

Commissioning and COVID-19: Legal and policy context





social care
institute for excellence

About SCIE

The Social Care Institute for Excellence improves the lives of people of all ages by co-producing, sharing, and supporting the use of the best available knowledge and evidence about what works in practice. We are a leading improvement support agency and an independent charity working with organisations that support adults, families and children across the UK. We also work closely with related services such as health care and housing.

We improve the quality of care and support services for adults and children by:

- identifying and sharing knowledge about what works and what's new
- supporting people who plan, commission, deliver and use services to put that knowledge into practice
- informing, influencing and inspiring the direction of future practice and policy.

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Introduction

This guide summarises law and areas of policy (in England) relevant to social care commissioning. This includes specific changes or considerations that applied for the two years from March 2020. Commissioners making or informing decisions in relation to the legal position should consult source legislation and guidance.

The Coronavirus Act 2020

The Coronavirus Act granted ‘emergency powers’, enabling public bodies to respond to the pandemic. The legislation is time-limited for two years and many of the measures were ‘switched on and off’ as necessary from March 2020. It is therefore important to check the **current status of the specific provisions**.

The Act has three main aims:

- to give further powers to the government to slow the spread of the virus
- to reduce the resourcing and administrative burden on public bodies
- to limit the impact of potential staffing shortages when delivering public services.

The powers included:

- emergency registration of health professionals and social workers to increase the available health and social care workforce
- easements to the Care Act 2014 for local authorities to prioritise the most urgent and serious care needs, even if this means not meeting everyone’s assessed needs in full or delaying some assessments
- amendments to mental health legislation, only requiring one doctor’s agreement instead of two to allow certain functions relating to the detention and treatment of patients
- temporarily allowing extension or removal of time limits in mental health legislation, to allow for greater flexibility where services are less able to respond
- allowing NHS providers to delay undertaking NHS continuing healthcare assessments for individuals being discharged from hospital until after the emergency period has ended.

Several of these temporary powers had expired prior to the end of the two-year period and the remainder did so at midnight on 24th March 2022. Social workers who had recently left the profession but who joined the temporary register enabled under this legislation can continue to practice until it closes but no new registrants can now apply.

Care Act 2014

Local authorities must have regard to the core principle of promoting wellbeing and considering care and support needs, and the support needs of unpaid carers in the context of the person's skills, ambitions and priorities. They must carry out duties in relation to assessment, support planning, review and meeting needs via personal budgets using person-centred and holistic approaches. Local authorities should also consider people in the context of their families and support networks so as to promote health and wellbeing, which will support the person to live as independently as possible. They must make independent advocacy available where needed. Key general duties are as follows:

- Prevent, reduce, delay – local authorities should ensure the provision of preventive services.
- Information and advice – local authorities must 'establish and maintain a service for providing people in its area with information and advice relating to care and support for adults and support for carers'. Information should be relevant, available and accessible. People should also be given tailored information and advice following an assessment.
- Market shaping – local authorities have a duty to facilitate the market, using a wide range of approaches to meet the needs of all people in their area who need care and support, whether arranged or funded by the state, by the individual themselves, or in other ways. There should be a variety of different service providers available offering a wide range of appropriate, high-quality services to meet the needs of the local population. Councils must promote equality and diversity in the provision of care and support services. They should promote a viable, well-trained and appropriately paid workforce.
- Integration, cooperation and partnership – Local authorities must carry out their care and support responsibilities with the aim of joining up the services provided, or other actions taken with those provided by the NHS and other health-related services (for example, housing or leisure services), where this is of benefit to people in the local area and to improve outcomes for individuals.

Easements to the Care Act 2014

The Coronavirus Act allowed **easements to the Care Act 2014** for a local authority to prioritise meeting the most urgent and acute needs if pressures due to a depleted workforce or increased demand were such that it was no longer reasonably practicable to comply with its Care Act duties.

Guidance set out the protections and safeguards to carry out 'eased' functions in line with the Care Act's wellbeing principle, person-centred approaches, the Ethical Framework and in full compliance with non-changed legislation including the Human Rights Act, Equality Act and Mental Capacity Act. If local authorities adopted these easements, the changed duties meant they would NOT have to:

- carry out detailed assessments of people's care and support needs in compliance with pre-amendment Care Act requirements

- carry out financial assessments in compliance with pre-amendment Care Act requirement
- prepare or review care and support plans in compliance with pre-amendment Care Act requirements
- meet eligible care and support needs, or the support needs of a carer; a power to meet needs replaced this.

