

Coronavirus Act 2020

Application to the Social Services and Wellbeing (Wales) Act 2014

Summary

1. The government has now passed the Coronavirus Act 2020 (the Act) <http://www.legislation.gov.uk/ukpga/2020/7/contents/enacted> It is a wide-ranging piece of legislation affecting several legal rights and protections under the Social Services and Wellbeing Act 2014 (SSWbA 2014) and the Mental Health Act 1983. The Act also provides a power for the UK Government to issue guidance that local authorities will be required to apply. At the time of writing (April 2nd 2020) and in marked contrast to the position in England, Welsh Government has yet to issue any guidance as to how the Act should be implemented.
2. This paper examines how the Act's provisions in Part 2 of Schedule 12, impact duties under the SSWbA 2014. In addition, BASW Cymru provides recommendations about what the statutory guidance should address and how BASW Cymru intends to provide guidelines on matters of professional judgement to complement this statutory guidance.
3. This is a 'live' document and will be updated regularly by additions or amendments, as such information is received.
4. The Act is set to expire in two years (March 24th 2022) but this can be extended by up to six months at a time or ended earlier if required (s.89 and s.90). If the Act goes beyond March 2021, the government is required to publish a report on the impact of the provisions in their first year, with a parliamentary debate to follow (s.98).
5. The original Bill proposed that the government's new powers would be in force for two years and then reviewed. Many groups (including BASW) argued that this two-year period was too long. Bowing to pressure, the Government has agreed that Parliament should review the use of these new powers and changes after six months (i.e. September 2020). Given that Parliament is currently not sitting it is not clear how this review will be implemented.
6. In Wales, the Act only applies to provision for Adults, unlike in England where provision for Children & Young People is also affected.
7. The changes to social care contained here are unprecedented and potentially have enormous implications in an already overstretched sector.

8. In Wales, changes to the Mental Health Act 1983 in respect of Mental Health Review Tribunals are now in effect, with a downgrading of the social care duties of the SSWbA 2014 implemented on Wednesday 1st April.

Duty to assess

9. Currently, local authorities “must” assess any adult if it appears that s/he “may” have needs for care and support (s.19 & s.20 SSWbA 2014). They must also seek to identify what outcomes the adult wants to achieve and to what extent provision of care & support, preventative services or information, advice and assistance will meet those needs and achieve the desired outcomes (s.19(4)).
10. The Act suspends this duty to assess (Schedule 12, sections 20-25). For as long as the Act is in force, i.e. currently up to two years, Local Authorities in Wales will no longer be obliged to decide if someone has needs for care and support.
11. If the duty to assess is suspended, so too are the regulations governing assessment, i.e. The Care and Support (Eligibility) (Wales) Regulations 2015). This includes a requirement that those carrying out assessments are suitably skilled, competent, knowledgeable and trained, meaning suspension negates this obligation.
12. Clearly, this could have profound consequences; on the one hand, it is not always obvious that someone has needs or what they are, which is why they must be assessed. Equally, severe staff shortages could mean that unqualified, untrained and inexperienced workers are drafted in to carry out assessments, placing individuals at risk of having complex needs missed. But assessment is just the beginning of the process and the Act imposes several other changes as illustrated below.

Duty to meet needs

13. Currently, local authorities only have a duty to meet “eligible” needs (s.35 SSWbA 2014) which, due to the impact of austerity and year on year budget cuts, means eligibility criteria have a very high threshold. For example, an adult must, because of a physical or mental impairment or illness be “unable” to achieve at least one of 7 specified outcomes and there must be, or likely to be, a “significant impact” on their wellbeing as a result (Explanatory Notes, The Care and Support (Eligibility) (Wales) Regulations 2015).
14. The SSWbA 2014 also requires local authorities to support carers (such as family and friends) who provide care to people with needs (ss40-45). This is a critical component of the care system, without which the number of people who will need care from the local authority would likely increase enormously.
15. In a 2019 ‘State of Caring’ report by Carers Wales, 23% of carers receiving support said that they thought their care would be reduced. The implications of the Act mean that this is now highly likely, with many unpaid carers simply not identified.

16. The National Assembly for Wales report, 'Caring for our future: An inquiry into the impact of the Social Services and Well-being (Wales) Act 2014 in relation to carers November 2019' highlights these immediate concerns.
17. Where a local authority is required to meet needs under the SSWbA 2014, they also have a duty to prepare a care and support plan that sets out the details of how the person's needs will be met. These Care plans must be kept under review by local authorities and should be revised if the person's care and support needs have changed (ss54-55 SSWbA 2014; The Care and Support (Care Planning) (Wales) Regulations 2015).
18. The Coronavirus Act 2020 suspends these core duties on Local Authorities, replacing them with powers. Crucially, this is the case whether the duty pre-existed the coming into force of the Act and irrespective of whether the person is making a financial contribution.
19. Paragraph 29, Schedule 12 of the Act removes the duty to offer a choice of accommodation, creating a risk that individuals are placed in unsuitable accommodation that may not meet their needs. There is anecdotal evidence to suggest that this is already happening given the urgent need to free space in hospitals.
20. Paragraph 31, Schedule 12 of the Act, no longer requires that a person has a care and support plan. If no one is required to have a care and support plan how will Local Authorities inform the provider services they commission, what a person's needs are? They may choose to simply rely on providers to undertake provider assessments under The Regulation and Inspection of Social Care (Wales) Act 2016 and The Regulated Services (Service Providers & Responsible Individuals) (Wales) Regulations 2017, but this of course creates as many problems as it solves, not least possible conflict of interest, downplaying of needs or insufficient understanding of what those needs are.

