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About Field Court Chambers' Public Law and Local Government Group

The Public Law and Local Government Group is long established and highly respected for its expertise and commitment to local government work. Clients value the Group's knowledge, efficiency and client friendliness at all levels of call. Our clients include individual claimants, central and local government, public bodies including the fire and police services, regulatory bodies and health trusts.

Members are regularly instructed in the following areas:

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Our multi-practice strength means that the Public Law and Local Government team can access expertise of colleagues in our other established groups such as family, property, court of protection, employment, personal injury and mediation in more complex cases. Many individual members' practices straddle these divisions in any event.

The Public Law and Local Government Group is regularly sought after for its expert CPD-accredited training, workshops and seminar programmes. Members can also deliver bespoke in-house training to law firms, local authorities and other professional bodies on request.

About The Speakers

Tony Harrop-Griffiths (1978)

Tony is top ranking barrister in Chambers and Partners and Legal 500. He specialises in public law and general civil law. Tony's main clients are local authorities in London and across the regions, principally their Social Services departments and he is regularly instructed by about a third of the London boroughs, as well as several city and some county councils. He is also occasionally instructed in claims against authorities. Tony's work is evenly split between Children and Family and matters concerning adults, including those affected by the Mental Capacity Act 2005.

Tony is one of the authors of Dementia and the Law and wrote the chapters on NHS Care and Treatment, Local Authority Care and Carers.

Christine Cooper (2006)

Christine Cooper is regularly instructed in matters that encompass both public and private law issues. She has developed considerable specialist knowledge in the field of charging for residential care and community care services and on the treatment of property in the financial assessment process in particular.

Christine regularly appears in judicial review proceedings concerning social and welfare issues and also appears in Court of Protection proceedings to protect the welfare and property of vulnerable adults.

Christine is one of the authors of Dementia and the Law and wrote the chapters on Property and Affairs in the Court of Protection and Funding for Care Services.

Rhys Hadden (2006)

Rhys specialises in all areas of public and administrative law. He has particular experience of human rights, mental health, community care, children-related matters (including education), immigration and asylum, social housing, freedom of information and data protection and costs. He advises and represents claimants and defendants in judicial review proceedings, as well as before a range of other tribunals, including other divisions of the High Court, the Court of Appeal, the First Tier Tribunal and Upper Tribunal.

Rhys is also regularly instructed on behalf of local authorities, the Official Solicitor and family members in the Court of Protection. He also has experience in advising and appearing in mental health cases such as nearest relative displacement applications, judicial review and habeas corpus applications by detained patients and in the First Tier Tribunal (Health, Education and Social Care Chamber).

Rhys is one of the authors of Dementia and the Law and wrote the chapters on Access and Rights to Personal Information and Rights to Assessments.

The Care Act 2014

Care Act 2014: General Overview and Selected Key Principles

Rhys Hadden

Introduction

1. The Care Act 2014 (hereafter "the Act") came onto the statute books on 14 May 2014. The bulk of the Act will come into force in April 2015. It sets out a new framework of local authority duties in relation to the assessment, arrangement and funding of social care, along with a number of changes to the regulation of social care providers.

2. The Act represents the biggest change in the law governing care and support in England since the National Assistance Act 1948. It not only consolidates and streamlines into a single statute over 60 years of piecemeal legislation but also places personalisation on a statutory footing and introduces a capped cost system and national eligibility threshold.

3. The Act is likely to have an impact on the lives of everyone in England, either as an individual in need of care and support or as family member or friend to someone in such need. In 2012-2013, an estimated 1.3 million people in England were supported by the provision of adult social care services from local authorities[1]. The Government estimates that in the next 20 years 1.4 million more people are likely to need support.

4. This seminar aims to provide a basic outline to the provisions of the Act and certain key principles that underpin it, in particular the promotion of well-being principle and the duty to develop preventative services.

Legislation to be repealed

5. The Act repeals almost all of the principal adult social care statutes that impose obligations upon local authorities to assess and provide services for disabled, elderly

[1] Health and Social Care Information Centre, *Community Care Statistics, Social Services Activity in England – 2012-13* (2013)

and ill adults as well as their carers. The legislation that will be repealed is extensive, including[2]:

- National Assistance Act 1948
- Health Services and Public Health Act 1968
- Local Authority Social Services Act 1970
- Chronically Sick and Disabled Persons Act 1970 (but only for adults)
- Health and Social Services and Social Security Adjudications Act 1983
- Disabled Persons (Services, Consultation and Representation) Act 1986
- National Health Service and Community Care Act 1990
- Carers (Recognition and Services) Act 1995
- Carers and Disabled Children Act 2000
- Health and Social Care Act 2001
- Community Care (Delayed Discharges etc.) Act 2003
- Carers (Equal Opportunities) Act 2004
- National Health Service Act 2006

Timetable for Implementation

6. The majority of the provisions of the Act will take effect from 1st April 2015. The remaining provisions, namely sections 15, 16, 28, 29 and 72, are scheduled to take effect from April 2016.

