The Coronavirus Act 2020 & Adult Social Care

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Key legislation / guidance

1. Coronavirus Act 2020

2. Care Act 2014

3. Care Act easements: guidance for local authorities

4. Responding to Covid-19: the ethical framework for adult social care
Changes to Care Act 2014: overview

• Coronavirus Act 2020: s.15 and Schedule 12
• Came into force 31 March 2020 by way of Coronavirus Act 2020 (Commencement No. 2) Regulations 2020
• Supplemented by Care Act easements guidance
• Majority of core duties under the Care Act 2014 are downgraded to powers
How long will the Coronavirus Act 2020 remain in force?

• Expires two years after the date on which it was passed (section 89) - so by March 2022.

• Subject to a power to alter the expiry date to make it earlier or up to six months later (section 90).

• Power to suspend and revive the operation of any provision of the Act (section 88).

• Parliament will review the operation of the Act as a whole every six months (section 98).
Duty to assess

• S.9 CA 2014: local authorities “must” assess any adult if it appears that s/he “may” have needs for care and support

• S.10 CA 2014: local authorities "must" also assess any carer that "may" have needs for care and support

• Paragraph 2(1) of Schedule 12 Coronavirus Act 2020 removes the duty to assess.

• Local authorities retain power to assess.

• Local authorities must make decisions to exercise power (or not) rationally and fairly – likely some form of assessment required.
Duty to meet needs

• S.18 CA 2014 imposes a duty on local authorities to meet “eligible” needs.
• S.20 CA 2014 also requires local authorities to support carers (such as family and friends) who provide care to people with needs.
• Paragraph 4 of Schedule 12 Coronavirus Act 2020 removes the duty to meet needs
• UNLESS the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the adult’s Convention rights
• Local authorities retain power to meet needs under s.19 CA 2014
Exception to avoid breach of human rights

• Case law on whether a failure to provide care and support amounts to a breach of Articles 3 or 8 ECHR sets the bar very high.

• Article 3 ECHR: essentially requires bare minimum of provision i.e. provision of food and basic necessities.

• See case law on destitution and breach of human rights in context of people with no recourse to public funds seeking to access care and support e.g. Limbuela v Secretary of State for the Home Department [2005] UKHL 66.
Exception to avoid breach of human rights

- *Bernard v Enfield* [2002] EWHC 2282 (Admin): LA failed to provide suitable accommodation for a severely disabled woman and her family.

- Living in deplorable conditions – property not wheelchair accessible; was forced to defecate and urinate on the living room floor; unable to play any part in looking after her six children.

- No Art 3 breach – even in these extreme circumstances.

- Art 8 breach.
Exception to avoid breach of human rights

- *McDonald v Royal Borough of Kensington and Chelsea* [2011] UKSC 33
- Former prima ballerina had a condition requiring her to urinate several times during the night. Not incontinent.
- LA had been providing a carer to stay overnight + provide assistance to access commode. LA withdrew carer; provided incontinence pads instead.
- Challenge failed at Supreme Court: no breach of Art 8.
- ECtHR: technical Art 8 breach (only in relation to period in which LA had failed to carry out proper assessment).
Care and Support Plans

• Sections 24-25 CA 2014: Duty to prepare a care and support plan setting out the details of how the person’s needs will be met.

• Sections 27(1) & 27(4) CA 2014: Care plans must be kept under review by local authorities, and revised if the person’s care and support needs have changed.

• These duties have been suspended by para 11 of Schedule 12 of the Coronavirus Act 2020

• **BUT**: local authorities retain power to make changes to care plans under ss.27(2) and 27(3) CA 2014 and the duty to involve the adult to whom the plan relates, their carer or advocate when making any changes to the plan remains in force.
Charging for care and support

• Local authorities do not have to carry out financial assessments during the crisis (para 3(1), Schedule 12)

• But they cannot charge for services unless such an assessment has been carried out (para 3(2), Schedule 12)

• Local authorities can decide to charge for care retrospectively following assessment (para 10, Schedule 12)
Transition to adulthood

• Coronavirus Act 2020 also suspends local authorities’ duties towards children with needs for care and support who are transitioning to adulthood (ss58-59; 60-61 and 63-64 CA 2014).

• Includes the duties (under s.17ZH Children Act 1989 and s.2A Chronically Sick and Disabled Persons Act 1970) to continue to provide children’s services to a young person with needs for care and support after they have turned 18 if their adult care package isn’t ready.
Care Act ‘easements’ guidance

• Care Act easements: guidance for local authorities
• Read in full!
Care Act ‘easements’ guidance

• Section 2: “Local Authorities should do everything they can to continue meeting their existing duties prior to the Coronavirus Act provisions coming into force.”

