



A: Introduction

1. This note has been written by the 39 Essex Chambers public law team in response to some of the many queries we have had about the implications of the Coronavirus Act 2020. It is not a comprehensive review - legal advice will need to be sought in respect of specific situations that arise.
2. The Act's provisions about social care came into force on 31 March 2020 (The Coronavirus Act 2020 (Commencement No. 2) Regulations 2020, [SI 2020/388](#)). Guidance has been issued on 31 March 2020: "[Care Act Easements: guidance for local authorities.](#)"
3. It is of note that the guidance requires that, before the "easements" are applied, there must be a decision made by the Director of Adult Social Care that "*...the workforce is significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable for it to comply with its Care Act duties (as they stand prior to amendment by the Coronavirus Act)*" and that "*...to continue to try to do so is likely to result in urgent or acute needs not being met, potentially risking life*" (see section 6 of the Guidance). There is a decision-making structure contained in the Guidance which makes clear that there should not be a wholesale disregard for the Care Act duties, and that any decision to rely on the new statutory provisions should be made carefully, in consultation with other relevant bodies and people, and in a staged manner so that changes are only made where they are truly necessary.

Editors

Victoria Butler-Cole QC
Jenni Richards QC
Fenella Morris QC
Neil Allen
Steve Broach
Sian Davies
Alex Ruck Keene

Disclaimer: This document is based upon the law as it stands as at April 2020; it is intended as a guide to good practice, and is not a substitute for legal advice upon the facts of any specific case. No liability is accepted for any adverse consequences of reliance upon it.

The picture at the top, "*Colourful,*" is by Geoffrey Files, a young man with autism. We are very grateful to him and his family for permission to use his artwork.

5. The new guidance also makes reference to the recently-published [ethical framework](#) for adult social care which identifies the following important values and principles:
- Respect
 - Reasonableness
 - Minimising harm
 - Inclusiveness
 - Accountability
 - Flexibility
 - Proportionality
 - Community
6. The SEN provisions are not yet in force, although the provisions removing the duties to carry out NHS Continuing Healthcare assessments and to have regard to the National Framework came into force on enactment of the Coronavirus Act. The SEND provisions only come into force when the Secretary of State makes a notice, which he can only do if he considers it to be necessary and appropriate to bring them in and dilute the existing duties.
7. As things are changing so rapidly, with new guidance coming out daily, we will do our best to update this note from time to time.

B: What changes does the Act make?

Adult social care

8. If, but only if, a local authority has taken the steps set out in the guidance to 'activate' the so-called easement under the Act, then the following changes will happen.
9. The local authority does not have to comply with any of the following Care Act duties:
- Duty to assess needs
 - Duty to assess the needs of a carer
 - Duty to give written records of an assessment
 - Duty to give effect to a preferred place of accommodation.
10. The local authority does not have to carry out financial assessments, but it cannot charge for services unless such an assessment has been carried out.
11. It does not have to provide services to meet assessed needs UNLESS a failure to do so would result in a breach of the human rights of the service user or their carer.

SEND

12. If and when the Secretary of State makes the required notice to bring them into force, the SEND provisions of the Act will give rise to:

- Modification of the duty under s.42 CFA 2014 to 'secure' special educational provision and 'arrange' health provision specified in an EHCP so that it becomes a duty to 'use reasonable endeavours' rather than an absolute duty
- Disapplication of the duty under s.42 CFA 2014 on schools and institutions to admit a child or young person where they are named in section I of an EHC Plan.
- Suspension of the duty in s.44 CFA 2014 to undertake annual EHCP reviews.
- Modification of other duties relevant to children with SEND, such as the duty to secure education otherwise than at school for children of compulsory school age (s.19 Education Act 1996) and the school and college transport duties (s.508A-F Education Act 1996), which also become 'reasonable endeavours' duties.

13. These changes can only be introduced for up to a month at a time. However, the Secretary of State can then renew the notice for a further month if he considers it appropriate and proportionate to do so.

C: What does the duty to avoid a breaching someone's human rights mean?

