



Briefing Note: Independent Advocacy under the Care Act 2014

The Department of Health (DH), with support from Voiceability, have produced this briefing note to support the work of the Winterbourne View Joint Improvement Programme (JIP), and in particular to support a series of regional advocacy workshops being run by the JIP.

The JIP was set up as part of the wider Transforming Care programme (following the abuse of people with a learning disability at Winterbourne View hospital) to provide support to local area partners to improve services for people with a learning disability and / or autism with behaviour that challenges or a mental health problem.

This briefing note provides a short overview of the key developments around advocacy provision being introduced under the Care Act 2014.

Introduction

From 1 April 2015, the Care Act 2014 places a new duty on local authorities to provide access to independent advocacy to those who would have **substantial difficulty** in being involved in care and support ‘processes’ and have no appropriate individual(s) – carer, family or friend – who can support their involvement.

It applies to adults and also applies to children who are coming up to ‘transition’ to adult care and support from children’s services.

Under the Care Act, independent advocacy means a service that is independent of the local authority.

When the duty to provide independent advocacy applies

The duty on local authorities to consider providing access to an independent advocate applies to a person’s involvement in **care and support processes** including:

- an adult’s needs assessment
- a carer’s assessment
- the preparation of an adult’s care and support plan or support plan
- a review of an adult’s care and support plan or support plan
- a child’s needs assessment as they transition towards adult care
- a child’s carer’s assessment (therefore some people below 16 years of age)
- a young carer’s assessment
- a safeguarding enquiry or safeguarding adults review

How the duty to provide independent advocacy applies

From the first point of contact with a person, the local authority must act to involve that person in the above listed social care processes. Whether raised by the person themselves or otherwise, the local authority must consider (under the new advocacy duty) whether a person would have 'substantial difficulty' in any one of the following areas:

- understanding relevant information
- retaining that information
- using or weighing that information as part of the process of being involved
- communicating the individual's views, wishes or feelings (whether by talking, using sign language or any other means)

For some people it will be possible to help and support their direct involvement through making reasonable adjustments, as required by the Equality Act, providing information in accessible formats or facilitating the use of video in a needs assessment, for example.

When it is considered that a person would have substantial difficulty in being involved in the 'process', the local authority needs to consider whether there is a carer, relative or friend (an 'appropriate individual') who can support their involvement. If not the local authority must arrange an independent advocate to be available to support and represent them.

The Care Act Regulations and Guidance set out some rules about who can be judged as an 'appropriate individual' - for example, it should be someone who the person wants to support them and it cannot be someone who is already providing the person with care or treatment in a professional capacity or on a paid basis.

What about existing duties about access to independent advocacy under Mental Capacity Act and Mental Health Act?

There are already circumstances in law under which a person has a right to access support from an independent advocate. Under the Mental Capacity Act, there are circumstances where an Independent Mental Capacity Advocate (IMCA) may be instructed to work with people who lack the capacity to make a specific decision. There are also circumstances under the Mental Health Act where a person may have access to an Independent Mental Health Advocate (IMHA). These rights are **not affected** as a result of the new duty under the Care Act.

However, there will be circumstances under which a person is part of a social care 'process' but who may not have access to an independent advocate under the Mental Capacity Act or the Mental Health Act. The duty under the Care Act will increase the availability of independent advocacy to them.

The role of the independent advocate

The Care Act Regulations set out the experience and training that an independent advocate should have, as well as the role they should perform. An independent advocate's role is to support and represent the person, always with regard to their wellbeing and interests, including helping a person to:

- Understand the process
- Communicate their wishes, views and feelings
- Make decisions
- Challenge those made by the local authority if the person wishes
- Understand their rights
- When appropriate, support and represent them in the safeguarding process

Where an independent advocate is provided the local authority must still consult with those friends or family members when the person asks them to.

The new advocacy duty and its relevance to the Transforming Care work

“Good information and advice, including advocacy, is important to help people with challenging behaviour and their families to understand the care available to them and make informed choices. But it is clear that there is a very wide variety in the quality and accessibility of information, advice and advocacy, including peer advocacy and support to self-advocate.”

Transforming care – a national response to winterbourne View Hospital¹

If the law alone could prevent events such as those which led to the abuse of people at Winterbourne View Hospital, it would have done so. However, the law – if it is well implemented – can contribute to people leading fuller and safer lives. Lessons from the events which led to the abuse of people at Winterbourne View were considered in the development of the independent advocacy provisions under the Care Act 2014.