• Section 4: “The easements took legal effect on 31 March 2020, but should only be exercised by Local Authorities where this is essential in order to maintain the highest possible level of services. They should comply with the pre-amendment Care Act provisions and related Care and Support Statutory Guidance for as long and as far as possible.”
Care Act ‘easements’ guidance

• Section 6:

"[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."
Care Act ‘easements’ guidance

- Section 6 + Annex A: set out how this decision should be taken, and the evidence that should be taken into account.

- “It is important that any decisions made in relation to Care Act easements are informed by discussions with local partners, in particular local senior NHS leadership. Health and Wellbeing Boards should also be informed about a decision to start operating under the easements.

  Recording by Local Authorities remains a priority and will enable them to ensure accountability and provide evidence for the thought processes behind the decisions they will be making.”
Care Act ‘easements’ guidance: s.3

1. Local authorities will not have to carry out detailed assessments of people’s care and support needs (in compliance with s.9 CA 2014) but they will still be expected to respond as soon as possible to requests for care and support, consider the needs and wishes of people needing care and their family and carers, and make an assessment of what care needs to be provided.

2. Local authorities will not have to carry out financial assessments in compliance with pre-amendment CA 2014 requirements. They will, however, have powers to charge people retrospectively for the care and support they receive during this period, subject to giving reasonable information in advance about this, and a later financial assessment.
Care Act ‘easements’ guidance: s.3

3. Local authorities will not have to prepare or review care and support plans in line with the pre-amendment CA 2014 provisions. They will however still be expected to carry out proportionate, person-centred care planning which provides sufficient information to all concerned, particularly those providing care and support, often at short notice. Where they choose to revise plans, they must also continue to involve users and carers in any such revision.

4. The duties on local authorities to meet eligible care and support needs, or the support needs of a carer, are replaced with a power to meet needs. Local authorities will still be expected to take all reasonable steps to continue to meet needs as now. In the event that they are unable to do so, the powers will enable them to prioritise the most pressing needs, for example enhanced support for people who are ill or self-isolating, and to temporarily delay or reduce other care provision.
Care Act ‘easements’ guidance: ss4-5

• Section 4: confirms that other important duties on local authorities remain in place, including the duty to promote wellbeing (s.1 CA 2014) and duties relating to safeguarding adults at risk (s.42 CA 2014).

• Duties in the Mental Capacity Act 2005 relating to Deprivation of Liberty Safeguards also remain in place, for which separate guidance will be published.

• Section 5 of the guidance confirms that local authorities will be expected to observe the Ethical Framework for Adult Social Care.
Care Act ‘easements’ guidance: status?

• Section 8 of the guidance:

“This guidance and the Ethical Framework for Adult Social Care fall under schedule 12 of the Coronavirus Act 2020. Schedule 12 to that Act gives the Secretary of State a power to direct Local Authorities to comply with this guidance and the Ethical Framework, and the Department will keep this under review.”
Care Act ‘easements’ guidance: status?

• Para 18, Schedule 12 Coronavirus Act 2020:

18(1) The Secretary of State may issue guidance about how local authorities are to exercise functions under any of the following enactments in consequence of the provision made by this Part of this Schedule—

(a) Part 1 of CA 2014;
(b) section 2 of the Chronically Sick and Disabled Persons Act 1970;
(c) section 17 of the Children Act 1989.

(2) A local authority must have regard to any guidance issued under this paragraph.
(3) A local authority must comply with such guidance issued under this paragraph as the Secretary of State directs.
Care Act ‘easements’ guidance: status?

• Local authorities must therefore **have regard to** the easements guidance when making decisions to exercise powers/suspend duties under the CA 2014.

• Secretary of State has the power to issue a direction that local authorities must comply with the guidance but has not yet done so.

• Any reasons for departure from the guidance by local authorities should be justified and clearly recorded.