All other Care Act duties remained in force including those in relation to market shaping, advocacy, information and advice, prevention and safeguarding.

Local authorities were required to follow a staged decision-making process before adopting the easements. This required involvement of the Director of Adult Social Services, the Principal Social Worker and the lead member. LAs were required to formally notify the Department of Health and Social Care (DHSC) and to publish and notify local residents, if they were applying the easements.

The principles governing the use of powers required that the needs and wellbeing of individuals should be central to decision making; respecting the principles of personalisation and co-production as underpinned by Think Local, Act Personal (TLAP) commitment to the **Making it Real** 'I statements'. Local authorities were also required to observe the **Ethical Framework for Adult Social Care** and its eight principles of:

- respect
- reasonableness
- minimising harm
- inclusiveness
- accountability
- flexibility
- proportionality
- community.

Easements were used by a very small number of local authorities and the option to do so expired on 16 July 2021.

Mental Health Act 1983 (MHA)

The **Mental Health Act (1983)** is legislation in England and Wales that covers the assessment, treatment and rights of people with a “mental health disorder”. It covers:

- assessment and treatment in hospital
- treatment in the community
- pathways into hospital, which can be civil or criminal.

In most cases when people are treated in hospital or another mental health facility, they have agreed or volunteered to be there. The Act is used when a person is detained, also known as sectioned, and treated without their agreement if they need urgent treatment for a mental health disorder and are at risk of harm to themselves or others.

A **code of practice** shows professionals how to carry out their responsibilities under the Mental Health Act 1983, and provide high quality and safe care.

The Coronavirus Act 2020 provided for some temporary modifications to the MHA to be used only if absolutely necessary due to severe pressure on mental health services. The intention was to help services to continue to offer care and treatment to those who need it during the emergency period. The emergency provisions which, if enacted, would have amended certain aspects of the MHA regarding second opinion safeguards and detention periods. However, based on the experience and outcomes of the first wave of the pandemic, the Government decided not to renew these emergency powers. Government developed **statutory instruments** at the end of 2020 to expire most of the mental health provisions in the Coronavirus Act.

The Children and Families Act 2014 (CFA)

The CFA requires councils to ensure children and young people with special educational needs and disabilities (SEND) – up to age 25, if appropriate – and families are at the centre of decision making, enabling them to participate in a fully informed way, and with a focus on achieving the best possible educational and other outcomes. There is a duty to identify all disabled children and young people and those with special educational needs. Councils must carry out their duties in a way that promotes integration between education and training provision and health care and social care provision.

Local authorities must publish and maintain a co-produced local offer of information setting out the education, health and social care provision that the local authority expects to be available for disabled children and young people and those with SEND. This includes provision that will help them prepare for adulthood.

Children and young people with SEND should be supported to develop education, health and care plans (EHC), which set out how they will meet their needs and outcomes. Local authorities must prepare a personal budget for children and young people who have EHC plans, if the child's parent or young person requests one.

The Coronavirus Act 2020 temporarily modified **section 42 of the CFA**: the duty to secure special educational provision and health care provision in accordance with an EHC. The modification meant that the duty on local authorities or health commissioning bodies to secure or arrange the provision was temporarily modified to: a duty to use 'reasonable endeavours' to do so. This provision applied only between 1 May 2020 to 31 July 2020 after which the full duty to secure provision was restored.

Mental Capacity Act (MCA)

The MCA sets out the legal framework that asserts and supports people's rights to make their own decisions. It remains unchanged by the Coronavirus Act. Everyone is presumed to have mental capacity until it is established that they do not, and local authorities should take all reasonable steps to support a person to make a decision. If a person cannot make a

decision, then any decision made on their behalf must be made in their best interests and taking the least restrictive option.

Duties relating to Deprivation of Liberty Safeguards (DoLS) remain in place. They will ultimately be replaced by the Liberty Protection Safeguards but this continues to be delayed.

Equality Act 2010

The Equality Act provides for protecting the rights of people against discrimination in relation to nine protected characteristics:

- age
- disability
- gender reassignment
- marriage and civil partnership
- pregnancy and maternity
- race
- religion or belief
- sex
- sexual orientation.

