the patient's care will usually make the application. If social care staff are concerned about a decision that affects the welfare of a person who lacks capacity, the relevant local authority should make the application."

MCA Code of Practice, para 8.8

Applications can be brought however, by P or by a family member or by a person who is interested in P's welfare (such as an advocate).

Advocates may consider carrying out this function in the following circumstances:

- If they are already involved as an advocate and wish to progress the decision to the Court of Protection*.
- IMCAs or other advocates may be asked, by the local authority, NHS or the Court itself to carry out this role because there is no one else willing and able to and the constraints on the Official Solicitor (OS) may mean the case is heard earlier than he is able to become involved.

Advocates will be well placed to know the full circumstances of the person's situation; they may have been involved in previous decisions made on the person's behalf (or within decisions where they had capacity). They can attend face-to-face meetings with the instructed solicitor or attend court. The OS will often not be in a position to carry out these duties (other than liaising with the instructed solicitor usually over the phone) due to both their high case load but also by being based in London which restricts their ability to travel across the country.

**Note that whilst IMCAs (and others such as P's family) have a right to apply to the Court of Protection in their own right, if they do so they are likely to incur costs. When acting as a litigation friend, the application is made in P's name and P may be entitled to legal aid to cover their costs. Where P is not entitled to legal aid, the Court can request through an order that their property and affairs deputy/attorney meet the costs out of the person's capital.*

Therefore the costs risk is limited for advocates acting as litigation friend. Advocates may feel uncomfortable that P is effectively paying their own costs but it is the Courts decision on this matter and therefore should not hinder the advocate in carrying out the role of litigation friend. As stated above, it is also important to remember that where an application is brought under section 21A of the Mental Capacity Act (i.e. the individual wishes to challenge their detention, or the terms of their detention under the standard authorisation scheme), they will be automatically entitled to legal aid regardless of their financial means.

A Guidance Note on Litigation Friends⁸, written by Alex Ruck Keene, Barrister at Thirty Nine Essex Street and Honorary Research Lecturer at the University of Manchester, was commissioned by the Department of Health (DH) to enable more people, both IMCAs and others, to consider acting as litigation friends. Given this comprehensive Guidance, this section is kept deliberately brief so as not to duplicate.

Rule 140 of the Court of Protection rules states:



(1) A person may act as a litigation friend on behalf of a person if he:

- (a) can fairly and competently conduct proceedings on behalf of that person; and
- (b) has no interests adverse to those of that person.

(2) The persons for whom a litigation friend may act are—

- (a) P;
- (b) a child; or
- (c) a protected party.

Summary of responsibilities:

- enable the litigation;
- act in the person's best interests i.e. make a decision about what that is;
- fairly and competently conduct proceedings;
- appraise yourself of the issues and instruct solicitor of the course to be taken;
- take P's views into account and ensure P's views are put before the Court.

Court of Protection

Mental Capacity Act and DoLS

- 2.8 The Court of Protection is a specialist court, set up as part of the Mental Capacity Act (MCA) to deal with decision-making for adults who may lack capacity to make specific decisions. Decisions about whether an application should be made to the Court of Protection must be informed by the MCA Code of Practice and case law.

In light of developments in the Supreme Court (*P v Cheshire West & Chester Council and P & Q v Surrey County Council* March 2014)⁹ it is now even clearer that people can be deprived of their liberty in supported living environments and potentially in their own home. The route and form of these applications to the Court of Protection are now much clearer (see new forms¹⁰ and practice Guidance)¹¹. The Law Society has also issued comprehensive Guidance on the law relating to Deprivation of Liberty Safeguards¹².

The main functions of the Court of Protection are:

- to make declarations as to whether or not someone has the capacity to make a particular decision;
- to make declarations as to the best interests of a person who lacks capacity;
- to make declarations as to the lawfulness or otherwise of any act done, or yet to be done, in relation to a person who lacks capacity.

Additional functions of the Court of Protection are:

- to make single, one-off orders; for example, in relation to disposal of a person's property;
- to appoint a deputy to make decisions in relation to the matter in which a person lacks the capacity to make a decision;
- to resolve disputes involving Lasting Powers of Attorney and Enduring Powers of Attorney;
- to make a declaration as to whether an advance decision to refuse treatment exists, is valid, or is applicable to a particular treatment;
- to determine disputed DoLS cases.

Where there is a dispute as to capacity, section 48 of the Mental Capacity Act applies:



“Reason to believe” has been interpreted by the Courts as meaning “sufficient evidence to justify a reasonable belief that P may lack capacity in the relevant regard”.

“The court may, pending the determination of an application to it in relation to a person (“P”), make an order or give directions in respect of any matter if—

- a) there is reason to believe that P lacks capacity in relation to the matter,
- b) the matter is one to which its powers under this Act extend, and
- c) it is in P's best interests to make the order, or give the directions, without delay.”

The Court of Protection's welfare jurisdiction is versatile and can include:

- disputes about change of residence;
- disputes about contact between family members or friends;
- disputes about capacity to marry or have sexual relations;
- disputes about the appointment of a welfare deputy;
- disputes about serious medical treatment, e.g.
 - withdrawal of life-sustaining treatment
 - abortion
 - surgical or other serious medical treatment where best interests are not clear

Approaching the Official Solicitor

2.9 Alastair Pitblado is the Official Solicitor (OS). Based in London, he has a team of caseworkers, some are lawyers, others work under the supervision of lawyers. He acts as a last resort litigation friend and in some cases as a solicitor. As a publicly funded body they have limited resources.



The first step in making a formal challenge is to ask the local authority or (Clinical Commissioning Group) CCG to make an application to the Court of Protection in order to resolve the best interest dispute. If the local authority or CCG fail to do this, an advocate should approach the OS with the facts of the case. The OS can decide to apply to the court as a litigation friend (acting on behalf of the person the IMCA is representing). If the OS decides not to apply himself, the IMCA can ask for permission to apply to the Court of Protection.

Reference to MCA Code of Practice 10.38

However in the majority of cases the OS will act as litigation friend only as the last resort. If a suitable individual is willing and able to act as litigation friend on behalf of P then the OS will usually decline the invitation to act on behalf of P and the proceedings can proceed with this individual acting as litigation friend for P. In some circumstances they may be able to act as such in urgent serious medical treatment decisions or in decisions where they can recoup their costs such as property and affairs decisions. But it is appropriate to contact the OS and ask for their views on the case where you may be considering approaching a solicitor or merely seeking guidance as to whether this is appropriate/who they might recommend based on the geographical location you are in. The OS is used to instructing solicitors and will have a list of firms they regularly instruct themselves.

Whilst the Act states that where an IMCA is seeking to formally challenge a decision, the first step is to approach the OS, it is important to note, however, that you can approach a solicitor first and they will ask the OS if they are happy for them to proceed.

Any challenges under the Mental Health Act 1983 should be informed by the Mental Health Act Code of practice (2015)¹³ as well as case law¹⁴.

The guidance on informal and formal ways to challenge (chapters 1 and 5 respectively) are both relevant in the specific context described below.

Ward rounds

3.1. For most mental health units, ward rounds are held on a weekly or fortnightly basis and are usually attended by the individual (where they choose to). This can be the most straightforward way of representing a person or supporting them to advocate for themselves including challenging decisions or practice. The following may be subjects or issues that the person, or advocate if acting in a non-instructed role, can raise:

- clarity on the proposed plan of care and treatment;
- request to see section papers;
- leave entitlement/requests for section 17 leave;
- discharge;
- medication;
- requests for tribunals or managers hearings, for example to gather the views from the Responsible Clinician (RC) and care team about an application. Note that a negative response i.e. if the RC believes the person will not be successful in an appeal as the detention is recent is not a reason for the person not to apply for one. But consideration should be given to their view given the limits on applying for tribunals in particular;
- housing;
- access to personal belongings (in instances where these have been restricted or limited);
- rights under the Mental Health Act;
- challenging decisions or professional practice via the complaints process.

