Headway
the brain injury association

Mental capacity:

supporting decision making after brain injury

The information in this publication offers guidance on mental capacity after brain injury, supporting decision making and making best interests decisions on behalf of a brain injury survivor who lacks mental capacity.

This publication is also available as a printed booklet, which can be purchased from our online shop.

www.headway.org.uk
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Introduction

Brain injury can have a significant impact on a person's ability to make decisions. In the immediate aftermath of brain injury, a person may be in a coma or post-traumatic amnesia, and family members will be required to manage finances. At this stage, clinicians will need to consider treatment decisions. However, they should take into consideration the wishes of the patient and their close family.

During the recovery process, cognitive, emotional and behavioural problems can make it impossible for brain injury survivors to understand the consequences of their decisions. In some cases, the effects can leave people unable to manage their own affairs or make decisions about their welfare. These changes can be permanent, so long-term arrangements may need to be put in place to enable decisions to be made in a person's best interests.

The information in this publication is designed to take you through the relevant issues in the order they may arise.

However, not all of the material will apply to your personal situation.

It is important that you receive as much support and guidance as possible and the Headway helpline can talk you through the situation, send free copies of Headway publications and refer to local Headway groups and branches. The Court of Protection enquiry line on 0300 455 4600 is also an important source of advice on many of the issues discussed. You can find more information on useful organisations at the end of this publication and in relevant places throughout.

The information in this publication does not replace clinical or legal guidance from professionals.

Section 1: Decision making after brain injury

In the early stages after a severe brain injury, people are highly unlikely to be able to make decisions for themselves, and responsibility will rest with the clinical team and family. As recovery progresses, the long-term difficulties caused by the injury will become more apparent.

This section explains some of the effects brain injury can have on decision making ability at different stages of recovery.

Hospital treatment decisions

After a severe brain injury, a person is likely to be unconscious and urgent treatment decisions will need to be made. Even when they regain consciousness, they are likely to experience a period of post-traumatic amnesia, during which they will be unable to make sense of the situation.

Treatment decisions are the responsibility of the medical staff, unless the person has registered an advance decision

regarding treatment, or they have a legally appointed representative available. The law is clear that when a person lacks capacity, any decisions must be made in their best interests, respecting their values, beliefs and wishes. In order to do this, it is important that doctors discuss these matters with family members when appropriate. It is also important that family members ensure their guidance is based on a reasonable judgement of their relative's wishes, as well as their own. If there is disagreement at any stage, mediation should be provided through the Patient Advice and Liaison Service (PALS).

Withdrawal of treatment

Sometimes decisions may need to be made about whether to continue life-prolonging medical treatment. In such cases, the clinical team will go through a formal process, and may need to seek a court judgement. If there is a disagreement between the medical team and family members, mediation should be offered to allow everyone to express their views and, if possible, seek agreement. If not, the courts may be required to make the final judgement on whether the treatment can be withdrawn.

Decisions not to pursue treatment can be very distressing. However, such decisions are not about giving up on a patient, they are about treating them respectfully as a person and ensuring they get the treatment that is right for them. Whatever decisions are made, this is an extremely difficult time for family members, who should seek support from appropriate counselling services.

Recovery and long-term difficulties

When your relative's condition has stabilised and physical injuries have been treated, they will be ready for discharge from

hospital. Their everyday decision making problems may become more apparent at this stage.

The cognitive, emotional and behavioural effects of brain injury can make rational decision making very difficult. Making decisions involves many different functions working together. For example, the following skills are essential:

- Short-term memory - holding information in mind and thinking things through
- Long-term memory – remembering previous choices, decisions and their outcomes
- Emotional regulation - assessing and controlling the emotional aspects of situations
- Planning and organisation - making plans and assessing their likely outcomes

If any of these processes is affected by brain injury, then decision making abilities may be impaired.

People are affected in different ways - some find it hard to make a decision at all, finding that even seemingly simple choices, such as what to have for dinner, become almost impossible. Some people become impulsive, making hasty decisions and acting without thinking things through. This can have devastating consequences for finances, relationships, careers and any other aspects of life.

People who are experiencing difficulties with decision making after brain injury should be assessed by a neuropsychologist, who can plan rehabilitation programmes and help with compensatory strategies.

Section 2: Assessing capacity to make decisions

This section explains how to assess a person's capacity to make decisions, and introduces some of the key legal principles that help protect their rights and wishes.

Helping others to make their own decisions

The first step is to assess whether they have the capacity to make a decision for themselves. It is important not to assume they do not have capacity, although some cases are much clearer than others.

Before you can make decisions on behalf of someone else, you must make every reasonable effort to support them to make it themselves. This may include taking time to discuss the decision with them, and explaining the relevant circumstances and possible consequences. It may be necessary to discuss the issues on several occasions to assist them to take on board all of the relevant information.

