



House of Commons
Women and Equalities
Committee

**Unequal impact?
Coronavirus, disability
and access to services:
interim Report on
temporary provisions
in the Coronavirus Act:
Government Response
to the Committee's First
Report**

**Second Special Report of Session
2019–20**

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Women and Equalities Committee

The Women and Equalities Committee is appointed by the House of Commons to examine the expenditure, administration and policy of the Government Equalities Office (GEO).

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Committee staff

The current staff of the Committee are Hannah Barlow (Committee Operations Manager), James Clarke (Committee Specialist), Holly Dustin (Committee Specialist), Chloe Freeman (Committee Specialist), Mariam Keating (Committee Specialist), Anwen Rees (Acting Clerk) and Saffron Stewart (Committee Support Apprentice).

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Second Special Report

The Committee published its First Report of Session 2019–21, *Unequal impact? Coronavirus, disability and access to services: interim Report on temporary provisions in the Coronavirus Act* (HC 386), on 25 September 2020. The Government response was received on 11 January 2021 and is appended below.

Appendix: Government Response

Summary

1. This memorandum sets out the Government's response to the Women and Equalities Select Committee's (the Committee's) interim report on temporary provisions in the Coronavirus Act and the use of these for disabled people.
2. It considers the recommendations made by the Committee in relation to three measures introduced under the Coronavirus Act 2020: Care Act easements, changes to the Mental Health Act and modifications to education, health and care (EHC) needs assessment and plan processes.
3. The Government welcomes the Committee's interim recommendations as well as the wider inquiry into the impact of Covid-19 for disabled people. Several actions (outlined in full below) have been taken to achieve an appropriate balance between responding to the pandemic and ensuring that disabled people have access to the services they need. This includes ensuring transparency regarding Care Act easements, removing Mental Health Act provisions from the Coronavirus Act and deciding not to renew the modification notice regarding EHC assessments.

Introduction

4. On 25 March, the Coronavirus Act 2020 received Royal Assent and became law. The Coronavirus Act introduced measures to ensure Government could take the right action at the right time to respond effectively to the pandemic.

Care Act easements

5. The Care Act easements were introduced under the Coronavirus Act as a tool to reduce the operational burden on local authorities and, where necessary, to allow them to reprioritise resource to meet the most urgent and acute needs during the pandemic.
6. If implemented, the Care Act easements relax some duties on local authorities and allow them to streamline assessments, charge for care and support retrospectively, prioritising care and support more effectively than is possible under the Care Act 2014.
7. Care Act easements should only be used when absolutely necessary and they do not remove many other duties provided for in the Care Act 2014 such as those relating to wellbeing, advocacy and safeguarding. Where they are used, local authorities remain under a duty to meet needs where failure to do so would breach an individual's human rights under the European Convention on Human Rights.

Mental Health Act changes

8. The emergency changes to the Mental Health Act were designed to only come into force if the mental health sector was experiencing unprecedented resource constraints as a result of responding to the pandemic, which would result in patients' safety being put at significant risk. No authorities have used them and on 8 December 2020, they were repealed from the Coronavirus Act.

Education, Health and Care plans

9. At the height of the pandemic, we changed temporarily two aspects of the law on education, health and care (EHC) needs assessment and plan processes:

- Issuing three notices under the Coronavirus Act 2020 to modify the duty on local authorities and health commissioning bodies to secure or arrange the special educational and health provision specified in EHC plans, so that they could discharge this duty by using their 'reasonable endeavours'. The notices were in force for the months of May, June and July 2020, with the final notice expiring on 31 July 2020.
- Amending the Regulations that set out various timescales for SEND processes, principally for EHC needs assessments and plans. These changes were in force from 1st May to 25th September 2020. Full details of the amendments to Regulations are available here: <https://www.gov.uk/government/publications/changes-to-the-law-on-education-health-and-care-needs-assessments-and-plans-due-to-coronavirus/annex-a-details-of-the-amendments-to-the-existing-regulations>

10. These changes were intended to balance the needs of children and young people with SEND with the ability of local authorities, education and childcare settings and health services to respond flexibly to the pandemic.

Government responses to the Committee

Care Act Easements (Paragraph 18): WESC conclusion: We were unable properly to scrutinise the effects of Care Act easements on disabled people because there are no published data, for example on the number and categories of people, or the types of social care services, affected.

