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Care Act Easements in Coronavirus Act 2020

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Overview: what are the Care Act 'easements'?



- **Coronavirus Act 2020**
 - **Modifies certain provisions of Care Act to relax LA duties**
 - **Statutory guidance refers to these measures as 'easements'**
 - **Context – national public health emergency caused by pandemic and resulting pressures on LA's and care providers**



- **Provisions in respect of social care:**
 - **Section 15 (enabling section)**
 - **Schedule 12 (detail)**
- **Those provisions in force since 31 March**
- **Statutory Guidance - issued 31 March, updated 1 April**
- **Ethical Framework for ASC – published 19 March**

When do the easements apply?



- The provisions are:
 - Temporary – kept subject to review, 2 years max.
 - To be used as narrowly as possible
- CA 2014 pre-amendment requirements should be followed for as long, and as far, as possible
- ‘Easements’ should only be exercised if *“this is essential in order to maintain the highest possible level of services”*



- **To begin exercising the easements:**
 - **the workforce must be significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable to comply with its pre-amendment] Care Act duties;**
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 Statutory Guidance)

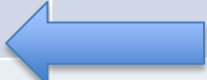
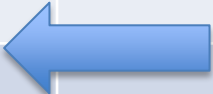
Decisions to apply the easements



- Decision about when to apply the easements is to be taken locally
- Must be agreed by the Director of Adult SS in conjunction with or on recommendation of the Principle SW
- Should be recorded, incl. evidence taken into account
- Should be communicated to all providers, service users and carers
- Should be reported to Department of Health & Social Care with reasons for decision

Four stages (Annex A statutory guidance)



Stage 1	Operating under pre-amendment CA 2014	 PRE EASEMENTS APPLIED
Stage 2	Applying flexibilities under pre-amendment CA 2014	
Stage 3	Streamlining services under CA easements (decision to operate under easements)	 EASEMENTS APPLIED
Stage 4	Prioritisation under CA easements	

What are the key changes to Care Act duties?



- Once a decision is taken to apply the easements, the LA is no longer under a duty to:
 - Carry out a needs assessment
 - Carry out a carers assessment
 - Prepare and review a care and support plan
 - Carry out a financial assessment (But nb. cannot charge if have not done one, although will be able to do one retrospectively)
 - Provide services to meet assessed needs unless a failure to do so would result in a breach of Convention rights

What are the key changes to Care Act duties?



- **NB. Remains a power to the above, just not a duty**
- **The provisions have retrospective effect:**
 - **apply in relation to duties arising before the Coronavirus Act commencement date as well as those arising after**

What is not changed



- Other duties in Care Act e.g.:
 - To promote wellbeing
 - Prevention
 - Providing information and advice
 - Safeguarding
- Mental Capacity Act duties incl. re DoLs (separate guidance awaited)
- Equality Act 2010 duties

Activating the Easements – Macro & Micro



Macro and Micro Decisions

- A close reading of the Care Act Easements – Guidance for Local Authorities 1 April 2020 (“the Guidance”) indicates that there are two classes of decisions to be made:
 - macro policy based decisions on whether the local authority will apply the easements on a systemic level; and
 - micro decisions on how those easements will be applied in relation to individuals.

Activating the Easements – Tension?



Tension in the Guidance?

- 2 categories not set out as clearly as they could be.
- Is this a result of the tension between:
 - The duties in the Care Act (“CA”) which are owed to individuals;
 - the modifications in the Coronavirus Act (“CVA”) which change those individual duties to powers; and
 - the need/wish (I speculate) to ensure consistency, so far as is possible, across local authorities and in relation to all service users as well as retain some central control against possible local over enthusiasm in its application?

Activating the Easements – Guidance



Statutory Guidance

- The Guidance is statutory guidance issued under paragraph 18(1) Schedule 12 CVA.
- Paragraph 18(2) Schedule 12: LA must have regard to it. I.e. cannot depart from it without good reason.
- That loophole may be closed - paragraph 18(3) Schedule 12 stats that the LA must comply with guidance if the SoS directs
 - For example, if a complaint is made to the SoS that not complied with it the SoS may direct the LA to do so.
 - Again more centralised control for consistency?

Activating the Easements - Stages



What Macro Decisions need to be made?