Some people may be able to consider decisions better in the morning, or maybe later in the day. It may help the person if distractions are removed, such as turning off the television, or discussing matters in a quiet room away from other people.

Introduction to the Mental Capacity Act

The Mental Capacity Act 2005 (MCA) sets out important legal principles concerning people who lack mental capacity. It outlines how people can be helped to make decisions for themselves and sets out rules for those who take decisions on someone else's behalf. The MCA applies to decisions relating to financial affairs, property, health and personal welfare.

The five key principles of the MCA are:

- There is a presumption that a person has mental capacity unless proved otherwise.
- Only after all practical steps have been taken to help a person make their own decision, should they be treated as incapable of doing so.
- It should not be presumed that a person lacks mental capacity just because they make an 'unwise' decision.
- Any acts carried out on someone's behalf should be done in their best interests.
- Before acting for a person lacking mental capacity, consideration should be given as to the least restrictive way of achieving the desired outcome.

These principles are set out in the MCA to ensure that people are involved as much as possible in decisions about their own personal affairs.

The MCA sets the following definition of when a person lacks mental capacity: *"… a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain."*

The cognitive, emotional and behavioural effects of brain injury often fit into this definition.

According to the MCA, when considering whether a person lacks mental capacity the following should apply:

- It does not matter if the mental impairment is permanent or temporary;

- Age, of itself, does not establish a lack of mental capacity;
- An “unjustified assumption” of a person’s condition should not, of itself, establish a lack of mental capacity;
- Lack of ability to communicate, of itself, does not establish a lack of mental capacity.

You can find out more about the MCA and assessing capacity in our publication *A guide to the Mental Capacity Act*.

Legal framework across the United Kingdom

The Mental Capacity Act applies to England and Wales. Scotland has its own legislation called the Adults with Incapacity (Scotland) Act 2000, and you can find more information on this in our publication *A guide to the Adults with Incapacity (Scotland) Act*. There you can find links to other useful publications, including step-by-step guides to applying to make decisions for someone else.

Northern Ireland also has its own legislation called the Mental Capacity Act (Northern Ireland) 2016. The Channel Islands and the Isle of Man do not currently have specific mental capacity legislation, so issues of capacity are dealt with under common law.

If you wish to seek a ruling to manage someone else’s affairs in these areas of the United Kingdom, you should seek advice from a solicitor with experience of mental capacity and brain injury issues. You can search for a brain injury specialist solicitor using the Headway Head Injury Solicitors Directory or contact the Headway helpline for more details.

Capacity for specific decisions

When considering a person's capacity, the complexity and magnitude of each decision should be assessed individually. For example, someone may be able to manage £100 in a bank account, yet require assistance dealing with £1 million worth of investments. Similarly, buying a bus ticket is less complicated than buying a new house. A person may be able to buy the ticket, but they may need someone to assist them with choosing and purchasing a property.

According to the Mental Capacity Act, the criteria in all cases are whether a person is able to:

- Understand information relevant to the decision;
- Retain the information long enough to make the decision;
- Use or weigh up the information;
- Communicate their decision by any means, even if only by simple movements, such as blinking an eye or squeezing someone's hand.

Capacity can be assessed by different people depending on the decision being made and its importance. For instance, carers and relatives may be able to judge capacity relating to straightforward everyday care issues, whereas GPs, social workers, psychologists and solicitors may be involved with more complex decisions, such as setting up care plans and signing legal documents. If the person has communication difficulties then it would be useful to consult a speech and language therapist to help them convey their wishes.

It is important to remember that a person has a right to make an unwise, unusual or eccentric decision. Just because the decision seems wrong, that doesn't mean they lack capacity to

make it. Therefore, it is important not to focus on the decision itself, but on whether they have made it according to the above criteria.

Section 3: Preparing to make decisions on someone else's behalf

This section gives you an overview of some points to consider before you apply to make decisions on behalf of someone else. It also provides an introduction to the Court of Protection (CoP), which oversees most aspects of decision making for people who lack capacity.

Consider whether arrangements have already been made

The Mental Capacity Act allows people to make legal agreements called Lasting Powers of Attorney (LPA). These agreements allow people to appoint an attorney to make decisions for them if they lose capacity in the future. Under previously legislation the agreements used to be called Enduring Powers of Attorney, and any EPAs made before October 2007 can still be used. There are two different types of LPS, one for a person's property and affairs and one for a person's health and welfare. Anyone appointed under an LPA has responsibility for decisions covered in the agreement. The Office of the Public Guardian (OPG) keeps a database of all Enduring or Lasting Powers of Attorney that have been registered. You should contact the OPG if you don't know whether the person you are concerned about has an LPA in place.