14. The most relevant human rights are likely to be Article 2 – right to life, Article 3 -freedom from inhuman or degrading treatment; Article 8 – respect for a person's individual autonomy (including their physical and psychological integrity) and their private and family life; Article 5 – no arbitrary deprivation of liberty. You can find out more about these rights from the British Institute of Human Rights website: www.bihhr.org.uk

15. These rights could be breached by failing to provide basic services such as:

- Adequate toileting facilities
- Access to life-saving medication
- Access to fresh food, water and heating
- Access to assistance with personal care
- Support for communication with friends and family.

16. They could also be breached by failing to have in place services that monitor the mental health of a person at risk of suicide or self-harm, or by locking a person in a confined space rather than

providing care services to them to keep them safe, or by failing to take any steps to protect a vulnerable adult from abuse.

17. In order to know whether a failure to assess a person's needs or to provide care to them might breach their human rights, it will be necessary to carry out an assessment of what they need to keep them safe and well, and to evaluate the reasonably foreseeable consequences, in particular on their physical health and psychological well-being, of not providing or withdrawing support. The Government guidance makes clear that such an assessment will be required even if the more detailed form of assessment normally required under the Care Act 2014 is not required.
18. When considering whether a failure to provide care could amount to a breach of human rights, careful thought has to be given to all the circumstances, and this includes the specific impact of the lockdown and other government advice on a particular individual seeking care. On the one hand, the new law is plainly intended to set the bar for a duty to provide care very high, and domestic case law (such as *Bernard and MacDonald*) decided to date on whether a failure to provide care amounts to a breach of Articles 3 or 8 also sets the bar very high. On the other hand, however, the European and domestic case law tells us that the State owes a heightened duty to someone when it restricts that person's liberty. The courts will also no doubt take into account that the cases decided to date have been decided against a context in which there was no need in most cases to have recourse to the European Convention on Human Rights to decide what care was required (or, if there was, it was in the very specific context of persons subject to immigration control, where the backdrop is often that the applicant is unlawfully in the UK and has an option to relocate to country of origin).
19. . It is therefore important to assess a person's care needs not just as things "normally" are but in the current circumstances, and with a particular reference to the impact upon the person of their circumstances more broadly (the Guidance issued by the Government also seeks to reinforce this point).
20. So – what might thinking along these lines involve? Perhaps the lockdown is making it more difficult to get supplies like pads or gloves, and that means more care is required. Perhaps government advice about handwashing is intensifying someone's symptoms of OCD, and that means more care is required. Perhaps shifts in NHS resource allocation means that there is a need for more social care. Services such as day centres and respite care are generally closed, and so provisions which in normal circumstances meet needs are in some cases no longer available. Perhaps the human rights obligations may require local authorities to permit direct payments recipients to use their direct payments to pay close family members to provide care, when they would not normally consider this to be 'necessary'.

21. This way of thinking has important implications when considering safeguarding obligations. As the Government Guidance makes clear, the safeguarding inquiry duty under s.42 Care Act 2014 has **not** been suspended. What might then follow in discharge of that duty may now be different, but must still be driven by compliance with the ECHR.
22. The government has been at pains to emphasise that victims of domestic violence are free to leave their homes for a safer place. However, this may not be an option for many disabled people or those with mental health problems (which may themselves have been intensified by the lockdown). It is easy to imagine that people being forced to stay at home all the time, perhaps with additional people in the household, and with scarce resources either because of loss of income or product shortages, are more vulnerable to abuse of all kinds. Once again, it is the circumstances of the lockdown which serve to change the obligation on the State to investigate and intervene to prevent abuse, or to provide care in order to mitigate the risk. So, although the law is aimed at reducing the obligations, in fact the circumstances may be intensifying them.

D: Prioritisation

23. The Guidance does not give any advice about prioritisation, saying that local areas should make their own decisions. It is premised on an expectation that local authorities will already have a good understanding of the needs of the individuals they support:

Most Local Authorities will have mapped all existing known packages for complexity and need and should where possible have also mapped the care and support needs of those that self-fund.