- 4 main easements: (a) assessments; (b) financial assessments; (c) preparing & reviewing care & support plans; and (d) meeting assessed eligible care needs
- 4 stages set out in guidance & 3 decisions to be made.
- Stages are not necessarily sequential. Can implement 2 or more stages at once.
 - Issue might be e.g. if don't implement (or at least seriously consider) stage 2 might find it more difficult to evidence a need for moving straight to stage 4.
- Don't have to implement all easements at same time (or at the same stage).

Activating the Easements – Stage 1



Stage 1

- no decision needed; continue as you are under the CA.

Activating the Easements – Stage 2



Stage 2

- Policy decision to change, delay, cancel '*service types*' under CA.
 - E.g. a decision that across the LA ASC will not offer X *service type*.
 - Examples given in Guidance are home care or supported living but with no clarifying details.
- Under the CA the duty is to meet assessed eligible needs but the way in which those needs may be met is for the LA.

Activating the Easements - Stage 2



- Presumably Guidance is hinting that a service user in supported living, which may be more resource intensive, could have his needs met by way of less resource intensive shared accommodation or in a care home (?practicality?)
- Alternatively as an example more technology could be used to meet a need, or e.g. if toileting needs met by the provision of 4x daily carers then use of incontinence products may reduce the need. i.e. the Article 8 balancing act may change.
- In light of the existing tough conditions as a result of austerity for ASC I don't see much scope in practice for this.

Activating the Easements – Stage 3



Stage 3

- This is a policy decision to decide that AC will not be subject to duty to assess, consider eligibility and review **in accordance with CA duties & guidance.**
 - As Lee will touch on, must still do some, but not in the comprehensive way currently required.
- Guidance does not mention it but stage 3 must also apply to the duty to conduct financial assessments, provide care and support plans as well as the duty to meet assessed eligible needs for care and support.

Activating the Easements – Stage 3



Stage 3

- A separate decision, even if linked and/or based on same/similar evidence should be made for each easement.
- For example removing need to undertake financial assessments or CA compliant reviews or care and support plans might free up enough resource that can still assess CA compliantly.
- Flexible localised approach – no blanket decisions.

Activating the Easements – Stage 3



Stage 3

- When to take the decision:
 - *‘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...** 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.’*

Activating the Easements – Stage 3



Stage 3

- Test: ‘no longer reasonably practical’.
- Threshold guidance includes:
 - where the impact of pandemic makes it unachievable or untenable to be subject to CA duties;
 - only where it is essential to maintain the highest level of service;
 - use as narrowly as possible; and
 - do everything that can be done to continue meeting existing duties.
- Procedure for decision making is in Guidance.

Activating the Easements – Stage 4



Stage 4

- Policy decision to make a whole system prioritisation of care and support across ASC
 - I.e. for AC to be able to meet previously assessed eligible needs for care and attention (or apparent needs for support) only to a level consistent with human rights obligations in an individual case ASC must first make a policy decision to have a whole system prioritisation of care and support.

Activating the Easements – Stage 4



Stage 4

- Guidance is unclear on this stage/has conflated the 2 types of decisions (macro & micro).
- First LA will have made the relevant easement decision. Then it will become apparent the LA is having difficulty meeting basic needs and needs to reduce care packages.
 - Example given in Guidance is LA is faced with a decision about reducing personal care for one person so another gets help to eat.
- When the LA comes to that realisation before the LA can implement reduction in an individual case it first must make a decision that it needs to prioritise care and support across the whole system.

Activating the Easements – Stage 4



Stage 4

- Procedure for decision making in the Guidance.
- How to prioritise?
 - Guidance takes a hands off approach - a matter for each LA based on local knowledge.
 - Threshold guidance includes: prioritise care so most urgent and acute needs are met.
 - Suggestion/example in Guidance is to rate care packages (high, medium, low for complexity/risk) and presumably meet only high or high and medium. Also, each individual care package might have high, medium, low elements so presumably may only meet those e.g. high elements in a care package. Lee's suggestions on

Activating the Easements – Stage 4



Stage 4

- Suggestion/example in Guidance is to rag rate care packages (high, medium, low for complexity/risk) and presumably meet only high or high and medium.
- NB – each individual care package might have high, medium & low elements so presumably the LA may choose only to meet the e.g. high elements in the care package.

Activating the Easements – Initial Thoughts



- **Public Law Decisions**
 - These macro level policy decisions are public law decisions and challengeable as such.
- **Evidenced. Reasoned. Reasonable.**
 - This is of vital importance.
- **Proportionate**
 - The decision making procedure as well as outcome.
 - Purpose of the Act is to reduce the burden on LA not to create an additional one or substitute an administrative burden one for the CA burden.

