

# Parliamentary briefing: Renewal of the temporary provisions of the Coronavirus Act 2020

## House of Lords debate, 28 September 2020

NHS Providers is the membership organisation for the NHS hospital, mental health, community and ambulance services that treat patients and service users in the NHS. We help those NHS trusts and foundation trusts to deliver high-quality, patient-focused care by enabling them to learn from each other, acting as their public voice and helping shape the system in which they operate.

NHS Providers has all trusts in voluntary membership, collectively accounting for £87bn of annual expenditure and employing more than one million staff.

### Key points:

- Coronavirus has presented the NHS with its biggest challenge in a generation, putting the system under an unprecedented level of strain at a time when demand for health and care services was already at an all-time high and in the context of workforce vacancies and a constrained financial envelope.
- While the NHS was well placed to respond to the pandemic, having well-rehearsed emergency and business continuity plans in place and a national health service with highly skilled staff, decisive measures in the Coronavirus Act on the emergency registration of health professionals, NHS continuing healthcare assessments and the temporary modification of mental health and mental capacity legislation, helped support the NHS through the first peak of infection.
- Trusts would welcome the ongoing flexibility provided by the Act to help tackle the sizeable backlog of planned care that built during the pandemic and to maintain the NHS' ability to respond to a second wave of COVID-19 as well as winter pressures.
- We believe any future discussions or decisions regarding the renewal of temporary provisions of the Coronavirus Act should be based on their efficacy, a thorough assessment of demands

on the health and care system, and full consultation with relevant stakeholders including frontline organisations such as NHS trusts, to consider whether these provisions should be maintained or amended and over what timeframe.

## Section 2, Schedule 1: Emergency registration of health professionals

The Coronavirus Act enabled the automatic re-registration of health professionals who had recently retired, those whose registration had lapsed and the early registration of final year healthcare students.

The individuals who returned to support the NHS played a key role in the delivery of care during the first peak of the pandemic, supporting a health service with over 100,000 vacancies, a workforce exhausted from another relentless winter followed by the COVID-19 pandemic. Approximately 10,000 healthcare workers from a range of health professions returned to the NHS, of whom 8,900 returners are estimated as being redeployed back to frontline services, alongside 1,800 to NHS 111 (PAC, 22 May).

Health Education England reported that 30,000 student nurses, midwives and allied health professionals had started their careers early by forgoing the conclusion of their studies, alongside 3,000 student doctors. We have also received positive feedback on the impact of fast-tracked students to the NHS front line, with trusts praising the contributions made by these individuals. The key now will be for national policy makers in the NHS to create an attractive framework to enable trusts to retain returners, and students in rewarding NHS careers.

## Should temporary provisions on the 'Emergency registration of health professionals' in the Coronavirus Act be renewed?

Measures within the Coronavirus Act enabled trusts to increase the number of staff able to care for critically ill COVID-19 patients, redeploying staff to care for patients outside of their usual specialties with appropriate training. Consequently, we believe it would be helpful to maintain these provisions as NHS trusts continue to address the backlog of care that emerged during the first wave of the pandemic and to support planning in advance of any second peak of the virus and traditional winter pressures.

In the longer-term, any review of the provisions of the Coronavirus Act in relation to the emergency registration of healthcare professionals should consider the following elements:

- The level of critical incident and consideration of wider pressures on the health and care system.
- Full consultation with stakeholders to set out and discuss which regulations should continue versus what should end and the potential impact of these on the staffing of health services.

## Section 14: NHS Continuing Healthcare assessments

The Coronavirus Act included provisions to suspend NHS Continuing Healthcare (CHC) assessments. This measure enabled trusts to discharge patients without undue delay awaiting confirmation of funding to meet their ongoing care needs. The suspension of this bureaucracy – alongside the suspension of fines for delayed transfers of care (DTOCs) - has been welcomed by patients and clinicians alike, accelerated local decision-making around discharges, and supported partnership working, freeing up bed capacity for those most critically ill with COVID-19 and easing patient flow through the system.

### Should temporary provisions in the Coronavirus Act on NHS Continuing Healthcare assessments be renewed?

The suspension of rules around continuing healthcare removed bureaucracy and enabled health and care professionals to support the right outcome for individual patients and service users more easily and more swiftly. It is deeply disappointing therefore that CHC funding negotiations resumed from 1 September 2020. Trusts and their partners would welcome a further suspension of CHC particularly given the likelihood of entering a second wave of the pandemic in tandem with winter pressures.

In the longer term, we believe any review of NHS continuing healthcare assessments provisions within the Coronavirus Act should include:

- An assessment of what impact the maintenance, easing or ending of social care provisions could have on social care and local government
- Demand modelling of care needs post-Covid, and an assessment of the impact of any changes to the provisions for the NHS and patient health and well being
- An assessment of the benefits and risks of being able to discharge medically fit patients in a more timely way.