7. The Act is accompanied by voluminous guidance, namely the *Care and support statutory guidance*[3], which runs to over 506 pages. In addition, there are 17 sets of regulations[4] which detail specific obligations relating to market oversight/business failure; the assessment of need; eligibility criteria; advocacy; charging; choice of accommodation; deferred payments; personal budgets; direct payments; the NHS interface; delayed hospital discharge; ordinary residence; portability of care packages and cross-border placements; and registers for people with visual impairments.

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[2] A full list of the primary legislation, secondary legislation and accompanying guidance can be found at appendix I of the Care and support statutory guidance.

[3] The final version of *Care and support statutory guidance* can be found at: https://www.gov.uk/government/publications/care-act-2014-statutory-guidance-for-implementation.

[4] The final version of the regulations can be accessed at: https://www.gov.uk/government/consultations/updating-our-care-and-support-system-draft-regulations-and-guidance.

8. The final version of the guidance and regulations were approved in 23rd October 2014, leaving limited time to local authorities to implement substantial changes and provide training to necessary staff.

Terminology

Adult

9. Unlike the National Assistance Act 1948, there is no express mention in the Act of disabled, elderly or ill people. Instead it uses the word 'adult'. This is generally qualified as being an adult 'in need' of care and support. The regulations define that this is an adult who has 'a physical or mental impairment or illness'[5].

Carer

10. A carer is someone 18 or over who provides or intends to provide care for someone but is not contracted to provide the care or providing the care as formal 'voluntary work'[6]. Subsection 10(11) of the Act makes clear that care includes the provision of practical or emotional support.

Individual

11. When the Act uses the term 'individual' it means either an adult 'in need' or a carer.

Structure of the Act

12. The Act is divided into five parts with eight schedules. Part 1 of the Act deals with the reform of adult social care and support legislation and is structured around an individual's journey through the reformed system (be they someone in need of care, or their carer). The Act will put a limit on the amount those receiving care will have to pay towards the costs of their care, with a cap on care costs beginning in April 2016. The remainder of Part 1 of the Act, such as national eligibility criteria and universal deferred payments, will come into force in April 2015.

13. Part 2 of the Act seeks to improve care standards by putting people and their carers in control of their care and support. It also provides a legislative response to the Francis

[5] Reg.2, The Care and Support (Eligibility Criteria) Regulations 2014.
[6] Sections 10(3), (9) and (10) of the Care Act 2014.

Inquiry by increasing transparency and openness. The intention is to enhance the quality of care. Part 3 of the Act establishes Health Education England and the Health Research Authority.

14. For the remainder of this seminar focus shall be placed on Part 1. Part 1 of the Act covers a large number of different areas, including:

- General responsibilities of local authorities, including the 'wellbeing principle' (sections 1-7)
- Examples of how local authorities can meet care needs (both adults and carers) (section 8)
- Assessing of needs and defining eligible need (sections 9 to 13)
- Charging and assessing financial resources and the cap on care costs (sections 14 to 17)
- Duties and powers to meet needs for care and support and certain exceptions relating to immigration, NHS and housing (sections 18 to 23)
- Care and support plans, personal budgets, care accounts and preference for particular accommodation (sections 24 to 30)
- Direct payments and deferred payment agreements (sections 31 to 36)
- Continuity of care and support when an adult moves (sections 37 to 38)
- Establishing where a person lives (ordinary residence) (sections 39 to 41)
- Safeguarding adults at risk of abuse or neglect (sections 42 to 47)
- Provider failure (sections 48 to 52)
- Market oversight (sections 53 to 57)
- Transition for children to adult services (sections 58 to 66)
- Independent advocacy support (sections 67 to 68)
- Enforcement of debts – recovery of charges and transfer of assets (sections 69 to 70)
- Appeals of decisions by local authorities under Part 1 (sections 72)
- Discharge of hospital patients with care and support needs (section 74)
- After-care under the Mental Health Act 1983 (section 75)
- Prisoners and persons in approved premises (section 76)
- Local registers of sight-impaired adults and disabled adults (section 77)
- Delegation of local authority functions (section 79)

15. Given the time available, this seminar will not consider the different provisions in Part 1 of the Act in any detail save for sections 1 and 2 below. For those that wish to read a more detailed summary of these key provisions, please consult the guidance produced by the Local Government Association, '*Get in on the Act: The Care Act 2014*' published in June 2014 (http://www.local.gov.uk/documents/10180/11309/L14-284+Getting+in+on+the+Act_web.pdf/edfb186d-166f-4058-a20d-5ba5e2646e6e)

