

COVID-19 and the Care Act 2014

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Social care is a system, [providing daily living assistance to disabled and elderly people](#), that was [already](#) overstretched and struggling to secure the dignity of its users in the context of increasing need and a disputed funding model before the coronavirus arrived. The impact of COVID-19 has been [devastating](#).

A concrete legal reaction has been to ease the social care duties owed by local authorities under the [Care Act 2014](#) in response to the pandemic. It is both striking and controversial that those already modest duties were attenuated five years after their introduction, and at a time of crisis when demand will obviously [remain high](#) and more informal sources of support for disabled people are at risk.

The name given for this process of attenuating a Care Act duty in the [guidance](#) is an 'easement', which is an unusual use of a [Land Law term](#). [Schedule 12 of the Coronavirus Act 2020](#) lists a host of duties under the Care Act and related regulations with which local authorities in England no longer have to comply. These include duties to assess an [adult](#) or a [carer's](#) need for care and/or support, and to determine whether someone's needs meet the Act's [national eligibility threshold](#). These provisions do not actually prevent a choice to carry out a needs assessment. But overall, local authorities' discretion is increased. The reality is that before the 2020 Act, [local authorities had considerable effective discretion](#) about which needs to meet despite the national eligibility threshold. Now they will have discretion over whether even formally to *assess* needs.

[Schedule 12](#) provides that a local authority's duty to *meet* a need for care and support under the Care Act is limited to situations where the authority considers it necessary to meet those needs to avoid a breach of the adult's [European Convention](#) rights. At first sight, this might provide some reassurance, purporting to ensure a minimum standard of protection for disabled people despite the pandemic. The [statutory guidance](#), moreover, emphasises that the 2020 Act does not give authority to withdraw whole services.

But any optimism must be qualified, since the protection provided by the Convention is limited at the best of times. This is illustrated by the case of [Elaine McDonald](#), who had help to reach a commode at night withdrawn such that she was forced to rely on incontinence pads, despite not being medically incontinent. [Subject to the local authority's procedural obligations](#), the substance of the local authority's decision there was held not to breach Ms McDonald's right to respect for her private life under Article 8. A breach of that right [might not be found](#) in this context unless it amounts to a breach of the rights to be free from torture, or inhuman or degrading treatment for the purposes of Article 3, which [carries a high threshold](#). So the 2020 Act's safeguarding of Convention rights may not provide much comfort to disabled people worried about maintaining their dignity at the present time, even if [it is unclear that the national eligibility threshold would have helped Ms McDonald](#).

As for the length of time that the situation will last, the [basic principle](#) is that the 2020 Act will expire two years after it was passed, in March 2022. That principle is [immediately undermined](#) by the fact that the Act's application can either be terminated early or extended for up to six months at a time by regulations. But perhaps there is no real alternative in contemporary conditions. It must be acknowledged that the present crisis involves a lot of unknowns and that extraordinarily difficult decisions will almost inevitably have to be made. The social care system was stretched before the

pandemic hit and issues such as care workers needing to self-isolate or falling ill themselves are likely to make matters even more difficult.

[Anecdotally](#), many care workers are going to considerable lengths to try to maintain a high quality of life for the people they support. The Government's [statutory guidance](#), moreover, makes clear that local authorities should do everything they can to continue meeting their pre-existing duties. When they're unable to do so, they are urged to follow a structured and fully informed decision-making process before taking advantage of the Act's relaxations. There is a notification procedure for doing so. At one time, at least [seven](#) or [eight](#) local authorities had formally triggered the provisions. While that has [recently reduced to one](#), there are suspicions that more are doing so informally, and any 'second wave' could cause a subsequent increase in reliance on the provisions.

The purpose of the so-called easements is to enable local authorities to streamline and prioritise so that the most urgent and acute needs are met. It is arguable, moreover, that a failure to allow a local authority the flexibility to prioritise in the context of scarce resources could have made matters worse, by encouraging formalistic compliance. But the [guidance](#) is not straightforwardly binding, and it is necessary to keep a watchful eye on legal limits that the state imposes on its duties to meet the needs, and ensure the dignity, of people who require support in order to lead fulfilled lives.

While it is easy to be bleak about social care's future, there is a chance that, analogously with the NHS, the present crisis will cause society properly to realise that social care needs to be adequately and fairly funded and both its users and its workers properly valued. Such aspirations, however, still seem a long way from being realised.

Recommendations:

- 1. Repeal the so-called 'easements' of local authorities' duties under the Care Act 2014 as soon as is feasible.**
- 2. Reconsider reliance on European Convention on Human Rights to provide a minimum level of protection for social care users, given their limited effectiveness in this context, and add a duty to protect from a risk of abuse and neglect.**
- 3. Establish an emergency cross-party working group to produce a White Paper setting out draft new legislation to ensure that social care is adequately, fairly and sustainably funded to ensure the dignity of its users and workers.**