It is important that mapping at this stage considers the complexity, risk and level of need within the care package and not just the current delivery. This should allow for a better understanding of the risk should there be an impact on care delivery. This includes considering unpaid carers. This will ensure Local Authority knowledge of an individual informs any prioritisation work needed, should the situation require it.

...

Local Authorities should take into account all elements of a person's life that may impact on their needs and their personal circumstances. These circumstances can include social issues such as domestic abuse, financial issues, and the vital support of unpaid carers which may not be appropriate or sustainable as a single support in this current climate.

Local Authorities should also understand what resources, assets/offers the person has at their disposal – including knowledge of and access to forms of community and neighbourhood support.

E: Specific queries

1. Can a care package that is already in place be stopped or reduced? What warning would need to be given to the person concerned?

24. Yes, in theory, and subject to the requirement not to breach someone's human rights. Paragraph 16 of Schedule 12 of the Act stipulates that any provision removing the requirement to comply with relevant duties under the Care Act, the Chronically Sick and Disabled Persons Act 1970 or the Children Act 1989 applies equally to duties which arose before the Act came into force.

25. In order to be satisfied that the person's human rights were not going to be breached by the changes to the care package, the local authority would need to carry out some form of assessment or evaluation of the impact on the person of the changes. As a matter of good practice and decision-making, it will be important for any such assessment or evaluation to be recorded in writing and (in most circumstances) shared with the person concerned. This is reflected in the Guidance which makes clear that:

Local Authorities should still assess people's social care and support needs throughout this period and should make a written record of this assessment.

26. The Guidance is also clear that the person concerned should be consulted as part of any decision to revise a care package.

2. Can parents or carers be prevented from accompanying a person to hospital if the person has a learning disability or communication difficulties?

27. Under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020, essential trips are allowed and generally the question is whether a journey is reasonable. It seems to us that accompanying someone with a learning disability, or any other communication difficulties, to hospital is more often than not going to be essential and usually reasonable. Furthermore NHS bodies have duties under the Equality Act 2010 to make reasonable adjustments to remove the disadvantages that disabled people face. The NHS workers responsible for treating the patient will need help in order to meet their health needs – not just with communicating their symptoms and any other health information but possibly helping them cope with what may be a hectic hospital environment so that they can cooperate with care so as to be safe. This may also apply in the case of people with mental health problems whose anxiety or difficulty in coping with the pressure of illness and an emergency hospital environment means they cannot sensibly be expected to manage the journey to hospital alone. However hospitals are of course entitled to have in place appropriate measures to reduce the risk of infection, both generally and particularly during the current pandemic. It is where those polices are 'blanket' in their application with no room for

consideration of the circumstances of individual cases that there is a particular risk that they will be unlawful.

3. Can family members and friends be prevented from visiting people in care homes or supported living placements?

28. Visits are generally at the discretion of the placement which has to balance the benefits of access to family and friends against its operational need to provide care and support. If a particular placement has decided that it is unable to operate in circumstances where members of the public have access (due to the risk of infecting staff and service users) that is most likely a decision within the discretion of the provider. However, where a service user is unable to have family contact, that potentially amounts to an interference with rights under art.8 ECHR and may require mitigating steps to ensure proportionality (e.g. phone calls, skype).

29. Again, while care providers are entitled to put in place reasonable policies to reduce the risk of infection, blanket policies with no room for any flexibility may create a number of legal problems, including under the Human Rights Act 1998 and the Equality Act 2010 (**note:** no duties under the Equality Act 2010 have been suspended). It is important to note that care providers who are providing local authority funded care are now 'public authorities' for the purposes of the Human Rights Act (as a result of s.73 of the Care Act 2014, which has not been suspended by the Coronavirus Act). As such a human rights claim could be brought against a private provider of local authority funded care. It may be that the courts would allow such a claim to be brought against a private provider of care funded by the NHS, in order to avoid unlawful discrimination between different groups of state-funded service users.