General responsibilities of local authorities

16. Sections 1 to 7 of the Act place a number of general duties (also known as target duties) on local authorities[7]. These are:

    1) Promoting individual well-being
    2) Preventing needs for care and support
    3) Promoting integration of care and support with health services etc.
    4) Providing information and advice
    5) Promoting diversity and quality in provision of services
    6) Co-operating generally
    7) Co-operating in specific cases

Well-being principle

17. Section 1 creates a new general duty that applies to a local authority and their staff when exercising any functions under Part 1 of the Act (including care and support and safeguarding), and means that whenever a local authority makes a decision about an adult (i.e. adults and carers), they must promote that adult's wellbeing. The target duty to promote well-being does not apply to the NHS.

[7] In broad terms, statutory duties imposed on public authorities can be divided into two categories: general duties and specific duties. General duties are not expressed as being owed to any specific individual but rather toward the relevant population as a whole. The courts have tended to allow public authorities considerable discretion in determining how to implement its general duties and therefore such duties are difficult to enforce. By contrast, specific duties place strong obligations upon public authorities in respect of an individual, although they can sometimes be qualified in some way such as a duty to provide "necessary" services or "take reasonable steps" to achieve a particular objective.

Definition of well-being

18. In section 1(2) of the Act, well-being is defined widely:

> *(2)"Well-being", in relation to an individual, means that individual's well-being so far as relating to any of the following –*
>
> *(a) personal dignity (including treatment of the individual with respect);*
>
> *(b) physical and mental health and emotional well-being;*
>
> *(c) protection from abuse and neglect;*
>
> *(d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);*
>
> *(e) participation in work, education, training or recreation;*
>
> *(f) social and economic well-being;*
>
> *(g) domestic, family and personal relationships;*
>
> *(h) suitability of living accommodation;*
>
> *(i) the individual's contribution to society.*

19. Paragraph 1.6 of the guidance states that the individual aspects of wellbeing or outcomes are those which are set out in the Care Act and are most relevant to people with care and support needs and carers. There is no hierarchy, and all should be considered of equal importance when considering "wellbeing" in the round.

20. Furthermore, paragraph 1.7 of the guidance states that promoting wellbeing involves 'actively seeking improvements in the aspects of wellbeing set out above when carrying out a care and support function in relation to an individual at any stage of the process from the provision of information and advice to reviewing a care and support plan'.

21. The wellbeing principle is meant to apply equally to those who do not have eligible needs but come into contact with the system in some other way (e.g. via an assessment that does not lead to ongoing care and support) as it does to those who go on to receive care and support, and have an ongoing relationship with the local authority. It should inform the delivery of universal services which are provided to all people in the local population, as well as being considered when meeting eligible needs. Although the wellbeing principle applies specifically when the local authority performs an activity or task, or makes a decision, in relation to a person, the principle should also be considered by the local authority when it undertakes broader, strategic functions, such as planning, which are not in relation to one individual.

Concept of meeting needs

22. The Act is intended to signify a conceptual shift from existing duties on local authorities to provide particular services to the notion of 'meeting needs'. The concept of meeting needs recognises that everyone's needs are different and personal to them. Local authorities must consider how to meet each person's specific needs rather than simply considering what service they will fit into. The concept of meeting needs also recognises that modern care and support can be provided in any number of ways, with new models emerging all the time, rather than the previous legislation which focuses primarily on traditional models of residential and domiciliary care.

Independent living

23. One criticism of the well-being obligation concerns the failure to include an explicit reference to the right to 'independent living'[8]. The statutory guidance addresses this omission at paragraph 1.19:

> *The wellbeing principle is intended to cover the key components of independent living, as expressed in the UN Convention on the Rights of People with Disabilities (in particular, Article 19 of the Convention). Supporting people to live as independently as possible, for as long as possible, is a guiding principle of the Care Act. The language used in the Act is intended to be clearer, and focus on the outcomes that truly matter to people, rather than using the relatively abstract term "independent living".*

[8] i.e. as protected by Article 19 UN Convention on the Rights of Persons with Disabilities (CRPD).

Factors that must be taken into account

24. In addition to the general principle of promoting wellbeing, when discharging any obligation under the Act, section 1(3) stipulates that a local authority must have regard to the following matters:

> *(a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;*
>
> *(b) the individual's views, wishes, feelings and beliefs;*
>
> *(c) the importance of preventing or delaying the development of needs for care and support or needs for support and the importance of reducing needs of either kind that already exist;*
>
> *(d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being);*
>
> *(e) the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate;*
>
> *(f) the importance of achieving a balance between the individual's well-being and that of any friends or relatives who are involved in caring for the individual;*
>
> *(g) the need to protect people from abuse and neglect;*
>
> *(h) the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised.*

25. All of the matters listed above must be considered in relation to every individual, when a local authority carries out a function as described in this guidance. This should lead to an approach that looks at a person's life holistically, considering their needs in the context of their skills, ambitions, and priorities – as well as the other people in their life and how they can support the person in meeting the outcomes they want to achieve. The weight to be attached to these different factors will vary depending on the particular context. Furthermore, as paragraph 1.15 of the guidance makes clear, the focus should be on supporting people to live as independently as possible for as long as possible.