Ward rounds can be intimidating environments for the individual as they often involve a number of people, some who the person has never met before, for example students, pharmacist, Occupational Therapist (OT) etc. It is important that advocates understand who they should raise issues with, within a multidisciplinary team, and in what context. For example a complaint is not best raised during a ward round but directly with the relevant person (e.g. ward manager, responsible clinician etc.). Advocates can spend time with the person beforehand however, clarifying exactly what they would like to be discussed and what their key

points are. Responsibility for who will do or say what can also be discussed, for example, if the person wishes for notes to be taken on their behalf so they can be reminded of what was discussed. Alternatively the person may prefer for the advocate to represent their views or attend the ward round without them.

Care Programme Approach (CPA) meetings

- 3.2. Care Programme Approach (CPA) meetings are a formal multi-disciplinary review of the person's care. Unlike ward rounds they are longer in time and are set in advance. They can occur prior to a Hospital Managers' Hearing or Mental Health Tribunal and there will usually be reports written and submitted by the person's named nurse, community mental health team, responsible clinician and others that are involved, for example an Occupational Therapist.

CPA meetings are an opportunity to review progress and action plans from the previous review, which may have been up to 6 months previously. This should be considered with regards to representation or challenges. For example, if action points have not been followed through:

- What are the reasons (where applicable) for actions not being taken?
- Has the person had access to all elements of proposed care and treatment or rehabilitation opportunities e.g. therapy, leave?
- Is the person fully involved in decisions about their discharge?
- Are restrictive proposals or actions necessary? Is there evidence that there is a need to revise these?
- Is this an issue that needs to be raised with the funding authority?

What is written in both the 'ward round' section and 'hospital managers' section of this guide are both relevant and applicable for meetings under the Care Programme Approach.

Supporting application to a Mental Health Tribunal

- 3.3. Where a person is detained under the Mental Health Act they are entitled to apply for a mental health tribunal to appeal their detention.

There are different timeframes for different sections:

- Section 2 – an application must be made in the first 14 days. For patients that lack capacity to make the decision to appeal (see *MH v United Kingdom* [2013] ECHR 1008¹⁵) it is best practice, if detained under a section 2, that this is an automatic referral.
- Sections 3, 47 and 47/41 – an application can be made in the first 6 months, one in the next six months and one in each 12-month period thereafter;

- Sections 37 and 37/41 - Patients given a hospital order i.e. section 37 can also apply to the courts if they disagree with their sentence and legal advice should be sought, as there are strict timescales to do this. No application can be made during the first six month period; once during subsequent six-month period; once during each annual period thereafter.
- Other Sections - there are other eligibility to appeal against section timeframes which can be found in the eligibility periods table¹⁶.

Please note that for restricted patients the decision to discharge them from a section is ultimately the decision of the Secretary of State for Justice who will consider the tribunals report and recommendations.

The Mental Health Act Administrator (MHAA), as part of their role, will usually complete applications to the Mental Health Tribunal. They also have access to solicitors who can be instructed and cover the area the hospital is based in. Advocates, or the person themselves, or their solicitor can request the application is made. The relevant forms will then be completed and sent.

Where the person lacks capacity to make the application, the MHAA can complete the application and send it. The tribunal will then appoint a legal representative. Alternatively the MHAA will instruct a solicitor on behalf of the patient.

However, individuals detained under the Mental Health Act have a right to complete the application themselves or they may ask their advocate to support them in completing the application form¹⁷.

Examples of where the person wishes to complete the application, or requests their advocate supports them in making an application, include:

- The person may not wish for someone that works for the hospital to make the application.
- The person may prefer to know exactly when the application has been sent which enables them to retain a level of control over their appeal, rather than relying on another individual.

The advocate, or the person, can also write directly to the Secretary of State to request a Tribunal under section 67 of the Mental Health Act (MHA). The Secretary of State has overall power to refer to a tribunal. For those people who are held under section 2 for a prolonged period of time (and missed the 14 day deadline) or for those who cannot apply themselves, it is well within the rights of advocates to either write to, or make the suggestion that they will write to, the Secretary of State and request that they look at the case and refer to the tribunal.

Tribunals can obviously make decisions about discharge from a section but they also occasionally make recommendations with regards to a person's treatment, for example where access to a specific treatment may be beneficial for their mental health and therefore subsequent detention. They cannot, however, enforce these

decisions. For example, if they recommended the person move to a low secure unit, or if there is not a suitable unit or bed available, they cannot change this.

Tribunals¹⁸ are effectively a court of law and their role is to consider the legal appropriateness of the detention and whether it is warranted. It is usual for the person's solicitor to make appropriate representation rather than an advocate, but advocacy plays a vital role in the steps leading up to a tribunal e.g. gathering information from ward rounds for the solicitor to consider or query. In England the tribunal has also issued guidance¹⁹ on the role of Independent Mental Health Advocates (IMHAs) in first tier mental health tribunals.

The Law Society²⁰ provides further information on representation before mental health tribunals and on the roles and responsibilities of solicitors who are representing someone that lacks the capacity to instruct a solicitor for the purpose of their tribunal.

Hospital Managers' Hearing

- 3.4. A Hospital Managers' Hearing (HMH) is very similar to a tribunal in that they too can make a decision to discharge a patient from detention (there are limits to this with restricted patients). A HMH panel must consider the person's request for a manager's hearing whenever one is made. The Mental Health Act Administrator should be approached to request the manager's hearing although these requests will not always be approved, for example if there has been a hearing only a week before or a tribunal. In theory, however, they can be requested as often as the person wishes. They can also be used as preparation for a tribunal, for example to hear the evidence presented by the detaining authority.

As this is not a court of law, advocates may be in a more prominent position of representing the person and advocating on their behalf.

The advocate's role in the Hospital Managers' Hearing is to:

- Read through the social care and psychiatric reports and check that they are accurate and up-to-date. They should also question whether they are a reflection of the person's history as well as their current mental health state.
- Identify the rationale for continued detention. They should check if there are any points that can be addressed in terms of progress the person has made, whether there is any recommended treatment that has yet to occur, or access to leave that has not been granted when previously agreed to.

When a person has been in hospital for a long period, their contact with their community team may be limited. Professionals should meet with the person prior to writing a report, access the person's records to ensure accuracy and use their professional judgement in completing the report. If the person themselves does not believe it highlights key aspects that they feel it should, this is an opportunity for the person, and their advocate, to consider how they might address some of the points.

Consider:

- Are there elements of the person's detention that are detrimental to their recovery, for example restricted visits from family members?
- If the person lacks capacity to be fully involved in the Hospital Managers' Hearing consider how you can represent their wishes, what is important to them currently as well as for the future? How is this relevant to their detention and what issues can be highlighted?



Case Example - Hospital Managers' Hearing

Joe was in a medium secure unit, detained under a hospital order, section 37. 10 years ago when he was acutely unwell he had dropped a lit cigarette into a bin on the unit he was in, in a communal area. It was a relatively minor incident, which staff quickly attended to and was recorded as such at the time. It was documented as a careless act, rather than deliberate, and that Joe had been confused at the time due to his mental health. Joe had no history of arson and since then there have been no concerns of this nature. However ever since this time, in managers and tribunal reports this is noted in terms of risk.

Joe believes that this is impacting on his discharge as, even though it is noted as 'accidental fire due to psychotic episode', without knowing the full details, he believes others view this as a more serious event than it was. Whilst this is only one aspect of his psychiatric and social care reports, Joe believes it is a factor that is given more weight than is justified given his progress in the last 2 years. Joe asks his advocate to highlight this in his manager's hearing and states he will speak up when addressed on this subject.



Case Example - Hospital Managers' Hearing

Judy has been in hospital for 5 months and the recommendations from the clinical team are that she needs long-term rehabilitation. Judy agrees that she needs support in daily living skills. She recognises her mental health deteriorates rapidly without appropriate support in the community which as a result has meant she has spent only 2 months in the last 2 years at home. The rest of the time she has been detained under the Mental Health Act.

