**Social care briefing – last update April 22 2020**

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**Changes to the *Care Act 2014* under the *Coronavirus Act 2020***

From **31 March 2020**, local authorities have the power to enact changes to the [Care Act 2014](http://www.legislation.gov.uk/ukpga/2014/23/contents/enacted) made by the [Coronavirus Act](http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted).

This briefing is based on [Schedule 12](http://www.legislation.gov.uk/ukpga/2020/7/schedule/12/enacted) of the Coronavirus Act and the accompanying guidance,[*Care Act easements: guidance for local authorities*](https://www.gov.uk/government/publications/coronavirus-covid-19-changes-to-the-care-act-2014/care-act-easements-guidance-for-local-authorities#contents) (‘*the Guidance*’).

The decision to enact the changes is taken by each individual local authority. Until that decision is taken, the local authority must comply with the pre-amended Care Act.

The changes must only be enacted in circumstances where the situation with Coronavirus is such that the local authority is unable to fulfill its duties under the pre-amended Care Act. The Guidance states:

*‘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’* (section 6).

The decision to enact the Care Act changes must be communicated to all care providers, people receiving care and support services and carers.

**Local authority duties under Care Act easements**

1. **Summary**

Below is a summary of the easement of duties under the Care Act made by the Coronavirus Act. See point two, *further guidance*, for information about how local authorities should implement the easements in line with the Guidance. Other related matters are set out at point 3.

Under the Care Act easements, a local authority is not required to:

* Carry out a needs assessment in line with the requirements of section 9 of the pre-amended Care Act.
* Determine whether assessed needs meet the eligibility criteria for care and support.
* Produce a care and support plan or set a personal budget.
* Review care and support plans.
* Carry out a financial assessment, unless the authority is going to charge for meeting needs. A local authority can later carry out a financial assessment and charge in retrospect for services it provided for free during the easements.
* Give the adult choice of a care home, or other accommodation, or allow the adult the choice of a more expensive option through payment of a top-up.
* Comply with continuity of care duties when an adult moves to another local authority area, in certain circumstances.

**Revised duty to meet needs**

* A local authority only has a duty to meet needs for care and support in so far as it considers doing so is necessary to avoid a breach of the adult’s rights under the European Convention on Human Rights (ECHR). Otherwise duty to meet needs remains the same.
* Articles under the ECHR likely to be most relevant are, Article two: right to life, Article three: prohibiting torture or inhuman or degrading treatment, Article five: deprivation of liberty, Article eight: right to private and family life.
* The Guidance indicates that this is intended to ensure that the *‘the most urgent and acute needs are met’* (section 2).
* The above notwithstanding, local authorities are expected to *‘take all reasonable steps’* to meet needs in line with the pre-amended Care Act (the Guidance, section 3).

Barristers from 39 Essex Chambers’ public law team have produced guidance on the revised duty to meet needs in [*Coronavirus Act 2020 – Social Care and SEND Guidance note for England*](https://1f2ca7mxjow42e65q49871m1-wpengine.netdna-ssl.com/wp-content/uploads/2020/04/Guidance-Note-Coronavirus-Act-SEND-and-Care-Act-1.pdf) (paras 15-16). With regard to a breach of the adult’s rights under ECHR, this states:

*‘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.*

*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’.*

**Duties applying to carers**

1. Duties towards carers also do not apply, including: duty to carry out a carer’s assessment, duty to determine whether carer’s needs for support meet the eligibility criteria and duty to produce carer’s support plan.
2. A local authority only has a duty to meet a carer’s needs for support in so far as it considers doing so is necessary to avoid a breach of the carer’s rights under the European Convention on Human Rights.

For more information on how local authorities should assess someone needing social care support under the *Care Act 2014*, see factsheet 41 [*How to get care and support*](https://www.ageuk.org.uk/globalassets/age-uk/documents/factsheets/fs41_how_to_get_care_and_support_fcs.pdf).