Preventing needs for care and support

26. The promotion of wellbeing cannot be achieved simply through crisis management. Instead it must include a focus on delaying and preventing care and support needs, and supporting people to live as independently as possible for as long as possible. Section 2 of the Act requires local authorities to ensure the provision of preventative services, namely services which help prevent, delay or reduce the development of care and support needs (including carers' support needs).

27. Sections 2(1) and (2) define the scope of this target duty as follows:

> *(1) A local authority must provide or arrange for the provision of services, facilities or resources, or take other steps, which it considers will –*
>
> *(a) contribute towards preventing or delaying the development by adults in its area of needs for care and support;*
>
> *(b) contribute towards preventing or delaying the development by carers in its area of needs for support;*
>
> *(c) reduce the needs for care and support of adults in its area;*
>
> *(d) reduce the needs for support of carers in its area.*
>
> *(2) In performing that duty, a local authority must have regard to –*
>
> *(a) the importance of identifying services, facilities and resources already available in the authority's area and the extent to which the authority could involve or make use of them in performing that duty;*
>
> *(b) the importance of identifying adults in the authority's area with needs for care and support which are not being met (by the authority or otherwise);*
>
> *(c) the importance of identifying carers in the authority's area with needs for support which are not being met (by the authority or otherwise).*

28. Paragraph 2.4 of the Guidance expands on the definition of prevention or preventative measures as follows:

> *The term "prevention" or "preventative" measures can cover many different types of support, services, facilities or other resources. There is no one definition for what constitutes preventative activity and this can range from wide-scale whole-population measures aimed at promoting health, to more targeted, individual interventions aimed at improving skills or functioning for one person or a particular group or lessening the impact of caring on a carer's health and wellbeing. In considering how to give effect to their responsibilities, local authorities should consider the range of options available, and how those different approaches could support the needs of their local communities.*

29. Paragraph 2.22 of the Guidance further identifies that local authorities must develop a 'clear local approach to prevention'; must identify an 'unmet need' in order to identify strategies to improve the provision of such services; and must share this information with local partners (paragraph 2.30).

30. A number of commentators have expressed concern about the capacity of local authorities to fulfil this obligation against a backdrop of significant cuts to funding and the lack of any new money to accompany the legislation. To invest in preventative services without new money would require a local authority to disinvest in an existing area (e.g. crisis services) which would be unrealistic.

31. Where a local authority decides to charge for preventative services, the Guidance advises that it is 'vital to ensure affordability' and that it balances the 'affordability and viability with the likely impact of charging on the uptake' and that this be considered individually as well as at a general policy level.

32. There may be a longer term value to this provision in that it could create an expectation that such preventative support could be developed. Similarly, the introduction of a capped cost system could reinforce aim of this duty by encouraging adults to be assessed earlier rather than later.

Care Act 2014

Needs assessments and care and support plans

Tony Harrop-Griffiths

Assessments

There are five types:

- Needs assessment – see sections 9 and 12
- Carer's assessment – see sections 10 and 12
- Child's needs assessment – see sections 58 and 59
- Child's carer's assessment – see sections 60 and 61
- Young carer's assessment – see sections 63 and 64

All types are governed by the same regulations.

Needs assessment

Section 9

Where it appears to a local authority that an adult may have needs for care and support, the authority must assess whether he does have such needs and, if so, what they are. This duty applies regardless of the authority's view of the level of his needs or the level of his financial resources.

A needs assessment must include an assessment of the impact of his needs on his well-being, the outcomes he wishes to achieve in day-to-day life and whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.

The authority must involve him, any carer he has and any person he asks it to involve or, where he lacks capacity to ask, any person who appears to it to be interested in his welfare.

The authority must also consider whether, and if so to what extent, matters other than the provision of care and support could contribute to the achievement of those outcomes and whether he would benefit from the provision of any preventative measures (under section 2) or information and advice (under section 4).

Regulations

A supported self-assessment (i.e. one carried out jointly by the authority and its subject) must be carried out in the case of an adult if he wants this and has the capacity to take part.

In order to facilitate this the authority must provide him with any relevant information it has about him, in an accessible format.

An authority must carry out any assessment in a manner that is (with regard to the subject's wishes and preferences, the outcome he seeks and the severity and extent of his needs) appropriate and proportionate to his needs and circumstances and that ensures he is able to participate in the process as effectively as possible. Where needs fluctuate, the authority must take into account his circumstances over such period as it considers necessary. It must give information about the process, beforehand wherever practicable, in an accessible format.

