

## **Appointing a suitable person**

Someone cannot just decide to be a suitable person in order to receive direct payments on behalf of another person. In most cases, the suitable person will be a family member or a close friend already involved in the provision of care for the person concerned. However, whatever the relationship of the proposed suitable person to the person requiring care, the council must still follow the process set out in the Regulations, to ensure that the best interests of the person lacking capacity are prioritised above all other considerations.

In the first instance, councils should establish whether someone who has offered to act as a suitable person qualifies as a representative. Someone can be made a representative in one of two ways:

- if the person has been given lasting power of attorney by the person needing services at some point before they lost mental capacity; or
- if the person has been appointed a deputy for the person needing services by the Court of Protection under section 16 of the Mental Capacity Act 2005.

Unless the council establishes that the representative is either unwilling, incapable of managing direct payments or for some other reason inappropriate to act as a suitable person, by virtue of the powers already given to them to manage the affairs of the person lacking capacity, they would normally be the first choice of suitable person.

- If the representative does not wish to act as a suitable person, the council should then look to see if there is an alternative person who would be willing to act as a suitable person. If the representative is also a surrogate, then they will need to consent to the appointment of someone else as a suitable person to manage the payments on behalf of the person who cannot consent. A surrogate is also a representative, that is to say a donee of lasting power of attorney or a court-appointed deputy. However, in order to be a surrogate rather than just a representative, the person's powers must cover decisions about securing services to meet a person's care needs. Lasting powers of attorney, for example, can cover a range of matters, including both personal welfare and property and affairs decisions, and may contain exclusions or restrictions.
- there may be specific circumstances in which a person other than the representative, in particular a close family member or a friend involved in the provision of care, is considered to be the most appropriate choice of suitable person by those consulted about making direct payments in respect of the person lacking capacity.
- If the council is satisfied that this arrangement would work in the best interests of the person lacking capacity, then it may, with the

agreement of any existing surrogate, accept that individual as the suitable person, instead of the representative.

- If there is neither a surrogate nor any other representative, then the council itself must make the decision about whether or not someone should act as a suitable person to manage the payments on behalf of the person who cannot consent.

In all cases, whether or not there is a surrogate to assist the council in its decision, and whether or not the proposed suitable person is a representative, the council should, so far as is reasonably practicable and appropriate, consult and take into account the views of the following people before making the decision to make direct payments to a suitable person:

- Anyone who has been named by the direct payment beneficiary before they lost capacity as someone to be consulted, either on the subject of direct payments to the suitable person, or related matters such as matters regarding their personal welfare.
- Anyone currently engaged in caring for the person lacking capacity to consent or anyone with an interest in their personal welfare.
- As far as is practicably possible, the person who lacks capacity themselves.
- Councils should ensure that they have taken all reasonable steps to ascertain the wishes of the person lacking capacity regarding who should act on their behalf. This includes consideration of any written statement of wishes and preferences made by the beneficiary before they lost capacity.
- Any representative or surrogate of the person lacking capacity. Generally speaking, an attorney or a deputy should always be consulted, even if they are not going to take on the role of suitable person. For instance, a professional person with a lasting power relating to a person's property and affairs might still have information about the person's wishes and feelings which should be taken into consideration when deciding whether someone is a suitable person to act on their behalf.
- There may be occasions where it is in the best interests of the person lacking capacity to consent for their personal information to be revealed to the people consulted. Councils should ensure that social care staff who are trying to determine a person's best interests act lawfully at all times, following their own professional guidance, as well as other relevant guidance concerning confidentiality. Legal advice should be sought where necessary.

### **Conditions to be met by the suitable person**

- As with all direct payments, the council must be satisfied that the beneficiary's needs can be met by means of the direct payments and that the recipient (in this case the suitable person) is capable of managing the direct payments.
- To help ensure that the suitable person does not mismanage or misuse the direct payments, the Regulations set out a number of conditions that the council should require of the suitable person before it makes direct payments to that person on someone else's behalf.
- Unless the council is satisfied that it is necessary to satisfactorily meet the person's needs, direct payments may not be used to secure services from the spouse, civil partner or partner of a person lacking capacity. Neither can they be used to secure services from a close relative, spouse or partner of a close relative of the person lacking capacity who is currently living in the same household as the person lacking capacity. There may be occasions when the council decides that it is necessary for the suitable person to use the direct payments to secure services from a member of the family of the person lacking capacity. However, such situations are likely to be exceptional and the council should be satisfied at all times that arrangements are made in the best interests of the person lacking capacity.
- The suitable person manages the direct payments on behalf of the person lacking capacity, on the understanding that in doing so, they must act in the best interests of that person, within the meaning of the 2005 Act. This includes, as far as is reasonably practicable, encouraging and permitting the person lacking capacity to have the fullest input possible into decisions affecting them. The suitable person should be required to take all practical steps to ensure that decisions are taken in the best interests of the person who lacks capacity. This may involve consulting other people close to the person lacking capacity, or health and social care professionals where appropriate. To ensure that the service recipient can maintain as much control and independence as possible, the suitable person should be required to notify the council as soon as they believe the person has regained capacity.

