

The Coronavirus Act 2020 and its impact on disabled people

Catherine Casserley, Cloisters Chambers, and Chris Fry, solicitor, Fry Law, consider the implications for disabled people of the Coronavirus Act 2020 and the government's response to the pandemic. They outline how the Act and policy guidelines have impacted on disabled people, in particular by suspending local authorities' duties under the Care Act 2014. They highlight a range of legal challenges on potential indirect discrimination, failure to make reasonable adjustments or comply with the public sector equality duty. They conclude that, in the development of responses to the pandemic, the rights of disabled people have been an afterthought, if they were considered at all.

Disabled people – as with other minorities – appear to have borne the brunt of crises over many years. Austerity hit disabled people particularly hard; they have borne the brunt of cuts to social care, the imposition of changes to welfare benefits which left many isolated and without the means to support themselves, and have experienced a rate of unemployment higher than that of non-disabled people. The UN's Special Rapporteur on extreme poverty and human rights highlighted how the culmination of government policies had a significant impact on disabled people; at a press conference in November 2018 the Rapporteur stated that the UK government has inflicted 'great misery' on disabled people and other marginalised groups, with ministers in a state of 'denial' about the impact of their policies.¹

It is perhaps no surprise then that the government's response to Covid-19 has created particular concern for its approach to disabled people and the adverse effect that many aspects of the pandemic, and dealing with it, have had. This article considers the impact on disabled people – not only of the legislation itself but of the general response to the pandemic.

The Coronavirus Act 2020

The Coronavirus Act 2020 (the 2020 Act) passed through parliament extremely speedily. Its primary purpose was to give the government the power to deal with the pandemic by making regulations to impose what was known as 'lockdown' and to provide for, for example, statutory sick pay for reasons related to the pandemic, allow nurses and doctors to return to help with the hospital effort, and to make ancillary provisions.

However it also made significant changes to legislation specifically concerned with disabled people. One aspect

of those changes was to the Care Act 2014 (CA 2014).

The CA 2014 overhauled the provision of what was known as 'community care', setting out principles relating to wellbeing which inform the CA 2014 and the assessments under it.

S1 makes provision for an assessment of needs for anyone who appears to be in need of care and support. Once it appears that a person is in need, the duty to assess whether their need meets the eligibility criteria is mandatory. This applies also to carers (see ss9 and 10).

The eligibility criteria are set out in the Care and Support (Eligibility Criteria) Regulations 2015 (the 2015 Regulations). These provide that needs must be met if the needs arise from or are related to a physical or mental impairment or illness; as a result of the adult's needs, the adult is unable to achieve one or more of the specified outcomes; as a consequence there is, or is likely to be, a significant impact on the adult's wellbeing.

Similar criteria are set out in the 2015 Regulations in relation to carers. If the eligibility criteria are met, consideration must be given to how the needs are met; and s18 provides that the assessed needs must be met in prescribed circumstances; broadly – subject to residence, being under the cost cap or any charge meeting relevant pre-conditions; and financial considerations. S8 sets out how the needs may be met.

A local authority also has a duty to prepare a care and support plan setting out the details of how the person's needs will be met (ss24-25 CA 2014); and care plans must be kept under review and revised if the person's care and support needs have changed (s27 CA 2014).

Schedule 12 to the Coronavirus Act 2020, however, suspends a large part of the CA 2014 for those authorities which choose to do so, and where the relevant pre-conditions are met. The most significant of the provisions which can be suspended are:

¹ <https://www.disabilitynewsservice.com/un-poverty-report-uk-government-has-inflicted-great-misery-on-disabled-people/>

- ss8, 9 and 10 – assessment and meeting needs;
- regulations relating to assessments, and written records of assessment (and accordingly, s11 doesn't apply);
- s11 – refusal of assessment – does not apply;
- s13 – determination of whether needs meet the eligibility criteria) or any regulations made under that section;
- ss58 and 59 (assessment of a child's needs for care and support);
- ss60 and 61 (assessment of a child's carer's needs for support);
- ss63 and 64 (assessment of a young carer's needs for support);
- any regulations made under s 65(1) CA 2014 (further provision about assessments under ss58 to 64).
- s17 (assessment of financial resources) (subject to certain qualifications).

Critically, s18, meeting of needs, is amended so that it reads as follows (and see below in respect of this):

(1) A local authority must meet an adult's needs for care and support if—

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,

(b) the authority considers that it is necessary to meet those needs for the purpose of avoiding a breach of the adult's Convention rights, and

(c) there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met. In this subsection 'Convention rights' has the same meaning as in the Human Rights Act 1998.