Decisions that do not need authority

Many everyday decisions have to be made quickly, and it is simply not practical to get formal authority for them. The Mental

Capacity Act provides protection for people who need to make quick decisions on someone's behalf, provided they:

- Have reasonable belief that the person lacks capacity in relation to the matter in question;

- Have reasonable belief that the action is in the best interests of the person concerned.

This does not exclude a person from civil liability for loss or damage, or criminal liability resulting from any negligence in performing the action. However, it is unlikely that this will happen with most common-sense decisions.

Decisions that may be made without legal authority include those concerning everyday care, such as whether a person ought to be bathed, what they will wear or what to have for dinner. Small amounts of money can also be managed without permission. Some more serious decisions can be taken when there isn't time to seek authority, such as consenting to hospital treatment or medical procedures.

You may require legal authority in order to make complex decisions which can have a serious impact on the person's life, or which involve legal contracts. The following sections explain the processes involved.

Introduction to the Court of Protection

If the person you are concerned about lacks capacity to make decisions about their financial affairs, property, health or personal welfare, then you may need to make an application to the Court of Protection (CoP) to be able to intervene. It is important to have a clear idea of the decisions that need to be made.

The CoP specialises in all issues relating to lack of capacity and it can decide whether or not someone lacks capacity to make a decision for themselves. It has the power to make decisions for them, or can authorise someone else to do so.

The Senior Judge is based in London and there are specially trained judges in key locations around England and Wales. This means that hearings can be held in most regions. The CoP is intended to be accessible and maintains an informal style for hearings. In practise, hearings are often unnecessary anyway, and rulings can usually be made based on the application forms.

The CoP may appoint a deputy if a series of linked decisions is required. However, if the matter relates to a single issue then a judge will usually take the decision. In personal welfare matters, the CoP is reluctant to appoint a deputy and will usually prefer to make a single decision itself.

Section 4: The duties and responsibilities of decision makers

As a family member or carer, the Court of Protection (CoP) may appoint you as a deputy. This will allow you to make a series of linked decisions on behalf of your relative, usually in relation to their financial affairs and/ or property, without applying to the Court each time. Alternatively, you may want to take payment of someone else's welfare benefits, in which case it is possible to become their appointee.

Becoming a deputy or appointee is a lot of responsibility and there are rules which must be followed in order to respect the rights of people who lack capacity. This section provides an overview of these duties and responsibilities.

What is a deputy?

The Court can appoint two different types of deputy:

- One for financial affairs and property
- One for health and personal welfare

A deputy has a responsibility to make decisions in the best interests of the person who lacks capacity and is usually a close relative or friend of the person with a brain injury. In some cases a professional, such as a solicitor or accountant, can be appointed. The CoP can appoint a 'panel deputy' to act on a person's behalf if nobody else is willing or able to take on the role. A deputy must be over the age of 18.

It is worth noting that, while most applications to be a financial affairs and property deputy are successful, the success rate for welfare deputy applications is very low. In many cases where a welfare deputy application is made, the CoP may only make a single decision, or they may refuse the application altogether.

The role of a deputy

The deputy should give careful consideration to the wording in the order made by the CoP. This is a document which bears the Court's seal (an impressed stamp in one corner) and the deputy's power and authority is limited to that set out in the order.

A deputy is required to:

- Only make decisions that are allowed within the Court order
- Abide by the principles of the Mental Capacity Act
- Make decisions only in the best interests of the person
- Ensure a high standard of care when making decisions

Before making any decision, the deputy should consider whether the person would be able to make it themselves. They should ensure the person they are acting for is allowed, encouraged and assisted to make their own decisions whenever they are able to do so. The important thing to remember is to follow the five key principles set out earlier in 'Introduction to the Mental Capacity Act'.

A deputy should not make a decision for someone when:

- They believe the person can make it themselves
- It will physically restrain the person, unless it is for their own safety
- It goes against a decision made under a Lasting Power of Attorney
- It concerns withdrawing life-prolonging treatment, such as ventilation and artificial nutrition

There are also some things that a deputy should never do when acting on behalf of someone. These include:

- Making or amending the person's will
- Making large gifts from the person's money or property, although some small gifts may be permitted
- Holding money or property on behalf of the person

A financial affairs and property deputy will be required to keep records, receipts and statements of financial transactions. A deputy may also be required to report annually to the Office of the Public Guardian (OPG) on how they have allowed, encouraged and assisted the person to make their own decisions, and the people with whom they have consulted (for more information on the OPG see 'Sources of support').

The duty to act in another's best interests

Every decision a deputy makes, from simple choices about what to wear and when to wash, to major financial, welfare or

property decisions, must be done in the best interests of the person they are acting for.