An authority must consider the impact of his needs on any carer and any other person it considers to be relevant.

An authority must ensure that any person carrying out an assessment on its behalf has the skills, knowledge and competence to carry it out and is appropriately trained.

Where it appears to an authority carrying out a needs assessment that its subject may be eligible for CHC it must refer him to the relevant CCG.

Guidance

During the assessment, local authorities must consider all of the adult's care and support needs, regardless of any support being provided by a carer. Where the adult has a carer, information on the care they are providing can be captured during assessment but it must not influence the eligibility determination. If the needs are eligible or the authority otherwise intends to meet them, the care provided by a carer can be taken into account during the planning stage. The authority is not required to meet any needs that are being met by a carer who is willing and able to meet them but it should record this. This ensures that all of an adult's needs are identified and the authority can respond appropriately if the carer feels unable or unwilling to carry on.

Eligibility

Section 13

Where an authority is satisfied on the basis of a needs assessment that its subject has needs for care and support, it must determine whether any of the needs meet the eligibility criteria.

Having made a determination it must give him a written record of it.

Where at least some of his needs meet the criteria the authority must consider what could be done to meet those needs that do, ascertain whether he wants them met by the authority and establish whether he is ordinarily resident in its area.

Where none of his needs meet the criteria the authority must give him written advice and information about what can be done to meet or reduce his needs or to prevent or delay the development of his needs in the future.

Regulations

An adult's needs meet the eligibility criteria if they arise from or are related to a physical or mental impairment or illness and as a result he is unable to achieve two or more specified outcomes and there is, or is likely to be, a significant impact on his well-being.

These outcomes are:

- *managing and maintaining nutrition*
- *maintaining personal hygiene*
- *managing toilet needs*
- *being appropriately clothed*
- *being able to make use of his home safely*
- *maintaining a habitable home environment*
- *developing and maintaining family or other personal relationships*
- *accessing and engaging in work, training, education or volunteering*
- *making use of necessary facilities or services in the local community including public transport and recreational facilities or services*
- *carrying out any caring responsibilities he has for a child*

He is to be regarded as being unable to achieve an outcome if he is unable to achieve it without assistance or he is able to do so - but it causes him significant pain, distress or anxiety or it endangers or is likely to endanger his or another's health and safety or it takes significantly longer than would normally be expected.

Guidance

Local authorities must be satisfied that his needs are due to a physical or mental impairment or illness and not instead due to other factors. They must consider if he has needs as a result of having a physical, mental, sensory, learning or cognitive disability or illness, substance misuse or brain injury. It should base its judgment on the assessment and a formal diagnosis should not be required.

The authority should consider the cumulative rather than each individual effect of him being unable to achieve outcomes.

The term 'significant' is not defined and must therefore bear its everyday meaning. Authorities will have to consider whether his needs and consequent inability to achieve outcomes will have an important, consequential effect on his daily life, his independence and his well-being.

In making this judgment authorities should look to understand his needs in the context of what is important to him.

Duty to meet needs

Section 18

An authority must meet an adult's needs for care and support that meet the eligibility criteria if:

- *he is ordinarily resident in its area or is present there but of no settled residence and*
- *his accrued costs do not exceed the cap on care costs and*
- *he is not to be charged or is to be charged but he asks the authority to meet his needs or he lacks the capacity to arrange for the provision of care and support and no-one is in a position to do so*

The duty does not, however, apply to such of his needs as are being met by a carer.

Power to meet needs

Section 19

An authority may meet an adult's needs for care and support if:

- *he is ordinarily resident in its area or is present there but of no settled residence and*
- *it is satisfied it is not under a duty to meet them*

Where an authority has determined that an adult's needs for care and support meet the eligibility criteria but is not under a duty to meet them, it may meet them if:

- *he is ordinarily resident in another authority's area and*
- *he is not to be charged or is to be charged but he asks the authority to meet his needs or he lacks the capacity to arrange for the provision of care and support and no-one is in a position to do so and*
- *it has notified the other authority of its intention to meet his needs*

An authority may meet an adult's needs for care and support that appear to be urgent, regardless of whether he is ordinarily resident in its area, without having carried out a needs assessment (or financial assessment) made a determination as to whether his needs meet the eligibility criteria.

Care and support plan

Section 24

Where an authority has a duty to meet a person's needs for care and support it must prepare a plan, tell him which (if any) of the needs it is going to meet may be met by direct payments and help him with deciding how to have his needs met.

Where an authority has carried out a needs assessment but is not under a duty to meet any needs and decides not to exercise its power to do so, it must give its subject its written reasons for not meeting needs and advice and, unless it has already done so, information about what can be done to meet or reduce his needs or to prevent or delay the development of his needs in the future.