Activating the Easements – Initial Thoughts



- **PSED**
 - No easements to Equality Act 2010. Document regard LA has had to PSED.
- **Ethical Framework for Adult Social Care**
 - Guidance states, *'Local Authorities will be expected to observe the Ethical Framework for Adult Social Care'*.
 - Is this weaker than *'have regard to'*? Read it? Consider it? Apply it substantively?

Activating the Easements – Initial Thoughts



- **Personalisation and Co-production**
 - Guidance states, ‘*Local Authorities **should continue to respect** the principles of personalization and co-production*’.
 - Is this weaker than ‘*have regard to*’ or even ‘*expected to observe*’? Read it? Consider it? Apply it substantively?
- **Hospital Discharge Service Requirements**
 - Effect of redeployment of staff to implement this on ASC’s capacity to meet CA compliant functions.

Activating the Easements – Initial Thoughts



- **Consultation**
 - No statutory duty to consult.
 - General principle is that there is no common law duty to consult unless there has been a promise, consulted in similar circumstances before, and in exceptional circumstances where the nature of the relationship would create conspicuous unfairness e.g. withdrawal of a benefit.
 - Unlikely to apply in these unique circumstances but e.g. the inclusive the decision making and more co-production involved at both levels the less likely.

Assessing under the easements



- **The Guidance:**

The Coronavirus Act does not give authority to block, restrict or withdraw whole services. It enables Local Authorities to make and apply person-centred decisions about who is most in need of care, and who might need to have care and support temporarily reduced or withdrawn in order to make sure those with highest need are prioritised.

Assessing under the easements



'Such decisions will in some cases be challenging, and therefore should always be made within the remit of the DHSC Ethical Framework. Importantly, they should be taken only where demand pressures and availability of staff in the coming period mean that the full range of services under the Care Act can no longer be delivered.'

Assessing under the easements



‘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.’

Conducting assessments



It may not be possible or necessary for assessments themselves to be face-to-face.

Consider:

- Use of a third party/allied professional to carry out needs assessments
- Supported self-assessments.
- Assessments using the telephone or video calls

Ethical Framework for Adult Social Care



Sets out 8 principles:

- 1. Respect

This principle is defined as recognising that every person and their human rights, personal choices, safety and dignity matters.

- 2. Reasonableness

This principle is defined as ensuring that decisions are rational, fair, practical, and grounded in appropriate processes, available evidence and a clear justification.

Ethical Framework for Adult Social Care



- 3. Minimising harm

This principle is defined as 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.

- 4. Inclusiveness

This principle is defined as 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.

Ethical Framework for Adult Social Care



- 5. Accountability

This principle is defined as 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.

- 6. Flexibility

This principle is defined as 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.

Ethical Framework for Adult Social Care



- 7. Proportionality

This principle is defined as 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.

- 8. Community

This principle is defined as a commitment to get through the outbreak together by supporting one another and strengthening our communities to the best of our ability.

Human Rights



The Guidance:

‘Local Authorities will remain under a duty to meet needs where failure to do so would breach an individual’s human rights under the European Convention on Human Rights. These include, for example, the right to life under Article 2 of the ECHR, the right to freedom from inhuman and degrading treatment under Article 3 and the right to private and family life under Article 8.’

Art. 2



- **Right to life**

Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Art. 2



- Article 2 –
 - the State must refrain from the intentional and unlawful taking of life; and
 - the State must take appropriate steps to safeguard the lives of people – a positive obligation.
- Not a general a duty to provide care to prevent death

Art. 3



- **Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Art. 3



- ***Limbuela*** [2006] 1 AC 396, Lord Bingham said:

‘Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. ... the treatment, to be proscribed, must achieve a minimum standard of severity, and ... in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3.

Art. 3



... But I have no doubt that the threshold may be crossed if [an individual] with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life... When does the ... duty ... arise? The answer must in my opinion be: when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life.

Art. 3



... Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation."

Art. 8



- **Article 8 - Right to Respect for Private and Family Life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

Art. 8



- Art. 8 also protects physical / moral integrity

In ***Bensaid v United Kingdom*** (2001) 33 EHRR 10, ECtHR said:

"Not every act or measure which adversely affects moral or physical integrity will interfere with the right to respect to private life guaranteed by Article 8. However, the Court's case-law does not exclude that treatment which does not reach the severity of Article 3 treatment may nonetheless breach Article 8 in its private life aspect where there are sufficiently adverse effects on physical and moral integrity."

