

# Care Act duties and COVID-19: Reflections on the rationing of social care



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Project team: Phil Drake, Debbie Price, Neil Allen & Jayne Astbury  
University of Manchester

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# Outline

- Quick summary of the research project
- What happened to Care Act 2014 assessments and services?
  1. Assessments and reviews: law, evidence, implications
  2. Day centres and respite care: law, evidence, implications
  3. In-home care: law, evidence, implications
- Concluding thoughts
- Questions

# The ‘easements’

Coronavirus Act 2020 included the unprecedented power for local authorities to temporarily suspend (‘ease’) the majority of their adult social care duties required under the Care Act 2014

Eight local authorities enacted Stage 3 or Stage 4 easements:

- Middlesbrough [ended 22 April 2020]
- Sunderland [ended by 18 May 2020]
- Birmingham [ended by 18 May 2020]
- Staffordshire [ended by 26 May 2020]
- Coventry [ended by 1 June 2020]
- Warwickshire [ended by 1 June 2020]
- Derbyshire (Stage 4) [ended by 9 June 2020]
- Solihull (Stage 4) [ended by 6 July 2020]

# Project Overview

## Primary Objective

- To investigate the impact of easements on this group of carers and those responsible for safeguarding within local authorities

## Workstreams

- Semi-structured interviews with 20 Principal Social Workers/Safeguarding Leads
- Semi-structured interviews with 48 carers (24 easement areas/24 non-easement areas)
- Survey (target of 500 responses)
- Legal analysis

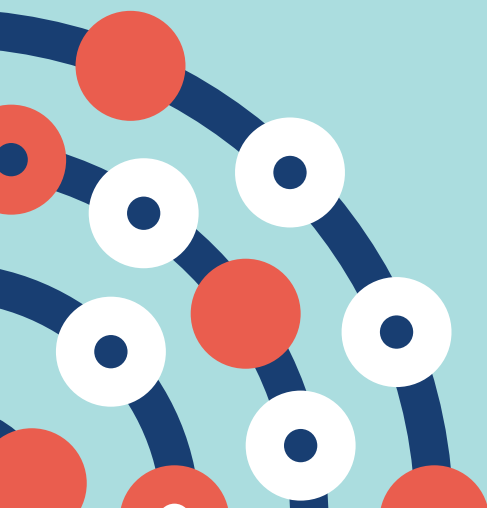
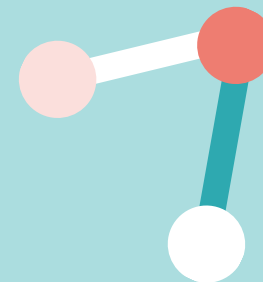
## Carer Advisory Group

# Where we are now

- Interviews completed:
  - 20 local authority PSW/SL interviews (6 easement/14 non-easement) [*May to December 2021*]
  - (46/48) carer interviews (split between easement and non-easement) [*May 2021 to May 2022*]
- Survey in the field, closes 30<sup>th</sup> June 2022 (aiming for 500 respondents – circa 168 so far)
- **Today:**
  - What happened to Care Act assessments and services? Some findings
  - Legal implications
  - Next steps

# What happened to Care Act assessments and services?

- **Similar across local authorities  
regardless of easement status**



# (1) Assessments and reviews: law

## Assessments:

- Care Act ss9-10: duty to assess those who “*appear*” to be in need of care and support
- Regulations require “*appropriate and proportionate*” assessments
- Statutory guidance allows for them to be undertaken in different ways, such as by phone, video link, or supported self-assessment (para 6.3)
  - ✓ No statutory requirement for them to be done face-to-face, although not doing so carries the risk of mis-identifying a person’s needs
  - ✓ No statutory deadline

## Reviews:

- Care Act s.27: local authorities must keep care/support plans “under review generally” and must review “on a reasonable request” the person
- Statutory guidance: lots of flexibility but at least annual reviews

Easements: no obligation to assess needs or comply with duties to determine eligibility, or to prepare care and support plans, or review existing ones on request. Entitled to care and support if it was necessary to avoid a breach of their human rights.

# (1) Assessments and reviews: evidence

- Care Act assessments shifted to virtual/telephone
  - Loss of the doorstep test
  - No eyes on households where self-neglect or abuse might be taking place
  - Circumstances of phone call not known
- Reviews not in person [in at least one easement area, reviews stopped]
- General social work face to face visits stopped except in the more extreme cases



So we took the decision to just do Level 3 and what that meant for us, we were going to divert – the main thing we were going to do was divert our review team resource, from reviews, annual reviews, to front line delivery, and that was one of the ways that we got through those waiting lists as I described. So we felt it was much more important to make sure people got the care and support they needed now, than checking the year on whether it was still okay.