Care Act Easements (Paragraph 18): WESC recommendation: *The Government must demonstrate that it is keeping local authorities' use of Care Act easements under thorough review and allow for proper scrutiny of data on the effects on disabled people. We welcome the Government's commitment to publishing Think Local Act Personal's report on the effects as part of the six-monthly review process. We urge the Government to ensure the report and all the accompanying data are published before the forthcoming six-monthly review and vote in the House, and each subsequent six-monthly review debate and vote, on temporary Coronavirus Act provisions, so that they can be used to inform the debates.*

11. The Government has been very clear that Care Act easements should only be used when absolutely necessary. To date, only eight local authorities out of 151 with social service responsibility have used easements to ensure they are able to meet the most urgent and acute care and support needs. There are currently no local authorities operating under easements.

12. Think Local, Act Personal (TLAP) published their findings 'A Telling Experience: Understanding the Impact of Covid-19 on People who Access Care and Support – A Rapid Evidence Review with Recommendations' on 13 October 2020. The report is available here: <https://www.thinklocalactpersonal.org.uk/covid-19/tlap-insight-group/TIG-report/>

13. With the data available, it was not possible to reach a clear conclusion regarding the specific impact of Care Act easements for people who access care and support. Impact data highlighted the difficulties of attributing change to Care Act easements directly, as opposed to the wider impact of Covid-19.

14. The Department of Health and Social Care (DHSC) will continue to work with Think Local, Act Personal (TLAP) and the Association of Directors of Adult Social Services (ADASS) to understand the impact of Covid-19 for those with care and support needs.

15. DHSC's Chief Social Workers regularly engage with the social care sector through the Adult Principal Social Workers (PSW) Network and have used this network to understand the rationale for easements being taken in specific geographies. These conversations have shown that all local authorities are engaging with individuals, following the guidance on Care Act easements, and that the Ethical Framework for Adult Social Care is being embedded in practice. The Ethical Framework was published on 19 March to support the planning and organisation of adult social care during the pandemic outbreak.

16. The Chief Social Workers are content that the Care Act easements have been used appropriately and that every consideration was given to the impact on individuals with care and support needs in the local authorities that used the easements.

Care Act Easements (Paragraph 26): WESC conclusion: We acknowledge that steps have been taken towards greater transparency in the Care Act easement process, notably the publication of an updated list of local authorities using the easements; however, we believe this falls short of a proportionate level of transparency and accountability. The current process is not stringent enough to provide confidence that easements cannot be triggered for anything other than severe demand or resource issues caused by the pandemic. As such, it is impossible to scrutinise whether easements are being mis-used.

Care Act Easements (Paragraph 26): WESC recommendation: We recommend guidance to local authorities on use of Care Act easements be updated to state that local authorities should keep a record of the reasons for their decisions and the anticipated effects on people and services, as set out in the current guidance but omitting the phrase "where possible". Local authorities should in all circumstances keep such a record. We recommend the guidance be updated to state that local authorities should publish the information contained in the record prior to notification to the Department for Health and Social Care. We further recommend the guidance be updated to state explicitly that pre-emptive triggering of easements prior to publication of the decision record would be a misuse of the provisions, leaving local authorities open to legal challenge.

17. On 1 September, DHSC published revised guidance and further explanatory guidance for councils, addressing frequently asked questions and building on lessons learned from the first wave. The guidance includes a notification form and asks local authorities to alert the Department when they plan to start operating under easements. It is available here: <https://www.gov.uk/government/publications/coronavirus-covid-19-changes-to-the-care-act-2014/care-act-easements-guidance-for-local-authorities>

18. If a local authority decides that Care Act easements are absolutely necessary, they are expected to record the decision-making process and reasons that led to this decision. This includes in relation to:

- Demand for services and workforce capacity
- The steps taken to mitigate the need for easements
- The expected impact of the measures being taken
- Those involved in the decision-making process
- When the decision will be reviewed

19. The guidance also notes that the decision should be communicated to all providers, service users, carers and local MPs.

20. The changes to the Care Act 2014 duties on local authorities are kept under regular review which includes engagement with stakeholders on any changes that may need to be made to existing guidance.

