THE CARE ACT AND THE COVID-19 EMERGENCY: INFORMATION FOR PROFESSIONALS IN SALFORD

The Coronavirus Act 2020 allows local authorities to make some changes (known as ‘easements’) to how they implement the Care Act and other legislation during the COVID-19 emergency.

What would change under the easements?

Some of the duties in the Care Act (mainly around assessment, support planning and review) would become powers. This would mean that the local authority could still provide support, but it would no longer be obliged to do so. But the local authority would still have a duty to prevent breaches of human rights.

In cases that do not raise human rights concerns, decisions would have to be made in accordance with the ethical framework published by the Government. But local authorities are expected to do keep doing everything they can to maintain the levels of support that would be provided under the Care Act.

Is there anything that doesn’t change?

- Some Care Act duties remain in force, e.g. to promote well-being, to provide information on services, and to safeguard adults at risk of abuse.
- There are some amendments to the hospital discharge process. These are covered by separate guidance “COVID-19 Hospital Discharge Service Requirements”.
- The complaints process is still in operation, however the Local Government and Social Care Ombudsman may not be processing complaints made to him at this time.
- There are no changes to the Mental Capacity Act or the public sector equality duty in the Equalities Act 2010.

Are the easements being applied in Salford at the moment?

No, and hopefully they never will be. Adult social care in Salford has risen to the challenge of COVID-19 thanks to all the hard work and commitment from staff in health and social care, and provider organisations and other partners. But contingency plans are needed, even as (hopefully) the COVID-19 epidemic passes its peak. As an example of what could happen, one local authority had to implement the easements when 25% of its adult social care staff were on sick leave having contracted COVID-19 and a further 10% were on restricted duties due to self-isolation.

Because the easements are not yet in force practitioners should be cautious about delaying or re-organising work ‘because of COVID-19’. The Care Act allows for considerable flexibility in how assessment and support planning is carried out. But it cannot simply be assumed that the current public health emergency is reason enough for a delay.

How would it work?

Managers and teams in adult social care already work together to respond to any increases in demand or shortages of staff or other resources. If any situations arose that could not be handled in this way then the Principal Social Worker would be informed. The PSW would review the situation with colleagues and advise senior colleagues. Any decision on easements would have to be taken by the Director of Adult Social Services (DASS). The DASS would decide whether to apply the easements, having consulted the lead council member for social care and NHS colleagues. The DHSC would be informed, along with service users, carers and providers, and local Members of Parliament.
What would be the impact on service users of introducing the easements?

The guidance is very clear that service users and carers should continue to be fully involved in assessment and support planning. But a local authority can use the easements to streamline these processes if absolutely necessary, even while it continues to try to provide as much support as possible.

If the situation is more severe then the easements could be used to prioritise support for those service users in greatest need. This could mean that some support would be temporarily withdrawn from other service users. But every possible step would be taken to avoid this happening, and support would be re-introduced as soon as possible.

How long would it last?

Any local authority using the easements has to review them at least every two weeks. But any easements would be stopped immediately if there was no longer any need for them. The Coronavirus Act itself will be reviewed in the autumn.

How can I find out more?

Further details can be found in the attached briefing, which includes links to the statutory guidance and ethical framework.
STAFF BRIEFING: IMPLICATIONS OF THE CARE ACT EASEMENTS FOR ADULT SOCIAL CARE

Circumstances in which easements may be considered

A local authority can consider introducing easements if:

“... 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.”

Duties that may be affected

Care Act:

- section 9 (assessment of an adult’s needs for care and support);
- section 10 (assessment of a carer’s needs for support);
- (any regulations made under section 12(1) or (2) (further provision about assessments under section 9 or 10);
- section 12(3) and (4) (duties to give written records of assessments);
- section 17 (assessment of financial resources).
- Section 18 (duty to meet needs for care and support)
- Section 19 (power to meet needs for care and support)
- section 20 (duty and power to meet a carer’s needs for support)
- section 24 (duty to prepare care and support plan or support plan, etc);
- section 25 (duties relating to plans)
- section 27(1), (4), (4A) and (5) (duty to review plans, etc).
- section 30 (cases where adult expresses preference for particular accommodation);
- section 37 (duties of notification, assessment, etc when a person moves);
- section 38 (case where assessments not complete on day of move).
- section 47(2) (duty to prevent or mitigate loss or damage to property of adults being cared for away from home).
- sections 58 and 59 (assessment of a child’s needs for care and support);
- sections 60 and 61 (assessment of a child’s carer’s needs for support);
- sections 63 and 64 (assessment of a young carer’s needs for support);
• any regulations made under section 65(1) (further provision about assessments under sections 58 to 64).

Other legislation:

Transition for children to adult care and support

• (a)section 2A(2) to (4) or (6) of the Chronically Sick and Disabled Persons Act 1970 (welfare services: transition for children to adult care and support), or
• (b)section 17ZH(2) to (4) or (6) of the Children Act 1989 (section 17 services: transition for children to adult care and support).