1. **Further guidance**

**Needs assessment:** under the easements, local authorities must respond *‘as soon as possible…* *within a timeframe that would not jeopardise an individual’s human rights’* to a request for care and support (the Guidance, section 3).Whilst local authorities are not required to conduct a detailed needs assessment in line with section 9 of the Care Act, it must still assess care needs and make a written record of the assessment. Local authorities should consider alternatives to face to face assessments where appropriate, such as supported self-assessments and assessments made over the telephone or by video call.

Local authorities should apply the [Ethical Framework for Adult Social Care](https://www.gov.uk/government/publications/covid-19-ethical-framework-for-adult-social-care/responding-to-covid-19-the-ethical-framework-for-adult-social-care) and where necessary record where they have considered the adult’s needs in relation to the European Convention on Human Rights.

* **Care and support planning**: under the easements, a local authority must ensure that care and support planning is person-led, person centred and proportionate to the complexity of the adult’s needs for care and support. However, local authorities are not required to comply with the care and support planning duties under the pre-amended Care Act.

When arranging services, the local authority must ensure the provider is given sufficient information about the adult’s needs to enable them to decide whether to accept the referral and to devise its own care plan for the adult. This information should be shared with the adult and their family.

Under the easements, the local authority is not required to review care and support plans. However, if it chooses to revise the adult’s care and support plan, its duty to involve the adult, their carer and anyone else the adult chooses remains in force.

* **Charging and financial assessment:** the easements enable local authorities to meet needs for care and support without carrying out a financial assessment, unless it intends to charge the adult.

Local authorities are permitted to carry out a financial assessment and charge in retrospect for services it provided for free under the easements, as long as it informs the adult that there may later be a charge for meeting their needs at the time the services are provided, or before the services are provided. The adult should be provided with information and advice about charging, including information and advice about charging for different care options.

Where appropriate, deferred payment agreements can continue to be provided once the financial assessment has taken place.

* **Safeguarding**: the easements do not apply to local authority safeguarding duties. However, the Guidance states that *‘it is also important that safeguarding teams are proportionate in their responses and mindful of the pressure social care providers are likely to be under’* (Annex D).

1. **Other matters**

* **Complaints**: social care formal complaints process is not affected by the above, meaning complaints to the local authority can be made as normal. However, as noted below, the Local Government and Social Care Ombudsman has suspended most of its services.
* **Prioritisation:** the Guidance states local authorities may have to prioritise care packages under the Care Act easements. This must take into account the individual circumstances of the adult and the [Ethical Framework for Adult Social Care](https://www.gov.uk/government/publications/covid-19-ethical-framework-for-adult-social-care/responding-to-covid-19-the-ethical-framework-for-adult-social-care).

Local authorities may wish to prioritise cases as high, moderate and low, or use similar terminology. However the Guidance states the government ‘*does not propose to advise local areas on how to prioritise as methods of prioritisation will be unique to each area’* (Annex C). As such, an adult should make enquiries with their individual local authority.

**Other social care updates**

**Update on issues affecting social care recipients and providers in England related to Covid-19 response from government.**

1. **All care settings –**

* **Care Quality Commission (CQC) stopping routine inspections** from 16 March. A small number of inspections may still take place, for example where there are concerns about harm or abuse. Otherwise, CQC will move to ‘remote’ means of carrying out its role. Full information [here](https://www.cqc.org.uk/news/stories/routine-inspections-suspended-response-coronavirus-outbreak).
* **Local Government and Social Care Ombudsman (LGO) temporarily suspending** central telephone line (0300 061 0614), and its online complaints submission form from Wednesday 18 March. This means it will not be able to take any new complaints, either online or by telephone, during this period. It’s ability to progress existing complaints may be limited. Full information [here](https://www.lgo.org.uk/announcement).
* On 26 March LGO announced a suspension of all case work that demands information from, or action by, local authorities and care providers. People who have already registered a complaint will be contacted about their case in due course. When normal services resume, the LGO will take delays into account when considering whether or not complaints have been brought to it within the normal 12-month time period specified in the service’s legislation. Full information [here](https://www.lgo.org.uk/information-centre/news/2020/mar/lgsco-suspends-complaints-enquiries-of-councils-and-care-providers).
* The Government has published [guidance](https://protect-eu.mimecast.com/s/jkYKCxGzPfLBKvJC8lui1) to support the planning and organisation of adult social care during the Coronavirus outbreak.

