



Coronavirus & the Legal Changes Affecting Health & Social Care

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Speaker



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James specialises in the provision of legal advice and assistance to individuals, their representatives, and professionals in the field of community care law, which governs the provision of education, health and social care services.

James' expertise and experience include a wide range of education, health and social care and mental capacity law matters. He prides himself on delivery of excellent client care which is tailored to meeting the needs of his clients. He has a passion for promoting and enhancing the rights, entitlements and protections available to individuals and their loved ones.

James works closely with [Laura Guntrip \(Partner & Head of Healthcare\)](#) & [Paula Barnes \(Partner in Clinical Negligence & Community Care\)](#).

Introduction

- Coronavirus Act 2020 & associated Regulations
- Simplified Hospital discharge process
- Changes to Local Authority-funded Care – “Care Act Easements”
- Changes to NHS Funded Care - NHS Continuing Healthcare

Unprecedented Times

- The Coronavirus pandemic has led to a truly unprecedented situation in the UK (and overseas).
- The UK Government's response has resulted in changes in practice and to health and social care law.
- Key legislation: Coronavirus Act 2020.
- Most significant and passed very quickly, despite concerns raised.
- Lots of subsequent Guidance.

Unprecedented Times

- Concerns?
- A number of leading disability rights organisations and senior figures expressed sincere concerns regarding the implications of these changes on some of the most vulnerable
- Baroness Grey-Thompson in the House of Lords debate:
“There is a need for part of this emergency Bill; however, the draconian measures outlined made it a personal necessity for me to be here today. This is a health and social care obliteration Bill by a different name. Alan Benson captured many views when he said that we have been fighting for 30 years and now it is about survival. Inclusion London has said that, ‘buried deep’ in the Bill is ‘the complete removal of social care responsibilities, for at least two years’. [...]

Hospital Discharge

- Simplified and expedited hospital discharge process.
- Idea is to expedite the safe discharge of patients from acute hospitals to free up acute beds as quickly as possible.
- At point at which a patient is deemed safe and ready for discharge, should be discharged that same day (within 3 hours of being deemed fit for discharge). Emphasis on returning the patient home, if at all possible.
- If discharged home, the patient should be visited at home on the day of discharge, or the day after, by a lead professional or MDT, to arrange any care support which needs to be put in place at home. For any patient requiring care and support on day of discharge, a co-ordinator should arrange the necessary provision before the patient leaves the hospital.
- If a patient's needs are too great to return home, a suitable bed or temporary care home placement will be arranged.
- If a patient has been admitted from a care setting, patient should be discharged back to original care setting.

Hospital Discharge

- All support provided as a result of the Discharge Today will be paid for by the NHS.
- This means Discharge Today care should be provided on a non-means tested basis – i.e. free, at no cost.
- Any patients requiring palliative care may require NHS Fast Track funding, for which there is a separate process. There seems to be confusion around this point.
- Note: May be possibility of respective charging.

Local Authority Funding

- Prior to Coronavirus Act 2020:
 - Care Act 2014 – contains duties and powers on Local Authorities to assess and provide care and support to adults. Note there is a separate regime governing children’s social care.
 - Pre-amendment: Duty to meet an individual’s care and support needs if met eligibility criteria and ordinarily resident in the Local Authority’s area.
 - Care & support means tested – subject to financial assessment before care needs met.
 - Explanation of the means-testing rules and financial assessment process can be found by [clicking here](#) to access our information sheet.
 - Statutory Guidance – elaborates on obligations and powers in Care Act 2014.

Local Authority Funding

- Changes under Coronavirus Act 2020: Care Act Easement Provisions:
- Local Authorities permitted to decide not to comply with some of the Care Act obligations – others downgraded from “duty” on Local Authority to meet need, to a “power”.
- If a Local Authority has taken specified steps to ‘activate’ easement under the Coronavirus Act 2020 and Regulations, then the Local Authority can choose not to comply with the following Care Act duties:
 - Duty to assess needs;
 - Duty to assess the needs of a carer;
 - Duty to give written records of an assessment;
 - Duty to complete annual reviews;
 - Duty to give effect to a preferred place of accommodation;
 - Duty to conduct a financial assessment before services are provided.

Local Authority Funding

- Clear expectation in Easements Guidance that Local Authorities should continue operating on basis as of 'business as usual' for as long as is reasonably practicable.
- 'Business as usual' to continue until such time as the criteria or threshold for initiating the process to operate under the 'easement' provisions is met.
- This provides discretion to Local Authorities regarding when to trigger 'easement' provisions (subject to criteria being met) and how to use the 'easement' provisions – i.e. to what extent it will choose not to meet the duties.
- Guidance states should continue to meet pre-amendment duties for as long as possible and triggering 'easement' does not mean all duties automatically disregarded. Local Authority should continue to try to meet those that it can but discretion sits with the Local Authority.
- Inevitably, this is going to lead to differences in approach by different Local Authorities. Big change from national processes provided by in Care Act 2014.