The Mental Capacity Act sets out a checklist to be used when determining what is in a person's best interests. As far as possible, the decision maker should consider:

- The person's past and present wishes and feelings (including any written statement made when he/she had capacity);
- The beliefs and values that the person would be likely to have if they had capacity;
- Factors the person would consider if able to do so;
- The views of other interested parties, such as close family members and friends.

Appointees

If a person receives income from welfare benefits and/or a state pension, and they haven't appointed an attorney under an LPA or EPA, you may be able to make an application to become their appointee. Being an appointee means that you:

- Sign the claim forms;
- Are responsible for telling the benefits office of any changes which may affect;
- the amount of benefit the person receives;
- Are required to claim any benefits to which the person may be entitled;
- Must spend the benefit in the best interests of the person – although paid to you, the benefit is not yours to spend on yourself;
- Can be responsible for any overpayments, if you knowingly provide wrong information.

Becoming an appointee can be a simpler and faster process than becoming a deputy. However, if the person claims benefits

that are paid by different government departments, separate applications may need to be made for each.

Section 5: Becoming a deputy

Once you have decided which decisions need to be made, and whether you would like to become a deputy or ask for a single decision to be considered, you will need to make an application to the Court of Protection (CoP). It is advisable to engage a solicitor specialising in CoP matters to carry out the necessary legal steps. This is particularly important if your application is for complex powers or if there are likely to be objections from other parties. You can search for solicitors advising on CoP issues on the Headway website. However, using a solicitor is not essential and you can make the application yourself. This section goes through the application process, including a guide to standard, urgent and fast-track applications. It also gives you some useful guidance on seeking support while waiting for an application to be processed, before telling you what to do if you disagree with a CoP ruling.

Making the application

If the issue relates to the person's health and welfare then you will need permission from the CoP before you make the application. You will not usually need permission if the issue relates to property and financial affairs. If you are in any doubt whether you need permission, you should contact the CoP enquiries line to discuss the situation.

When you are ready, you can find the appropriate application packs on the government website. These include both application and permission forms. Alternatively, you can contact the CoP directly.

The forms should be completed to specify the decision or decisions that need to be made and to outline the circumstances. If you would like to become a deputy and make a series of linked decisions, you should fill in the Deputy's declaration form. Applications should be accompanied by medical evidence from a doctor confirming the person's lack of mental capacity.

The application will incur a fee, which at time of writing is £400. This can be waived or reduced if a person is on a low income and the appropriate form is submitted with proof.

You will be required to notify all interested parties about the application, in case they wish to object. The CoP will usually only intervene after the appropriate people have had an opportunity to raise any objections, usually allowing three weeks after the last person has been notified.

Urgent applications

The CoP recognises that in some cases a decision needs to be made quickly and has put procedures in place to allow this. An urgent application can be made to the CoP when a person is at risk of serious loss or harm and a decision needs to be made within 24 hours.

Examples include:

- Applications about urgent medical treatment;
- Applications to prevent someone being removed from the place where they live;
- Applications to execute a statutory will or financial transaction if the person's life expectancy is very short.

To make an urgent application, you should contact the CoP and ask to speak to the Urgent Business Officer.

Fast-track applications

The CoP may agree to fast-track an application in certain circumstances, when a decision is required quickly but doesn't qualify as an urgent application.

Examples may include:

- Property sale or purchase where there's an immediate risk that a buyer might be lost
- Investment of money when there is a deadline approaching
- Release of funds to pay for care or treatment

Release of funds to pay for household maintenance

Existing applications may be fast-tracked if an important issue arises. In all cases, enquiries regarding fast-track applications should be directed to the Fast-track Business Officer at the CoP.

Waiting for an application to be processed

Waiting for an application to the CoP to be processed and approved can be very difficult and frustrating. At the time of writing, the waiting period for a standard application is typically around 14–18 weeks. Among the main practical issues to consider during this time are the finances, health and welfare of all concerned.

Finances

If the person with the injury is a key wage earner for the family, then loss or reduction of their salary can make life difficult financially. Therefore, it is very important for other family members to have access to essential finances.

Sadly, during the waiting period, financial institutions such as banks, insurance firms and mortgage providers may refuse to speak to anyone other than the account holder, so you will not be able to discuss anything that is in the sole name of the person with a brain injury.

It is important for family members to seek advice as soon as possible to avoid further financial difficulties in the future. Services such as the Citizens Advice and Civil Legal Advice may be able to help you contact financial institutions and signpost you to other sources of independent financial advice. They can also discuss any welfare benefits that may be available (see 'Sources of support' for contact details).

Health and welfare

In the early stages after a moderate or severe brain injury, medical staff will help you to make the majority of decisions regarding health and welfare. However, when the person has returned home there may be decisions that will need to be made for them.