There is a summary overleaf from government guidance on social care in different settings including care homes, supported housing, and domiciliary care settings.

1. **Care homes –**

On April 2, the government published guidance on care home admissions: [*Admission and Care of Residents during COVID-19 Incident in a Care Home*](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). This replaced guidance previously issued. Important areas include:

* **Care home admissions:** the guidance strongly indicates the government expects care homes to provide services to people who have tested for COVID-19, for example following discharge from hospital. It states, *‘we…need care homes to continue to make their full capacity available to support the national effort, both in terms of beds and their skilled care staff. Helping to move patients who no longer require acute care into the most appropriate setting will help to save thousands of lives’*. It goes on to state that people with COVID-19 can be cared for safely in a care home if the guidance is followed.
* **Care home visits**: the guidance states *‘family and friends should be advised not to visit care homes, except next of kin in exceptional situations such as end of life*’. The guidance sets out how care home visits should be managed, including limiting visitors to one at a time. See the guidance at Annex H, *Considerations for visitors and non-essential staff*.

1. **At home care (guidance for supported living is broadly similar)**

* Providers should review their list of clients, ensure this is up to date, including levels of informal support available to the person. Local authorities should do likewise for people it has arranged services for, and support providers to do so for people who self-fund their care.
* Local authorities should map care and support plans they have commissioned, to inform planning during any outbreak. Local authorities should support providers to do the same for people who self-fund services.
* Local authorities should work with all providers, including those who provide services to self-funders, to establish plans for ‘mutual aid’.
* Providers should note arrangements local authorities, NHS Clinical Commissioning Groups and NHS 111 are putting in place to refer vulnerable people self-isolating at home to volunteers who can offer practical and emotional support.
* Again, key point that cooperation and planning between local authorities, NHS and providers must not exclude providers who cater for people who make self-funded, private care arrangements.

See [Covid-19 residential care, supported living and home care guidance](https://www.gov.uk/government/publications/covid-19-residential-care-supported-living-and-home-care-guidance) for more

1. **Informal care –**

* On April 8, the government published guidance for informal carers, [*Guidance for those who provide unpaid care to friends or family*](https://www.gov.uk/government/publications/coronavirus-covid-19-providing-unpaid-care/guidance-for-those-who-provide-unpaid-care-to-friends-or-family). This features practical advice on providing care to a person in the *‘vulnerable’* or *‘extremely vulnerable’* groups, including where the carer or cared for person has symptoms of Coronavirus. The guidance also covers making an *‘emergency plan’* for use if alternative arrangements need to be made for the cared for person.

1. **Direct payments -**

On 21 April, the government published guidance on direct payments, [*Coronavirus (COVID-19): guidance for people receiving direct payments*](https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-people-receiving-direct-payments/coronavirus-covid-19-guidance-for-people-receiving-direct-payments), accompanied by a Q&A, [*Coronavirus (COVID-19): Q&A for people receiving a personal budget or personal health budget*](https://www.gov.uk/government/publications/coronavirus-covid-19-guidance-for-people-receiving-direct-payments/coronavirus-covid-19-qa-for-people-receiving-a-personal-budget-or-personal-health-budget#contents). Below is a summary of the key points.

