

# **Coronavirus Act 2020**

## **What it means for carers – detailed briefing on the health and care provisions on the Act 2 April 2020**

### **Overview**

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This briefing sets out the main measures in the Coronavirus Act that affect carers and Carers UK's view.

This is emergency legislation that passed through Parliament and has become law. It contains other provisions on benefits and welfare, but these are not covered here.

It covers all four nations, England, Wales, Scotland and Northern Ireland. Northern Ireland does not have any specific measures relating to social care law as their legislation is framed differently, but they will be seeking alignment.

The Government stated that the purpose of the Act is to: “respond to an emergency situation and manage the effects of a covid-19 pandemic.”

The Government's stated aims of the Act are to:

- Increase the available health and social care workforce
- Ease the burden on frontline staff
- Containing and slowing the virus
- Managing the deceased with respect and dignity
- Support people.

For England, Government has already brought in the health and care provisions set out in Section 15 and Schedule 12 below. The Welsh Assembly Government is likely to do so shortly, as is the Scottish Government.

In England, the effect of the “Care Act easements” in particular under Schedule 12 can be brought in by local authorities when they consider they need them. Guidance published on this sets out how and when this should happen.

The measures with the Act can be suspended and then later reactivated if needed over the lifetime of the Act. This means that Government could decide to move back to full implementation of the Care Act 2014 duties. The lifetime of the Act is limited to two years. It can also either be ended early, and Government states that it is possible to extend the lifetime of the Act for a further temporary period, if, they consider it is prudent to do so. After

six months, the Secretary of State must present a review to Parliament and it will be debated.

### **Impact Assessment: What would trigger the provisions? (England)**

Government states in the Impact Assessment, “These changes to the Care Act 2014 would only be triggered if the spread of coronavirus was such that the Secretary of State considered LAs to be at imminent risk of failing to fulfil their duties under the Care Act 2014 and would be deactivated at the conclusion of the emergency period. Even during the operation of these changes, **LAs would still be expected to continue meeting all of their duties under the Act if they are able to do so.** It would though allow them to prioritise the provision of services if needed, including requiring them to meet needs in order to prevent individuals’ human rights being breached.”

### **Summary of impacts from Impact Assessment for the Bill:**

- Provision that in a coronavirus outbreak a Local Authority (“LA”) may lawfully prioritise who and what type of needs it will meet, rather than being required to meet all eligible assessed needs as specified under the Care Act 2014 (as at present). (para 86)
- Provision that in a coronavirus outbreak LAs may lawfully determine whether and the extent to which it will carry out assessments of individuals’ needs or review care plans, or carry out financial assessments, rather than being required to carry these out in all cases required by the Care Act 2014 as at present. (para 87)
- Provision for the Secretary of State for Health and Social Care to direct LAs in relation to the prioritisation of services to meet care and support needs in accordance with guidance issued by the Department of Health and Social Care. (para 88)

### **Crucially, Government states in the Impact Assessment:**

**“We expect LAs, working with providers, to do everything possible to maintain services over the coming period.”** This is also reiterated in statutory guidance accompanying the Act.

### **Carers UK view on the Act:**

We recognise these are temporary measures which should help local services better deal with Coronavirus in a time of extreme emergency - but it is essential that councils continue to assess the risks and vulnerabilities affecting carers and the people they support.

Carers are under huge stress currently, taking extra precautions and going above and beyond what they normally do to ensure their loved ones are safe. If they are not clearly recognised and supported during this emergency then more people will become unwell and need support.

Legislation in England, Wales, Scotland and Northern Ireland contains hard won rights for carers, after years of campaigning. It is essential that provisions are returned as soon as possible and built upon further.

### **What the Act does regarding carers:**

- Removes the duty to carry out assessments care legislation, including carer's assessments i.e. the requirement that the local authority must carry these out.
- Replaces this duty with a power, which means they can carry these out under care legislation provisions e.g. Care Act 2014 and Social Services and Wellbeing Act (Wales) Act 2014. The provisions for Scotland are worded differently (see below).
- Removes the requirement to follow eligibility criteria.
- Removes the duty to provide services, and care and support plans, etc. except, in relation to the Convention on Human Rights i.e. Human Rights Act 1998 (see below).
- Vitally, the Human Rights Act 1998, must be followed for people who need services and for carers. There is a very clear duty to ensure that services are provided to ensure compliance with the Human Rights Act 1998.
- It effectively allows prioritisation of care services to those that the local authority deems most in need, in England and Wales. Carers Scotland will clarify the precise provisions in Scotland.
- It removes the requirement to carry out a financial assessment and allows charges to be applied retrospectively in England and Wales.
- It changes some provisions relating to mental health legislation requiring only one doctor to make decisions and changes time limits (for all nations, although the precise drafting is different).
- It also removes the requirement for Clinical Commissioning Groups in England to undertake a Continuing Healthcare assessment.
- In the sections about England, Wales and Scotland, each respective Government can issue new guidance and direct local authorities in their nation to comply with it.