Where an authority is not going to meet an adult's needs for care and support it must nonetheless prepare an independent personal budget for him if his needs meet the eligibility criteria, at least some of his needs are not being met by a carer and he is ordinarily resident in its area or is present there but of no settled residence.

Section 25

A care and support plan is a document that:

- *specifies the needs identified by the needs assessment*
- *specifies whether, and if so to what extent, the needs meet the eligibility criteria*
- *specifies the needs that the authority is going to meet and how it is going to meet them*
- *specifies to which of these matters the provision of care and support could be relevant: the impact of the person's needs for care and support on his well-being; the outcomes he wishes to achieve in day-to-day life; whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes*
- *includes the personal budget*
- *includes advice and information about what can be done to meet or reduce the needs and what can be done to prevent or delay the development of needs in the future*
- *specifies any needs to be met by the making of direct payments and their amount and frequency*

In preparing such a plan the authority must involve the person concerned, any carer he has and any person he asks the authority to involve or, where he lacks the requisite capacity, any person who appears to the authority to be interested in his welfare. The authority must also take all reasonable steps to reach agreement with the person concerned about how it should meet his needs.

The authority must give a copy of the plan to the person concerned, with his authority any carer he has and any other person to whom he asks it to give a copy.

Personal Budgets and Resource Allocation under the care Act 2014

Christine Cooper

Introduction

1. Over recent years there has been a drive towards person-centred assessments and care planning. The advent of the individual budget or personal budget has been seen as a major part of that movement. The Care Act 2014 and its supporting regulations and guidance continues this development and enshrines in law the principle that everyone should have a personal budget.
2. The general scheme of the Act is:
    a. Following the assessment of need, an indication of the likely personal budget is given.
    b. The care and support plan is developed, making choices about how and by whom the needs that the local authority has agreed to fund will be met.
    c. The indicative personal budget is reviewed and adjusted to ensure that it is sufficient to meet those needs taking into account any reasonable preferences as to how the needs are to be met.
    d. Direct payments are made where the person choses to make their own arrangements for their care and support.
3. The stated aim of giving service users greater choice and autonomy is an admirable goal. However, given the very difficult economic circumstances in which local authorities are delivering such services, it is likely that there will be tensions, particularly where the preferred method of meeting a particular need costs significantly more than the local authority would otherwise spend. It seems likely that the court will be called upon to adjudicate in this area before very long.

The Indicative Budget

4. The Act makes no mention of an indicative budget being given at an early stage. Section 24(1)(e) simply requires the care and support plan produced to include the personal budget. The secondary legislation is silent upon the need for an indicative personal budget to be given. However, the guidance takes a different view. It states at paragraph 11.22 that:

> It is important to have a consistent method for calculating personal budgets that provides an early indication of the appropriate amount to meet the identified needs to be used at the beginning of the planning process. Local authorities should ensure that the method used for calculating the personal budget produces equitable outcomes to ensure fairness in care and support packages regardless of the environment in which care and support takes place, for example, in a care home or someone's own home. Local authorities should not have arbitrary ceilings to personal budgets that result in people being forced to accept to move into care homes against their will.

5. On one level, it is easy to see that this premise is correct, there is no point including options when drawing up the detailed care and support plan if they are likely to cost far more than the local authority is able to fund. However, it is hard to see how the starting point for a person who needs 24 hour care would be anything other than the likely cost of a suitable care home. That does not mean that the personal budget could not be adjusted upwards where there were sufficient benefits to the person's well-being of remaining in the community, but the guidance seems to suggest that it should not be the starting point.

6. Many local authority have already developed resource allocation models or systems which are used to give an indicative personal budget for a person with a particulars set of needs. The lawfulness of these systems has been challenged under the existing legislation. The Supreme Court considered the use of a resource allocation model in the determination of the amount of the personal budget in *R (KM) v Cambridgeshire County Council* [2012] UKSC 23. It held that the local authority was entitled to use its resource allocation model to produce a 'ball-park' figure for the personal budget provided that there was a further check to verify that the allocated figure was sufficient to procure the services identified as being necessary for the local authority to provide.
7. The guidance confirms that these systems may still be used to give an initial figure but warns that the model may not be suited to all client groups especially where there are complex needs which may be costly to meet and gives the example of deaf-blind people. It goes on to say (in paragraph 11.22):

> It is important that these factors are taken into account, and that a 'one size fits all' approach to resource allocation is not taken. If a RAS model is being used, local authorities should consider alternative approaches where the process may be more suitable to particular client groups to ensure that the personal budget is an appropriate amount to meet needs.