It requires the design of policies and the delivery of services to reflect equality considerations, including internal policies, and to keep these under review. The public sector equality duty (the equality duty) requires public sector bodies to have due regard to the need to:

- Eliminate unlawful discrimination, harassment and victimisation.
- Advance equality of opportunity between people who share a protected characteristic and those who do not.
- Foster good relations between people who share a protected characteristic and those who do not.

Due regard for advancing equality involves:

- Removing or minimising disadvantages suffered by people due to their protected characteristics.
- Taking steps to meet the needs of people from protected groups where these are different from the needs of other people.
- Encouraging people from protected groups to participate in public life or in other activities where their participation is disproportionately low.

Human Rights Act 1998

The Human Rights Act enables individuals to enforce 16 of the fundamental rights and freedoms contained in the [European Convention on Human Rights \(ECHR\)](#). Rights particularly relevant to care and support include the right to life, the right not to be subjected to inhuman or degrading treatment and the right to a family life.

The Health and Social Care Act 2008

This act established the Care Quality Commission (CQC) and sets out the overall framework for the regulation of health and adult social care activities.

The **Health and Social Care Act 2008 (Regulated Activities) (Amendment) (Coronavirus) Regulations 2021**, which came into force on 11 November 2021, in effect required all adults working in or volunteering in registered care homes to be fully vaccinated against COVID-19 (allowing for some exemptions). These requirements were also due to be extended to all front-line care and NHS workers in April 2022. However, this was revoked on 15 March 2022 and vaccinations are no longer a condition of deployment.

The Health and Social Care Act 2012

The act provides for collaboration and partnership, including joint financing options, working across health and care services to ensure care is integrated around the needs of patients. Councils and Clinical Commissioning Groups (CCGs) have equal and joint duties to prepare joint strategic needs assessments (JSNAs) through their health and wellbeing boards in order to identify the current and future health and social care needs of population in their area. They are also required to prepare joint health and wellbeing strategies (JHWSs) for meeting the needs identified in the JSNAs.

Public Services (Social Value) Act 2012

This act requires those who commission public services (in England and Wales) to consider how they can also secure wider social, economic and environmental benefits. It applies to public services contracts above the EU threshold for the application of EU procurement rules and so subject to The Public Contracts Regulations 2015.

Before starting the procurement process, commissioners should think about whether the services they are going to buy, or the way they are going to buy them, could secure these wider benefits for their area or stakeholders. It also encourages commissioners to consult their local provider market or community to design better services and find new and innovative solutions to difficult problems.

Social Value Act commissioner guidance sets out examples of wider benefits including: helping to employ a diverse workforce for the delivery of the service; collaborating with the voluntary and community sector and users involved in designing and delivering the service; improving skills and access to digital technology; job creation/employing from a local community or disadvantaged groups.

The Public Contracts Regulations 2015

Where a contracting authority chooses to put a service out to tender, the authority must comply with the UK's regulations in conducting its procurement process in line with the 2014 European Union Public Procurement Directive. The full regulations only apply to certain types of contract above a price threshold determined by the EU. Contracts valued below the thresholds do not have to comply with the full regulations but do have to comply with the principles of procurement set out in the regulations.

Inclusion London set out regulation-compliant recommendations **contracting small providers** to support the commissioning of DPOs (Disabled People's Organisations) and small organisations which are often disadvantaged by traditional tendering. These organisations, however, can make a significant contribution to local economic growth.

The Local Government Association's (LGA) **National Social Care Category Strategy** for local government and associated toolkits and guidance supports appropriate procurement in the sector. They recommend involving procurement officers or category managers throughout the commissioning cycle to understand the options for spending money on health and care, and so market analysis is available at the outset of the process.

Procurement should not be at odds with personalised choice. **Guidance on the light touch regime** under the Public Contracts Regulations makes it clear that allowing people who use services to choose their provider, whether through call-off from frameworks or dynamic purchasing systems, does not contravene requirements around transparency and treating providers equally. The expectation is that people using services should be involved in choosing services and there should be a clear justification if they are not.