## Section 15, Schedule 12: Local Authority Care and Support

The Act also eases local authorities' usual legal duties around care provision (Section 15 and Schedule 12), meaning local authorities will not have to complete all the assessments or meet all people's needs as they usually do, if they are unable to deliver their usual duties due to COVID-19 pressures. Overall, we understand that eight local authorities triggered these emergency powers, due to increases in demand and workforce shortages. Currently, **no local authorities** are operating under easements.

## Should temporary provisions in the Coronavirus Act on NHS Local Authority Care and Support be renewed?

Overall, we believe this provision of the Coronavirus Act should only be maintained as long as is reasonably necessary so that full social care provision is restored as soon as possible. This will depend on local circumstances, as local authorities/social care staff are under pressure from increased demand but should not be allowed to continue as a short-term fix for the structural issues with the social care sector. This temporary provision runs the risk of vulnerable people deteriorating if they are not receiving the care they need, which will in turn impact on health outcomes and transfer demand onto NHS.

## Mental health and mental capacity

Trusts have **told** us they have faced significant operational challenges to assess, detain and treat people in safe, timely and dignified way, and balance this with the urgent need to protect very vulnerable patients and frontline staff during the pandemic. Key issues include:

- ensuring people- including those without capacity or with dementia- self-isolate effectively to reduce the risk to themselves and others. Trusts are seeking legal guidance when complex situations arise, such as people not being able, or not wanting, to self-isolate.
- supporting detained patients to take leave from hospital, whilst keeping patients and staff as safe as possible from COVID-19 infection. Trusts have supported patients and family members to understand current public health guidance and introduced a debrief on return to discuss how they managed social distancing while out of hospital and how much contact they had with other people.
- the shortage of approved mental health professionals and doctors, under section 12 of the Mental Health Act (MHA). This is linked to the broader workforce challenges trusts were already facing, with significant gaps in the mental health workforce and staff tired and stressed from another demanding winter, which the pandemic has only served to exacerbate

- increasing demand and acuity in cases often directly associated with individuals' experience of lockdown during the pandemic, or of associated economic hardship

Currently, no changes have been made to mental health legislation and trusts have been continuing to operate in line with the existing MHA and Mental Capacity Act (MCA) and their respective codes of practice. NHS England and Improvement **published** updated legal guidance on 19 May, which has provided trusts with useful information on when it might be appropriate to depart from the MHA code of practice during the pandemic. It also provides guidance on the use of digital technology to support the use of the MHA, and on escorting patients detained under the MHA. The Department for Health and Social Care has also **published** emergency guidance to support staff caring for, or treating, a person who lacks the relevant mental capacity during the COVID-19 pandemic.

During the Act's passage through Parliament, we **stated** that the temporary emergency provisions regarding second opinion safeguards and detention period should give services the support and flexibility required to ensure those at risk to themselves or others still get the treatment they need in the event of extreme staffing pressures and service disruption.

## Should temporary provisions in the Coronavirus Act on Mental Health and Mental Capacity be renewed?

Whilst to date it has not been deemed necessary to enact the emergency provisions, we would support retaining the option to enact them during the next review of the Act to ensure local areas are able to use these powers if they require them to support patient safety.

This is particularly important as mental health trusts take on the complex, difficult and challenging task of navigating the next phase of their response to the pandemic. Mental health services will **continue** to face pressures in the weeks and months ahead, given a predicted surge in demand for mental health care as lockdown eases. Indeed, in its most recent briefing on the Coronavirus Act, the Government noted that acute Mental Health service demand is rising quickly, and people who do present are doing so with higher levels of acuity than usual. The Institute for Fiscal Studies also **reported** that the scale of deterioration in people's mental health in the first two months of the pandemic and the associated lockdown is of a magnitude unlike anything seen in recent years. The **first forecast** from Centre for Mental Health is that at least half a million more people in UK may experience mental ill health as a result of COVID-19 with mental health issues likely to be exacerbated by the wider socio-economic impacts of lockdown including unemployment, housing issues and social isolation. The

pandemic has also exacerbated the significant workforce challenges mental health trusts were already facing.

If the mental health and mental capacity measures in the Coronavirus Act are enacted, it is crucial that these changes, and how they impact on provision are clearly communicated to trusts. Trusts need to have a clear understanding of when to use these flexibilities, given the impact of COVID-19 across the country has varied locally, and is likely to continue to vary in the weeks and months ahead. It is important that the process for enacting the emergency powers is not overly bureaucratic and that the extent to which any changes may impact on the resources of the wider system also needs to be adequately considered.

There may be further temporary changes to the management of the MHA that could be considered to ensure patients still get the treatment from services they need, in the event services find themselves in a situation where it is becoming very difficult to manage safely within the existing legal framework. However, the consideration of any further temporary changes must continue to be balanced against the impact they have on the immediate safeguards around these processes.