Local authorities retain a **power** to carry out such assessments of need as they consider appropriate to determine whether services should be provided to a person. They also have the power to meet a person's needs (s19 CA 2014) but, **if they implement the easements**, they will no longer be required to meet needs under the CA 2014, or to prepare and review care and support plans. This applies regardless of whether the duty existed prior to the coming into force of the 2020 Act and whether or not the person is making a financial contribution.

There are also provisions relating to charging for meeting needs during the emergency period.

S18 of Schedule 12 to the 2020 Act gives the Secretary of State power to issue guidance which authorities must have regard to and comply with as the Secretary of State directs. There are separate, though similar, provisions in the 2020 Act for Wales.

Guidance on CA 2014 easements

The government has produced guidance to accompany the revisions to the CA 2014. *Care Act easements: guidance for local authorities*, May 20, 2020 (the guidance) sets out a process to be followed by those authorities which wish to implement the provisions.

In particular, s6 of the guidance states as follows:

A local authority should only take a decision to begin exercising the Care Act easements 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 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.

The guidance also sets out a detailed process for putting an easement into practice, including who should agree the decision to implement an easement and who should be involved and briefed; the detail of the record-keeping necessary; and who should be informed. The guidance states that:

- There should be a report of a decision to the Department of Health and Social Care when local authorities decide to start prioritising services under these easements, explaining why the decision has been taken and briefly providing any relevant detail. This should be communicated to CareActEasements@dhsc.gov.uk.
- Information received will be held and may be shared with the Care Quality Commission (CQC), the Association of Directors of Adult Social Services, the Local Government Association and other relevant parties. Details of which local authorities are operating under easements will be publicly available for transparency.

As well as providing a process for implementing the easements, the guidance also sets out the process to be followed when making changes to care – a staged approach should be applied, and appropriate consultation engaged in. Any decision taken to prioritise or reduce support must be reviewed every two weeks and a full service must be restored '*as soon as is reasonably possible*'.

The guidance also provides advice on carrying out alternative means of assessment (such as supported user self-assessment) and emphasises the obligation upon authorities to continue with their duties towards service users.

Implementation of the easements

According to the CQC's website last updated on June 1st, two local authorities were using the easements – Derbyshire County Council and Solihull Council. This contrasts with the position reported in Community Care magazine on April 30, 2020 that eight councils had taken advantage of the easements.² Some local authorities had faced legal challenges as a result of what was seen as a rush to implement easements without following the correct procedure and without the basis for implementation.

Derbyshire County Council later reversed its position following a legal challenge based on its failure to follow the guidance, leaving only one council operating the easements.³

Impact on disabled people's rights

These provisions have the potential to significantly undermine the provisions of CA 2014 at a time when social care and those in need of it has already suffered significantly as a result of austerity. The amended s18 of the CA 2014 sets a comparatively low bar for meeting care needs by referring to 'avoiding a breach of Convention rights'. It is acknowledged that challenging a decision on assessment of need is difficult on Convention grounds, as not only is the threshold for Articles 2 and 3 high, but resources will often weigh heavily in the context of a proportionality assessment for the purposes, in particular, of Article 8 (see *R (McDonald) v Royal Borough of Kensington and Chelsea* [2011] UKSC 33, [2011] HRLR 36).

McDonald was cited most recently in a decision regarding the attempt by a hospital to remove the defendant from her hospital bed and her challenge to the proposed care package on the basis of which she was being moved (*An NHS Foundation Trust v MB* [2020] EWHC 882 (QB)); in particular, the judgment repeated the words of Lord Brown in *McDonald*:

... 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'. [para 59]

2 <https://www.communitycare.co.uk/2020/04/30/eight-councils-triggered-care-act-duty-moratorium-month-since-emergency-law-came-force/>

3 <https://www.communitycare.co.uk/2020/06/09/just-one-council-left-suspending-care-act-duties-authority-subject-legal-challenge-returns-full-compliance/>

In addition to the impact on meeting needs, and the potential of the use of easements on assessing need, the easements will also create delay in conducting any assessment and the review of needs. This will result in the possibility of service users being faced with backdated charges for care assessed as needed during the Covid-19 period. This may affect in particular those who have additional needs following a stay in hospital due to Covid-19 infection and who have thus had to have a reassessment.

In addition to following the guidance, the Equality Act 2010 (EA) remains relevant, particularly in this context, the duty under s149 to have due regard to the elimination of discrimination, advancement of equality of opportunity and fostering of good relations. Authorities will need to have given consideration to these equality 'goals' in reaching any determination as to the easements (see *R (Bracking & Others) v SSWP* [2013] EWCA Civ 1345; Briefing 702 for a summary of the key principles, and confirmation that regardless of the fact that the decision relates to a specific protected characteristic, that alone does not mean that the duty will have been discharged).

