

# Coronavirus, people's voice and advocacy: a myth buster

There has probably never been a more important time for people to be able to get independent advocacy to ensure that their voices are heard. There are myths circulating which might restrict people's access to advocacy, but this guide debunks them, to help enable people to get the support they need to have a strong voice and their rights respected.

## **1. Due to the pandemic and Coronavirus Act, people are no longer entitled to an advocate as they were before due to the emergency powers: **False****

The rights to an advocate under the Mental Health Act 1983, Mental Capacity Act 2005 and Care Act 2014 have not been changed. There has also been no change to the duty to make advocacy available in relation to health complaints.

## **2. Advocates are unable to carry out their role during the coronavirus pandemic: **False****

Advocates are finding ways to carry out their roles. Wherever practicable contact is being made using telephone, text or video call. Many pragmatic solutions are also being found, including using intercoms and phone with visual contact through windows.

For the safety of all involved meetings in person must be limited to only when it is essential that they take place and no alternatives exist. [VoiceAbility's published internal guidance](#) may help in determining this, but ultimately each advocacy service will need to weigh up the risks in each case as to whether a meeting in person is essential.

Advocates have a legal duty to meet with a client privately whenever this is reasonably requested (Mental Health Act) or practicable and appropriate (Care Act, Mental Capacity Act). It follows that service providers must facilitate this to the extent possible.

If a care home or hospital believe it is not safe for an advocate to meet a client in person, they may ask for this not to take place. Where this happens, advocates are encouraged to seek to understand the reasons for this and discuss alternatives. This may include requesting a written explanation, which may be helpful in assessing whether it is a reasonable and proportionate decision.

### **3. It's unclear whether advocates are essential key workers: False**

Advocates are key workers. They come under the categories set by the government in its [guidance on maintaining educational provision](#). Furthermore, the Chief Social Worker has explicitly confirmed that advocates are essential key workers.

### **4. The Care Act no longer applies and local authorities no longer need to assess, plan for or meet people's needs: False**

The [Coronavirus Act](#) and [Care Act easements guidance](#) do allow a local authority to trigger 'easements' to the Care Act. If a local authority does so, it would result in the Care Act duties to assess and meet eligible needs of adults, young people transitioning to adult services and carers being downgraded to powers.

Government guidance is clear that local authorities should only trigger easements if it is essential that they do so, due to the pressure from coronavirus. The local authority must go through a process to decide this, including approval by the Director of Adult Social Service: it is not automatic. The decision is taken as a whole local authority, not on an individual client basis. This also means that different local authorities may make different decisions at different times.

The government's stated expectation is that even after triggering the easements, local authorities will do everything that they can reasonably do to continue to meet need as they would under the Care Act. Advocates should support and represent clients to ensure that the local authority fully uses its powers to provide necessary support.

In addition, local authorities will still be expected to carry out proportionate, person-centred care planning and they must meet needs wherever required to avoid a breach of a person's human rights.

There are important Care Act duties that remain intact irrespective of 'easements'. These include duties to:

- promote individual well-being (s1)
- provide suitable information and advice (s4)
- involve the person when revising care and support plans (s 27(2))
- safeguarding (s42 to s47)
- refer for and provide advocacy (s67 and s68).

### **5. The rights to advocacy under the Mental Health Act have been suspended: False**

The Coronavirus Act does not alter a person's right to an Independent Mental Health Advocate if detained under the Mental Health Act. Furthermore, the Coronavirus Act's emergency powers regarding the Mental Health Act have not been switched on. The Mental Health Act remains in force (07/04/20).

**6. It's not possible to support and represent a young person with their Education, Health and Care Plan (EHCP) assessment: False**

The Coronavirus Act's emergency powers as they relate to EHCPs and SEND under the Children and Families Act 2014 have not, as of 07/04/2020, been switched on by the Secretary of State. As an advocate you can still support the young person with their EHCP.

**7. Complaints processes no longer apply: False**

NHS England & NHS Improvement have announced an 'optional pause' to NHS complaint processes for 3 months. The guidance makes clear that advocacy providers should still accept referrals, and support people to raise concerns or make a complaint as providers will continue to accept and triage complaints. Advocates must support their clients to understand that an investigation will likely not happen in the near future.

The Parliamentary and Health Service Ombudsman (PHSO) has stopped accepting new NHS complaints from 26<sup>th</sup> March 2020 onwards and have postponed work on open cases.