And I know from back in the day, when I did it, you know, your assessment process started at the garden gate. You know, you'd see what the outside of the house was like. It would tell you a bit about the person's mobility, their motivation, all of those things you don't get on the phone.

And I think it's important to say if you are doing digital assessments you're not as a practitioner able to sit in somebody's home environment and understand what's happening in that environment, what's it like, what the levels of care are. What the levels of appropriateness are or self-neglect are, 'cos actually it's like me and you, Phil, isn't it? You're sat there, I'm sat here. I can't see your house, so you could have cleared that space and made it look lovely, and everywhere else could have been an absolute hoarding paradise.

# (1) Assessments and reviews: implications

- *Appearance* matters:
  - [Essex County Council \(20 006 658\)](#) the Council was at fault for not offering a carer's assessment when her daughter went to stay with her; it should not have been left to her to ask for one
- Sufficient legal flexibility already as to *how* assessments were done?
  - [Wiltshire Council](#) (20 011 682, 3 September 2021) at para 35
- Cogent grounds to lawfully depart from the guidance?

## (2) Day Centres & Respite Care: law

### Adult in need

- Eligible needs are those that *arise from, or relate to, a physical or mental impairment or illness* which mean the person is unable to achieve at least *two* specified outcomes, as a result of which there is (or is likely to be) a *significant impact* on their wellbeing.
- Care Act s.18 duty to meet eligible needs (eg to avoid social isolation, or structured daytime activities); duty does “not apply to such of the adult’s needs as are being met by a carer” *so long as that carer is both able and willing to do so* (CP v North East Lincolnshire Council [2018] EWHC 220 at [97])

### Carer

- Eligible needs are those which arise as a consequence of *providing necessary care* for an adult, the effect of which is that their *physical or mental health* is (or is at risk of) deteriorating *or* they are unable to achieve *one* of the prescribed outcomes, and as a consequence there is (or is likely to be) a *significant impact* on their well-being.

Easements: no obligation to assess needs or comply with duties to determine eligibility, or to prepare care and support plans, or review existing ones on request. Entitled to care and support if it was necessary to avoid a breach of their human rights.

## (2) Day Centres & Respite Care: evidence

- Community initiatives – centres and offices closed but volunteering temporarily up
- Day Centres temporarily closed to comply with social distancing rules
- Groups moved online
  - Overall online is no respite for this group of carers, often a greater burden
- Respite in residential homes reduced significantly except in more extreme circumstances
  - Respite isn't respite if it causes more stress than it relieves
- Unable to offer choice of residential care/respite

I know that I qualify for four weeks' respite care a year. But I don't use it, simply because when he came back from the home, he was very dirty. His bottom was dirty. He hadn't had a shave for a week. He had been – they told me he'd just been pacing. He looked like a little old man, and he isn't a little old man. And he – he didn't want me to go – he wanted to be able to see me all the time. And I felt as though he felt abandoned so while ever I can keep him at home, I don't want him – I don't want to take advantage of these four weeks away.

The only arrangement was outside for fifteen minutes a week, once a week. That was the difficulty – so you go through all the emotions of guilt and is she alright and so on, but on reflection, I needed it. I needed a break from that and obviously we realised it was the infection, it wanted treating and obviously things settled down and I got her back after the two weeks. So a mix, really. It wasn't, you know, A1 because I was thinking, from [partner]'s sort of perspective, that she's in a different environment. Are they looking after her? I can't access her. I can't check, and so on. So, you know, there was anxiety there. It wasn't a sort of total two week rest, as indeed it should have been, but at least it gave me an opportunity to get things that I'd not been able to

## (2) Day Centres & Respite Care: implications

- Care Act focuses on meeting needs rather than providing particular services
- Were eligible needs (eg to avoid social isolation, or structured daytime activities) met despite temporary closures?
- If needs could not be otherwise met, how did non-easement areas act lawfully?
  - [Milton Keynes Council \(20 004 047\)](#): not at fault on particular facts
  - [East Riding of Yorkshire Council \(20 008 271\)](#): fault for delay in re-opening
  - [Essex County Council \(20 006 658\)](#): fault for not offering carer's assessment
  - [London Borough of Croydon \(21 000 026\)](#): fault for not considering support



### (3) In-home care: law

- Where a local authority has arranged or is funding the support, it remains responsible for those services and for the actions of the organisation providing them (eg lack of PPE)
  - [London Borough of Bexley \(20 011 149\)](#): fault for care workers not using PPE properly which put couple at further risk of harm
- Care Act s.18 duty is not discharged if person reasonably refuses offer of care/support
  - *R (on the application of Khana) v Southwark LBC* [2002] HLR 31
- Direct payments could, if necessary, be used to pay family: Care and Support (Direct Payments) Regulations 2014 reg 3(1)-(2).

Easements: no obligation to assess needs or comply with duties to determine eligibility, or to prepare care and support plans, or review existing ones on request. Entitled to care and support if it was necessary to avoid a breach of their human rights.

