

Coronavirus and social care



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An outline of the new framework (1)

- Section 15 and Schedule 12 to the [Coronavirus Act 2020](#) (“the Act”), in force in England on the 31 March 2020, on the 1st April, in Wales.
- The statutory guidance, [Care Act easements: guidance for local authorities](#) (“the Guidance”).
- The non-statutory guidance, [Responding to COVID-19: the ethical framework for adult social care](#) (“the Ethical Framework”).
- A great deal of non-statutory guidance which is revised fairly regularly.

An outline of the new framework (2)

- The Act amends the Care Act 2014 by reducing the duties therein. These are referred to as “the easements”.
- Local authorities are no longer required to discharge their duties to assess the needs of adults or carers, make eligibility determinations, undertake financial assessments or prepare care and support plans.
- Local authorities continue to have the power, but are no longer under a duty, to meet needs except in the case of persons ordinarily resident or present and not settled elsewhere, so far as necessary to avoid a breach of Convention rights and subject to charging provisos.

An outline of the new framework (3)

- The Guidance advises local authorities to exercise their powers, e.g. to assess and meet needs, as if the Care Act 2014 remained in force, and for as long as reasonably possible.
- When that ceases to be reasonably possible, the Guidance advises that care and support needs should continue to be assessed and as far as possible met in a timeous, proportionate, evidence-based and person-centred manner, in accordance with the Ethical Framework.

What remains unchanged

- Safeguarding functions (and see Annex D of the Guidance).
- Duties to promote well-being, preventing duties and advice and information duties.
- Complaints procedures.
- The PSED and the reasonable adjustments duty under the Equality Act 2010.
- DOLS – see *Coronavirus (Covid-19): looking after people who lack mental capacity* and associated guidance.

The first two lines of defence

- The Guidance advises local authorities to exercise their new functions as if the Care Act 2014 remained fully in force, and for as long as possible and it advises that this can be done by operating the first two lines of defence: (i) business as usual; and then (ii) by taking short-term measures and using flexibilities that always have been in the Care Act 2014. For example:
 - Para 6.3 of the Care and Support Statutory Guidance (proportionate assessments of different kinds);
 - Para 10.11 of the CSSG (flexibility as to how needs may be met)(may warrant changes to types of provision, delays or short-term cancellations – Annex B of the Guidance).

The third and fourth lines of defence (1)

- If it becomes necessary to go further, the Guidance envisages local authorities applying the easements in two stages:
 - (i) ceasing formal assessments, eligibility decisions, assessment reviews and care and support plans, with some shifting of resources;
 - (ii) wholesale prioritisation of needs.
- First, the “tipping point” needs to be reached.
- Second, the right process needs to be undertaken.

The third and fourth lines of defence (2)

- The “tipping point” is reached

“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 do so is likely to result in urgent or acute needs not being met, potentially risking life. Any change result from such a decision should be proportionate to the circumstances in a particular Local Authority” (Guidance, page 5).

The third and fourth lines of defence (3)

- A decision to operate the easements should (i) be taken by the Director of Adult Social Services in conjunction with the Principal Social Worker; (ii) having involved and briefed the lead member; (iii) having discussed the matter with the local CCG leadership; and (iii) carefully recorded. Decisions to reduce/prioritise needs should be reviewed every 2 weeks and reversed asap (Guidance, page 5 and 8-9). NB comply with the PSED.
- A decision to operate the easements should be (i) communicated to the HWB (Health and Well-being Board); (ii) communicated to *all* providers, service users and carers (taking into account any communication difficulties/needs); and (iii) reported to the DHSC (when a decision is made to start prioritising services, explaining why the decision has been made and providing brief details) (Guidance, page 5 and 8-9).

The third and fourth lines of defence (4)

- The easements should be applied as narrowly as possible.
- The third line of defence is applying the easements so as to undertake streamlined assessments and reviews of need and care planning, re-allocating resources, meeting needs differently, and reducing levels of personal care (Guidance, pages 8-9).
- The fourth line of defence is moving into full scale prioritisation. Such decisions need to be made separately, to be reviewed every two weeks, to be communicated to the DHSC with reasons and to be revoked asap, and to be recorded with reasons (Guidance, page 9).

Assessments, Reviews, Care Planning (1)

- Assessments, reviews and care planning should still mirror the approach and ethos under the Care Act 2014.
- Local authorities must still respond as soon as possible to requests for care and support, consider needs and wishes and make an assessment of what care needs to be provided (page 3).
- Assessment (and care planning) must still be proportionate and person-centred (pages 3, 4-5, 6).
- Assessments must demonstrate that decisions (i) are evidenced; (ii) based on professional judgment; (iii) apply the Ethical Framework (see below); and (iv) consider Convention rights (page 10).