### **Principles of best interest**

A person trying to act in the best interests of someone lacking capacity should:

- do whatever is possible to permit and encourage the person to participate, or to improve their ability to participate, as fully as possible, in acts and decisions;

- try to identify and take into account all the things that the person who lacks capacity would take into account if they were acting for themselves, including their past and present wishes and feelings and any beliefs and values which would be likely to influence their decisions;
- not make assumptions about what might be in the interests of the person lacking capacity simply on the basis of the person's age, appearance, condition or behaviour;
- assess the likelihood of the person regaining capacity;
- consult others when making decisions, including anyone previously named by the person as someone to be consulted, anyone engaged in caring for the person, family members, close relatives, friends or others who take an interest in the person's welfare, any attorney appointed under a lasting power of attorney made by the person and any deputy appointed by the Court of Protection to make decisions for the person; and
- for any major decisions, make sure a record is kept of the process of working out the best interests of that person.

### **Where disputes arise**

The suitable person may face disagreements with others involved in or concerned for the welfare of the person lacking capacity to consent. Family members, partners and carers may disagree between themselves about how the direct payments should be spent, or they might have different memories about what views the person expressed in the past. Carers and family might disagree with a professional's view about the person's care or treatment needs.

- The local council should support the suitable person to balance these concerns and decide between them. The council should include the person who lacks capacity (as much as they are able to take part) and anyone who has been involved in earlier discussions. It may or may not be possible to reach an agreement at a meeting to air everyone's concerns, but any decision must always be in the person's best interests, following the best interests principles in the 2005 Act.

### **Advocacy**

An advocate may be useful in providing support for the person who lacks capacity to consent either in terms of deciding who should act as a suitable person on their behalf or, subsequent to that decision being made, how the direct payments should be used to meet their assessed needs. Advocates may be especially appropriate if:

- the person who lacks capacity has no close family or friends to take an interest in their welfare;
- family members disagree about the person's best interests;
- family members and professionals disagree about the person's best interests;
- the person who lacks capacity has already been in contact with an advocate; or
- there is a concern about the protection of a vulnerable adult.

### **Approaches to risk**

The changes to the direct payment scheme brought about by the Health and Social Care Act 2008 were designed to enable adults lacking mental capacity to consent to direct payments to benefit from the choice and flexibility that direct payments can bring. People lacking mental capacity may not be able to exercise the same level of choice and control as other direct payment recipients. However, direct payments can still provide a vital means of ensuring that choices about the person's care and support can be made by those who are best placed to understand their needs and preferences and who know how to involve them as much as possible in decisions to support their best interests.

However, councils should be very clear about the unique position of adults lacking capacity, who may not only be more vulnerable to abuse, but also less able to tell people when it is happening. Councils should therefore take steps to develop a comprehensive risk management strategy, which should inform the support plan and subsequent arrangements for monitoring and review. It is likely that reviews may need to be conducted more frequently and in person rather than on the telephone, particularly in the early stages of the direct payments being made. Councils should consider involving other people known to the person lacking capacity, particularly those consulted when the suitable person was first appointed, as well as independent advocates where appropriate. The Mental Capacity Act Code of Practice specifies that Independent Mental Capacity Advocates (IMCAs) can be used in care reviews where the person concerned has no one else to be consulted.

### **Safeguarding**

There are various legislative provisions that have been put in place to support safeguarding measures for adults lacking mental capacity. The Regulations specify that if the suitable person is not the spouse, civil partner, partner, close relative (or spouse or partner of a close relative) or friend involved in the provision of care of the person lacking capacity, then the council must obtain a CRB check for that suitable person, as a further protective measure for the person lacking capacity. For example, the

suitable person may be an independent care broker or a solicitor acting as a professional deputy, who may not previously have been personally known to the service recipient.

Anyone caring for a person who lacks capacity for the purpose of the 2005 Act who wilfully neglects or ill-treats that person can be found guilty of a criminal offence under the Act punishable by up to five years in prison, or a fine, or both.

In addition, the Fraud Act 2006 created a new offence of 'fraud by abuse of position'.

This may apply to a range of people including attorneys under a lasting power of attorney (LPA) or enduring power of attorney (EPA) or deputies appointed by the Court of Protection to make financial decisions on behalf of a person who lacks capacity. Someone acting as a suitable person receiving direct payments on behalf of someone lacking capacity to consent to the making of direct payments may be guilty of fraud if they dishonestly abuse their position, intend to benefit themselves or others, and cause loss or expose that person to the risk of loss. Without discouraging people from taking up the role of suitable person, councils should also make clear to anyone considering the role the consequences of financial misconduct or other forms of neglect or ill-treatment.

The Independent Mental Capacity Advocate service was set up as a consequence of the 2005 Act to support and represent the views of particularly vulnerable people who lack the capacity to make important decisions about serious medical treatment and changes of accommodation, and who have no family or friends that it would be appropriate to consult about those decisions. For more information, see Department of Health, *Making decisions: The Independent Mental Capacity Advocate (IMCA) Service* (2007) – [www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH\\_073932](http://www.dh.gov.uk/en/Publicationsandstatistics/Publications/PublicationsPolicyAndGuidance/DH_073932)

See section 44 of the Mental Capacity Act 2005

See section 4 of the Fraud Act 2006 Guidance on direct payments. The Regulations also provide councils with the power to impose other conditions on the suitable person if they think fit. If councils believe that it is necessary to ensure the best interests of the person requiring services to impose other conditions, then this should be done.