However Judy wishes to highlight the following in her manager's hearing and asks her advocate to help her write her own report/written representation:

- Judy states her Community Psychiatric Nurse (CPN) has changed 5 times in the last 2 years and this is not conducive to her mental health stability.
- Judy previously had a support worker who visited on a twice weekly basis. This was over the period of time that she remained out of hospital. Judy believes this is evidence that with appropriate support she manages at home.
- Judy believes that the team is making a recommendation based on the lack of community support available rather than working with her in addressing her issues.
- Judy owns her own house and states that she will be unable to pay her mortgage if she has to go to long-term rehabilitation. She says this will be a detriment to her mental health and not appropriate treatment as recommended.

Together, Judy and her advocate write the report and this is presented by way of asking the managers' hearing to consider why long-term rehabilitation (and therefore detention) is more appropriate than community support.

Judy hopes the report will be instrumental in at least directing a future care plan even if immediate discharge does not occur.



Case Example - Hospital Managers' Hearing

Veronica is 68 years old and has a diagnosis of dementia. She is detained under section 2 of the MHA having been picked up by the police whilst wandering the streets. The advocate involved in the Hospital Managers' Hearing highlights the following that she has observed about Veronica in the short time on the ward as well as within notes:

- Veronica up to this point only had contact with her GP and memory clinic, she had no extra support at home.
- This is her first admission and her initial confusion has subsided.

The advocate asks on Veronica's behalf whether consideration needs to be given to a less restrictive regime of assessment, care and treatment including the opportunity to return home on section 17 leave until her detention expires.

Group advocacy/collective issues

- 3.5. Where advocates facilitate group advocacy meetings it is likely that this process is standardised with systems in place already, for example, the group discuss with the advocate what issues they wish to raise and then a ward manager attends the meeting to discuss further.



Case Example – Collective Issues; group advocacy meeting

Anytown advocacy service facilitates a monthly group advocacy meeting on the three separate wards at Hospital B. Attendance is voluntary and there is a nominated chair and minute taker. For the first three meetings it was agreed this would be the advocate and her colleague. The group have raised the following issues in meeting four:

- Several patients feel one member of the nursing staff is rude and abrupt to several patients and that this is impacting on those whose named nurse he is, in terms of being able to discuss their care and treatment.
- The group would like more healthy options available on the menu.
- The group would like to request the purchase of a microwave so that they can prepare some of their own meals outside of the usual meal times, particularly those that have leave which means they are not always back in time.

Continued...

- The group would like activities to be more focused on rehabilitation and daily living skills such as cooking, banking and having access to information on welfare rights for when they are discharged.

The ward manager attends the meeting for the final 30 minutes and the chair of the group presents the issues to her:

- The ward manager states she is aware of the issues relating to this particular member of staff and states she will discuss this with him.
- The ward manager will speak to the hospital cook and ask him to attend the next meeting so that he can get ideas as well as look at whether the budget will allow for certain requests.
- The ward manager states she will need to take the request for a microwave to the hospital manager as this has previously been requested but at the time was deemed to not be in line with health and safety.
- The ward manager informs the group that they are in the process of arranging short seminars from relevant charities to focus on rehabilitation and increasing life skills. They are also in the process of recruiting a new Occupational Therapist and again will ask that person to attend the next meeting if they are in post by then.

Not all units, or advocacy services, will be in a position to facilitate group advocacy meetings. There may be times when a 'group' issue is raised, but by individuals. Alternatively it may be the advocate themselves that identifies an issue for example:

- blanket policies being applied including access to leave, mobile phones, locked bedrooms or toilets;
- basic care rights not being adhered to;
- lack of a care plan;
- rigid visiting hours;
- limited access to drinks;
- no food outside of mealtimes;
- cultural or religious needs not being met;
- restrictions on use of the ward telephone.

The above are all examples of blanket policies and restrictions, of which there were twenty one identified in the 2012/13 Care Quality Commission (CQC) report. It is therefore reasonable to hypothesise that advocates will come across these issues.

Where more than one person has raised an issue, even when the person requests that this not be progressed, if the advocate is aware this is unlawful practice they have a responsibility to raise this. This does not mean that confidentiality should be breached but rather that the issue comes from the advocacy provider.

Example letter from the advocacy provider:

“Our service has become aware through our own observations/raised by patients on an individual basis on more than one occasion (*delete as applicable*) that there are blanket policies (*insert relevant issue*) being applied across the unit. The Care Quality Commission identified and highlighted the use of blanket policies in their (*insert year of report*) stating ‘Ward managers should make sure patients are not subject to disproportionate restrictions as a result of unimaginative, institutional responses to the challenges of daily life on the ward’. This statement was in relation to a policy that was applied after a serious incident that occurred in a toilet. CQC asked whether the relevant unit needed to consider less restrictive alternatives and if after this, they were unable to, that all patients are informed of their right to access the toilet on request. We therefore as a service feel a duty to highlight this concern and request that clarity is given as to why this practice is occurring”.

The above is an example and any letters from the advocacy provider would clearly need to provide clarity as to:

- what the issue was;
- why there is a concern e.g. because it is a blanket policy;
- reference any guidance that suggests this should not occur, including extracts from CQC reports.

They would then need to state what response is needed, which may vary depending on the actual issue.

Advocates must not use confidentiality as a reason not to do anything. Confidentiality can still be maintained in many circumstances. Where the concern is a safeguarding one, advocates must be familiar with the relevant protocols.

Care Quality Commission (CQC)

- 3.6. The above section on group advocacy offers an insight into the types of issues CQC come across during their inspections and anecdotal evidence suggests that advocates come across these issues frequently.

So, as an advocate, consider the following:

- Are you aware of restrictive practice within mental health units?
- Is there evidence of institutional practice that you observe or that you are approached about?

- Are the people you work with involved in their own care plans and treatment?
- Are you aware that staff go through the person's rights with them? Do patients understand their rights as detained or informal patients?
- Are patients able to access the IMHA service, for example having the opportunity to contact them when they wish?
- Are patients given information about the IMHA service?
- Are there regular referrals made to the service on behalf of patients that lack capacity?
- Are blanket policies applied with no rationale or reasoning that is no longer applicable, for example where an incident occurred months or even years before?

On an individual issue basis, clearly it would be unnecessary to contact CQC to raise a concern each time. In the first instance it would be appropriate to raise the issue with the relevant person (ward manager, named nurse, responsible clinician, medical director, modern matron etc.). However, where there is no resolution to issues raised by the advocate, or advocacy service, and there remains a concern it may be more appropriate to contact CQC about the provision of those services.

The Mental Health Act 1983 also gives CQC discretionary powers to investigate certain complaints²¹ from, or about, people who are, or have been:

- detained in hospital;
- subject to a Community Treatment Order;
- subject to guardianship.

The types of complaints CQC might deal with include:

- concerns that an assessment and decisions about someone's detention were not carried out in line with the Mental Health Act, or the Code of Practice that supports it;
- a person not being given information about their rights under the Mental Health Act;
- a person not being involved in decisions about their care;
- a person not being able to have approved leave;
- the use of secluding people from others and restraining them;
- arrangements for discharging people from hospital.

As CQC's powers under the Mental Health Act are discretionary they can decide whether or not they will investigate an individual complaint. If they cannot help they will tell the complainant why not and whether anyone else might be able to help. If they can look into it, CQC will write to the complainant explaining what will happen next. In either case a reply should be received within three working days.



Case Example – raising issues with the Care Quality Commission

Sarah is an advocate in a medium secure unit for people with a learning disability. Most patients are detained under a section 3 or 37 so their leave is ultimately authorised by the responsible clinician. Two years ago a patient was given unescorted section 17 leave and after a period of months it transpired that he had pitched up a tent in local woods, which children frequented on their way to and from school. The patient did not commit any criminal offence but based on his history his leave was stopped and a decision made by the unit that all unescorted leave would not be authorised. Several patients had been aware of his 'hiding spot' and it was decided that an investigation needed to be carried out in order to identify the exact risk to others including other patients.