Assessments, Reviews, Care Planning (2)

- Assessments must take into account risks both current and future (page 7).
- Assessments need not be conducted face-to-face and a range of different methods may be adopted (page 10).
- People need to be informed that their needs may be assessed or re-assessed in the future and a different decision made (page 10).
- Local authorities must ensure there is a clear and transparent pathway for Convention issues to be raised (page 11).
- Escalation and complaints procedures remain unaffected (page 11).
- All assessments and reviews not completed must be followed up and completed in full once the easements are terminated (page 4).

Prioritisation (1)

- Surprisingly, given its central importance, the Guidance offers very little advice about prioritisation, stating that “The Department does not propose to advise local areas on how to prioritise as methods of prioritisation will be unique to each area. The Department also recognises that there will already be well established methods of prioritising in most areas” (page 14).
- One suggestion that the Guidance does make is that “Local Authorities may want to ‘RAG-rate’ their packages and have them split between High, Moderate and Low (or similar terminology). It is likely that many will have a mixed care package. They should note these but work on the most essential element of care for mapping purposes” (page 13).

Prioritisation (2)

- Does anyone else remember *Fair access to care services: prioritising eligibility for care and support*.
<https://www.scie.org.uk/publications/guides/guide33/files/guide33.pdf> .
- Could it be a useful starting point, to inform the identification of different levels of need, bearing in mind that the first level must be “Convention rights”?

Prioritisation (3)

- **Critical** – when:
 - life is, or will be, threatened; and/or
 - significant health problems have developed or will develop; and/or
 - there is, or will be, little or no choice and control over vital aspects of the immediate environment; and/or
 - serious abuse or neglect has occurred or will occur; and/or
 - there is, or will be, an inability to carry out vital personal care or domestic routines; and/or
 - vital involvement in work, education or learning cannot or will not be sustained; and/or
 - vital social support systems and relationships cannot or will not be sustained; and/or
 - vital family and other social roles and responsibilities cannot or will not be undertaken.

Prioritisation (4)

- **Substantial** – when:
 - there is, or will be, only partial choice and control over the immediate environment; and/or
 - abuse or neglect has occurred or will occur; and/or
 - there is, or will be, an inability to carry out the majority of personal care or domestic routines; and/or
 - involvement in many aspects of work, education or learning cannot or will not be sustained; and/or
 - the majority of social support systems and relationships cannot or will not be sustained; and/or
 - the majority of family and other social roles and responsibilities cannot or will not be undertaken

Convention rights

- *R (Bernard) v Enfield LBC* [2002] EWHC 2282 Admin, (2002) 5 CCLR 340.
- *R (Anufrijeva) v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124.
- *R (Limbuella) v SSHD* [2005] UKHL 66, (2006) 9 CCLR 30.
- *Pentiacova v Moldova* (2005) 40 EHRR SE23.

Dealing with the market

- It is now probably too late for providers to apply for a JR of LA decisions as to the levels of standard fees for 2020/2021 but that cannot be taken for granted and it would be good practice to check that current standard fees have been properly assessed e.g. taking into account inflation, the increased NLW and relevant statutory & non-statutory guidance.
- The first tranche of government funding for increased payments has ended. How any future funding is to be distributed will depend primarily on the terms of the funding

Dealing with the market

- The LGA has published a number of very helpful notes, at <https://www.local.gov.uk/our-support/our-improvement-offer/care-and-health-improvement/commissioning-and-market-shaping/covid-19>.
- *LA should have monitored the impact of C19 on provider costs from April 2020 (Temporary Funding for Adult Social Care providers during the Covid-19 Crisis) and that can still be done. Temporary Funding suggests taking into account “the costs pressures caused by Covid-19 arising from, inter alia, higher dependency levels, higher staff sickness, absence rates, higher administration costs perhaps due to greater volatility of support packages, PPE costs and any other relevant factors”.*

Dealing with the market

- All LA will need to consider the state of the market as a whole, because of section 5 of the Care Act 2014 and Chapter 4 of the *Care and Support Statutory Guidance*. They will need to at least consider whether it may be necessary to provide support for homes with whom they do not contract.
- The judiciary is not going to impose unrealistic demands in the current environment, but it would be prudent as far as possible to start to review the JSNA (Joint Strategic Needs Assessment), the Market Position Statement and any other relevant local strategies: at least by starting a conversation/process locally if that has yet begun.

Thank you for listening

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