4. Can people who do not understand why the social distancing guidance has been issued be made to stay indoors?

30. The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 set out the restrictions on movement at Regulation 6. They provide that "no person may leave the place where they are living without reasonable excuse". Reasonable excuse includes (in a list which is inclusive of rather than limited to its examples) to take exercise (Regulation 6(2)(b)). Just because someone doesn't understand the need for social distancing, does not mean they lose, for example, their right to exercise.

31. It is important to remember that the requirement as set down in Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 is not "to stay indoors" but rather not to "leave the place where they are living" without reasonable excuse (Reg 6(1)). The place where they are living includes any garden or yard or other "appurtenance of such premises" (Reg 6(3)). So the Regulations could not be used to stop someone who does not understand why the social

distancing guidance has been issued (“P”) from going into the garden or otherwise to make them “stay indoors” if there is a safe outdoor space available to them.

32. NHS Guidance on managing capacity and demand within inpatient and community mental health, learning disabilities and autism services for all ages³ provides at paragraph 1.i. that “People with mental health needs, a learning disability or autism should receive the same degree of protection and support with managing COVID-19 as other members of the population. This may mean providing additional support, including making reasonable adjustments.” A reasonable adjustment might include practicable steps to enable someone unable to understand the need for social distancing to access the outdoors – for example by taking them to secluded spots for exercise or exercising at particularly quiet times of day.
33. If, say, a person without capacity to make their own decisions about social distancing lives in a built-up urban area with no outdoor space and there is a danger that, on stepping foot outside, he or she might unwittingly breach the 2 metre “social-distancing” zone of another individual, it would arguably still be unlawful to prevent them from going outside altogether, if this constituted a deprivation of liberty. For such a restriction to be lawful it would need to form part of P’s standard authorisation if he or she were living in a care home. Even then, it would need to be a proportionate response to the likelihood of their suffering harm – Paragraph 16(5) of Schedule A1 of the Mental Capacity Act 2005.
34. Alternatively, such a restriction could be construed as a “vital act” within the meaning of s.4B(3)(a)(ii) of the Mental Capacity Act 2005 and authority would be obtained from the moment of issuing an application to court – see s.4B(1). As Alex Ruck Keene has pointed out in his blog⁴, however, it seems unlikely that the Court of Protection will have capacity to hear such applications in any speedy timeframe in the foreseeable future.
35. There is more detailed guidance in a separate note prepared by the 39 Essex Chambers Mental Capacity team available [here](#).
- 5. If carers are not available and family members take over caring responsibilities, how can they be remunerated for this?**
36. The regulations governing the use of direct payments provide for local authorities to permit direct payments to be used to pay for care from close family members living in the same home as the recipient, if this is assessed to be necessary. We would suggest that local authorities should be more willing than usual to find these kinds of arrangements to be ‘necessary’, given the difficulties in continuity of care that direct payments recipients are likely to experience. However advice will

³ <https://www.england.nhs.uk/coronavirus/publication/guidance-managing-capacity-and-demand-within-inpatient-and-community-mental-health-learning-disabilities-and-autism-services-for-all-ages/>

⁴ <https://www.mentalcapacitylawandpolicy.org.uk/public-health-house-arrest-and-capacity/>

need to be taken on the employment law implications of transferring funding over from an existing team of paid PAs to a family member or members.

6. What support should there be for parents of children with SEN who are having to home school?

37. If a child with SEN has an EHC Plan, then at present the local authority must ensure that they continue to receive all the specified provision in section F of that Plan, unless it is impossible for them to do so. For example, if a child will not be attending school it will not be possible for the local authority to secure any specified small group learning for that child. However if (for example) therapy provision is specified in section F of the Plan, then this provision should be secured if possible, perhaps in modified form (for example the therapist coming to the child's home, or if this is unsafe delivering instructions via technology so the parent can work with the child.

38. If and when the Secretary of State makes the notice modifying the s.42 duty, local authorities will still need to use their reasonable endeavours (i.e. do everything reasonable) to secure the specified provision in section F.

39. There may be a requirement on local authorities or schools to support pupils with SEN who do not have EHC Plans and who are at home.