Art. 8



- The threshold for breach, arising from absence of social care support, is very high.
- ***Anufrijeva v Southwark London Borough Council*** [2003] EWCA Civ 1406. The claimants, who were asylum seekers, alleged that deficient accommodation and support amounted to a breach of their art. 8 rights.
- All failed in their claims.

Art. 8



- Lord Woolf, CJ observed that there are no specific criteria for the imposition of a positive duty to provide welfare support, and went on to say:
 - *"We find it hard to conceive . . . of a situation in which the predicament of an individual will be such that article 8 requires him to be provided with welfare support, where his predicament is not sufficiently severe to engage article 3. Article 8 may more readily be engaged where a family unit is involved. Where the welfare of children is at stake, article 8 may require the provision of welfare support in a manner which enables family life to continue."*

Art. 8



- ***R (McDonald) v Royal Borough of Kensington and Chelsea*** [2011] UKSC 33. Appellant claimed that providing incontinence pads, rather than a carer to help her to the toilet at night, amounted to art. 8 breach.
- Claim failed

Art. 8



- Lord Brown said:

Article 8 is too well known to require citation again here. There is no dispute that in principle it can impose a positive obligation on a state to take measures to provide support and no dispute either that the provision of home-based community care falls within the scope of the article provided the applicant can establish both: (i) “a direct and immediate link between the measures sought by an applicant and the latter's private life”...

Art. 8



‘Even assuming that these links do exist, however, the clear and consistent jurisprudence of the Strasbourg Court establishes “the wide margin of appreciation enjoyed by states” in striking “the fair balance ... between the competing interests of the individual and of the community as a whole” and “in determining the steps to be taken to ensure compliance with the Convention”, and indeed that “this margin of appreciation is even wider when ... the issues involve an assessment of the priorities in the context of the allocation of limited state resources...’

Art. 8



Lord Brown's judgment referred to three ECtHR judgments, and continued:

*'Really one only has to consider the basic facts of those three cases to recognise the hopelessness of the art.8 argument in the present case. **Sentges** ... concerned a sufferer from muscular dystrophy complaining of a refusal to supply him with a robotic arm. Without it he depended on others for every single act and so was unable to develop and establish relationships with others; with it, his "severely curtailed level of self-determination would be increased": ...*

Art. 8



*‘The applicants in **Pentiacova** suffered from renal failure and complained of insufficient funding for their haemodialysis treatment. The applicant in **Molka** was confined to a wheelchair and, for want of positive assistance, was unable to vote in local elections. The complaints in all three cases were unanimously held to be manifestly ill-founded and thus inadmissible.’*

Art. 8



- Breach found in ***Bernard v Enfield LBC*** [2002] EWHC 2282 (Admin).
 - Claimants were husband and wife. They had 6 children.
 - Wife was severely disabled and confined to a wheelchair.
 - In breach of its duty under s. 21(1)(a) of NAA 1948, the Council failed, for 20 months, to provide the family with suitably adapted accommodation.

Art. 8



- The wife was doubly incontinent.
- No wheelchair access to the toilet, so she was forced to defecate and urinate on the living-room floor.
- Wife unable to play any part in looking after her six children.
- Art. 8 breach conceded, and £10,000 damages awarded.

Challenges on Human Rights grounds



- Decisions amenable to judicial review
- In JRs on human rights:
 - The court does not defer to the Council's decision, and apply a **Wednesbury** test;
 - The court decides whether, in fact, there is a Convention rights breach, see ***R (Begum) v Denbigh High School*** [2006] UKHL 15

What to record?



- The Guidance says Authorities:

‘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.’

And says that:

‘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.’

What to record?



- Consider:
 - New, simple, forms
 - Include:
 - Description of disability / illness, and its impact on daily life
 - Critical care elements, e.g. medication, feeding, observation
 - Describe protective factors, e.g. informal support
 - Templates could include descriptions of Convention rights thresholds

What to record?



- Analysis need not be elaborate:
 - thresholds are high – cases of potential breach should be clear
 - The easements are designed to reduce, not add to, the administrative burden!

Other points



- Consider fast review process (either generally, or in cases of complaint), to pick up any particularly high-risk / potentially 'wrong' decisions
- Ensure changes in circumstances are considered promptly, e.g. if informal support ends



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