You may need to make some everyday decisions without any formal authority, and the law provides protection as long as they are made in the best interests of the person. You can seek further advice by speaking to the person's GP or social worker, who will be key sources of support.

It is also important to remember your own welfare. Our publication *Caring for someone with a brain injury* provides a guide to the practical and emotional issues faced by family members and carers. Further information is available on the Headway website.

Our helpline can send out free copies of printed booklets, provide emotional support and signpost to local Headway

services. Our Headway groups and branches can also be a valuable source of support and information.

Appealing against Court of Protection rulings

If you disagree with the CoP's ruling, you can ask for a review at no extra cost within 21 days (although in some instances the judge may specify a different time limit). If the time limit for a review has passed, it will be necessary to make a new application.

After you've been appointed

As a deputy, you will be supervised by the Office of the Public Guardian (OPG) which is responsible for helping you carry out your duties and making sure you comply with the Mental Capacity Act.

Once appointed you will be sent a court order telling you what you can and can't do as a deputy. You can start acting on behalf of the person:

- As soon as you're appointed if you're a health and welfare deputy.

- When you pay a 'security bond' – a type of insurance to protect the person's money - if you're a property and financial affairs deputy. You'll get a letter from the court with details of how to do this. The bond is paid to a bond provider and the amount is decided by the CoP.

You will need to check the court order to make sure it is entirely accurate as this is a legally binding document. If there are any mistakes then inform the OPG as soon as possible.

You will also get official copies of the court order to send to banks and other institutions you need to deal with. These prove

you're acting on behalf of the other person. It is important to ask for any official copies you send out to be returned, although you can order extra copies by writing to the CoP.

How you'll be supervised

When you're appointed as a deputy you'll be assessed by the OPG to decide the supervision and support you need. As a new deputy you will need to pay a £100 assessment fee.

You will be assigned to an OPG case manager who specialises in one of the different deputy types: lay deputies, professional and panel deputies, local authorities or health and welfare deputies. If you are a lay deputy or a professional who has not previously handled a deputyship, the OPG will contact you within the first few weeks to set up a telephone discussion with your case manager.

The purpose of this conversation is to ensure you are clear about your role and responsibilities, and the scope of the powers you have been given. It will also cover the OPG's responsibility to the Court to supervise and support you in a proportionate way, and what that means in terms of periodic contact. The case manager will explain the need to pay a general supervision fee, currently £320 a year. This expense is met from the money of the person you are protecting and is payable at the end of the financial year.

Supervision visits

Following the initial telephone call, the case manager will decide whether you would benefit from a face-to-face visit. The purpose is to support you and ensure you are comfortable with your role.

The OPG has a dedicated team who deal with all requests for visits to deputies. A visit may be required for a number of reasons:

- To ensure you understand your duties
- To ensure you have the right level of support from OPG
- To ensure you are carrying out your duties in the best interests of the person
- If you are under investigation because of a complaint

If a visit is required then a Court of Protection visitor will be sent. The OPG will arrange for a CoP visitor to contact you to arrange the visit and explain the reason. Alternatively, a telephone call may suffice to cover the issues at hand. The amount of visits or calls required varies between individuals. In the first year of your deputyship it is likely that you will need at least one or two supervisory sessions. Some people may require very little supervision after this, while others need regular ongoing visits. You can request a visit or call if you need help. This can be done by contacting the OPG who will then decide if they need to call on a CoP visitor.

Annual reports

You'll need to write an annual report for the OPG explaining the decisions you've made as a deputy. The report should include:

- The reasons for your decisions and why they were in the best interests of the person
- Who else you spoke to and what they said was in the person's best interests
- How you resolved any differences between what you and other people thought

As a property and financial affairs deputy, you must fill in details of how you've managed the person's money in your annual report. You are required to keep copies of any bank statements,

receipts, contracts, letters or emails relating to your deputyship duties.

Major decisions

You must tell the OPG if you're planning to make an important decision such as selling the property of the person you're deputy for.

Contact the OPG for further information about supervision and your requirements as a deputy. See 'Sources of support' for contact details.

Changing circumstances

In some circumstances it may be appropriate to ask the CoP to reconsider a matter at a later date. For example, the passing of 12 months may allow a person time to demonstrate how well they can manage their finances themselves. Their ability to make their own decisions may have improved after the initial effects of the injury have passed, or they have stabilised on a particular course of medication.

If you no longer feel that the person requires a deputy then it is advisable to contact the CoP. You will then need to send in the appropriate forms and up-to-date medical evidence so the Court can assess the person's ability to make their own decisions.

If the person's ability to make decisions has deteriorated, or you feel you need authority to make new decisions on their behalf, you will need to make another application to the CoP.