Care Act Easements (Paragraphs 34 and 35): WESC conclusion: Had the pandemic been more clearly under control, we would have recommended repeal of the Care Act easements at the first six-monthly review. However, the current precarious state of the pandemic, combined with the fragility of the social care system, makes repeal a finely balanced judgement call. Throughout the peak of the pandemic earlier this year, only around five per cent of English local authorities triggered easements to their Care Act duties, and none have been relying on them since early July. There is, however, considerable uncertainty about how the virus might progress through the autumn and winter and what the effects might be on local authorities' capacity to cope with social care demand.

Care Act Easements (Paragraphs 34 and 35): WESC recommendation: On balance, and subject to our other recommendations to tighten guidance and increase transparency being implemented, we accept that the Care Act easement provisions may need to remain in place over the winter period. The Government should keep the need for the Care Act easement provisions under constant review over the autumn and winter. It should use its power to suspend them immediately should it become clear that a second peak of the virus has been avoided. Should the progress of the pandemic remain stable or improve, we recommend the provisions be repealed before or at the second six-monthly review in Spring 2021. We recommend the Government state publicly that it intends to take this approach. This would provide greater clarity, and some reassurance, to disabled people and be an important marker of the Government's determination to fully restore disabled people's absolute rights to the care and support they need.

21. The changes to the Care Act 2014 duties on local authorities will be kept under regular review and the Secretary of State will take a decision to suspend them based on expert clinical and social care advice, including findings of the Chief Social Workers, in accordance with the Coronavirus Act 2020.

22. The provisions in the Coronavirus Act are subject to a six-monthly review and renewal vote in the House of Commons. They may be terminated early, if the scientific assessment of the pandemic indicates that this is appropriate. They are also subject to a two-monthly report to Parliament and an annual debate.

23. The Adult Social Care Winter plan published on 18 September sets out the clear and robust steps we are taking to ensure the sector is prepared for winter, and that we protect people who need care, such as disabled people. The full plan is available here: <https://www.gov.uk/government/publications/adult-social-care-coronavirus-covid-19-winter-plan-2020-to-2021/adult-social-care-our-covid-19-winter-plan-2020-to-2021>

Mental Health Act (Paragraph 45): WESC conclusion: The Coronavirus Act's emergency changes to the Mental Health Act 1983 were intended for use as a last resort should mental health staff resources be depleted by the pandemic to the extent that people needing assessment or detention in hospital become a risk to themselves or others. These provisions have not come into force in England because, through the peak of the pandemic earlier this year and to date, existing processes have proved sufficiently robust and adaptable to make them unnecessary. In these circumstances, Ministers have the power to suspend the measures and, if absolutely necessary, reinstate them at a later date. While we acknowledge that the current precarious stage of the pandemic means that the future is uncertain, evidence suggests the measures are unlikely to be needed. Furthermore, relaxing requirements for authorising people's detention in hospital and extending or suspending time limits for detention goes directly against the grain of much-needed Mental Health Act reform. This is intended to address inequalities in the existing system, as set out in the final report of the Independent Review of the Mental Health Act 1983 in December 2018. This adds impetus to the call for the emergency powers to be curtailed as soon as possible. They should not be left available "just in case".

Mental Health Act (Paragraph 45): WESC recommendation: We recommend the Government should, as a minimum, if not repeal the provisions, use its power to suspend the Mental Health Act provisions in England by Regulations and only reinstate them should mental health service providers call for their reintroduction. This would send an important signal of the Government's support for a more just and equitable system, while leaving open the possibility of reinstating emergency measures should they be needed. Should the progress of the pandemic remain stable or improve, we recommend repeal of the measures at or before the next six-monthly review in Spring 2021. We further recommend the Government prioritise Mental Health Act reform; it should indicate in its response to this Report when it intends to bring forward its long-awaited White Paper.

24. On 30 September 2020, the Secretary of State for Health and Social Care announced that Mental Health Act provisions will be removed from the Coronavirus Act 2020. On 8 December 2020, they were officially repealed in legislation.

25. Throughout the pandemic, the Department of Health and Social Care and NHS England and NHS Improvement have worked very closely with NHS trusts and local systems to monitor pressure on services and any consequent need to commence the Mental Health Act emergency powers.