### (3) Some in-home care stopped

- Stopped or was refused, almost always at the request of the couple
  - Real and present dangers of allowing carers in to put them at risk (being communicated daily by government)
  - Carers often young, moving from home to home, different carers every day, no or variable PPE, potential asymptomatic spread
  - Very high risk of serious illness and death to older people, especially with multiple conditions and dementia [pretty much all of this client group]
  - Also, perception by recipients that very poor quality care being received (so it might as well stop)
  - Without recipients declining to allow carers/other help in, some local authorities would have been compelled to enact easements
- Interaction with furlough – important (unintended) interaction between furlough system releasing family members for care, and local authorities unable to provide care
  - Without furlough some local authorities would have been compelled to enact easements
- Follow up variable, but mostly no or little follow up
  - Some local authorities made occasional welfare telephone calls, but many simply left for carers to self-refer in the future
  - While some carers appreciated it, other carers did not find calls helpful where no further assistance was available – especially when from a person who didn't know them



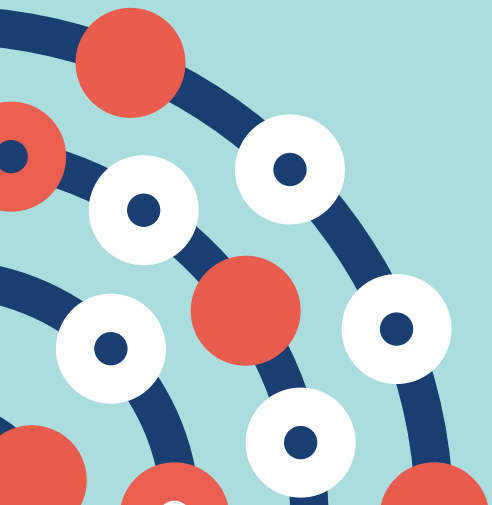
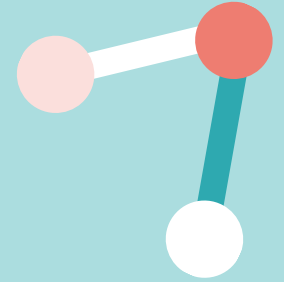
But I think the reason – and the only reason in X, that we stayed out of easements was because we had a really good relationship with our commissioners and providers, a good understanding of what easements meant and how they needed to be applied. But also, because our demand at those key pinch points, reduced when we were expecting that it was going to – it was going to increase.

... so then we would have chased them next when there was a change in guidance, or there was a change in lockdown, or we were – because if they said to us, “We don’t want carers in our home,” or the pandemic’s still at the same level and the guidance is still the same, we probably wouldn’t have chased them... But I don’t think we would have had the resource to be ringing up every week, or every month, to check.

### (3) In-home care: implications

- If needs could not be otherwise met, how did non-easement areas act lawfully?
  - [Oxfordshire County Council](#) (20 014 404): fault for not sourcing alternative
  - [Staffordshire County Council](#) (20 005 645): fault for not being flexible with direct payments to fund support from within family

# Concluding thoughts



# Social Care versus Health

- Marked contrast with NHS – the law permitted triage, rationing, operational prioritisation without enacting easements and thus escaping the political, legal and media barrage
- Much resentment about the lack of support and lack of appreciation given to the social care sector (then and ongoing)
- Social care viewed as the “poor relation” to health; vital role not recognised
- Situation now for social care perceived as much more serious than at any stage in the pandemic: emotional burden, burnout, staff shortages, low pay, lack of funds, lack of political and social recognition
  - Exit of experienced workforce, inability to recruit and retain staff
  - Short term funding not helpful for long term stability, commissioning things that will last, and solving recurring problems
  - Deep concern about the current situation and the future

# Legal implications

- Without easements, were the actions described above that Local Authorities took across the board likely to have resulted in breaches of statutory duty under the Care Act?
  - Ambiguity as to what Local Authorities are actually required to do under the Care Act
  - Although much guidance, varying interpretations as to what the law is – very few cases, leads to widely diverging views
- If the actions taken by Local Authorities were in full compliance with the Care Act, is this desirable as a matter of social policy? Are those statutory duties robust enough to protect carers and people being supported?
- How should we interpret statutory duties in the face of people declining to have carers in-house when those carers potentially carried a risk of death to the recipients?
  - What is a reasonable offer of care and support in these circumstances?

# Moral hazards and the law

- Political and legal focus was on preventing easements (and largely succeeded), rather than on challenging Local Authorities that had not enacted easements for reduced service provision.
  - What were the potential moral hazards of challenging reduced service provision?
  - What might have been the outcome for individuals of challenging reduced service provision?
- If Local Authorities breached the Care Act without easements, what does that say about future social care legal obligations?

# Thank You Q&A

