

The Coronavirus Bill – Social Care implications

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Please note: the information contained in this legal update is correct as of the original date of publication

The Delay phase of the Government's coronavirus response plan anticipated a need to take steps to support health and social care systems, including steps to preserve essential services by reducing some others. The Coronavirus Bill was laid before Parliament on 19 March 2020.

The Bill itself will confer powers for measures to be brought in at a later date. Therefore, in most domains change will not be immediate, though we expect it to be rapid.

What risks are being addressed?

The Bill as it relates to social care is particularly aimed at addressing the twin challenges of:

- -Increased need for care, particularly among vulnerable groups, through infection, indirect effects on health provision and self isolation
- A depleted social care workforce, due to illness, self isolation and personal caring responsibilities.

The Bill does not do a great deal to address 'process' requirements running through social care, such as the operation of the family courts and court of protection, the impact of self isolation on DOLS authorisations, and fostering and adoption.

The measures relating to Social Care

The Bill will

- Amend the Care Act 2014 and Social Services and Well-being (Wales) Act 2014 to allow local authorities to prioritise services, though this may mean that others' assessed needs are not met in full, or assessments are delayed. The Bill does not do a great deal to address 'process' requirements running through social care, such as the operation of the family courts and court of protection, the impact of self isolation on DOLS authorisations, and fostering and adoption.
- Enable emergency registration of social workers
- Ease or remove of time limits in mental health legislation, to allow services greater flexibility, if required to ensure continued safe running of mental health services.
- Providing powers to the Secretary of State and Welsh Ministers to close schools and childcare providers, or to require them to continue to provide their service, which are currently being exercised to close schools to all but children whose parents are classed as key workers.

Use of video and audio links for court proceedings is to be expanded, though the Bill only extends this to criminal and magistrates courts.

The Bill will also enable employees to take Emergency volunteer Leave, with the guidance noting that volunteers place a crucial role in the delivery of health and social care services. Press briefings suggest this is particularly targeted at enabling existing volunteers in health, community health and care to commit additional time to their voluntary role.

Prioritisation of Services (England)

The Care Act 2014 is modified by section 14 and schedule 11 to free local authorities of certain of their duties, including those relating to:

- assessments of adults in need of care and support, and children expected to have such needs on attaining 18, or carers of such adults or children, including eligibility assessments.
- Section 17 assessments of financial resources (though it limits the ability to charge for services in the absence of an assessment)
- the duty under section 18 of the Care Act to meet needs for care and support satisfying the eligibility criteria, unless it is necessary to meet those needs to avoid a breach of the adult's human rights.
- Care plans under sections 24, 25 and 27 of the Care Act
- Notification and assessment duties when a person moves between local authority areas

Schedule 3 to the Care Act is also modified so that following receipt of an assessment notice in relation to a discharged patient, a local authority will be required to inform the NHS body responsible which of the patient's needs it intends to meet (rather than which meet the eligibility criteria). This reflects the amendments to duties, but will mean that discharges happen where it is known assessed needs will not be met.

Provisions are made in relation to readjustment following the end of an emergency period, including undertaking assessments which did not take place during the period of emergency, notifications of adults who have moved, and charging for meeting needs during the emergency period.

Prioritisation of Services (Wales)

Amendments are made to the Social Services and Well-being (Wales) Act 2014, with a view to achieving a similar position to that under the Care Act.

These include relieving local authorities of duties relating to:

- Assessment of needs of adults for care and support, to assess carers for support, or to determine whether needs meet the eligibility criteria.
- Assessment of financial resources under section 63(2), though charging powers are limited where an assessment has not taken place.
- The duty under section 35(3)(a) to meet an adult's needs where they meet eligibility criteria. Section 40(3) in relation to the duty to meet support needs of an adult carer is also amended. The result is that for both adults and adult carers, a duty to meet care and support needs only arises where it is considered necessary to meet those needs to protect the individual from abuse or neglect or the risk of abuse or neglect.
- Care and support plans under section 54
- portability of care and support under section 56.

Provisions are made in relation to assessments, including charging assessments, after the expiry of the emergency period.

Registration of social workers

The Government briefing published prior to the bill indicated it would include provision for re-registration of social workers who had recently left the profession.

