

Written evidence from The Advocacy People (COV0089)

For over 20 years, The Advocacy People have been delivering statutory advocacy across the south of England. This provides us with a unique insight into the challenges people face when getting their voices heard and their rights upheld within the UK legislation designed to protect their human rights, namely, the Mental Capacity Act 2005 (including Deprivation of Liberty Safeguards), the Mental Health Act 1983 and the Care Act 2014 and the right to complain about NHS care and treatment under the Health and Social Care Act 2008.

What steps need to be taken to ensure that measures taken by the Government to address the COVID-19 pandemic are human rights compliant?

1. To enforce the guidance ‘The Mental Capacity Act (2005) (MCA) and Deprivation of Liberty Safeguards (DoLS) During the Coronavirus (COVID-19) Pandemic’

With particular reference to the fact that the MCA and DoLS legislation still applies and that decisions cannot be applied to a group, for example DNAR, access to an outdoor space.

2. To update the guidance in 1. above to include reference to the right to an Independent Mental Capacity Advocate in line with the MCA and DoLS requirements.

See notes below regarding impact on human rights should this not be followed.

3. To update the guidance to reflect the requirement for referral for Independent Advocacy under the Care Act

This is a key element of the Care Act in ensuring that people have their say in decisions that are being made about their care and treatment and protects the legal process. In the local authorities in which we work there is no suggestion that easements have been applied and therefore we should expect referrals to continue – they are not. The downward turn in safeguarding referrals is particularly worrying.

Example: Immediately lockdown was implemented (before the Coronavirus Act 2020) we were informed by a number of social workers that cases had been ‘de-allocated’ and would be reassigned when appropriate. We have challenged these decisions and the process has been reinstated.

4. To extend the time limit for making a complaint to an NHS body or a referral to the PHSO from 12 months from the date of incident/knowledge to 24 months.

This is to allow a reasonable period of time for a complaint to be raised. Since the start of the COVID-19 crisis we have seen:

- a drop in referrals
- a reluctance to complain about NHS services during the crisis
- existing complainants deciding to discontinue complaints because they see the crisis as more important than their complaint
- a backlog of complaints already logged to be resolved once services resume

We are of the view that once the main peak of the crisis is over we will see an increase in requests for our support to raise complaints in relation to: coronavirus care and treatment; normal services below the expected standard; incidents prior to the crisis.

5. Provide technological solutions in hospitals and care homes to:

4.1 Ensure that people detained under the Mental Health Act have access to independent support and representation

If wards have insufficient alternative communication facilities there may be problems with patients contacting their solicitors or Independent Mental Health Advocates (IMHAs). Some wards have provided telephones and tablets to keep patients connected with solicitors and IMHAs but other wards do not have these facilities and patients' public telephones are often out of order and lack confidentiality.

4.2 Ensure that people detained under the Mental Health Act or living in a care/nursing home can speak to and see family and friends

The guidance for care homes, etc does not go far enough to ensure measures are in place to reduce social isolation.

What will be the impact of specific measures taken by the Government to address the COVID-19 pandemic be on human rights in the UK?

1. Article 2 – Right to Life

We have received complaints and concerns about:

- Use of blanket DNARs introduced across a care home population or certain groups (eg people with learning disabilities) by GPs without due regard to the wishes of the person or consultation with family or an Independent Mental Capacity Advocate
- An individual being pressured into signing a DNAR when they have not wished to do so by a health professional who was viewed as being aggressive
- Assumptions being made about what a person wants to happen in terms of treatment without involving the person, such as not being admitted to hospital.