The provisions for Scotland are differently worded:

- It removes the duty to assess if it would not be practical or would delay the delivery of support.
- It has some differently worded provisions around charging which Carers Scotland will provide more detail.

As each nation has different legislation, this means the provisions vary slightly in each nation. Northern Ireland's Health and Care Trusts are likely to face similar measures.

## **Does this mean that these measures will be in force for an entire 2 years or more?**

Government has said that it wishes to only use these measures for as long as absolutely necessary. There is power to suspend the measures. The Act is subject to parliamentary renewal every 6 months, meaning MPS will debate and vote to renew the Act.

**Carers UK's view** is that the decision about whether to suspend these measures in relation to care legislation must be made at the earliest reasonable opportunity. The legislation, and the impact of carers and people who need care, must be monitored closely and we have welcomed Government's assurances that this will be the case. We are pleased to be able to contribute to that process. Government has also made it clear in the guidance that those who would have received services, or more services but for the easements, will also be clearly recorded. However, there is currently no clear transparent process for returning services and assessments to how they would have been otherwise. Going forward, social care must remain a priority for Government funding to find a new sustainable funding solution going forward that increases the amount of support available.

## **What are the main provisions? Carer's Assessments – England**

### **Changes to the Care Act 2014: Section 15 and Schedule 12**

Schedule 12, Part 1 states that a local authority does not have to comply with the following provisions under the Care Act 2014 i.e. the full processes of assessments (sections below refer to pre-amended Care Act provisions):

Section 10 – duty to carry out a carer's assessment

Section 12 (2) – regulations which set out eligibility criteria which must be followed

Section 14 (2) – requirement to have outcome in writing

Section 11 – refusal of assessment does not apply

Section 13 – determination of whether needs meet eligibility criteria

Section 60 and 61 – doing an assessment of a parent carer under the Care Act when the disabled child is about to start transition.

Section 63 and 64 - requirement to consider and assess a young carer where an adult needs care and support

**All similar provisions for people needing care and support would also be amended.**

### **Duties and powers to meet needs – Schedule 12**

Schedule 12 contains duties to assess and provide support for people needing care and carers, where people are ordinarily resident and so that this avoids a breach of Convention rights. This is contained under Paragraph 4 (people needing care) and Paragraph (5) a

power to provide services. Additionally Paragraph 6 amends Section 20 of the Care Act, and replaces it with a duty to provide care where it would otherwise breach the Convention (Human Rights Act 1998) and also introduces a power to meet needs.

### **Council must meet needs to avoid breaching the Human Rights Act 1998**

Under Schedule 12 (6) instead of having to meet carers' needs after a determination has been made from the eligibility criteria, "the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the carer's Convention rights." Convention rights means the Human Rights Act 1998. (see below for more detail).

### **A similar provision exists for the person needing care and support.**

#### **What this means in practice:**

The guidance clarifies that an assessment of some description must be used to determine needs so that the authority can satisfy itself that it is not breaching the carer's human rights or the human rights of the person needing care and support. Like the Care Act 2014 provisions in England, it may be that in order not to breach the carer's human rights, services must be provided to the person needing care.

### **Ethical framework: new guidance for operational practice in social care**

Government has also published an "ethical framework" under which we believe this would have to operate. This [ethical framework](#) would apply equally to carers as the person needing care. This is being considered alongside the statutory guidance to have the equal force of law. The Secretary of State may direct a local authority to comply with the ethical framework.

### **Charging for services: England**

Schedule 12 removes the duties of local authorities to carry out a financial assessment, but allows them carry out at a later date and retrospectively apply charges. Carers UK asked Government to ensure that any charges incurred during the emergency period were effectively waived, but this has not been accepted. Most local authorities don't charge for carers' services currently and we would urge this situation to continue. Guidance positively suggests that this would be counter-productive.

NB: this is different to services delivered following hospital discharge will be free at the point of delivery and paid for by the NHS out of the £1.3bn settlement from Government. These are being made free to enable quicker discharge from hospital.

### **Disabled Children/Young People and Transition**

Under Schedule 12 (15) the local authority does not have duties imposed by:

- (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).