Section 6: Protection people's welfare

This section covers the important steps that need to be taken to protect the welfare of someone who lacks capacity. This includes an introduction to the Mental Health Act, which allows people to be detained for treatment if their behaviour is putting themselves or other people at risk.

Challenging the decision of a deputy or attorney

Sometimes there may be serious concerns of abuse or ill-treatment by deputies or attorneys, while at other times there may be less serious, but very genuine, worries. In order to protect the interests of potentially vulnerable people, the Mental Capacity Act allows for decisions made by deputies or attorneys to be challenged and reviewed.

If there are concerns about a decision the following options should be considered:

Discuss your concerns with the decision maker

In some circumstances it may be appropriate to firstly approach the deputy or attorney to discuss the concerns. They may reconsider their decision in light of what is said.

Contact the Office of the Public Guardian (OPG)

If you are concerned about the actions of a deputy or attorney, you can telephone the OPG to report your concerns on 0300 456 0300. The OPG can investigate the matter and can also refer concerns to other relevant agencies. They can also make an application to the Court of Protection if required.

Make a new application to the Court of Protection (CoP)

Ultimately, it may be necessary to make a new application to the CoP in order to challenge a decision made by a deputy. The application may ask the CoP to make a decision about:

- Whether the person has the mental capacity to make their own decision
- What decision should be made in the person's best interests and what is the least restrictive option for them
- Whether the attorney or deputy is an appropriate person to continue to make decisions
- Whether a new or replacement deputy should be appointed and, if so, the extent of their powers

See Section 5 for more information on making an application to the CoP.

Reporting concerns about a person's welfare

When there are concerns about a person's welfare, the following agencies should be contacted:

- The Office of the Public Guardian (OPG) – you can report suspicions of fraud or abuse by a deputy or attorney;

- The local police – if there is a suspicion that someone has committed, or is about to commit, a crime against a vulnerable person, such as theft or physical assault;

- The local authority's Social Services Department or adult safeguarding team – if there are concerns about a person being abused, at risk of abuse, or if you wish to complain about a social worker;

- The local authority or the Care Quality Commission (CQC) – when there are concerns about the standard of care in a care home, or about the care provided in a person's home ;
- Patient Advice and Liaison Service (PALS) – when there are concerns about the care or treatment given to a person by an NHS service.

Treatment under the Mental Health Act

Behavioural problems and lack of self-awareness are common after brain injury. This can sometimes lead to behaviour which puts the brain injured person and/or others at significant risk. The Mental Health Act 2007 (MHA) stipulates how a person could be detained against their wishes for assessment and treatment. The person has to be shown to have some kind of "mental disorder", including behavioural problems caused by brain injury, and for it to be severe enough to warrant detention for an assessment.

Detention under the MHA must be in "the interests of the person's health, safety or the protection of others". It also has to be shown that the person would not willingly accept treatment, which sometimes happens after brain injury if the person doesn't understand that there is any problem.

It is worth noting that drug or alcohol dependence are not in themselves grounds for detention under the MHA.

If you have serious concerns about the behaviour of a person with brain injury, you should contact your GP or local social services. If they agree with your concerns, they may refer the person for assessment by a psychiatrist.

People who are detained under the Mental Health Act have a right to appeal against their detention. An appeal will be heard by a judge in the presence of an independent panel, usually

consisting of a doctor from outside the service and a lay person.

Deprivation of Liberty Safeguards (DOLS)

The Mental Health Act added safeguards to the Mental Capacity Act to ensure that the deprivation of a person's liberty should not happen unless absolutely necessary and in the best interests of the person concerned. The following safeguards create a process to be followed whenever it is thought necessary to restrain or restrict a person living in a hospital or care home:

- The deprivation of liberty must be formally authorised - this is the responsibility of either the NHS hospital or the registered care home;
- The application should be submitted to a supervisory body for approval, usually the Clinical Commissioning Group (CCG) or local authority;
- The process can only be applied to someone who is incapable of making a decision about the arrangements made for their care and/or treatment;
- After an independent assessment, the deprivation must be considered to be in the person's best interests and necessary to protect them from harm;
- All minimally restrictive means of meeting the person's best interests must be considered.

If it is felt that a deprivation of liberty is inappropriate, or the deprivation has not been properly authorised, the matter should be discussed with the relevant supervisory body. When

agreement cannot be reached, an application to the Court of Protection may be needed in order for the matter to be reviewed by a judge.

Advocacy services

In most situations, people who lack capacity will have some support from family members and friends. However, for circumstances where people do not have anyone appropriate to help them, the Mental Capacity Act created a national system of Independent Mental Capacity Advocates (IMCAs). If you do not feel that you are being treated as an appropriate person then you can ask for an IMCA to be appointed.