Whilst the need for advocacy may often go beyond that which is provided for in law, the following specific features of the Care Act may be especially relevant to those people with a learning disability and / or autism who are part of the Transforming Care programme and who are at risk of or are accessing inpatient settings:

- The Care Act integrates the provision of independent advocacy into the key decision-making points in people's journey through social care. By making it something that needs to be considered as a matter of course (i.e. during assessments, care and support planning, review and safeguarding processes)

¹ *Transforming care – a national response to Winterbourne View Hospital*, Department of Health
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/213215/final-report.pdf

rather than an exception, it is envisaged that it is more likely that people get access to advocacy when they require it. This may help ensure access to independent advocacy to support the person's voice and rights, whether they are in an inpatient setting (like an assessment and treatment unit) - or whether they are receiving community based support but may be at risk of moving into somewhere like an assessment and treatment unit.

- As noted above, the duty to provide access to independent advocacy applies when there is no 'appropriate individual' available to support the person's involvement. There is an exception to this, when as part of the care and support assessment or planning functions it is likely that the individual will be placed in NHS-funded provision in a hospital for a period of twenty eight days or more (including places like assessment and treatment units) or care home for a period of eight weeks or more. In these cases, the local authority must provide independent advocacy (even if the person has an 'appropriate individual' available to support them) if it is satisfied that receiving advocacy would be in the best interests of the individual. This is because it is recognised that the consequences of moving into NHS funded care can be so far reaching to the individual. Often the person needs all the support they can get in relation to such a decision whilst family members can also, for example, feel that they are being ignored, or feel exhausted by the process of supporting their relative alone.
- The provision of independent advocacy under the Care Act applies equally to those people whose needs are being jointly assessed by the NHS and the local authority or where a package of support is planned, commissioned or funded by both a local authority and a Clinical Commissioning Group (CCG) (a 'joint package' of care). As these processes and arrangements have historically been difficult for individuals, and their family, friends or carers, to understand and be involved in, local authorities (with CCGs) are advised in the Statutory Guidance to consider especially the benefits of providing access to independent advocacy or independent advice beyond the requirements of the Act. In particular, they are encouraged to consider providing access to these supports for people who do not have substantial difficulty and/or those who have an appropriate person to support their involvement.
- The Care Act, together with the Mental Capacity Act (including the Deprivation of Liberty Safeguards) and Mental Health Act set out the minimum legal requirements for ensuring the provision of independent advocacy and access to it. Nothing in the legislation prevents the provision of advocacy outside of, and in addition to, these requirements. This is especially important to consider for people who may also need support to express their views at other times in their lives, may need long term advocacy support, and for people who will benefit and contribute greatly through self-advocacy.

There are various actions which people can take, dependent on their role, to help ensure that the independent advocacy provisions in the Care Act do make a positive difference. These include:

- Ensuring that people using services, family members, friends, carers and social care, health and other professionals are aware of them.
- Drawing to the attention of the Local Authority, or the Local Authority and NHS and CCGs where a person is being jointly assessed, people who may be entitled to an independent advocate when that person is due to have an assessment, care or support plan, review or is subject to a safeguarding enquiry or review.
- For Commissioners – ensuring that the implementation of the Care Act pays sufficient regard to the needs of people with learning disabilities in assessment and treatment services or hospitals and those who may need enhanced community support to avoid being admitted to them. The level of advocacy resource available to these people and to their carers needs to reflect the often high level of individual need.
- For organisations – providing training and awareness raising for their members of staff on the Care Act 2014 and the independent advocacy provisions (see training and development materials below).

Additional Information

Care Act 2014 Statutory Guidance:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/366104/43380_23902777_Care_Act_Book.pdf

Final negative Regulations in part 1 of the Care Act:

<https://www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance>

Care Act 2014:

<http://www.legislation.gov.uk/ukpga/2014/23/contents/enacted/data.htm>

Training and development materials:

<http://www.skillsforcare.org.uk/Standards/Care-Act/Learning-and-development/Learning-and-development.aspx>

Guidance for commissioners:

<http://www.scie.org.uk/care-act-2014/advocacy-services/index.asp>