

Social Care

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- 19 March 2020, Ethical Framework for Adult Social Care
- Hospital Discharge Requirements, to be updated
- 15 April 2020, DHSC “Action Plan for Adult Social Care”
- 22 May 2020, Coronavirus: provision of home care (includes supported living settings)
- 10 June 2020, Updated MCA and DOLS guidance
- Care Act Easements, 20 May 2020

Coronavirus Act 2020

- Section 15 and paragraph 2 of schedule 12 provide that a LA does not need to comply with duties imposed by sections 9, 10 and 12 of CA 2014 (assessment of need for care and support/carer); section 13 (determination of eligibility); sections 50 – 61, 63 -64 (assessments in relation to children transitioning to adult social care)
- Paragraph 3 – no duty to comply with duty under s. 17 (financial assessment); but may not make a charge for meeting need under sections 18 – 20 or 62 without such assessment (but note paragraph 10 in relation to subsequently assessing and charging for the ‘emergency period’)
- Paragraph 4 – section 18 to read as if duty to meet needs only where necessary to meet those needs for the purpose of avoiding a breach of adult’s Convention rights
- Paragraph 5 – section 19 to read as if power to meet need without needs assessment, financial assessment eligibility assessment
- Paragraph 6 – section 20 to read as if duty to meet carer’s needs applies only where necessary to meet needs for purpose of avoiding breach of carer’s Convention rights
- Paragraph 11 – no duty to prepare care and support plan, review plan etc
- Paragraph 18 – Secretary of State power to issue guidance, to which LA must have regard

Guidance

- Easement should be exercised only where essential in order to maintain the highest possible level of service; should comply with pre-amendment provisions and guidance for so long and as far as possible
- Notes that the duties to promote wellbeing and in relation to safeguarding adults remain in place: specific guidance provided on safeguarding at Annex D
- Notes that duties in the MCA 2005 and in relation to DOLS remain in place
- Notes that duties under the EA 2010, in particular PSED still apply
- Emphasises that the Ethical Framework should be applied and that personalisation and co-production are as important as ever

Guidance: Steps before exercising the easements

- “A local authority should only take a decision to begin exercising the Care Act easements when 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 where to continue to try to do so is likely to result in urgent or acute needs not being met, potentially risking life. Any change resulting from such a decision should be proportionate to the circumstances in a particular local authority.”
- Decision should be agreed by Director of Adult Social Services in conjunction with Principal Social Worker
- Lead member for social care should be involved and briefed
- Health and Wellbeing Board should be kept informed
- Decision should be fully informed by discussion with local NHS CCG leadership

Guidance: record keeping and communication

- Local authorities should have a record of the decision with evidence that was taken into account. Where possible the record should include the following:
 - The nature of the changes to demand or the workforce
 - The steps that have been taken to mitigate against the need for this to happen
 - The expected impact of the measures taken
 - How the changes will help to avoid breaches of people's human rights at a population level
 - The individuals involved in the decision-making process
 - The points at which this decision will be reviewed again
 - This decision should be communicated to all providers, service users, carers and local MPs. The accessibility of communication to service users and carers should be considered.
 - The decision should also be reported to the Department of Health and Social Care (the Department) when local authorities decide to start prioritising services under these easements, explaining why the decision has been taken and briefly providing any relevant detail. This should be communicated to CareActEasements@dhsc.gov.uk.

Guidance, Annex A: “Four Stage” Process

- Stage 1 – business as usual
- Stage 2 – apply the flexibility under the pre-amendment Care Act. For example, changing how a need is met if a local service ceases to be accessible because of social distancing. Short term changes, delays or cancellations to services
- Stage 3 – operating under the easements – need to be clear about the reason why the decision needs to be taken; and the impact of the decision on service users, their families and carers
- Stage 4- whole system prioritising care and support. “An example might be where a local authority is faced with a decision about reducing personal care for one person so that another gets the help they need to eat.” Emergency Decision Meeting of Director of Adult Social Services should be called; decisions to prioritise or reduce support should be reviewed every two weeks with the principal social worker and full service resumed as soon as reasonably possible. Annex C provides some guidance on prioritisation

Guidance, Annex B: Streamlined decision

- “Local authorities should still assess people’s social care and support needs throughout this period and should make a written record of this assessment. Principal Social Workers should ensure that proportionate professional recording is maintained and may consider a single alternate document for local use.
- It is crucial that local authorities are able to evidence their decision, demonstrate their professional judgement apply the [Ethical Framework for Adult Social Care](#), and where necessary, record that they have considered the Convention Rights.”
- Alternative forms of assessment may included third party/allied professionals to undertake assessments; supported self assessment; technology and video assessment

Easements in action

- According to the CQC only Solihull has a current notification of Care Act Easements in place; 8 authorities have notified their application for at least some period of time
- Court has not had to consider the easements to date. Derbyshire faced PAP correspondence when it used easements to suspend, reduce or change certain 'non-essential homecare' services on the basis that Derbyshire had failed to indicate why it was satisfied the threshold set out in the guidance or whether/how the consultation and notification requirements were met or communicate the decision effectively. Proceedings resolved at pre-action stage

Easements in action

- Convention rights – Articles 2, 3 and 8 are the most likely to be in play
- Difficult to apply in practice
- *McDonald v UK* – failure to meet an assessed eligible need for assistance with a commode was an interference with Article 8 and ‘not in accordance with the law’, therefore a breach; but no breach from the time a review of need concluded sanitary pads were an acceptable alternative. Article 8 plainly relevant to complaints about public funding to facilitate mobility and quality of life of disabled applicant. Court declined to consider whether Article 8(1) could impose a positive obligation to put in place a level of entitlement to care equivalent to that claimed
- High threshold for positive obligations, but they do exist: see e.g. *Marzari v Italy*; *R (Anufrijeva) v Southwark* [2003] EWCA Civ 1406; *Bernard v Enfield* [2002] EWHC 2282 (Admin); *R (Hughes) v Liverpool CC* (2005) 8 CCLR 243
- Removing an existing service may be more likely to be a breach

Business as usual

- *R (on the application of Raja) v Redbridge* [2020] EWHC 1456 (Admin)
- Revisits the approach to ‘rolling’ judicial review
- Court concluded that, pending a full re-assessment, the sole justifiable way of local authority meeting needs of two brothers with severe disabilities was for overnight carers to change incontinence pads and reposition them since mother was no longer fit to do so
- In a number of places the Court pointed out the absence of contemporaneous minutes of LA decision making and absence of a witness statement from the LA explaining its decision making as difficulties it faced in defending the claim