However since this time the policy has remained in place and whilst patients still request unescorted leave they are turned down each time due to 'policy'. Sarah has attempted to challenge this on behalf of individual patients within ward rounds highlighting that the decision should be a person centred and an individual one, particularly as several patients were not in the unit at the time. This means that decisions about their leave are based on a historical incident that they were not part of and ultimately this is impacting on their discharge plans.

The responsible clinician states that at this time the policy cannot be reviewed. Sarah therefore speaks to her manager and agrees that this should be raised with CQC. Sarah phones CQC and follows this up with an email outlining this as a concern. CQC state they are due to carry out a visit within the next few weeks and they will raise this. They also ask for the details of individual patients that this has affected to see if they are willing to share their experiences.

- 4.1. The majority of the provisions contained within Part 1 of the Care Act came into force in April 2015. Advocates will sometimes be in a position where individuals they are supporting in relation to a needs assessment, care and support plan, a review of their care/support arrangements or the safeguarding process will want to challenge how the local authority carried out decisions, or the assessment or planning functions. Advocates may need to challenge on the individual's behalf where the person lacks capacity to do this.

Under the Care Act local authorities are under a duty to appoint an independent advocate for an individual whilst assessing their care needs if the person has substantial difficulty in being involved in the care assessment process, and where there is nobody appropriate to support and represent the person's wishes. The Statutory Guidance state that it will normally be appropriate for an individual's advocate, or IMCA representing them under the MCA, to also act as their advocate in relation to the care assessment process, provided they have had the necessary training.

The Care and Support Independent Advocacy Regulations 2014 state:



In particular the independent advocate must assist the individual in: -

- 5(5)(a)(v) challenging the local authority's decisions if the individual so wishes;
- (c) make such representations as are necessary for the purpose of securing the individual's rights in relation to the exercise of the function; and
- (d) where the independent advocate has concerns about the manner in which the assessment or planning function has been exercised or the outcomes arising from it, prepare a report for the local authority outlining those concerns.

Additionally Regulations state that:

- (8) Where the individual does not have capacity, or is not competent, to challenge a decision made in the exercise of the assessment or planning function, the independent advocate **must** challenge the decision if the independent advocate considers the decision to be inconsistent with the authority's general duty under section 1 of the Act (duty to promote the individual's well-being).



Where a person has been assisted and supported and nevertheless remains unable to make their own representations or their own decisions, the independent advocate must use what information they have collected and found, and make the representations on behalf of the person. They must 'advocate' on their behalf, to put their case, to scrutinise the options, to question the plans if they do not appear to meet all eligible needs or do not meet them in a way that fits with the person's wishes and feelings, or are not the least restrictive of the person's life, and to challenge local authority decisions where necessary. The ultimate goal of this representation is to secure a person's rights, promote the individual's well-being and ensure that their wishes are taken fully into account.

Care and Support Statutory Guidance (issued under the Care Act): 7.52

In practical terms, this new legislation means that advocates will need to be aware of the local authority's duties to provide individuals with care and support, when individuals are likely to be eligible for care services, and must take steps to secure and challenge the support provided, where that is necessary, on the individual's behalf.

The Care Act statutory Guidance says that when an advocate has concerns and writes a report, the Local Authority should arrange a meeting with the advocate and then provide a response in writing after the meeting has been held.

Duty to promote the individual's well-being

- 4.2. The principle of promoting an individual's well-being underpins all that is in the Care Act. Local authorities have a duty to promote well-being when carrying out care and support assessments and planning. It applies equally to adults who have care and support needs and their carers, young people in transition and young carers. Where it is evident that the principle has not been upheld, advocates will need to raise their concerns with the relevant local authority.

The Care Act sets out the different aspects of well-being. There is no hierarchy; each is of equal importance:

- personal dignity (including treatment of the individual with respect);
- physical and mental health and emotional well-being;
- protection from abuse and neglect;
- control by the individual over day-to-day life (including over care and support provided and the way it is provided);
- participation in work, education, training or recreation;
- social and economic well-being;
- domestic, family and personal life;

- suitability of living accommodation;
- the individual's contribution to society.

Chapter 1 in the Care and Support Statutory Guidance²² issued under the Care Act gives more detail on the local authority's duty to promote well-being.

Advocate's report

- 4.3. If the advocate has concerns about decisions or the process under the Care Act they must be addressed in a report to the Local Authority (see also Report Writing under the Care Act page 24). The following may be relevant:
- the individual's views, wishes and feelings about the decision and/or the way the decision has been made;
 - the issue(s) and the impact on the person;
 - whether more could be done to support the individual's involvement;
 - any issues regarding the Local Authority's duty to promote the individual's well-being;
 - any issues regarding the Local Authority's duties under Part 1 of the Act;
 - any issues regarding the rights of the individual;
 - any concerns about the way the care/support assessment or care/support planning has been carried out;
 - any options that the Local Authority did not consider that may be relevant to the individual's situation;
 - any issues regarding mental capacity or deprivation of liberty;
 - any issues relating to funding;
 - the individual's desired outcomes;
 - the specific issues that need to be raised, e.g the assessment does not accurately reflect the needs of the individual or the individual does not agree with the support choices offered or the plans do not appear to meet eligible needs etc;
 - any actions that are not the least restrictive;
 - any safeguarding issues;
 - any issues related to the prevention or delaying the development of needs for care and support.

Appeals Process

- 4.4. Section 72 of the Care Act provides that Regulations may be made for appeals against local authority decisions made under Part 1 of the Act and includes reference to the provision of independent advocacy. This is expected to come into force from April 2016, subject to consultation and Parliamentary process.



Case Example - advocate challenging local authority decision

An advocate is involved in a care review for Simon, a man who has profound disabilities. Care staff have not been able to support Simon to make use of local facilities to go swimming for almost a year as funding for 2-1 staff that would enable him to do this has been withdrawn. As a result not only has this affected Simon physically but he has also become more withdrawn as he has not been able to see his friends who attended the swimming group.

The advocate gathers evidence that swimming is very beneficial to Simon, in particular for his physical and mental well-being and puts together an argument that funding for this is just as important as funding that is in place to support Simon's care needs. The evidence is strong and includes an opinion from Simon's physiotherapist and hospital consultant that Simon needs his swimming sessions.

The advocate persuades the local authority to provide funding and they agree to fund 2 swimming sessions per month. Although this is less than before, Simon is at least having some swimming sessions and it is felt that this would meet his needs.

When is the formal route to challenge appropriate?

- 5.1. There are some issues that by their nature are serious enough to warrant an immediate formal approach. These are listed on page 9 and repeated here:
- A violation of a person's human rights or rights to appeal against detention.
 - Where the issues are serious and there is no time to try an informal approach to resolution.
 - Where using a formal method is necessary in order to delay a decision so that further discussion can take place.
 - Where the matter is urgent and legal proceedings may be required within a short period of time (for example if judicial proceedings are required, these must be brought promptly and in any event within 3 months).

Likewise, when attempts using informal methods have been made and resolution of the issues has not been possible, it may be necessary to use more formal methods.

Supporting an individual to formally challenge

- 5.2. Advocates should discuss with the individual at the beginning of a case how they will support them to challenge informally at first by talking it over with people or writing to the right person. They should also explain that if they are still not happy with the result, then more formal options may be appropriate. When discussing options, advocates will want to consider, depending on the situation, what formal options are appropriate and available to the person and explain those options to them.

What if the advocate believes the individual doesn't have capacity to decide on a particular option?

- 5.3. The advocate should do everything possible to present the information about formal options in a way that is accessible and understandable for the person, including the consequences of taking or not taking particular actions.