7. Will safe staffing levels change? What compromises will providers be able to make on:

- Staffing levels
- DBS checks
- Compliance training

40. It seems likely that there will be no watering down of these provisions. There is a link here to the NHS volunteer responder scheme. For that scheme, volunteers are asked to provide Government ID which is subject to verification, and also asked whether they hold a DBS check. Presumably one of the purposes is that those with a DBS check are allocated to the tasks which involve unsupervised contact with a vulnerable adult, whereas those without might be limited to, for example, calling those who are in isolation.

8. Whose responsibility is it to ensure that a vulnerable person is provided with food and essential care?

41. This would fall to the local authority adult social services department under the amended Care Act 2014 duties (i.e. to avoid a breach of the adult's human rights which would arise without the provision of food and necessities: see *Limbuella v Secretary of State for the Home Department* [2005] UKHL 66). The human rights breach test is likely to require the local authority to consider what alternative means exist by which the adult's basic needs might be met, i.e. family or community support. This is also suggested by the Government Guidance.

9. Can a local authority compel a care home to admit people in response to the current Covid-19 pandemic using their public health-related powers?

42. It is highly unlikely that these powers enable a local authority to compel a care home to admit adults to a care home or to seek a court order to do so. However, under the Health Protection (Part 2A Orders) Regulations 2010 a local authority does have a power to request action be taken.

43. Regulation 8 says:

"8. – Requests for co-operation for health protection purposes

(1) A local authority may by serving notice on any person or group of persons request that the person or group of persons do, or refrain from doing, anything for the purpose of preventing, protecting against, controlling or providing a public health response to the incidence or spread of infection or contamination which presents or could present significant harm to human health.

(2) The notice must provide contact details for an officer of the local authority who is able to discuss the notice.

(3) The local authority may offer compensation or expenses in connection with its request."

44. The DH guidance "Health Protection Legislation (England) Guidance 2010" 25 March 2010 describes the power under regulation 8 as follows: *"Local authorities have a general power to ask a person, or a group of people, to take, or refrain from taking, any action to protect human health. This allows a flexible response to unforeseen threats to human health where no other local authority power is relevant and where application for a JP order is not required."*

45. Where appropriate local authorities should consider exercising this power to request care home owners to assist as part of their overall response to the Covid-19 pandemic. Clearly, provision of testing for the presence of the virus and/or the presence of antibodies, will be of great assistance in making decisions about moving people into care homes or other institutional settings, and in relation the provision of domiciliary care.

F: Useful resources

1. Useful free websites include:

- www.39essex.com/resources-and-training/mental-capacity-law – database of guidance notes, case summaries and case comments from the monthly 39 Essex Chambers Mental Capacity Law Report, to which a free subscription can be obtained by emailing marketing@39essex.com.
- www.mclap.org.uk – website set up by Alex with forums, papers and other resources with a view to enabling professionals of all hues to 'do' the MCA 2005 better.
- <https://www.specialneedsjungle.com/> - website providing a host of SEND related resources.

Michael Kaplan
Senior Clerk
michael.kaplan@39essex.com

Sheraton Doyle
Senior Practice Manager
sheraton.doyle@39essex.com

Peter Campbell
Senior Practice Manager
peter.campbell@39essex.com

Chambers UK Bar
Court of Protection:
Health & Welfare
Leading Set

The Legal 500 UK
Court of Protection and
Community Care
Top Tier Set



clerks@39essex.com • [DX: London/Chancery Lane 298](https://www.39essex.com) • [39essex.com](https://www.39essex.com)

LONDON

81 Chancery Lane,
London WC2A 1DD
Tel: +44 (0)20 7832 1111
Fax: +44 (0)20 7353 3978

MANCHESTER

82 King Street,
Manchester M2 4WQ
Tel: +44 (0)16 1870 0333
Fax: +44 (0)20 7353 3978

SINGAPORE

Maxwell Chambers,
#02-16 32, Maxwell Road
Singapore 069115
Tel: +(65) 6634 1336

KUALA LUMPUR

#02-9, Bangunan Sulaiman,
Jalan Sultan Hishamuddin
50000 Kuala Lumpur,
Malaysia: +(60)32 271 1085

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