Impact on care

The impact on care of the pandemic and provisions relating to it has been significant: in its May 28 2020 edition, Community Care reported on a broad survey it had carried out into the impact of 'pandemic operating conditions' on services provided to service users.⁴ It asked social workers very broadly whether they believed the coronavirus pandemic, or measures associated with it, had had a negative impact on people they provided services to.

The response was fairly damning, with 96% of people working in mental health, 88% in adult social care and 87% in children's services answering 'yes'.

Adult social care and mental health practitioners warned that being forced to stay at home, with some services suspended due to the need for social distancing, was fuelling clients' social isolation, ramping up distress and heaping pressure on carers.

In June 2020, the Disabled Children's Partnership reported⁵ that, amongst other things, parents reported an increased caring load, both for themselves and for their disabled children's siblings. Parents feel exhausted, stressed, anxious and abandoned by society. In 76% of cases, the support families previously received has now stopped. These are just some examples of the impact

4 <https://www.communitycare.co.uk/2020/05/28/social-workers-say-coronavirus-negatively-affected-services-people-they-support/>

5 LeftInLockdown- Parent carers' experiences of lockdown, June 2020

that disabled people are facing.

It is important to note, however, that authorities are not divested of obligations altogether and the guidance provides the framework in which they must approach these. It will be critical for users to remain vigilant and as well as monitoring the effects of the changes to s18 CA 2014, to consider whether an authority operating any easement has followed the guidance – organisations of disabled people have mobilised already to gather information on the impact of these changes.

Other legislative or policy changes impacting on the rights of disabled people

There have been other impacts upon disabled people of Covid-19 as a result of legislation which has been passed and/or practice and procedure which does not appear to have given consideration to the impact upon disabled people. The 2020 Act did not affect the EA, and the guidance on easements, for example, specifically refers to the obligations remaining on authorities to take these obligations into account.

The 2020 Regulations

The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the 2020 Regulations) came into force on March 26, 2020. These made provision for, amongst other things, the restrictions imposed upon the population of England, otherwise known as ‘lockdown’ – that no one could leave the place where they were living without reasonable excuse. Regulation 7 set out what the reasonable excuses were, one of which was to leave the house for exercise. The government produced guidance based on the 2020 Regulations which included a requirement that you could only go out once a day for exercise. A failure to adhere to lockdown was (and still is, although the circumstances for leaving the house have changed) punishable by means of a fixed penalty notice (Regulation 10).

A requirement to exercise only once a day, however, put disabled people who needed to leave their house more regularly at a disadvantage – for example, those with autism who needed to leave the house and had a routine of doing so, or those with mental health issues who needed to be outdoors.

Regulation 7 did not specify that leaving the house for exercise could only be done once a day – it stated that the house could be left ‘to take exercise either alone or with other members of their household’ – there was no limit on the number of times. As a result, legal action was threatened against the government on behalf of disabled people. It was argued that adults and children with certain health

conditions (including those with autism and mental health conditions) were disproportionately impacted by the inflexible policy which required everyone to only leave the house for exercise once per day, and which was therefore unlawful and discriminatory (potentially amounting to both indirect discrimination and a failure to make reasonable adjustments). The restrictions in the policy were also not reflected in Regulation 7 above and so were unlawful on that basis. The guidance was changed following the challenge so that it read instead:

You can leave your home for medical need. If you (or a person in your care) have a specific health condition that requires you to leave the home to maintain your health – including if that involves travel beyond your local area – then you can do so. This could, for example, include where individuals with learning disabilities or autism require specific exercise in an open space two or three times each day – ideally in line with a care plan agreed with a medical professional.⁶

NHS Visitors Guidance

NHS Visitors Guidance, issued in April 2020, prohibited visitors to hospital save in particular circumstances. These did not include where disabled people required carers or personal assistants who might be needed to assist them with their care in hospital. Again, legal action was threatened on the basis that this policy was in breach of the public sector equality duty contained in s149 EA, specifically in relation to disability, in that it failed to have due regard to the need to eliminate discrimination and advance equality of opportunity for disabled people. It was also argued that it was potentially discriminatory under ss19 and 20 EA (indirect discrimination and a failure to make reasonable adjustments).