### **Government will be able to direct local authorities to comply**

Local authorities will have to have regard to statutory guidance issued by Government. A different provision allows the Secretary of State to direct a local authority to comply with statutory guidance.

### **Young carers and disabled children/parent carers: what this legislation does not do (England)**

It does not amend the Children Act 1989 in key areas. If these provisions came into force, key elements of the Children Act 1989 would remain unchanged and operational, meaning that young carers' rights under the Children Act 1989 must still be complied with. It also means that the provisions for disabled children would also continue unchanged (apart from transition – see above).

It does not amend the Carers (Recognition and Services) Act 1995 which, under Section 1, confers a right to an assessment on carers of all ages.

### **Mental Health Act and Mental Capacity: Section 9**

Government intends to use these slimmed down processes at a time when they expect services to be very stretched. They amend mental health legislation in each of the four nations (Schedule 7 of the Mental Health Act 1983 covering England and Wales, Schedule 8 of the Mental Health (Care and Treatment) (Scotland) Act 2003, Schedule 9 of the Mental Health (Northern Ireland) Order 1986, Schedule 10 of the Mental Capacity Act (Northern Ireland) 2016) and allow certain functions relation to the detention and treatment of patients to be satisfied by fewer doctors opinions or certifications. Temporary amendments also allow for the extension or removal of certain time limits relating to the detention and transfer of patients.

More detail in the Explanatory notes can be found here:

<https://publications.parliament.uk/pa/bills/cbill/58-01/0122/en/20122en06.htm>

### **No requirement to carry out NHS Continuing Healthcare assessments: Section 14 (England)**

This allows suspension of NHS Continuing Healthcare (CHC) assessments which are complex and can involve many staff. Government has said that services that are provided after discharge from hospital will be made free at the point of delivery. Carers UK has

welcomed this measure. The guidance clarifies that community based NHS CHC assessments are also suspended but does not clarify whether that person based in the community would be free at the point of delivery.

### **Hospital discharge procedures have changed from 19 March 2020 (England)**

This is not part of the Bill but is and does relate to the provisions in the Coronavirus Act 2020. New [hospital discharge](#) guidance was issued in England and operational from 19 March 2020 which changes the way that hospital discharge work. The new guidance is intended to speed up “safe and rapid” discharge. The guidance states that this would be in consultation with the family. Normally the procedures would be to ensure that carers are willing and able to provide care and that, if necessary a separate carer’s assessment carried out.

This new procedure changes the procedure to the following:

- Expected date of discharge
- Determination for safe discharge
- Within one hour of this decision being made, movement to discharge lounge.
- Within 2 hours of this, transfer to next place, 95% of which is expected to be in the home, where care services will be put in if required. For the 5% who are not expected to go home and need ongoing health and care, then a care setting will be chosen for them and they will not have a choice.
- A new procedure called “discharge to assess” – this shows how frequently decisions will be made, the decision pathway and what will happen.

Carers UK has argued that at early enough in the procedure, part of safe discharge is essential to ensuring that, if there is a carer, they are both willing and able to provide care. If a package of care is not put in immediately, carers must be given the information and advice to care safely, otherwise their health could be compromised along with that of the person they care for. Delay in care packages will also impact on carers ability to work at a time when families and businesses need carers to work for as long as possible.

### **What does not breaching the Human Rights Act 1998 mean in relation to carers?**

The Human Rights Act 1998 main articles in this emergency situation that would be relevant include: a right to respect for private and family life (Article 8), freedom from inhuman or degrading and treatment (Article 3), a right not to be discriminated against (Article 14) and a

right to life (Article 2). Some rights are absolute i.e. they must be followed, others are qualified. This emergency period introduces some qualifications.

Carers UK carried out the first work on the Human Rights Act and carers has more recently contributed to and supported the British Institute of Human Rights. We will update our information and advice and on this specifically and in relation to any Government guidance.

Carers are telling us that some services have closed because of public health advice e.g. day centres. Others have told us their care company has notified us that they will be withdrawing services, which are provided by a local authority. In this situation, local authorities must satisfy themselves that there is no breach of human rights of either the person needing care or the carer, or both.

### **Some SEND provisions are also amended:**

Our colleagues in the organisation, Contact, are the experts on disabled children's SEND provisions and have provided a useful summary here: <https://contact.org.uk/advice-and-support/coronavirus-information-for-families-with-disabled-children/#bill>

### **Disclaimer:**

While every effort has been made to ensure that this briefing is accurate, it is not an authoritative statement of the law.

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## **Contact us**

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