**Key points from the guidance:**

* Local authorities should contact all direct payment recipients to provide information and advice about maintaining the care and support they receive. This should include information and advice about how to contact the local authority if they think there will be difficultly in continuing to receive care and support via the direct payment.
* Local authorities should develop registers of adults at high risk and, where possible, develop contingency plans for those adults.
* Individuals using a direct payment to employ a personal assistant (PA) should plan for a situation where the PA is unable to provide care due to the need to self-isolate. This should, for example, consider whether alternative care arrangements can be put in place to cover PA absence.
* Those using a direct payment to purchase care from an agency should make early contact with the agency to discuss action that will be taken in the event a regular carer is unavailable.
* A direct payment recipient should contact their local authority adult social care team in the event they have no alternative care and support arrangements available. Adult social care should respond as quickly as possible and provide support with making alternative arrangements.

**Key points from the Q&A**

* The government strongly recommends all direct payment recipients to develop a contingency plan, to be discussed and agreed with the local authority.
* Local authorities should take a more flexible approach to the use of direct payments, recognising that Coronavirus is an exceptional circumstance.
* In taking a more flexible approach, local authorities should take into account that it may not be possible to arrange care and support in line with the adult’s care and support plan and, where possible, the adult should raise this with their local authority. However, local authorities should allow more flexible use of the direct payment where there is a clear rationale that this enables the adult to keep safe and avoid admission to hospital. If the direct payment is used differently, this should be evidenced by the adult so the spending can be discussed with the authority after the pandemic if needed
* In exceptional circumstances, local authorities should allow use of unspent allocation of direct payments, as long as this is evidenced. In line with normal practice, individuals can request emergency payments from the local authority.
* If the adult’s PA is unavailable, the local authority should consider any request to allow family or friends to be paid from the direct payment on a case by case basis.
* Self-funders should follow the guidance on contingency planning and health and safety and contact their local authority to discuss their situation if they cannot make alternative care arrangements due to the situation with COVID-19.
* The Q&A also includes guidance on how carers, including informal carers, can access Personal Protective Equipment (PPE).

**Mental Capacity and related**

* **The Office of the Public Guardian** **(OPG):** the OPGhas issued guidance on its work in light of the situation ­with Coronavirus. The OPG helpline, processing of LPA applications and safeguarding activities will continue as normal, but with expected delays. Callers to the helpline may wish to look at the OPG’s online guidance about LPAs and Deputies. Anyone with an urgent safeguarding referral which means someone is in imminent danger should contact the police. Full information [here](https://www.gov.uk/guidance/coronavirus-covid-19-office-of-the-public-guardian-response).
* **Lasting Power of Attorney**: the OPG has published guidance on creating an LPA whilst observing government guidance on social distancing, self-isolating and shielding [here](https://www.gov.uk/guidance/making-and-registering-an-lpa-during-the-coronavirus-outbreak).
* **Deprivation of Liberty Safeguards (DoLS):** on 9 April, the government published new DoLS guidance, [*The Mental Capacity Act (2005) (MCA) and Deprivation of Liberty Safeguards (DoLS) During the Coronavirus (COVID-19) Pandemic*](https://www.gov.uk/government/publications/coronavirus-covid-19-looking-after-people-who-lack-mental-capacity).

Key points include:

* + The Mental Capacity Act and the DoLS framework remain in force. The guidance applies to the care and treatment for people lacking mental capacity in the Coronavirus pandemic, and is only valid during the pandemic. The guidance should not become the *‘new norm’* beyond the pandemic.
  + *‘In most cases’* changes in care or treatment due to Coronavirus will not require a DoLS authorisation and it will be sufficient to make a best interest decision for the person lacking mental capacity.
  + Where a DoLS authorisation is already in place, *‘in many cases’* a new authorisation is will not be necessary, as the current authorisation will cover the new arrangements. However, it may be appropriate to carry out a review of the authorisation.
  + Decision makers can refer to the flow chart at Annex A of the guidance when making decisions about the care or treatment of the person lacking mental capacity.
  + A shortened form for urgent authorisations is available at Annex B of the guidance.