A person may seem to have capacity in many areas but, for whatever reason, struggles to make a decision in a particular area. It may be that, even after all attempts to maximise their capacity have been made, the person cannot express a view. In this instance, the advocate should consider working with the individual on a particular option that the advocate considers to be most in keeping with the person's views and wishes. In circumstances where these are not available, an approach that seeks to best ensure that individual's rights are protected (see Mental Capacity Act, Care Act, Human Rights Act) will be appropriate.

However, if the person expresses a view that they would not want to take a particular formal option, the advocate should discuss with them the consequences of not taking that option and go over alternative options. If they are all declined by the person, the advocate should review this with them at a later date.

The exception to this is if there are safeguarding issues where the individual has been harmed or may come to harm and they say that they do not wish to progress the matter. Advocates must refer to any multi-agency policy and procedures written by the appropriate Local Authority if there is any doubt about whether an alert should be made. Advocates who are employed by an organisation should also look at their own safeguarding and escalation policy.

Formal complaint

- 5.4. If an issue is not resolved using informal methods, there is always an option to move on to using more formal methods. Or perhaps the issue has been resolved informally but the individual, or the advocate in the case of non-instructed advocacy, feels that the issue(s) warrants making a formal complaint.

If it is instructed advocacy the advocate must involve the individual, supporting them to write the complaint for themselves wherever possible. The individual may need support to access information about the process and their options, for example or help to complete forms. If it is non-instructed advocacy, the advocate must consider making a formal complaint on the individual's behalf if issues have not been resolved at the informal stage.

Formal complaints procedures set out the process for making a complaint. They set out an individual's right to make a complaint, how the complaint will be dealt with, timeframes for responding to a complaint and the rights of an individual within that process. Many organisations have Complaints Managers to deal with the complaints sent to their organisation.

In April 2009, a single, joint complaints procedure for health and social care was introduced based on the Local Authority Social Services and National Health Services Complaints (England) Regulations 2009²³. This creates a joint working duty reflecting that complaints may relate to both the Local Authority and the NHS.

Complaints procedures will vary from organisation to organisation but they generally follow a staged process. The individual must always be informed of the outcome of their complaint and advocates may need to support the person in pursuing this if outcomes are not communicated in a timely manner. Local procedures will have defined time limits, including when the organisation must acknowledge the complaint and the likely length of the investigation.

Advocates should be familiar with The Local Authority Social Services and National Health Service Complaints (Regulations) 2009²⁴.

Stage 1 Making a complaint and setting out the issues. The complaint may be made verbally, in writing or electronically. Some organisations consider this to be the 'informal resolution' stage.

Stage 2 The complaint is always put in writing at this stage. It is important to include the effect of the issues on the individual and consider including a time-line which can help the person investigating to understand the issue.

The issues may be resolved to the satisfaction of the individual at this stage or...

A response is received but the client, or advocate in the case of non-instructed advocacy, feels that it does not address the issues and/or provide a satisfactory outcome.

The individual and/or the advocate may meet with representatives of the organisation in receipt of the complaint. If the organisation does not change their response then the individual and/or their advocate may consider going to the next stage which will be approaching the relevant Ombudsman or Judicial Review. It is not possible to complain to the Ombudsman and to seek a judicial review at the same time so a decision will need to be made about which to use.

Some organisations have a Stage 3 in their complaints process. This is when an independent investigator will be appointed to look into the complaint and will make recommendations. An advocate may want to suggest that this happens, even if not part of the official complaints procedure, in situations where independent input of this nature may resolve the issues.

The Local Authority Monitoring Officer

- 5.5. There is an option to write to the Monitoring Officer in a situation where it is believed that a decision or actions taken, or will be taken, by the local authority are unlawful. The monitoring officer has a duty to write a report on any of the council's proposals or decisions which are, or could be, in contravention of existing law and are therefore illegal. This action may result in the local authority changing its decision.

The Ombudsman

- 5.6. If the issues are not resolved at stage 2 of the formal complaint process, there is an option of contacting the relevant Ombudsman. Ombudsmen usually offer their service free of charge and are therefore accessible to individuals who could not afford to pursue their complaint via the court. The Ombudsman has discretion as to whether they take on a case or not based on the presenting issues and circumstances. Advocates should support individuals to present good evidence that supports their case including important relevant documents.

The Ombudsman are committed to seeking redress for the individual and where they identify injustice, they work to put this right. Using the Ombudsman is a good option when the individual feels that they have not been treated fairly by an organisation and that this has had a negative impact on them. This could be financial, psychological or practical.

An Ombudsman does not have the power to force a local authority to change its mind. However, its 'recommendations' for redress are usually followed by local authorities. The Ombudsman may recommend that a local authority takes a particular course in future, changes its policy towards certain individuals, puts right an individual wrong, or pays compensation in appropriate cases.

An advocate could take an issue to the Ombudsman on behalf of an individual if using non-instructed advocacy. Advocates may want to familiarise themselves with the powers and responsibilities of Ombudsmen which are set out in the Local Government Act 1974²⁵.

The Ombudsman will always expect that the organisation the individual/advocate is unhappy about has been approached to discuss the issues and that it has not been possible to resolve those issues at that stage. The issue should be under a year old from the point it first arose although sometimes this is counted from when the final response about a complaint has been received from a Local Authority or NHS Trust. It is advisable to check this with the relevant Ombudsman. Sometimes the Ombudsman can investigate complaints of an urgent nature very quickly.

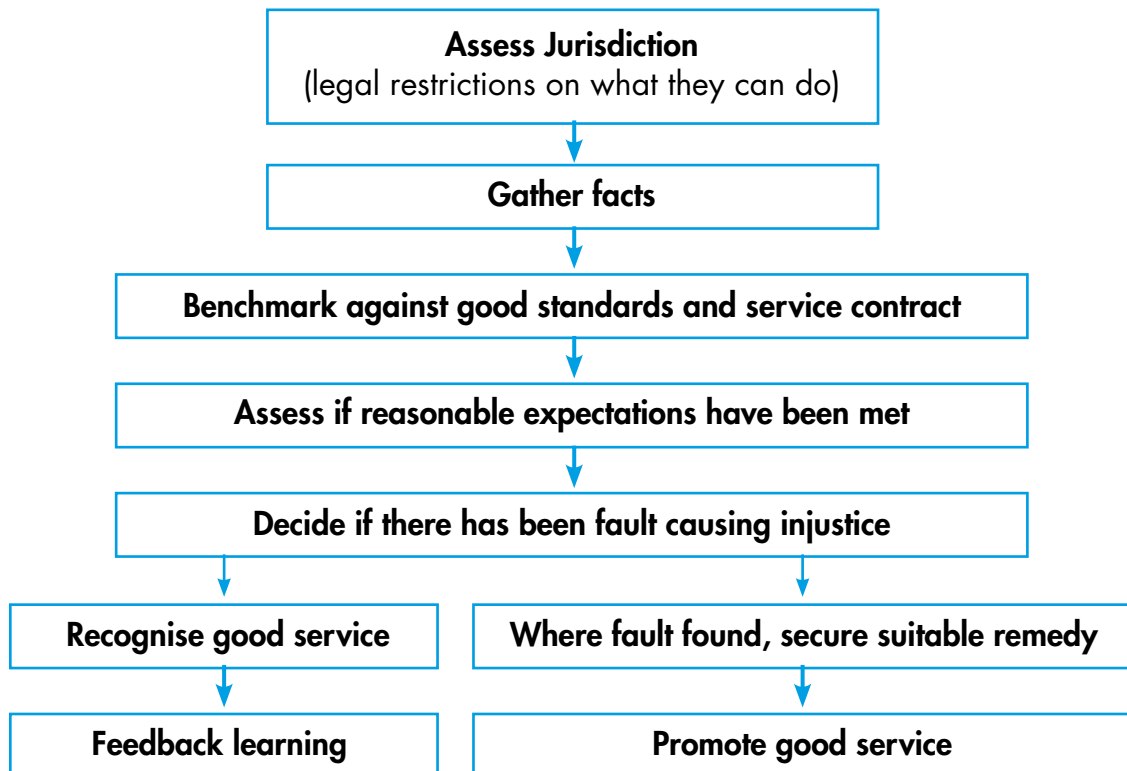
Examples of Ombudsmen:

Parliamentary and Health Service Ombudsman	Investigates complaints that individuals have been treated unfairly or have received poor service from government departments and other public organisations and the Health Service in England.
Local Government Ombudsman	Considers complaints about councils and all sorts of care services for adults in England.
Housing Services Ombudsman	Deals with complaints about registered providers of social housing.