Section 5 and Schedule 4 of the Bill will make amendments to the Social Workers Regulations 2018 and the Regulation and Inspection of Social Care (Wales) Act 2016 in order to facilitate registration of individuals or groups (within which individuals need not be identified) as social workers where:

1. the Secretary of State in England or Welsh Ministers in Wales advise that an emergency has occurred, and ask Social Work England ('the regulator'), or the Care Inspectorate Wales ('the registrar') to consider registering such individuals or groups, and
2. The regulator or registrar considers the person or group meet criteria of being fit and proper people, and suitably experienced, with regard to the emergency.

Conditions of registration may be imposed on either individuals or on a group registered in this way, and rules and guidance may be issued. The Bill will permit the regulator (but not the registrar under the Social Care (Wales) Act 2016) to do "anything which appears to it to be necessary or expedient for the purpose of or in connection with its functions under the regulation"

Registration appeals are not permitted in relation to decisions under these powers.

Individual or group registration may be revoked at any time and must be revoked if the Secretary of state or Welsh Ministers advise the emergency situation has come to an end.

The provisions will permit re-registration of those who have recently been social workers, but are much broader. Importantly, the ability to consider the experience requirement with reference to the prevailing emergency situation may allow individuals or groups with a focused skillset of relevance to the current outbreak to be registered.

Emergency Volunteering Leave (EVL)

Section 7 and Schedule 4 will permit any “appropriate authority” including county councils, district councils for areas with no county council and London borough councils to issue an “emergency volunteering certificate” for a period of 2, 3 or 4 weeks to a worker they have approved as an emergency volunteer in health or social care. Exceptions at paragraph 3 of the schedule protect small businesses and certain other organisations from being required to release workers for EVL.

The Schedule sets out protections for workers taking EVL in relation to their terms and conditions of employment, benefits and right to return. The Employment Rights Act will be modified to prevent discrimination on the basis of having taken or being thought likely to take EVL.

Indemnity

The Bill empowers the Secretary of State in relation to England or Welsh Ministers in relation to Wales to indemnify or arrange indemnity in relation to ‘qualifying liabilities’ arising from ‘relevant services’.

While the earlier briefing on the Bill suggested such an indemnity may be limited to clinical negligence, the Bill is in fact drafted in broader terms. The liabilities in respect of which the power will apply are only those arising in tort in relation to death injury or loss arising out of or in connection with a breach of a duty of care owed in connection with the provision of certain services, after the section comes into force. This will not encompass human rights claims.

The services in relation to which the provisions apply include caring and treatment of those diagnosed with coronavirus or suspected of being infected, and also other diagnostic, care and treatment services provided because those usually providing the service are either responding to the epidemic or themselves unable to do so through coronavirus.

However, the provision is limited to services provided “as part of the health service”, therefore does not extend to social care provision, save possibly where social care staff become involved in supporting health provision due to staffing issues in health. The provisions are also discretionary, with decisions as to whether a person qualifies for an indemnity and the amount of the payment to be determined by the Secretary of State or Welsh Ministers.

Implementation

The powers to be conferred on local authorities will permit significant departures from ‘business as usual’ social care provision in their areas, in order to enable a focused emergency response to the coronavirus pandemic, which will likely be coordinated through Local Resilience Forums in most cases.

However, the Bill leaves implementation, including such potentially controversial decisions as prioritisation of care services and keeping schools open, to individual authorities. Decision making itself is being affected by the pandemic and the potential for decisions to be challenged is significant.

Though the Government briefing identifies a need to address what we have termed ‘process’ requirements, it does little to address these in social care. Lawyers in Local Government is seeking to identify these concerns (both in the social care context and beyond) in order to seek solutions to them, with Government.

Beyond Covid-19

What has yet to be addressed by the Bill or the briefing which preceded it, but decision makers will have to grapple with, is the long-term impact of emergency measures on service provision, service users, vulnerable children and adults.

Guidance

Risks in relation with implementation of the powers granted by the Bill, including on the future functioning of services, could be mitigated by further guidance. The Delegated Powers Memorandum accompanying the Bill identifies that the Government and Welsh Assembly may wish to make guidance on how to 'operationalise' the changes under the Bill and goes further to suggest that the Secretary of state and Welsh Ministers may need to be able to direct local authorities to comply with any such guidance.

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