IMCAs are trained professionals appointed in hospitals and communities to represent the rights of people who have no one else to speak up for them. The system is designed to provide extra safeguards for particularly vulnerable people in specific situations. This may be particularly relevant to medical treatment or long-stay accommodation decisions.

The responsibilities of IMCAs are to:

- Represent and support the person who lacks capacity
- Make representations about the person's wishes, feelings, beliefs and values
- Bring all relevant factors to the attention of decision makers
- Challenge decision makers if necessary

Local authorities and NHS bodies are under a duty to provide this service where necessary. If you know of someone who may require an IMCA but has not had one made available, you should contact their hospital, Social Services or the IMCA service provider in your area (see 'Sources of support').

IMCAs are not available to people detained under the Mental Health Act. However, some people – referred to as 'qualifying patients' – are entitled to help from Independent Mental Health Advocates (IMHAs). Qualifying patients include those detained under the Mental Health Act for longer than 72 hours and people living in the community under Mental Health Act guardianship. Others receiving treatment in hospital may be entitled to IMHA support if the hospital is proposing certain treatments under the Mental Health Act, such as neurosurgery. IMHAs should be made available by the hospital to anyone who qualifies.

For further details on locating IMCAs, IMHAs and other advocacy services, see 'Sources of support'.

Summary

It is common for people to have difficulty making decisions after brain injury. This can place enormous pressure on families, who are required to manage financial and property affairs and to ensure that welfare decisions are made in the best interests of their relative.

You can make simple, everyday decisions without applying to the Court of Protection. However, when complex decisions are needed for financial affairs, property, health and personal welfare, an application may be required. It is important to keep in mind that all decisions must be made in the best interests of the person with a brain injury, and their values and wishes should be considered as much as possible.

The Court of Protection enquiries line can be a good source of support when making an application, as they can guide you to the correct forms and answer any queries you may have. They can also provide information about your role as a deputy. The Office of the Public Guardian is in charge of supervising

deputies and is there to support you after you are appointed. You can find details of these and other useful organisations in the 'Sources of support' section.

Although the laws might appear complex, they are there to protect vulnerable people. With a clear idea of the decisions required and an understanding of the process, it is possible to support someone's decision making, while preserving their freedom and individuality.

Sources of support

There are a number of organisations that are directly responsible for the welfare of people who lack capacity to make their own decisions. This section provides further details of some of the most important organisations and services. It also gives details of other useful organisations that can provide support to people who lack capacity, as well as their family and carers.

The organisations and apps listed below are provided for information purposes only. Their inclusion does not imply endorsement, recommendation, or approval by Headway. Users should make their own assessment of any organisation or service before engaging with them.

The Court of Protection
Tel: 0300 456 4600
Email: courtofprotectionenquiries@justice.gov.uk
Web: www.gov.uk/court-of-protection

The Court of Protection (CoP) is a court specialising in all issues relating to lack of capacity. For a detailed explanation of the role of the CoP, see Sections 3, 4 and 5 of this publication.

Office of the Public Guardian

Tel: 0300 456 0300
Email: customerservices@publicguardian.gov.uk
Web: www.gov.uk/government/organisations/office-of-the-public-guardian

The Office of the Public Guardian (OPG) protects people who lack mental capacity to make decisions for themselves. The role of the OPG is to:

- Support the Public Guardian in the registration of Enduring Powers of Attorney (EPA) and Lasting Powers of Attorney (LPA)
- Supervise deputies and attorneys, helping them to carry out their duties
- Work with other organisations to ensure that allegations of abuse are fully investigated and acted upon
- Take responsibility for mental capacity policy, providing guidance to the public as well as legal and health professionals

The UK Government website is now the main host of information relating to the MCA, deputies, guardians, LPAs and EPAs. In addition to the links provided above you may find the following particularly useful: www.gov.uk/become-deputy/overview

Advocacy

The following organisations are responsible for providing many IMCA and IMHA services in England. Each operates in different areas of the country. You will need to visit their websites or contact them to find out about services in your region.

POhWER
Tel: 0300 456 2370
Email: pohwer@pohwer.net
Web: www.pohwer.net

Voiceability
Tel: 0300 303 1660
Email: helpline@voiceability.org
Web: www.voiceability.org

If another organisation provides the service in your area then the organisations above should be able to provide contact details.

Details of IMCA providers in Wales is available from IMCA Wales.

IMHAs should also be made available by hospitals to anyone who qualifies. Further information on IMHA and IMCA services is available from the mental health charity Mind on 0300 123 3393.

Other useful organisations

The list below provides details of some other organisations that can provide support.