What information should be provided to the ombudsman?

- 5.7. The Ombudsman offices usually provide a standard form but this does not have to be used. Advocates should support individuals to provide the following:
- the name and address of the person making the complaint;
 - the name and address of the organisation the complaint is being made about;
 - details of what the complaint is about and what the organisation did wrong or failed to do;
 - what personal injustice, financial loss or hardship was suffered;
 - what the organisation should do to put the situation right;
 - details of how the complaint has been followed up before you contacted the ombudsman;
 - the date when you first identified the event you are complaining about.

How will the Ombudsman deal with the complaint?



Case Example - a couple are supported to use the Ombudsman service

Mr. and Mrs. Connelly had been married for 61 years and lived in a privately rented property. Both had developed disabilities that meant they could no longer get in and out of the bath. The landlord agreed that adaptations could go ahead.

Mr. Connelly's neighbour had contacted the advocacy service about an issue concerning the council refusing Mr. and Mrs. Connelly a Disabled Facilities Grant and that the issue had been ongoing for about a year. Mr. and Mrs. Connelly show the advocate letters from the Council where it is stated that the application has failed on the grounds that Mr. and Mrs. Connelly cannot prove that they will still be at the property in 5 years' time. Mr. Connelly had made a complaint but this did not change the decision.

The advocate supports Mr. and Mrs. Connelly to write to the Local Government Ombudsman. On investigating the case, the Ombudsman decided that the council had unfairly applied its policy in this case and made a recommendation that the Council should award the grant to the Connelly's and review their policy in relation to older people in privately rented accommodation.

Legal advice

- 5.8. There may be situations that arise where an advocate believes that an individual may need to access legal advice. Many law firms will offer free initial advice and this can be very helpful when trying to ascertain if a client has grounds for using the litigation route. It is advisable for advocates to find out which firms in their local area will provide free advice and to develop a professional relationship with them. Some law firms may be able to offer some services on a pro bono basis so it is always worth asking. If you are not sure whether a particular issue needs to be referred to a lawyer or whether to complain first, most lawyers specialising in this field will be willing to provide initial suggestions and advice, and will tell you whether a complaint or a more informal route needs to be attempted first.

Advocates may be concerned about suggesting particular law firms for an individual to approach. It is important to consider, however, that perhaps without the advocate's support with this the individual will be at risk of not being able to achieve resolution of their issues.

It is important to find the right legal support for the person in terms of the specialist area and whether they are able to apply for legal aid where that is relevant. The Law Society's Guidance on 'Using a solicitor'²⁶ and the Solicitors Regulation Authority²⁷ are useful resources.

If an advocate is considering becoming a litigation friend either before the Court of Protection or in judicial review proceedings, they may want to instruct a lawyer and would want to consider what experience the lawyer has in the field of Mental Capacity and/or community care.

Suggestions for finding a lawyer include:

- using the Law Society's 'Find a Solicitor'²⁸ service
- looking at recent judgments in the Court of Protection to identify legal firms involved in cases. Cases are recorded on Bailii²⁹
- using the Mental Health Association's³⁰ website
- ring the Official Solicitor's office on 020 3681 2751

What if I believe the individual does not have capacity to instruct a lawyer?

- 5.9. The advocate should bring this to the attention of the lawyer at an early stage. It is the responsibility of the lawyer to decide if the individual has capacity to litigate. If the lawyer decides that the person does not have capacity they will need to ensure that the individual has a litigation friend who is able to give instructions on the individual's behalf. The role of a Litigation Friend is described in this Guidance on page 29. In the case of *D v R* [2010] (EWHC 2405)³¹ Mr. Justice Henderson provides a useful analysis of the capacity to litigate. There are other leading cases that advocates should be familiar with. For example, *Masterman – Lister v Brutton & Co* [2002]³² and *Dunhill v Burgin* [2014] UKSC 18³³.

Judicial review

- 5.10. Judicial review is a type of court proceeding where a judge reviews the *lawfulness* of a decision made or action taken or failure to act by a public body such as a local authority or NHS Trust. When public bodies make decisions that affect individuals they have to do this in accordance with the law. The court will examine the process used to make the decision rather than the conclusion reached. In particular, the Court will be looking at whether:
- The public body's actions were unlawful (e.g. did they follow the correct laws, Regulations and statutory Guidance, and did they act in accordance with their obligations under the Human Rights Act and Equality Act?)
 - The public body's actions were irrational (e.g. did they take a decision which is so blatantly unfair or incorrect that it renders it invalid?)
 - The public body failed to follow the correct process or procedure in coming to its decision.

Unlike the Court of Protection, the court will not make what it considers to be the 'right' decision but will normally invite the public body to retake a decision in a lawful manner.

The court will expect parties to have considered resolving the issues through alternative dispute resolution such as negotiation and discussion, using the relevant Ombudsman or mediation. The courts take the view that litigation should be a position of last resort.

Examples of decisions that fall within the scope of judicial review:

- the assessment of an individual's needs and whether that is in accordance with the law/Regulations;
- the way a local authority has made a decision on the funding it provides to meet an individual's care needs and whether that is lawful;
- the way in which an individual's 'eligible needs' have been determined or assessed;
- any new policies which may be unlawful, for example policies relating to the removal of services or blanket eligibility criteria applying to certain types of disability;
- decisions relating to prisoners' rights;
- decisions in breach of the Human Rights Act;
- decisions in breach of the Equality Act;
- decisions that have been made without properly consulting those affected by them;
- decisions made by public bodies that are unfair, irrational or biased.

Timing is very important. An application for judicial review must be made not later than three months after the grounds upon which the claim is based first arose. So if a decision is made on 1 March not to award care services and it is felt that this decision is not lawful, the latest an application can be made for Judicial Review in order to challenge that decision is 31 May. Solicitors will need to carry out significant work prior to issuing the proceedings, and so it is important that legal advice is sought promptly.

There are also occasions when the Court can sometimes decide that three months is too long to have waited before issuing a claim, for example where it is too difficult to 'undo' the local authority's unlawful decision. It is therefore important to act upon any unlawful decisions promptly.

As with all court applications, there are rules and a defined process that should be followed. It is possible for an individual to apply for judicial review themselves, and possible for an advocate to support them with this, but it is very important to consider whether legal advice should be sought particularly as the cost implications arising from the application will need to be considered.

Judicial review is a potentially expensive process and may not be a realistic option for an individual unless they are eligible for public funding (legal aid). If an individual is eligible for legal aid not only will they have their legal fees paid for by the state (although depending on their finances they may need to pay a contribution), but they will also have 'costs protection'. This means that if the individual ends up losing his case at court, he will not normally have to pay any of the other side's costs either. Individuals without legal aid often take the additional risk of having to pay the other side's legal costs if the case is lost.

The pre-action protocol sets out good practice and the steps that parties should generally follow before making a claim for judicial review. The pre-action protocol can be found on the Ministry of Justice website www.justice.gov.uk. The protocol sets out the communication that should take place between the parties and provides template letters that describe the information that must be included.

Public funding for legal costs in judicial review is available from legal professionals and advice agencies which have contracts with the Legal Services Commission as part of the Community Legal Service. Funding may be provided for:

- Legal Help to provide initial advice and assistance with any legal problem; or
- Legal Representation to allow you to be represented in court if you are taking or defending court proceedings.