26. The emergency changes to the Mental Health Act were designed to only be used if the mental health sector was experiencing unprecedented resource constraints, which would result in patients' safety being put at significant risk. These powers have not been commenced in England and therefore no authorities have used them.

27. Sir Simon Wessely's Independent Review of the Mental Health Act 1983 made 154 recommendations. The Government will publish a White Paper as soon as it is possible to do so.

Education, Health and Care Plans (Paragraph 50): WESC conclusion: Assessing needs and securing provision for children and young people meeting the threshold for EHC Plans was an extreme challenge for local authorities during the peak of the pandemic earlier this year. Local authorities could not have been expected to meet their EHC Plan duties fully in these circumstances; some flexibility was needed. It is less clear whether it was necessary for the relaxed "reasonable endeavours" duty to remain in place until the end of July, leaving many children and young people with special educational needs and disabilities with very little or no support for three months.

Education, Health and Care Plans (Paragraph 50): WESC recommendation: We recommend the Department review the information-gathering and decision-making processes in place with a view to making a faster decision to return to full EHC Plan duties, should flexibilities be introduced 5 again.

Education, Health and Care Plans (Paragraphs 53 and 54): WESC conclusion: The "reasonable endeavours" duty in relation to Education, Health and Care (EHC) Plans is a nebulous concept, which has been inconsistently interpreted and poorly understood by some local authorities, whose support for children and young people with special educational needs and disabilities fell far short of an acceptable standard after the issuing of national section 42 notices from May to July. There were extreme examples of local authorities failing to communicate at all with children and young people and their families. This is clearly unacceptable. We understand and support the intention to provide local authorities with flexibility to adapt to local circumstances during the pandemic, but they must not be allowed to interpret a relaxed duty as leeway to do nothing to support children and young people's needs.

Education, Health and Care Plans (Paragraphs 53 and 54): WESC recommendation: If the Secretary of State for Education's power to invoke the "reasonable endeavours" duty in relation to EHC Plans is to remain in place, we recommend the Department for Education update its guidance to local authorities to include the factors which must be considered in deciding how the relaxed duty can best be fulfilled. The guidance should include a set of minimum standards and a range of examples of good practice in supporting children and young people with special educational needs and disabilities (SEND) when resources are stretched by the pandemic. We further recommend that, should flexibilities in EHC Plan duties become necessary again, notices be issued on a local basis only, in direct response to local effects of the pandemic, instead of the blanket,

national approach taken earlier this year. We further recommend that guidance to local authorities operating EHC assessments and Plans under reasonable endeavours be updated to state that they should publish information about what this will mean in practice for children and young people with SEND and the minimum level of provision they expect to be able to provide. We believe the time is right for this change of approach. It would be in line with the more local approach to coronavirus-related restrictions since the end of national lockdown and would offer some reassurance to children and young people with SEND and their families that any changes to support will only occur when strictly necessary as a result of the pandemic.

28. The temporary changes to the law were kept under close review during the period that they were in force, to ensure that they could be ceased as soon as they were no longer necessary. Following the expiry of the third modification notice on 31st July, we did not issue a further notice in order to ensure the restoration of support in full for children and young people with EHC plans in advance of their return to school or college in September.

29. To support local authorities, health commissioning bodies and others involved in EHC needs assessment and plan processes to discharge the modified duties, we published guidance on the temporary changes to the law. The guidance was clear that local authorities and health commissioning bodies had not been absolved of their duty to secure or arrange the provision specified in EHC plans and included some illustrative examples of alternative arrangements for delivering provision that it might have been reasonable to put in place.

30. The guidance was also clear that, as the modified duty related to the provision for each individual child and young person, local authorities and health commissioning bodies were not permitted to apply blanket policies about the provision that would be available within their area. Instead, they were required to consider for each individual with an EHC plan what they could reasonably provide in the circumstances during the notice period, based on the needs of and specific circumstances affecting each child or young person. The guidance was clear as to the ongoing importance of coproduction and effective communication with families, both at the strategic level and in relation to individual cases.

31. We do not intend to issue any further notices to modify the duty on local authorities and health commissioning bodies to secure or arrange the special educational and health care provision specified in EHC plans, unless the evidence changes.