• Decision to trigger ‘easements’ in particular should be recorded and backed up by evidence of need to trigger.
Overview

1. More about the Ethical Framework

2. What does this mean for the Court of Protection?
The Ethical Framework for Adult Social Care (I)

- Published 19 March 2020 (”week one”)
- Must “have regard” to this; and “local authorities will be expected to observe” the Framework
- For: planners and policy makers at local, regional and national level; and health and social care professionals
- May be used as checklist
The Ethical Framework for Adult Social Care (2): Guiding Principles

- Respect
- Reasonableness
- Minimising Harm
- Inclusiveness
- Accountability
- Flexibility
- Proportionality
- Community
Respect

“Recognising that every person and their human rights, personal choices, safety and dignity matters”

1. Provide an opportunity to express their views
2. Respect personal choices as much as possible while communicating implications
3. Where person may lack capacity, ensure that a person’s best interests and support needs are considered
4. Strive to support people to get what they are entitled to subject to available resources, ensuring “fair judgment and clear justification” for decisions on prioritisation
Reasonableness

“Ensuring decisions are rational, fair, practical, grounded in appropriate processes, available evidence, clear justification”

1. Decisions should be practical with reasonable chance of working
2. Consider alternative options and ways of thinking, conscious of diverse views from cultures and communities
3. Use clear, fair decision-making process.

Consider alongside “relevant equalities related legal and policy frameworks”
Inclusiveness

“Ensuring people are given a fair opportunity to understand situations, be included in decisions that affect them and offer their views and challenge. Decisions and actions should aim to minimise inequalities”

1. Involve people in aspects of planning that affect them, their care and treatment, and communities
2. Involve families and carers in aspects of planning that concern them/person they care for ....
3. Consider any disproportionate impacts of a decision on people/groups
4. Provide appropriate communications to all involved using the range of communication methods and formats
5. Be transparent.

Consider alongside “relevant equalities related legal and policy frameworks”
Accountability

“Holding people and ourselves to account for how and which decisions are made, being transparent about why decisions are made and who is responsible”

1. Adhere to official guidance, statutory duties and professional regulations
2. Be transparent about how and which decisions need to be made and on what basis
3. Be prepared to justify which decisions are made and on what basis
4. Supporting others to take responsibility for decisions and actions

Will involve “locally agreed processes ..to handle ethical challenges”
Flexibility

“Being responsive, able and willing to adapt when faced with changed or new circumstances”

1. Ensure that plans and policy “have room for flexibility and innovation where necessary....”

2. Provide people with as much opportunity as possible to challenge decisions that affect them in the time that is available.
What about the Mental Capacity Act (1)?

- No changes made in the Coronavirus Act.
- No changes to DOLS. Guidance on DOLS “will be published separately” - unclear when. Will we see an increase?
- Updated guidance to care homes
  https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/878099/Admission_and_Care_of_Residents_during_COVID-19_Incident_in_a_Care_Home.pdf- p4- “professionals may want to consider a proportionate approach” to capacity assessments
What about the Mental Capacity Act (2)?

• BP v Surrey CC and RP [2020] EWCOP 17- care home prevented any face to face visits, offered to set up Skype and Facetime. Daughter sought move of father to her care.

• Court approved plan to help BP learn to use Skype and family to be able to wave through the window: “All this will require time, effort and some creativity”

• Flexibility principle in action?
How will this affect the Court of Protection?

N v ACCG [2017] UKSC 22

It has no greater power to oblige others to do what is best than P would have himself. This must mean that, just like P, the court can only choose between the “available options”
A. Investigate and Evaluate- including s.21A

• Seeking information from local authority that is operating the easements?
• “Local authorities should still assess people’s social care and support needs ... and should make a written record of this assessment....it is essential that local authorities are able to evidence their decision......”
• Respect and Accountability principles in action?
• Duty to assist the Court in furthering the over-riding objective remains on all parties- COPR 1.4
• Section 49 reports?
A. Investigate and Evaluate- leaving hospital


- Drive to get people out of hospitals quickly- within 2 hours of being medically fit for discharge. Further assessments take place in own home or care setting- even if not patient’s first choice.

- Paid for by NHS till end of emergency period.

- S.14 disapplies requirement to carry out CHC assessments.
A. Investigate and Evaluate - detained patients

- P is detained under s3, Court needs to authorise deprivation of liberty in new placement after discharge
- Big drive to get patients out of hospital
- Easements do not affect aftercare provisions in section 117 Mental Health Act
- But P may also have Care Act needs which are affected by easements
B. “Safeguarding” Cases

- No changes in safeguarding duties under Care Act- prioritise immediate safety
- Real difficulties in spotting signs of abuse/neglect in lockdown
- What about those who have lost informal care and can’t manage?
- What about those who lack capacity to comply with the regulations?
- Very difficult judgments about risks of moving vulnerable adults in current climate.
- Rights under A5 and A8 ECHR still in place and COP/Inherent Jurisdiction will still have a role.
C. “Contact” Cases

- Challenges to decisions to stop face to face contact- care homes and supported living
- May require facilitated discussions, aimed at finding creative solutions, as in BP
- Some may not involve public law decision-making.