Policy overview

People at the Heart of Care: adult social care reform

The government **white paper** published on 1 December 2021 sets out a vision for social care that:

- offers people choice and control over the care they receive
- promotes independence and enables people to live well as part of a community
- properly values the social care workforce, enabling them to deliver the outstanding quality care that they want to provide
- recognises unpaid carers for their contribution and treats them fairly.

It sets out objectives to encourage investment and innovation across the sector, to shift away from a reliance on residential care, and offer people genuine options for quality care at home and in the community.

The government has also set out reforms to social care funding and from October 2023, intends to introduce a new £86,000 cap on the amount anyone in England will need to spend on their personal care over their lifetime.

COVID-19: Our action plan for adult social care

The **DHSC plan** sets out how it aims to support care providers, the care workforce, unpaid carers, local authorities and the NHS to maintain services and continue to provide high quality and safe social care to people throughout the pandemic. It focuses on four main strands of action:

- Controlling the spread of infection.
- Supporting the workforce.
- Supporting independence, supporting people at the end of their lives, and responding to individual needs.
- Supporting local authorities and the providers of care.

Carers action plan 2018–2020

The **carers action plan** outlined the cross-government programme of work to support carers in England. It built on the National Carers Strategy retaining the strategic vision for recognising, valuing and supporting carers. The plan was structured around the following themes: services and systems that work for carers; employment and financial wellbeing; supporting young carers; recognising and supporting carers in the wider community and society; building research and evidence to improve outcomes for carers.

The NHS Long Term Plan

The **NHS Long Term Plan** commits to developing fully integrated community-based health care and has a key focus on personalisation. There is a commitment to rolling out the NHS model of universal personalised care, extending social prescribing, and accelerating the use of personal health budgets.

Prevention Green Paper – Advancing our health: prevention in the 2020s

Consultation on this paper ran from July to October 2019, but as of May 2022 an update of the paper is yet to be published. It set out proposals for a personalised prevention model as well as programmes to tackle obesity and diabetes; support for stopping smoking; establishing alcohol care teams in more areas, and commitment to almost one million people benefiting from social prescribing by 2023 to 2024. Underpinned by technology development, the aim is to shift the health system away from just treating illness, and towards preventing problems in the first place. This ‘asset-based approach’ takes a whole-life view, considering the wider impacts on health and wellbeing.

For mental health and through **Every Mind Matters**, the aim is to work towards ‘parity of esteem’ for how to treat conditions and also for how they are prevented. Improvements to dementia support are also proposed through timely diagnosis and access to advice, information, care and support to enable people to live well with the condition and to remain independent.

Regulatory context: the Care Quality Commission (CQC)

The CQC is the independent regulator of health and social care in England. It monitors, inspects and regulates services to make sure they meet **fundamental standards** of quality and safety and it publishes findings, including performance ratings, to help people choose care.

It has a 'market oversight' duty to oversee the financial health of the most difficult-to-replace providers of adult social care services, so it can assist local authorities with their responsibility to ensure continuity of care if services are likely to fail.

Build back better: Our plan for health and social care (2021)

This sets out plans to put the NHS on a sustainable footing and sets funding intentions for the NHS and social care for the next three years. Initiatives will be funded through a new 1.25 per cent Health and Social Care Levy (the Levy), ring-fenced for health and social care from April 2023, and based on National Insurance (NI) contributions. The plan also commits to a focus on prevention for health care. For social care, the plan sets out the commitment to:

- **offer choice, control and independence to care users** – so that individuals are empowered to make informed decisions and live happier, healthier and more independent lives for longer
- **provide an outstanding quality of care** – where individuals have a seamless experience of an integrated health, care and community system that works together and is delivered by a skilled and valued workforce
- **be fair and accessible to all who need it, when they need it** – ensuring that fees are more transparent, information and advice is user-friendly and easily accessible, and that no one is subject to unpredictable and unlimited care costs.

The government is committed to introducing a cap to protect people from 'catastrophic care costs' and having to sell their home to pay for care. The proposal is to set the cap at £86,000. There is considerable debate as to the respective benefit of this for people with higher or lower-valued property. The details of the Adult Social Care charging reform are set out in [this paper](#).

Support from SCIE

SCIE's COVID-19 hub contains more relevant information including safeguarding, Mental Capacity Act and infection control. It can be used when working and supporting people who are isolated or vulnerable through COVID-19, and can also be shared with community groups.



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