8. The principles that apply to the indicative personal budget (as well as to the final agreed personal budget) are:
   - **Transparency:** Authorities should make their allocation processes publicly available as part of their general information offer, or ideally provide this on a bespoke basis for each person the authority is supporting in a format accessible to them. This will ensure that people fully understand how the personal budget has been calculated, both in the indicative amount and the final personal budget allocation. Where a complex RAS process is used, local authorities should pay particular consideration to how they will meet this transparency principle, to ensure people are clear how the personal budget was derived.

- **Timeliness:** It is crucial when calculating the personal budget to arrive at an upfront allocation which can be used to inform the start of the care and support planning process. This 'indicative budget' will enable the person to plan how the needs are met. After refinement during the planning process, this indicative amount is then adjusted to be the amount that is sufficient to meet the needs which the local authority is required to meet under section 18 or 20(1), or decides to meet under section 19(1) or (2) or 20(6). This adjusted amount then forms the personal budget recorded in the care plan.
- **Sufficiency:** The amount that the local authority calculates as the personal budget must be sufficient to meet the person's needs which the local authority is required to meet under section 18 or 20(1), or decides to meet under section 19(1) or (2) or 20(6) and must also take into account the reasonable preferences to meet needs as detailed in the care and support plan, or support plan.

Care and Support Planning

9. The provisions of the Act and the guidance given in respect of personal budgets do not sit together very well. Section 26(1) of the Act defines the personal budget as:

> (1) A personal budget for an adult is a statement which specifies—
>
> (a) the cost to the local authority of meeting those of the adult's needs which it is required or decides to meet as mentioned in section 24(1),
>
> (b) the amount which, on the basis of the financial assessment, the adult must pay towards that cost, and
>
> (c) if on that basis the local authority must itself pay towards that cost, the amount which it must pay.

10. However, the guidance repeatedly refers to a need for the personal budget to be greater than the cost to the local authority of meeting the needs that it has a duty to meet or has decided to exercise its power to meet. Paragraph 11.25 of the guidance states:

> … In establishing the 'cost to the local authority', consideration should therefore be given to local market intelligence and costs of local quality provision to ensure that the personal budget reflects local market conditions and that appropriate care that meets needs can be obtained for the amount specified in the budget. … Consideration should also be given as to whether the personal budget is sufficient where needs will be met via direct payments, especially around any other costs that may be required to meet needs or ensure people are complying with legal requirements associated with becoming an employer (see chapter 12). There may be concern that the 'cost to the local authority' results in the direct payment being a lesser amount than is required to purchase care and support from the local market due to local authority bulk purchasing and block contract arrangements. However, by basing the personal budget on the cost of quality local provision, this concern should be allayed.

11. The following paragraphs (11.26-11.28) do make the point that this does not mean that the budget must be increased where there is a preference for a direct payment no matter what the cost. However, they do start from a general premise that the personal budget should be increased where the preference for a direct payment is reasonable and would deliver some additional benefit. It states (in paragraph 11.27) that:

> … Decisions should therefore be based on outcomes and value for money, rather than purely financially motivated.

12. The potential problems created by the approach taken in the guidance can be seen from the case study that follows paragraph 11.28:

> Example – Costs of direct payments
>
> Andrew has chosen to meet his needs by receiving care and support from a PA. The local authority has a block contract with an agency which has been providing support to Andrew twice per week. Andrew would now like more flexibility in the times at which he receives support in order to better meet his needs by allowing him to undertake other activities and consider employment. He therefore requests a direct payment so that he can make his own arrangements with another agency, which is happy to arrange a much more flexible and personalised service, providing Andrew with the same carer on each occasion, and at a time that works best for him. The cost to the local authority of the block contracted services is £12.50 per hour. However, the more flexible support costs £17 per hour (inclusive of other employment costs). The local authority therefore increases Andrew's direct payment from £62.50 to £85 per week to allow him to continue to receive the care he requires. The solution through a direct payment delivers better outcomes for Andrew and therefore the additional cost is reasonable and seen as value for money as it may delay future needs developing. The local authority also agrees it is more efficient for them to allow Andrew to arrange and commission the hours he wants to receive support and handle the invoicing himself.

13. It is difficult to see that the additional £4.50 per hour in this example will delay future needs developing or that it is more efficient for the local authority to make direct payments to Andrew rather than using its block contract. However, it does seem likely that this example will be frequently cited as a requirement that the local authority must set the budget at a rate that is higher than the cost the local authority would incur if it were to provide services itself.

14. The way in which the personal budget is to be used is at the heart of the process of planning the person's care and support and local authorities will be expected to support and facilitate decision making. The personal budget may be used to fund services provided by the local authority, to fund services managed by a third party (referred to in the guidance as an individual service fund or ISF) or taken as direct payments. The care and support plan may ultimately adopt a mixture of these approaches.