Duties that will not be affected

• Duty to promote individual well-being (Care Act section 1)
• Duties to provide information (Care Act section 4)
• Duty to safeguard adults at risk of abuse (Care Act section 42)
• Duties under the Mental Capacity Act 2005
• Duties under the Equalities Act 2010, particularly the public sector equality duty in section 149

Human rights protection

The local authority is still bound by all its Care Act duties if failure to follow them would lead to a breach of the person’s human rights under the European Convention on Human Rights. The rights that are most likely to be at issue as follows:

• Article 2 (right to be protected from real and imminent risk to life) – not providing support would be highly likely to lead to the service user’s death in a very short time.

There is never any justification for the local authority not to uphold someone’s Article 2 rights, even during a national emergency such as COVID-19.

• Article 3 (right to be free from inhuman or degrading treatment) – not providing support would lead to significant and rapid deterioration in the person’s physical and/or mental health, and/or significant abuse by others.

There is never any justification for the local authority not to uphold someone’s Article 3 rights, even during a national emergency such as COVID-19.

• Article 8 (right to privacy and family life) - not providing support would lead to significant interference with the person’s privacy or their ability to communicate with others. This is a qualified right: the local authority can limit it for certain reasons (including to protect public health) but any limitations have to be necessary and proportionate.
During the current emergency everyone is subject to some level of restriction on their contact with their family members and friends. Article 8 issues could arise if a person would be subject to disproportionate restrictions if support were not provided.

- **Article 14** (right to be free from discrimination when claiming Convention rights) - not providing support would lead to the person experiencing unjustified discrimination because of their age, disability, ethnicity, sexuality etc.

Human rights issues are very sensitive to the facts of each case. What may be necessary and proportionate for one person may be excessive and unnecessary for another.

**Changes to duties and ethical decision-making**

If applying the Care Act easements would not lead to a breach of the person’s human rights, then there is no longer a duty to provide support. But this does not mean that the local authority can do nothing.

Instead local authorities will have **powers** to provide support. The guidance on the ‘easements’ makes clear that local authorities are expected to do everything they can to provide as much support as they can, even if the ‘easements’ are in place.

The usual rules for using public decision-making powers have to be followed:

- Take decisions on a case-by-case basis, not on a ‘block’ basis
- Base each decision on the relevant factors and ignore any irrelevant factors
- Give reasons for the decision to the person(s) affected and providing a means of challenge

In addition to these general rules, decisions under the Care Act ‘easements’ have to be taken in accordance with the Ethical framework for adult social care which has been published by the Department for Health and Social Care. The key principles in the framework are as follows:

- **Respect** – recognising that every person and their human rights, personal choices, safety and dignity matters;
- **Reasonableness** – ensuring that decisions are rational, fair, practical, and grounded in appropriate processes, available evidence and a clear justification;
- **Minimising harm** – striving to reduce the amount of physical, psychological, social and economic harm that the outbreak might cause to individuals and communities. In turn this involves ensuring that individual organisations and society as a whole cope with and recover from it to their best ability;
- **Inclusiveness** – ensuring that people are given a fair opportunity to understand situations, be included in decisions that affect them, and offer their views and challenge. In turn, decisions and actions should aim to minimise inequalities as much as possible;
- **Accountability** – holding people, and ourselves, to account for how and which decisions are made. In turn, this requires being transparent about why decisions are made and who is responsible for making and communicating them;
- **Flexibility** – being responsive, able and willing to adapt when faced with changed or new circumstances. It is vital that this principle is applied to the health and care workforce and wider sector, to facilitate agile and collaborative working;
- **Proportionality** – providing support that is proportional to needs and abilities of people, communities and staff, and the benefits and risks that are identified through decision-making processes;

Salford Care Organisation
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• **Community** – a commitment to get through the outbreak together by supporting one another and strengthening our communities to the best of our ability.

**Interaction with the Mental Capacity Act**

If the Care Act easements are put in place then this may limit the support that is offered to service users. If an individual lacks capacity to make a decision whether to accept the support they are offered then the decision has to be taken in his/her best interests in the usual way.

The best interests decision has to be based on the ‘concrete options’ that are available at the time: it can’t be hypothetical, i.e. it’s not possible to decide that “It would be in P’s best interests to be offered XYZ”. But consideration should still be given to whether declining to offer more support would breach P’s human rights.

The Court of Protection is still in operation during the emergency so decisions can still be challenged in the usual way.

**Charging for services**

Local authorities can use the Care Act easements to provide support without conducting financial assessments, but will be able to apply charges retrospectively once the emergency is over.

**Process**

Team managers and principal managers already manage demand across adult social care to respond to staff shortage, provider concerns etc., and these processes will continue. If all options have been considered but it still appears that some support needs to be reduced or withheld then the principal social worker has to be informed using the COVID-19 request form.

After discussion with team managers and principal managers the principal social worker has to give a recommendation to the director of adult social care. The director then has to make a decision after consultation with the lead council member for adult social care and senior NHS colleagues.

Further details of the processes to be followed will be issued in due course.

**Review**

Any use of the Care Act easements is limited to two weeks at a time but can be renewed following review.
Further information

Guidance on Care Act easements:


Ethical framework for adult social care:


Application of MCA/DOLS during the COVID-19 emergency;