As a result the guidance was amended in June 2020 so that it made provision for carers/supporters and personal assistants to accompany disabled people (they are no longer to be treated as additional visitors).⁷

Access to information

Access to information – or lack of – has been a recurring theme throughout the pandemic but more so for disabled people. Lynn Stewart-Taylor launched a campaign #where’stheinterpreter⁸ to highlight the fact that at the initial PM’s briefings from Downing Street regarding the virus and what the public should do in response to it, there was no BSL interpreter to impart the information

⁶ <https://www.bindmans.com/news/government-guidance-changed-to-permit-people-with-specific-health-needs-to-exercise-outside-more-than-once-a-day-and-to-travel-to-do-so-where-necessary>

⁷ <https://www.frylaw.co.uk/archives/articles/fleurs-challenge-to-the-nhs-visitor-guidance/>

⁸ <http://cfd.org.uk/where-is-the-interpreter-campaign/>

provided to the 80,000+ BSL users in England. Some time later, interpretation was provided via the BBC News Channel but there is still no live interpretation as there is in Wales, Scotland and Northern Ireland (the latter providing both Irish sign language and BSL) for the equivalent briefings.

Mass claims have been started on behalf of those deaf people who have not had access to information.⁹ In addition, on April 30, 2020 the Equality and Human Rights Commission wrote to the Prime Minister's Office asking the PM to reconsider the decision not to have a live interpreter at the briefings.¹⁰ The EHRC's letter drew the PM's attention to how essential an interpreter was to ensure deaf people were able to understand the information, and the '*potentially significant health or even criminal implications*' if that information was unclear or misunderstood. It is not known whether the EHRC has had a response to its letter.

Similarly, there is little information available in BSL on government websites; infographics on government's twitter feeds are not available in alternative formats for those who are visually impaired; printed coronavirus warning leaflets alongside a letter from No 10 Downing Street have been sent all households in the country, including to blind people in a format that they cannot access. These are also the subject of a number of challenges on the basis that there has been a failure to make reasonable adjustments in according with s20 EA – a duty which is anticipatory in nature.¹¹

Access to services

Many will have seen the chaotic scenes at supermarkets as the virus first began to spread, with empty supermarket shelves and crowded stores. As lockdown began, disabled people found it harder to access services that they had been reliant upon before the pandemic – such as online deliveries. One of the difficulties with the way in which the government has focused on those who are '*extremely clinically vulnerable*' is that it potentially provides another definition of disability – and one which is very different to s6 EA. Service providers may consider that they are complying with obligations to those who are disabled if they provide services to those on this list and neglect those who have needs because of their s6 disability.

9 <https://www.frylaw.co.uk/archives/articles/why-are-deaf-people-excluded-from-live-national-addresses-on-coronavirus/>

10 <https://www.equalityhumanrights.com/sites/default/files/letter-to-prime-minister-british-sign-language-bsl-coronavirus-briefings-30-april-2020.pdf>

11 <https://www.leighday.co.uk/News/Press-releases-2020/May-2020/Blind-woman-issues-legal-challenge-to-> and <https://www.frylaw.co.uk/archives/articles/second-discrimination-case-launched-against-the-pm/>

The Research Institute for Disabled Consumers has been monitoring the experiences of disabled consumers during the pandemic. It reports that disabled people have had concerns about obtaining food from supermarkets, with difficulties such as not being able to get a delivery at all because they are not on the government list, despite relying on deliveries for the past 13 years; having to queue for long periods to obtain entry to the shops when queuing is difficult; and waiting eight weeks before the supermarket would accept that they were shielding.¹²

Legal action has been mounted over some of the failures of service providers in these circumstances.¹³

Medical treatment

At the outset of the pandemic disabled people and organisations of and for disabled people were extremely concerned by guidance from the British Medical Association (BMA) and the National Institute for Health and Care Excellence (NICE) on treatment in respect of Covid-19, and particularly triaging. There were, in addition, reports of patients being pressured to sign *Do Not Attempt Resuscitation Notices*. This led to a statement by disabled people and their allies, and a response from NHS leaders in which they stated that the NHS will '*always seek to fully protect*' the rights of disabled people during the coronavirus pandemic.¹⁴

Nevertheless, concerns remain. NICE Covid-19 rapid guideline: critical care in adults published on March 20, 2020 and updated on April 29, 2020, encourages staff to use the Clinical Frailty Scale (CFS) in relation to decisions on whether to admit patients to intensive care units (ICU) only in the case of persons over 65. The Covid-19 rapid guideline flowchart provides that for a patient aged over 65, without stable long-term disabilities (for example, cerebral palsy, learning disabilities or autism), the CFS score should be used as part of a holistic assessment. CFS allocates a series of frailty scores to a person based on their report (or the report of others) of their needs. Above a score of five, there is little chance of ICU treatment being given to the person.