Legal Representation in Judicial Review Process

5.11. Legal representation is available in two forms:

Investigative Help

This is limited to funding to investigate the strength of the proposed claim. It includes the issue and conduct of proceedings only so far as is necessary to obtain disclosure of relevant information or to protect the client's position in relation to any urgent hearing or time limit for the issue of proceedings. This includes the work necessary to write a **letter before claim** to the body potentially under challenge, setting out the grounds of challenge, and giving that body a reasonable opportunity, typically 14 days, in which to respond.

Full Representation

Full representation is provided to represent the client in legal proceedings and includes litigation services, advocacy services, and all such help as is usually given by those providing representation in proceedings. This includes steps preliminary or incidental to proceedings, and/or arriving at or giving effect to a compromise to avoid or bring to an end any proceedings. Except in emergency cases, a proper **letter before claim** must be sent and the other side must be given an opportunity to respond before Full Representation is granted³⁴.

In order to be represented under legal aid, a specialist solicitor will need to assess both the merits of the potential case and whether there are prospects of challenging the decision made by the local authority ("the merits test") and the solicitor will also need to assess the individual's finances to make sure they are eligible financially ("the means test").

If an individual is not eligible for legal aid, you may be worried about what costs might be incurred on somebody's behalf in order to resolve an issue with a solicitor's involvement. However many law firms will offer fixed price deals, or low initial fees, to see if an issue can be resolved with a lawyer's involvement at an early stage. Lawyers have to be clear and open about the fees that may be incurred in a case, and so it is sometimes worth approaching a solicitor for a fee estimate even where you think an individual may not be eligible for legal aid.

The Court's permission is required for a claim for judicial review to proceed. If the court refuses, the grounds for refusal will be set out in writing. If permission is refused, the person making the claim may make a request that that decision is reconsidered at a hearing (known as an 'oral renewal'). Requests for an oral renewal must be received within 7 days of refusing permission. Where permission is granted after the 'oral renewal' the claim can proceed as normal. If the refusal stands the claimant may appeal to the Court of Appeal, unless the claim is assessed as being 'totally without merit' by the judge.

The judge will provide a fully reasoned decision, in writing, after the hearing. Either party can appeal the decision in the Court of Appeal.

It is not easy to tell if a decision or action taken by a public body is unlawful. If an advocate suspects that it may be, and their client agrees to it, it would be advisable to contact a legal professional specialising in public law to get their view.

What is the advocate's role in the judicial review process?

- 5.12. An advocate's role is to support the individual to understand the process and support them throughout. The role may include:
- Highlighting that judicial review may be an option.
 - Supporting the person to get legal advice and helping them to understand that advice.
 - Supporting the person to understand the judicial review process.
 - Supporting the person to prepare to go to court (if they wish to, although they do not have to attend the hearing and often people don't).
 - Ensuring that the person's views on the issues are heard in the process.
 - Ensuring that reasonable adjustments are made to enable the individual to take as full a part in the process as they wish to.
 - Supporting them to understand the outcome and, where appropriate, any other action they may be able to take.
 - If no one else is willing and able to do so, acting formally as a 'litigation friend' for the person, and liaising with solicitors and legal representatives on their behalf.



Case Example - individual is supported through the judicial review process

Jim's carer contacts the advocacy service when Jim, a 40 year old man who has a physical disability, has received a letter from social services to say they have reviewed his Direct Payment (DP) and as his care can be delivered more cheaply under different arrangements, his DP will be reduced from next month. Jim has tried to resolve the issues himself.

The advocate meets with Jim and it is clear that the impact of the reduction will be very serious for him as he will no longer be able to employ the same carers. The advocate supports Jim to do three things very quickly; arrange a meeting with social services, make a formal complaint to delay the change in DPs, and to take legal advice. Despite Jim and the advocate's best efforts at negotiation, the decision remains the same. The lawyer advises that the decision appears to be unlawful. However, it seems very unlikely that social services will change their minds and, because the time limit for judicial review is nearly up, that Jim should apply for a judicial review.

The lawyer makes an application for public funding (legal aid) and completes all the relevant paperwork. The lawyer advises that there are good merits in challenging the local authority's decision. The pre-action protocol is followed, the case is issued at court, and it progresses to a final hearing. Because the issues in the case were urgent, the lawyer applied for the case to be heard on an 'expedited' basis, so the matter is resolved relatively quickly.

The advocate keeps Jim informed about how the case is progressing. The outcome from the judicial review is:

- The local authority were found to have not acted lawfully when they proposed to reduce Jim's funding without having assessed his needs, assessed how those needs could be met, or given reasons other than that care could be purchased more cheaply elsewhere.
- The local authority had contravened Jim's rights under Article 8 of the Human Rights Act as reducing the funding would affect his Right to Family Life as his carers had provided care for many years and in the absence of any family had effectively become his family.

The court orders that the local authority needs to carry out a new assessment of Jim's needs in order to determine the level of direct payments he should receive.

Second medical opinion

- 5.13. Advocates may get involved in obtaining a second medical opinion (sometimes called further opinion) from a healthcare professional in two main situations:
- A person wants to obtain a second medical opinion and asks an advocate to support them with this or obtain it on their behalf.
 - An advocate supporting a person who lacks capacity to make a treatment decision wants to get a second medical opinion regarding a decision that has been taken in the client's best interests.

Before asking for a second opinion, an advocate may want to suggest to the person that the particular healthcare professional, a consultant or GP for example, should be approached again for further information about their opinion on treatment options. The advocate working in a non-instructed capacity may want to do this on behalf of the individual.

Anybody is entitled to seek a second medical opinion or to ask someone to do that on their behalf. The person may want their advocate to support them to see a different GP within a practice or to support them to get an opinion from a different consultant. If an individual wants a second opinion from a different consultant, the usual practice is for the individual to go back to their GP who will make the arrangements.

If the person is in hospital and lacks capacity to instruct the advocate to seek a second medical opinion, the advocate may want to approach the original consultant who made a decision and ask them directly how a second opinion can be obtained.

There is useful information about the rights of individuals in the Department of Health Guidance on the NHS 'Choice Framework'³⁵.

Raising Concerns with the Care Quality Commission (CQC)

- 5.14. If an individual is in receipt of care or health services and the provider of those services is registered with CQC, there is an option to raise any concerns in relation to the provision of those services with CQC. With instructed advocacy it is important that clients are offered this as a possible option although it is important that they understand that CQC do not have a responsibility to respond to individual complaints - the exception to this being complaints relating to use of the Mental Health Act 1983 (see CQC page 42/43). In non-instructed advocacy the advocate may consider raising issues on behalf of an individual³⁶.

NHS Complaints Advocacy

5.15. [NHS complaints advocacy](#) is a free service to assist individuals with making a complaint about a National Health Service (NHS).

Advocates will:

- provide an opportunity to speak confidentially to someone who is independent of the NHS;
- find out what support a person needs to make a complaint;
- give information about the different ways that concerns can be raised;
- help individuals to think about what they would like to achieve from making a complaint. People want different outcomes when they complain such as an apology, an explanation or an improvement to NHS services.
- explore the options available at each stage of the complaints procedure with the individual;
- support individuals to write an effective letter to the right people;
- provide support before and during meetings;
- contact and speak to third parties if that is what the individual wants;
- assist the individual to consider whether they are satisfied with the response they receive from the NHS provider.

The NHS Constitution³⁷ explains a person's rights when it comes to making a complaint and redress about NHS services.

Role of Healthwatch

5.16. Healthwatch describes itself as 'the national consumer champion in health and care'. Local Healthwatch organisations play a role in ensuring that people are informed about choices they have when issues arise with their healthcare or social care and will raise local issues nationally. They find out people's experiences of health or social care and use that information to encourage service providers to engage more effectively with people who use their services and to encourage providers to change or improve services where needed. They do not investigate complaints or take on case work.

Where clients report that they have not been listened to or have received a poor service, advocates should inform them of the option to talk to Healthwatch about their experiences. This may be in addition to other forms of resolution, formal or informal.