Local authority complaints and escalation procedures remain the same as under the Care Act. Additionally, the easement guidance state that local authorities need to ensure that there is a clear, transparent and quick way for people to raise any concerns that their human rights are being breached.

**8. NHS Continuing Health Care (NHS CHC) assessments have been suspended: True**

The Coronavirus Act's emergency powers suspended the duty to carry out NHS CHC assessments and the duty to have regard to the NHS CHC National framework as from 25<sup>th</sup> March 2020.

**9. Blanket decisions not to consider hospital admission for care home residents and blanket Do Not Attempt CPR (DNACPR) notices are permitted due to the national emergency: False**

Decisions must always be made individually; this is a legal requirement. It has been highlighted by all relevant national organisations, including NHS England, Royal College of GPs, BMA, CQC and NICE.

**10. Health and care providers should stop all visits to inpatients and residents from friends and family: Partially true**

[NHS Guidance](#) on 8th April suspends all visitors to inpatient, diagnostic and outpatient areas, with some notable exceptions which are listed. These include parents or appropriate adults visiting children and to support someone with a mental health issue such as dementia, a learning disability or autism, where not being present would cause the patient to be distressed.

Government guidance on care homes does not now explicitly mention visitors, but visits to care homes would be prevented by the Regulations other than in the exceptional circumstances. [Caselaw](#) established since the pandemic highlights that local authorities and care homes should communicate with residents and their families to find creative solutions for enabling meaningful contact between residents, their family and friends.

People living in supported living and their own homes must follow the same legal requirements and should follow the same guidance as everyone else. This would usually preclude visits to and from friends or family outside their household.

**11. Mental Health Hospitals can stop leave under section 17 under the Mental Health Act: Partially true**

Hospitals can stop section 17 leave during the pandemic under the [Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#). They are however urged by the [Royal College of Psychiatrists in their guidance](#) and by others to exercise 'reasonableness' and come up with creative solutions for enabling leave to take place.

**12. People can't pay their family members to provide care and support: False**

It is possible for people to use a Direct Payment to pay family members to help meet their eligible needs. This is permitted where it is 'necessary' and effective to meet needs. This may be an excellent way to ensure people continue to be supported should providers not be able to meet needs. However, there are implications for employment status and contractual obligations that will need to be looked at. Ensure advice is taken if this appears to be a suitable option for a person.

## Notes

This information is primarily aimed at advocates and may also be useful to health and social care professionals, people who use health and social care services and their relatives and friends.

This document was written in good faith based on the best information available at a point in time in a fast-changing situation. It does not constitute advice on the law or any other matter. No liability is accepted for any adverse consequences of reliance upon it.

This document was written by VoiceAbility, Kate Mercer (Kate Mercer Associates) and Gail Petty (NDTi) and inspired by discussion with a collective of advocacy organisations who are co-operating to ensure effective advocacy support to people through the pandemic. We intend to update this in response to emerging issues.

## Additional references and some helpful explanatory resources

- [The Coronavirus Act](#) Questions 1, 4, 5, 6, 8
- [Care Act easements: guidance for local authorities \(updated 1/4/2020\)](#) Questions 1, 4, 8
- [Steve Broach and Kate Mercer webinar on Covid 19 and Care Act Easements \(90 mins\)](#) Question 1,2,4,5
- [What does the Coronavirus Act mean for social care: 2 minute video.](#) Questions 1,2,4
- [The Care Act 2014](#) Questions 2, 4
- [The Care and Support \(Independent Advocacy Support\) Regulations 2014](#) Question 2
- [Code of Practice: Mental Health Act 1983](#) Question 2
- [The Mental Capacity Act 2005](#) Question 2
- [VoiceAbility's published internal guidance](#) Questions 2, 3,
- [39 Essex Chambers briefing on Covid 19 and changes to the Care Act](#) Questions 4, 6, 8
- [VoiceAbility briefing on restrictive practices and coronavirus](#) Question 9
- [Alex Ruck-Keene 15-minute video on DNACPR and advance care planning](#) Question 9
- [Beacon's guidance to assist providers, advocates, families and CCGs.](#) Question 8
- [Joint statement on advance care planning](#) Question 9
- [NHS England Letter on maintaining quality and care under pressure, 7th April 2020](#) and [letter of 3rd April 2020](#) Question 9
- Case law [BP v Surrey County Council & RP](#) (25/03/20) and summary by [Oliver Lewis of Doughty Street Chambers here.](#) Question 10