The BMA guidance, 'Covid-19: ethical issues; a guidance note' endorsed by NICE says that where the consequences of age or a pre-existing disability mean that the patient is significantly less likely to survive, these become relevant factors. It is not clear how the 'consequences' of age or disability are established. The

12 https://www.ridc.org.uk/sites/default/files/uploads/Research%20Reports/Covid19_050620/RiDC_Covid19_Survey3_Summary.pdf

13 <https://www.disabilitynewsservice.com/coronavirus-supermarkets-face-mass-legal-action-over-discrimination/>

14 <https://www.disabilitynewsservice.com/coronavirus-joint-action-from-disability-movement-secures-nhs-treatment-pledge/>

guidance moves from criteria related to the chances of survival, to using a criterion based on speed of recovery.

Though the guidance has now been amended so that it addresses the duty to make reasonable adjustments, the conclusion is that this duty should not substantially affect clinical decision-making governing access to such treatment under a ‘*capacity to benefit quickly*’ test. The view is described as ‘provisional’ (though no indication is given as to when this will be reviewed) and is on the basis that:

- the disability suffered by many disabled persons will have no relevance to their ability to benefit quickly from life-saving or life-sustaining treatment and thus no adjustment appears to be needed to deliver equality of access; and
- where a person’s disability does, or may have, some relevance to their ability to benefit quickly from life-saving or life-sustaining treatment, as far as the BMA is aware, there is no clear body of clinical evidence which could set out the nature or extent of the adjustments to make it fairer in representing a proper balance between the interests of disabled and non-disabled persons.

It remains unclear how detailed a consideration has been given to this duty, and on what basis the conclusions have been reached.

In addition, the guidance also includes the potential for both direct and indirect discrimination on the basis of age and disability. Whilst the pressure of the pandemic may now have receded, it may come into play if there is a second wave. For further discussion of the legal implications see Resuscitation and the value of a disabled person’s life: Triaging and Covid-19.

Conclusion

This article has outlined only some of the issues which have arisen over the past few months. It does not touch on other very significant issues such as deaths of those with learning disabilities, an already extremely marginalised group; nor the lack of personal protection equipment for those who are shielding with carers; nor the most recent conclusion by the Office for National Statistics that disabled women are 2.4 times more likely to die from the virus than non-disabled women. Some other issues just emerging include, for example, issues relating to track and trace, and in particular the accessibility of the testing system which has been rolled out. In this regard, a number of disability activists have prepared an open letter to the NHS questioning it and Public Health England about disability access to the track and trace and testing system.¹⁵ Inevitably, as the response to

the pandemic brings new challenges, other issues will doubtless emerge.

The pandemic and reaction to it may have brought some benefits – for example, home working may benefit disabled people to some extent, and the apparent ease with which this adaptation has been made will undoubtedly assist requests of this nature in future.

However, in many areas, disability has been an afterthought, if it has been considered at all. In the public sector, it is not clear that the s149 equality duty is being complied with as it should, regardless of the urgency of the necessary response. Its consideration is critical in ensuring that disabled people are not left isolated and disadvantaged by rapid changes which do not take their needs into account.

On March 30, 2020 the Women and Equalities Committee launched its inquiry into the impact of Covid-19 on people with protected characteristics; subsequently, and perhaps unsurprisingly, it launched three sub-inquiries, including one on disability and access to services. This sub-inquiry is looking at access to food, health, social care and education. It is also considering how the government could improve its communications and consultation with disabled people about guidance and policies which are having substantial effects on their daily lives. Submissions can be made up until July 13, 2020.¹⁶

If there is a broader public inquiry into government responses, it is critical that the impact upon disabled people specifically must be taken into account.

On a positive note, it is obvious that when innovative changes such as the establishment of online systems need to be done quickly – they can be. This should mean that in the future, if reasonable adjustments need to be made to, for example, information systems, the speed of response in these times can be used as an example of what can be done with commitment and a willingness to respond to the need.

But disability discrimination legislation has now been in place since 1995 – 25 years. Disability and the need to make adjustments where necessary should be built into the fabric of our society; resources necessary to support disabled people should be seen as enabling society to function equitably and, to that end, disability and the needs of disabled people should be embedded in the mindset of decision-makers, both in the public and the private sector. The pandemic and the processes and procedures associated with it have exposed even more crudely that this is far from the case. This cannot, and should not, continue.

¹⁵ <https://twitter.com/natalyadell/status/1268641910555660299>

¹⁶ <https://committees.parliament.uk/call-for-evidence/168/unequal-impact-coronavirus-disability-and-access-to-services/>