Advocates working in a non-instructed capacity may consider that issues need to be raised with their local Healthwatch with the primary aim of wanting to ensure that the experiences of people who cannot raise the issues for themselves are heard.

References

	Item	Web link	Return to place in document
1	BAILII - AJ v A Local Authority (2015) EWCOP5	http://www.bailii.org/ew/cases/EWCOP/2015/5.html	Return
2	The UK Parliament website – How to contact your MP	http://www.parliament.uk/get-involved/contact-your-mp/when-to-contact-your-mp/	Return
3	Gov.uk - Mental Capacity Act Code of Practice (chapter 5)	https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/224660/Mental_Capacity_Act_code_of_practice.pdf	Return
4	SCIE - IMCA and the paid Relevant Person's Representative roles in the Mental Capacity Act Deprivation of Liberty Safeguards (May 2011)	http://www.scie.org.uk/publications/guides/guide41/	Return
5	BAILII - AJ v A Local Authority (2015) EWCOP5	http://www.bailii.org/ew/cases/EWCOP/2015/5.html	Return
6	University of Manchester - Guidance Note: Acting as a Litigation Friend in the Court of Protection (2014)	http://www.law.manchester.ac.uk/medialibrary/Main%20site/LAC/Acting-as-a-Litigation-Friend-in-the-Court-of-Protection-October-2014.pdf	Return
7	Gov.uk - Mental Health Act Code of Practice (Revised January 2015)	https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983	Return
8	University of Manchester - Guidance Note: Acting as a Litigation Friend in the Court of Protection (2014)	http://www.law.manchester.ac.uk/medialibrary/Main%20site/LAC/Acting-as-a-Litigation-Friend-in-the-Court-of-Protection-October-2014.pdf	Return
9	BAILII - P v Cheshire West and Chester Council and another; P and Q v Surrey County Council (2014) UKSC 19	http://www.bailii.org/uk/cases/UKSC/2014/19.html	Return
10	Adass - New DoLS Forms (November 2014)	http://www.adass.org.uk/mental-health-Drugs-and-Alcohol/key-documents/New-DoLS-Forms/	Return
11	Browne Jacobson - Practice direction: Deprivation of Liberty (November 2014)	http://brownejacobson-updates.com/28/1199/november-2014/transaction-update-health(1).asp?sid=33d3dcb6-b64c-4f12-bde9-ce6a4cd23d18	Return
12	Law Society - Deprivation of Liberty: A practical guide (April 2015)	http://www.lawsociety.org.uk/support-services/advice/articles/deprivation-of-liberty	Return

13	Gov.uk - Mental Health Act code of Practice (Revised January 2015)	https://www.gov.uk/government/publications/code-of-practice-mental-health-act-1983	Return
14	Mental Health Law Online	http://www.mentalhealthlaw.co.uk/Main_Page	Return
15	BAILII - MH v United Kingdom (2013)	http://www.bailii.org/eu/cases/ECHR/2013/1008.html	Return
16	Mental Health Law Online – Eligibility Periods	http://www.mentalhealthlaw.co.uk/Eligibility_periods	Return
17	Mental Health Law Online – Tribunal Forms	http://www.mentalhealthlaw.co.uk/Tribunal_forms	Return
18	Law Society – Representation before mental health tribunals (January 2015)	http://www.lawsociety.org.uk/support-services/advice/practice-notes/mental-health-tribunals/	Return
19	Mental Health Law Online – Role of mental health advocates in first tier mental health tribunals	http://www.mentalhealthlaw.co.uk/Practice_Note:_Role_of_the_Independent_Mental_Health_Advocate_in_First-tier_Tribunal_(Mental_Health)_Hearings	Return
20	Law Society - Representation before mental health tribunals (January 2015)	http://www.lawsociety.org.uk/support-services/advice/practice-notes/mental-health-tribunals/	Return
21	CQC.org.uk – Complaining about the use of the Mental Health Act (2012)	http://www.cqc.org.uk/sites/default/files/documents/complaining_about_use_of_mha_policy.pdf	Return
22	Gov.uk - Care and Support Statutory Guidance (October 2014)	https://www.gov.uk/government/uploads/system/uploads/attachment_data/	Return
23	Complaints procedure for health and social care (2009)	http://www.legislation.gov.uk/uksi/2009/1768/contents/made	Return
24	The Local Authority Social Services and National Health Service Complaints (Regulations) (2009)	http://www.legislation.gov.uk/uksi/2009/309/pdfs/uksi_20090309_en.pdf	Return
25	Local Government Act (1974)	http://www.lgo.org.uk/guidance-on-jurisdiction/local-government-act-1974/	Return
26	Law Society – Using a Solicitor	http://www.lawsociety.org.uk/for-the-public/using-a-solicitor/	Return
27	Solicitors Regulation Authority	http://www.sra.org.uk/	Return
28	Law Society - Find a solicitor	http://solicitors.lawsociety.org.uk/	Return
29	BAILII	http://www.bailii.org/	Return
30	Mental Health Lawyers Association	http://www.mhla.org.uk/	Return

31	BAILII - D v R (2010) (EWHC 2405)	http://www.bailii.org/ew/cases/EWHC/COP/2010/2405.html	Return
32	BAILII - Masterman –Lister v Brutton & Co (2002)	http://www.bailii.org/ew/cases/EWCA/Civ/2002/1889.html	Return
33	BAILII - Dunhill v Burgin (2014) UKSC 18	http://www.bailii.org/uk/cases/UKSC/2014/18.html	Return
34	Ministry of Justice	http://www.justice.gov.uk/	Return
35	Gov.uk - NHS Choice Framework	https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/299609/2014-5_Choice_Framework.pdf	Return
36	Care Quality Commission	http://www.cqc.org.uk/	Return
37	NHS Constitution (March 2013)	https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/170656/NHS_Constitution.pdf	Return

Useful Resources

Organisation	Resource
Care Quality Commission	New Inspection Model
Citizens Advice	Guide to making a complaint about health services
Community Legal Service	Free online information on legal matters
Irwin Mitchell LLP solicitors	Template letters to request care assessments, challenge decisions taken under the MCA, or to send complaints to a public body. Guide to judicial review
Legal Aid Agency	Civil and criminal legal aid and advice in England and Wales Easy Guide to Judicial Review
Local Government Ombudsman	Fact sheets on how to make a complaint
Ministry of Justice	Information on Court Processes
Official Solicitor	Official solicitor contacts
Office of the Public Guardian	Information on the role of the OPG
Social Care Institute for Excellence (SCIE)	Guide 42 : Good practice guidance on accessing the Court of Protection (May 2011) Guide 41 : IMCA and the paid Relevant Person's Representative roles in the Mental Capacity Act Deprivation of Liberty Safeguards (May 2011)
Shelter	Information on Challenging Homelessness decisions
Turn to Us	A free service that helps people in financial need to access welfare benefits, charitable grants and other financial help
Mental Health Law	Tribunal Forms

Appendix 1: Template letter to Supervisory Body

MCA DOLS Lead
XXXX Supervisory Body

Date

Dear

Final Letter Before Action

I am writing to seek immediate clarification with regards to the following people whom VoiceAbility have been supporting as Paid Relevant Person's Representative/ IMCA (delete as appropriate), and for urgent action to be taken in respect of their cases.

Partners' name and date that DOLS expired

It is my understanding that the Managing Authorities where these people reside have requested DOLS re-authorisations and your office has not responded within the statutory timeframes. I am very concerned that these individuals may now be unlawfully deprived of their liberty and are without the appropriate safeguards required by law. As such their Article 5 rights under the Human Rights Act are, in all likelihood, contravened.

The advocates supporting these people have already been in touch with your office to outline their concerns. As the organisation providing independent support to these individuals we request that the necessary assessments and potential safeguards are provided without further delay.

Should these people remain without the necessary assessments and safeguards, for any further period beyond 14 days, we shall be seeking legal advice with a view to sending you a formal letter before claim.

We look forward to hearing from you within 14 days of this letter.

Yours sincerely



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