Exception to avoid an individual experiencing abuse or neglect

21. The Act allows for some exceptions to these downgrading of duties. In Wales, the effect of this means that there is still a duty on the Local Authority to provide care and support, if a failure to act meant that the individual would experience or be at risk of abuse or neglect (s.27).
22. The SSWbA 2014 defines "abuse" as, 'physical, sexual, psychological, emotional or financial abuse (and includes abuse taking place in any setting, whether in a private dwelling, an institution or any other place)'

23. "Neglect" means 'a failure to meet a person's basic physical, emotional, social or psychological needs, which is likely to result in an impairment of the person's well-being.'
24. Although this appears to be a lower threshold than is the case in England, where a duty to meet needs only arises if a failure to do so would be a 'breach of an individual's human rights', what is immediately apparent is the likely contested nature of what is meant by the terms 'basic' and 'impairment', i.e. how will Local Authorities and social workers actually define these in practice?
25. It remains unclear as to why the Act treats Wales and England differently in this way, but nonetheless, it is important to remember that the Act does not suspend the Human Rights Act 1998 in Wales and Local Authorities are still required to comply with this, due to the duty on them conferred by section 6 of the HRA.
26. Nonetheless, the effect of these changes means that it will be immensely difficult to challenge Local Authorities for failing to provide care and support. Arguably, the greatest impact will be on those who are already severely disadvantaged and for whom recourse to challenge has been their only option. The result is that many individuals with needs for care and support and their carers, are likely to be left with no entitlement to care, at a time of crisis and isolation and when their care needs may have increased.

A proportionate response?

27. The Government's impact assessment of the Coronavirus Bill prior to enactment <https://publications.parliament.uk/pa/bills/cbill/58-01/0122/Coronavirus%20Bill%20Impact%20Assessment%20final%203.pdf> justified the temporary suspension of the majority of the SSWbA 2014 duties with the prediction that, "during the peak [of the virus], adult social care services will face surging demand and reduced capacity arising from higher rates of staff absence. This may make it impossible for LAs to continue to deliver at current service levels or undertake the detailed assessments they would usually provide."
28. As noted above, Welsh Government has already published Regulations that will allow for Local Authority duties to be downgraded but, to date, they have not published any compelling evidence or reasons for this action, nor have they, unlike the Department of Health & Social Care in England, produced any guidance or information for Local Authorities or social workers in light of the very draconian changes wrought by the Act.
29. This means that social workers in Wales currently have no framework or guidance on which to base their practice and decision making, despite the Explanatory Notes to

the Bill <https://publications.parliament.uk/pa/bills/cbill/58-01/0122/en/20122en.pdf> suggesting that, *'In order to support Local Authorities in operating under the new powers, including making prioritisation decisions in a consistent, and ethical manner, the Government will publish guidance'* (para.36).

30. Further, even when the peak of the crisis has passed, it appears that care needs will still not be met. The Act include a 'backlog' clause (s.30, Schedule 12) which essentially gives Local Authorities some 'breathing space' and time to catch up with needs not assessed during the crisis.
31. Local Authorities may welcome such space to enable them to get their house in order, but it must not be forgotten that a decade of austerity has already caused significant and long-lasting harm to the most vulnerable and needy in Wales.
32. This is, of course, a serious health crisis, and the need to prioritise care in order to protect life can hardly be argued with. But it is hard to believe that these changes and the Welsh Governments haste in implementing them, will not make the situation worse. The link between current failures to meet care needs and consequent pressure on all services is well-established. Now does not seem like a good time to test that evidence.

Statutory Guidance

33. In making the required decisions about meeting needs, some form of assessment and prioritisation process will be necessary and BASW Cymru welcomes the UK Government publishing statutory guidance in England, that local authorities will be required to comply with, to ensure that decisions are made in a consistent and ethical manner.
34. Clearly, something similar is urgently needed in Wales; this cannot come soon enough.
35. Nevertheless, BASW Cymru believes that existing well-understood assessment pathways can and should be retained and adapted. Therefore, statutory guidance in Wales should include clarity about the following:
 - a. The initial threshold i.e. the equivalent of "appearance of needs".
 - b. The types of inability and difficulty that people may receive help with.
 - c. How a Local Authority will determine whether if a failure to meet needs for care and support meant that the individual would experience or be at risk of abuse or neglect. Statutory Guidance in Part 7 of the SSWbA 2014 is already well understood and should provide a good basis for decisions taken under the Coronavirus Act.

36. Statutory guidance for the Act should also include advice for Local Authorities on how downgraded duties to meet needs can be applied in a consistent and equitable manner.
37. The professional judgements of social workers and the application of their knowledge and skills to the process of determining how to meet needs, will continue to be an essential part of the decisions local authorities are required to make. This understanding and contribution must not be lost.
38. Once a suitable framework is agreed, BASW Cymru will urgently develop further guidance for social workers on good practice, ethics and human rights to assist practitioners in Wales making the necessary professional judgements.
39. Finally, the DHSC has already produced some guidance, 'Responding to Covid-19: the ethical framework for adult social care'
<https://www.gov.uk/government/publications/covid-19-ethical-framework-for-adult-social-care/responding-to-covid-19-the-ethical-framework-for-adult-social-care>
40. BASW Cymru welcomes the publication of this guidance for England and suggests that it provides an excellent and welcome starting point for Welsh Government when looking to develop similar resources in Wales.

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