Education, Health and Care Plans (Paragraph 60): WESC conclusion: At the time of writing, the Special Educational Needs and Disability (Coronavirus) (Amendment) Regulations 2020, which temporarily modify the time limits in relation to EHC assessment and Plans, were due to expire on 25 September. This will add further pressure to local authorities already facing the huge challenge of dealing with an inevitable backlog of cases.

Education, Health and Care Plans (Paragraph 60): WESC recommendation: The Department must set out a clear national strategy for managing the backlog of EHC assessments and Plans, to ensure children and young people with special educational needs and disabilities get the support they need, within the statutory timescales. It should also set out in guidance to local authorities clear criteria for prioritising EHC cases.

32. We are continuing to work with individual local authorities to provide ongoing support with their continued response to the pandemic. The focus of the support provided to each local authority will be based on their specific issues, which may include their plans for managing EHC needs assessment cases at risk of becoming overdue. We are working with partners to identify good practice within local areas, so that we can use this to develop and target our delivery support offer to local areas.

33. The Minister for Children and Families has commissioned Ofsted and CQC to undertake a series of joint 'interim visits' to local areas, which are taking place during the period that routine Ofsted/CQC Area SEND inspections have been paused due to the pandemic. The purpose of the interim visits is to support local areas to understand the impact of the pandemic on children and young people with SEND, find out what has worked well and identify learning to be shared. Inspectors are focussing on children and young people's access to the right support at the right time, including remotely where necessary. Learning from the visits, alongside positive case studies, will be published in national reports. The findings will provide an insight into how well the SEND system is working and contribute to the development of the inspection framework for the second cycle of Area SEND inspections.

Parliamentary Review (Paragraph 63): WESC conclusion: We consider the section 98 arrangements for six-monthly parliamentary review of temporary Coronavirus Act provisions unsatisfactory. The Act prescribes a binary "take all or leave all" vote, which will present MPs with no real choice over provisions which have clear and obvious equality impacts on their disabled constituents and which, they may take the view, are no longer justified, either this autumn or later in the two-year lifetime of the Act. Continuing these provisions has the potential to further restrict or curtail important and hard-won rights relied upon by disabled people and deserves proper consideration, separately from the statutory vote. Arranging for the House to express its view on temporary provisions with clear and obvious implications for disabled people would be an opportunity for the Government to demonstrate its commitment to equality and judicial oversight.

Parliamentary Review (Paragraph 63): WESC recommendation: The Government should not only to give MPs the chance to debate the temporary provisions discussed in this Report but should also make arrangements to test, separately from the statutory vote required by section 98 of the Coronavirus Act, the view of the whole House on the merits of continuing different, individual provisions for a further six months and each subsequent six-month period until the sunset provision of the Act. Arrangements should be made for this to happen before the second six-monthly review in spring 2021.

34. The Government recognises the vital importance of Parliamentary scrutiny, which is why Part 2 of the Coronavirus Act sets out various mechanisms for managing, and reporting on, the use of the Act. The six-monthly review and renew vote in the House of Commons, gives Ministers the opportunity to debate whether the Act as a whole should continue, or expire before reaching the automatic "sunset" date that is due to occur 2 years after the Act came into force. This also gives members the opportunity to debate individual provisions within the Act.

35. Many of the provisions were designed to be used temporarily, and only when necessary. Therefore, Ministers have the facility to commence, suspend and revive powers when it is deemed necessary. The Act also includes the option to permanently repeal provisions early, before reaching the automatic sunset date, as was the case for the Mental Health Act provisions. The two-monthly report provides further detail on individual provisions, including their status and how the powers have been used since Royal Assent.

36. The Government feels this is a flexible and proportionate response to a major crisis, which ensures ongoing Parliamentary scrutiny and places proper checks and balances on the use of the powers in the Act.

Conclusion

37. The Government recognises there has been concern that measures introduced under the Coronavirus Act 2020 would result in a weakening of the rights of disabled people. This is not their purpose and measures regarding the Care Act, Mental Health Act and Children and Families Act were introduced to enable local services to respond effectively to the pandemic.

38. Care Act easements are not currently being used by any local authorities, Mental Health Act provisions have been removed from the Coronavirus Act and the modification notice regarding EHC assessments and plans expired on 31 July 2020. The Government will continue to keep the use of the Coronavirus Act under review, including in relation to disabled people.