The Coronavirus Act – implications for education, social care and mental health

2nd April 2020

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Changes to the Care Act 2014

- Section 15 and Schedule 12 CV Act
- In force from 31 March
- Similar but not identical to changes in Wales
- NB – see also section 14 re CHC
  - No duty to carry out CHC assessments
  - No duty to have regard to the National Framework

Changes to the Care Act 2014

- In essence, CV Act downgrades Care Act duties to powers
  - LAs not prevented from doing anything they do currently, but no longer required
- Key areas where duties no longer apply
  - Assessment
  - Meeting needs
  - Care and support planning
  - Transition to adulthood

Changes to the Care Act 2014

- <u>Assessment</u>
  - No longer a duty to assess disabled adults or their carers (or carry out transition assessments)
  - Power to assess in every case
  - Is there an implicit requirement to assess to comply with (i) common law principles of rationality and / or Human Rights Act (particularly Article 8 ECHR)?

Changes to the Care Act 2014

- <u>Meeting needs</u>
  - No longer a duty to meet the needs of disabled adults or carers UNLESS
    - LA considers that the failure to meet needs would result in a breach of a Convention right
  - Power to meet needs in every case
  - May be circumstances where refusal to exercise this power is unlawful at common law?

Changes to the Care Act 2014

- <u>Care and support planning</u>
  - No longer a duty to prepare a care and support plan
  - If care and support plan reviewed, still a duty to involve the person concerned
  - Article 8 ECHR and / or common law may require appropriate degree of involvement of disabled person / carer in planning care

Changes to the Care Act 2014

- <u>Transition to adulthood</u>
  - No longer a duty to carry out transition assessments for disabled young people, adult carers or young carers
  - No longer a duty to continue to provide children's services
  - Again – would common law or Article 8 ECHR require an appropriate transition process from children's to adult social care?

Care Act 2014 – what remains?

- Provisions <u>not</u> modified by CV Act 2014 include:
  - Well-being duty (s 1)
  - Market shaping duty (s 5)
  - Duties in relation to advocacy
  - Safeguarding duties

New guidance

- Refers to Care Act ‘easements’…
- ‘… ensure the best possible care for people in our society during this exceptional period’
- Las should ‘do everything they can to continue meeting their existing duties prior to the Coronavirus Act….’
- Incorporates ‘Ethical Framework’

New guidance (cont)

- LAs ‘still be expected to respond as soon as possible (within a timeframe that would not jeopardise an individual’s human rights) to requests for care and support, consider the needs and wishes of people needing care and their family and carers, and make an assessment of what care needs to be provided.’

New guidance (cont)

- LAs ‘still be expected to carry out proportionate, person-centred care planning which provides sufficient information to all concerned, particularly those providing care and support, often at short notice. Where they choose to revise plans, they must also continue to involve users and carers in any such revision.’

New guidance (cont)

- LAs ‘will still be expected to take all reasonable steps to continue to meet needs as now. In the event that they are unable to do so, the powers will enable them to prioritise the most pressing needs, for example enhanced support for people who are ill or self-isolating, and to temporarily delay or reduce other care provision.’

New guidance (cont)

- BUT statutory basis of guidance…
  - Para 18 of schedule 12
  - Guidance currently only ‘have regard’ guidance
  - SoS has power to direct compliance with the guidance
  - But guidance to a public body must not direct it to apply a different test to that laid down by the relevant legislation (*R (Girling) v Parole Board* [2006] EWCA Civ 1779

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Changes to the Care Act – human rights considerations

- **Local authorities do not have automatic free rein**
  - Must be necessary to introduce the new regime
  - Must be consultation with NHS/Health and Wellbeing Board and notification to DHSC
  - With written reasons for area and individual decisions
  - Non regression and formal derogation
- **Context is everything**
  - Circumstances of the individual/family changed by lockdown
    - Restrictions on movement – increases State obligations
    - Lack of resources – increases individual need
    - Safeguarding – the duty to investigate and intervene
    - Gaps between services and interim obligations
- **HR can change a power back to a duty**
- **Fair balance with community needs**
- **Importance of the rule of law**

Changes to the MHT

- Judges sitting alone and remotely
  - Loss of connection with patient
  - Loss of professional insight of other members of MHT (even if the Judge decides to call)
  - Difficulties in assessing patient's life in hospital – increases risk of abuse particularly
- Article 6 still complied with given its importance in the context of Article 5?
  - Justice seen to be done?
- Long term consequences

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SEND changes

- <u>Not yet in force</u>
- Schedule 17, para 5(1) – SoS must make a notice to disapply or modify provisions
  - Notice must state why appropriate / proportionate
- Notice can
  - Disapply duty to admit (CFA 2014 s 43)
  - Modify duty to secure provision (s 42) into ‘reasonable endeavours’ duty

Mental Health Act changes in the Coronavirus Act

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s.2 and s.3 MHA 1983

- Only a single medical recommendation necessary if getting two ***is impractical or would involve undesirable delay***

- Must have written record in support of any such decision
- Must have personally examined the patient **but** no need to have any previous acquaintance with them

s.5 MHA 1983

- Anyone can write a s.5(2) report, not just the AC if it would be ***impractical or would involve undesirable delay***
- Period of detention under s.5(2) increased from ***72 to 120 hours.***
- Period of detention under s.5(4) increased from ***6 to 12 hours***

Criminal justice system

- Remand to hospital for report or treatment no longer has a time limit of 12 weeks (s.35(7) and s.36(6))
- Court orders and transfer directions can be by one medical practitioner instead of two.
- Relaxation of time limits for actually implementing orders

s.136 MHA 1983

- Period of detention up to ***36 hours from 24 hours***

Administration of medicine

- **Decision to give medicine without consent for period of more than 3 months can be taken by the RC without a second opinion if it would be *impractical or would involve undesirable delay***
- **The RC has to consult with only 1 other person, not 2 if it would be *impractical or would involve undesirable delay***
- **That person**
  - must have been professionally concerned with the patient's medical treatment, and
  - must not be a nurse, a registered medical practitioner, the responsible clinician or the approved clinician in charge of the treatment in question.

Issues

- What counts as ***impractical*** or ***undesirable delay*** in the context of Article 5?
- What about other problems such as inability to comply with the Code of Practice due to absence of resources
  - Segregation reviews, face to face assessment etc

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Thank you for watching

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