Local Authority Funding

- At least seven Local Authorities known to have triggered 'easements' so far:
 - Sunderland City Council
 - Warwickshire County Council
 - Staffordshire County Council
 - Birmingham City Council
 - Solihull Council
 - Derbyshire County Council
 - Coventry City Council
- Possibly other Local Authorities also. Lag in reported to DHSE.
- Potentially all now operating in different ways and providing different services. Likely to be a lack of transparency and lack of consistency in practice until changes cease.

Local Authority Funding

- What does this mean?
- The duty to meet a person's assessed needs, where a needs assessment has determined that an adult meets the eligibility criteria and is ordinarily resident is suspended.
- Instead, the Local Authority will have a power, not a duty, to meet needs, unless a failure to meet care and support needs would breach the individual's human rights.
- The duty to complete a full assessment and prepare a care and support plan is suspended.
- Instead, the Guidance suggests that Local Authorities will be expected to "*make an assessment of needs*".

Local Authority Funding

- What does this mean in relation to paying for care?
- Local Authorities are not required to charge for care provided during the emergency period.
- If they do wish to charge, they are required to complete a financial assessment before charges are raised.
- May still complete a 'light touch financial assessment'. This means that, in some cases, a Local Authority may choose to treat a person as if a financial assessment had been carried out.
- Local Authority must be satisfied on the basis of evidence provided by the person that they can afford, and will continue to afford, any charges due.

Local Authority Funding

- Beware of Retrospective charging possibility.
- Where a Local Authority does not conduct a financial assessment at the outset of a package - it may do so at any time during the emergency period, or within a reasonable time after the emergency period.
- There is the power to retrospectively charge for care and support provided.
- Little guidance as to how retrospective charging is going to operate in practice. Likely to lead to disputes and a need for further government direction as to how retrospective charging should operate in practice.
- Important to ensure your client is aware of this possibility before agreeing to care and support contracts provided by a Local Authority.

NHS Funding - NHS Continuing Healthcare

- Prior to Coronavirus Act 2020:
 - Where primary need is “health” need – care and accommodation should be funded by NHS through NHS Continuing Healthcare.
 - Assessment considers range of healthcare needs – assessment undertaken by multi-disciplinary team (MDT).
 - Non-means tested (i.e. free, no cost to the patient/your client).
 - Note duty on financial advisors to consider NHS Continuing Healthcare when advising clients, risk of possible litigation. More information available on this point by [clicking here](#).
 - National Framework for NHS Continuing Healthcare – guidance on assessment and decision making process.

NHS Funding - NHS Continuing Healthcare

- Changes under Coronavirus Act 2020:
 - Duty to assess eligibility has been suspended – but note a CCG can choose to do so
 - The duty to ‘have regard’ to the National Framework for NHS Continuing Healthcare is suspended.
 - This means that where an NHS body agrees to complete an eligibility assessment or review, there could be variations in the way the assessment and decision-making process is undertaken between different CCGs.
 - Timescales for completing assessments & processing appeals are suspended. Will cause delays with appeals processes.
 - Backlog in assessments likely.

NHS Funding - NHS Continuing Healthcare

- What does this mean for paying for care?
- You still need to consider what forms of NHS funded care may be available when advising a client. It is, after-all, non-means tested and could make a huge difference.
- As the Financial Times article referred to in our [recent article](#) identifies, there is an expectation that Financial Advisors will consider the availability of statutory-funded care.
- Even though we are seeing delays in processing eligibility assessments or requests for reviews of decisions refusing to award NHS Continuing Healthcare, it is vital to lodge a request for an eligibility assessment or appeal with the responsible health body (Clinical Commissioning Group). Secure a place in the queue.

NHS Funding - NHS Continuing Healthcare

- What does this mean for paying for care?
- If your client privately funds care until such time as resources allow for the necessary eligibility assessment or appeal to be processed by a CCG, and subsequently it is agreed your client is eligible, it is possible to retrospectively recover care fees incurred through the NHS redress process with interest added.
- If your client receives a package of care temporarily funded by the NHS under the changes, ensure your client is aware that the non-means tested funding may be withdrawn upon review leaving them liable to fund care as a self-funder unless they satisfy means-testing rules for Local Authority funded care.
- In addition, keep very careful and detailed care records, diaries, intervention charts, or notes to start building up evidence to demonstrate the 'primary health need' criteria is met, in preparation for any future review or re-assessment.

More Information?

- The purpose of this webinar was to provide a quick overview of the changes.
- If you would like more detail, please visit our website which contains a number of useful articles & videos to download and share with colleagues, contacts & clients:
<https://www.lesteraldrIDGE.com/for-you/community-care/>.
- To be added to our Community Care mailing list to receive our newsletters and regular update alerts, please email James.Pantling-Skeet@LA-Law.com.
- If you have any client(s) you wish to discuss, please do not hesitate to get in touch.
- Future webinars to be provided explaining NHS Continuing Healthcare in detail and Mental Capacity.

Thank you for listening.



Visit: www.lesteraldridge.com/communitycare for more information

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