2. Article 5 - Right to liberty

- There is the potential for increased restrictions on s.17 leave going beyond the least restrictive principle in terms of granting and conditions.
- There may be an increase in the unreasonable use of seclusion and potentially for the restraint of patients who test positive for the virus.
- A significant reduction in referrals for Independent Mental Capacity Advocates (IMCAs) and Independent Care Act Advocates (ICAAs) suggests that people are being moved without due regard to the relevant legislation and therefore are at increased risk of being inappropriately cared for and / or placed
- We know that some homes are not allowing residents to go out for daily exercise. More restrictive measures are being implemented by some care homes, ie, isolating individuals into their own rooms without enabling them to access communal spaces
Example: on speaking to a client who is under a DoLS he advised that he was tied to bed for 24/7. The carer explained that they are keeping residents in their rooms and popping in throughout day to do welfare checks etc. Residents are having meals in their rooms.

3. Article 6 - Right to a fair hearing

2.1 Temporary changes to the Tribunal Rules and Practice Directions

We have concerns about potential human rights breaches as follows:

- Community patients e.g. CTOs and conditional discharges will no longer have a hearing, unless an application is made by the representative as to why the case must go ahead. Community patients normally have a right to a hearing when they appeal their CTOs, Conditional Discharges and Guardianships. The changes to the Tribunal Rules and Regulations mean that this will no longer be the case. Now they will have to show exceptional reasons why the case should be heard.
- Hearings will be held by one Judge alone and therefore has the potential for bias, as the only medical opinion (saving an independent psychiatric report) would be from the detaining Responsible Clinician.
- The client will no longer be able to see the medical member prior to the hearing and therefore have no opportunity to seek clarity on medical issues / concerns.
- There may be a delay in holding hearings leading to people being detained for longer than is lawful. Delays in hearings would breach human rights, as one has a right to have a hearing within a reasonable time and these are set by the MHA. It is extremely likely that these limitation periods will be exceeded.
- Hospital Managers' hearings will be by Panel only reviews on the papers which means there will be no opportunity for witnesses to be cross examined
- Meetings held over video conferencing can experience technical difficulties or subject to user error if participants aren't trained in their use.

2.2 People who are subject to Deprivation of Liberty Safeguards

Relevant Persons Representatives now must rely on the view of the managing authority as to whether someone is objecting to their placement which removes the independent safeguard the role was created for. This removes the person's right to have their placement challenged in the Court of Protection.

Example: A paid RPR has had to initiate a s21a challenge without meeting P as the BIA was clear that he would wish to object and his assessment documents advised that he would need support to challenge.

4. Article 8 - Right to respect for your private and family life

Visitors are not allowed and therefore if homes and hospitals do not have technology, or training to use technology, to enable residents to continue to have virtual contact with family members this is a restriction to people's rights to private and family life.

5 Article 14 – Protection from discrimination

- Inequality exists between support for the NHS and support for social care.
- Unlawful application of DNARs – see above

Example: a GP held a video call whereby the clinical lead of the nursing home had to walk around the home to enable the GP to see all the residents remotely (for two GP surgeries) which would "tick the box that they've been seen by a GP within last 28 days".

Example: The NHS provider arranged a telephone call local resolution meeting in place of a face to face meeting. The client agreed to this with advocacy support. The lack of visual/face to face engagement between the client and advocate resulted in information being misinterpreted and misunderstood. Absence of visual cues/exchanges between client/advocate was identified as

contributing to the overall negative experience of the client and advocate during the meeting. The client lacked technology for a video conference which could have assisted. The client felt their voice went unheard. So whilst we are of course pleased that the NHS provider was trying to provide early resolution to the issue, this must be balanced with the hurdles to effective communication when options are limited.

Which groups will be disproportionately affected by measures taken by the Government to address the COVID-19 pandemic?

- Those who are already frail, vulnerable and /or socially isolated due to illness/injury/disability or situation
- Those who do not have access to technological solutions, particularly those who are not known to services (how will they know how to access support for shopping, medications, etc?)
- Staff and residents of care homes and supported living due to focus on hospital admissions of people with COVID-19.
- Children and young people due to being unable to go to school or college, particularly those whose parents are unable to home school and those who don't have sufficient access to IT
- Parents and carers of the children and young people
- Those who already have mental health difficulties
- Those at risk of domestic abuse in all its forms

5/05/2020