Association of Independent Visitors
Web: www.aivuk.org.uk

A nationwide group of current and former Court of Protection Visitors who formed an alliance to work with private clients and their families, solicitors, deputies and attorneys in upholding and safeguarding best interests.

Association of Speech and Language Therapists in Independent Practice
Tel: 0203 002 3704
Web: www.helpwithtalking.com
Provides information on independent speech and language therapy throughout the United Kingdom and provides a directory of therapists.

British Association of Behavioural and Cognitive Psychotherapies (BABCP)
Tel: 0330 320 0851
Email: babcp@babcp.com
Web: www.babcp.com

A multi-disciplinary interest group for people involved in the practice and theory of behavioural and cognitive psychotherapy. The website hosts a directory of all officially accredited Cognitive Behavioural Therapists in the UK.

British Association for Counselling and Psychotherapy (BACP)
Tel: 01455 883 300
Email: bacp@bacp.co.uk
Web: www.bacp.co.uk

A membership organisation and registered charity that sets standards for therapeutic practice and provides information for therapists, clients of therapy, and the general public.

Care Quality Commission (CQC)
Tel: 03000 61 61 61
Email: enquiries@cqc.org.uk
Web: www.cqc.org.uk

Checks whether hospitals, care homes and care services are meeting government standards. Holds a comprehensive directory of secondary care services.

Citizens Advice
Web: www.citizensadvice.org.uk

Provides free advice to everyone on their rights and responsibilities, including finances, benefits, housing, legal issues and more. There are Citizens Advice centres across England and Wales. Visit the website to find details of your local service.

Civil Legal Advice (CLA)
Advice line: 0345 345 4 345
Web: www.gov.uk/civil-legal-advice

A free and confidential advice service in England and Wales paid for by legal aid. If you are living on low income or benefits, you may be eligible for free specialist advice on issues including debt, housing, domestic abuse, special educational needs, discrimination and issues around a child being taken into care.

Court Funds Office (CFO)
Tel: 0300 0200 199
Email: enquiries@cfo.gov.uk
Web: www.gov.uk/contact-court-funds-office

Provides a banking and administration service for clients with funds held in courts throughout England and Wales, including the Court of Protection. This includes providing a service for people who are unable to make decisions about their own finances and for deputies appointed on their behalf. It accounts

for monies paid into and out of court and acts as custodian for any investments made with that money.

Financial Ombudsman Service
Tel: 0800 023 4567
Email: complaint.info@financial-ombudsman.org.uk Web: www.financial-ombudsman.org.uk

A free service which investigates complaints about most financial problems.

The Law Society (England & Wales)
Web: www.lawsociety.org.uk

Represents lawyers in England and Wales and provides a comprehensive directory of accredited solicitors in the UK. The website provides a directory of solicitors worldwide.

Legal Ombudsman
Tel: 0300 555 0333
Email: enquiries@legalombudsman.org.uk
Website: www.legalombudsman.org.uk

Free service with formal powers to resolve complaints about lawyers.

Local authority social services

Responsible for providing help and support to disabled people and their carers. You can find contact details of your local department in the telephone directory and at www.gov.uk/apply-needs-assessment-social-services.

National Debtline
Tel: 0808 808 4000
Web: www.nationaldebtline.co.uk

Provides free, confidential and independent advice on how to deal with debt problems.

Patient Advice and Liaison Service (PALS)
Web: www.nhs.uk/chq/pages/1082.aspx?CategoryID=68

Provides information on health-related issues and acts to resolve the concerns of patients, their relatives and carers as quickly as possible.

Scope
Helpline: 0808 800 3333
Email: helpline@scope.org.uk
Web: www.scope.org.uk

Provides a directory of Disability Information and Advice Line (DIAL) services in England and Wales.

Solicitors Regulation Authority
Tel: 0370 606 2555
Web: www.sra.org.uk
Regulates standards for solicitors operating in England and Wales. Can investigate accusations against solicitors of fraud, misconduct and dishonesty.

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We hope that this has been a helpful resource. Please consider sharing your feedback with us by scanning the QR code or by visiting our publication feedback survey https://uk.surveymonkey.com/r/hwpublications.

Learn more and support our work at www.headway.org.uk/get-involved.

This information was last reviewed in 2016.

We're here to listen.

If you need support, or have a question about brain injury, contact our free nurse-led helpline:

0808 800 2244
helpline@headway.org.uk

0115 924 0800 | enquiries@headway.org.uk
www.headway.org.uk

Head office: Bradbury House, 190 Bagnall Road,
Old Basford, Nottingham, NG6 8SF

Headway – the brain injury association is registered with the Charity Commission for England and Wales [Charity No. 1025852] and the Office of the Scottish Charity Regulator (Charity No. SC 039992]. Headway – the brain injury association is a company limited by guarantee registered in England [No. 2346893].