Setting the Final Personal Budget

15. As with the indicative personal budget, the final decision as to a person's personal budget must be transparent, timely and sufficient and these principles are explained above at paragraph 8. The care and support plan must include the cost to the local authority of meeting the needs that the local authority is required or has decided to meet.
16. Where the cost to the local authority of meeting the needs for care and support include daily living costs, such as when the care is provided in a residential care home, the personal budget must state the amount attributable to the daily living costs and the balance (i.e. the amount not attributable to daily living costs).
17. The local authority may not include the costs of intermediate care or reablement services provided for up to six weeks within the amount of the personal budget and may not charge for such services. If the local authority chooses not to charge for intermediate care or reablement services after six weeks, it must not include the cost in the personal budget (see The Care and Support (Personal Budget: Exclusion of Costs) Regulations 2014).
18. Further, other sums that do not form part of the cost to the local authority of providing the care and support necessary to meet the person's needs should not be included in the personal budget. So, for example, a person who has resources in excess of the relevant capital threshold may request that the local authority makes the arrangements for their care may be charged an administration fee to cover the cost of making the arrangements by virtue of s. 14(1)(b). However, that administration fee is not part of the cost to the local authority of meeting the person's needs and so cannot be included in the personal budget.

19. From 2016, when the provisions concerning the cap on the total amount that a person can be asked to contribute towards the cost of his or her care comes into effect, the amount of the personal budget will assume a critical importance (independently of questions about how the care needs are to be met) because it is the amount that will accrue towards the cap. If extraneous amounts are included in the personal budget, the cap will be reached sooner and the local authority will have to bear the full cost of the care and support plan sooner.

Direct Payments

20. The provisions for direct payments are broadly similar to those in the current regime. They are set out in s. 31- s. 33 of the Act and in the Care and Support (Direct Payments) Regulations 2014 ("the Direct Payment Regulations"). Chapter 12 of the guidance deals with direct payments and this is considerably shorter than the guidance it replaces.
21. As previously, direct payments cannot be made to certain groups, generally those subject to orders in respect of alcohol or drug abuse.
22. The local authority must be satisfied that the person requesting direct payments or their nominated representative is capable of managing the administration of the direct payment with such assistance as is likely to be available. The use of the direct payment must be monitored within six months and thereafter every twelve months and the local authority must not ask for more information than is reasonably required for the purpose of enabling it to know that making direct payments is still an appropriate way of meeting the needs, and that conditions upon which it is made are met. The guidance states (in paragraph 12.24):

> Local authorities should not design systems that place a disproportionate reporting burden upon the individual. The reporting system should not clash with the policy intention of direct payments to encourage greater autonomy, flexibility and innovation. For example, people should not be requested to duplicate information or have onerous monitoring requirements placed upon them. Monitoring should be proportionate to the needs to be met and the care package. Thus local authorities should have regard to lowering monitoring requirements for people that have been managing direct payments without issues for a long period.

23. This suggests that a lighter touch review should be conducted where the size of the direct payment is small, the care purchased is simple or where there is a history of managing the direct payments properly.

24. The rules on paying family members have been enlarged. Reg.3 of the Direct Payment Regulations permits the direct payment to be used to pay a member of the family to provide some administrative and management support to the person to whom the direct payments are made. This is still subject to the restriction in the regulation that the local authority considers it necessary to pay the family member for this support. That is somewhat at odds with the guidance which seems to suggest that personal preference is sufficient in the example it gives following paragraph 12.35.

Example – Direct Payment to pay a family member for administration support

David has been using direct payments to meet his needs for some time, and has used private agencies to provide payroll and administration support, funded by a one-off annual payment as part of his personal budget allocation.

David's wife, Gill provides care for him and is increasingly becoming more hands-on in arranging multiple PAs to visit and other administrative tasks as David's care needs have begun to fluctuate.

They jointly approach the local authority to request that Gill undertake the administration support instead of the agency as they want to take complete control of the payment and care arrangements so that they can best meet David's fluctuating needs and ensure that appropriate care is organized.

The local authority considers that Gill would be able to manage this aspect of the payment, and jointly revises the care plan to detail the aspects of the payment, and what services Gill will undertake to the agreement of all concerned. The personal budget is also revised accordingly.

The family now have complete control of the payment, Gill is reimbursed for her time in supporting David with his direct payment, and the local authority are able to make a saving in the one-off support allocation as there are no provider overheads to pay. In promoting David's wellbeing, the local authority has demonstrated regard for the balance between promoting an individual's wellbeing and that of people who are involved in caring for them. They have given Gill increased control in a way that David is comfortable with and supports.

25. Once again, the example given seems unrelated to the statutory test and this is likely to give rise to problems as family members providing administrative support seek to have payment for their time included within the personal budget.
26. As currently, direct payments cannot be used for long term care in a care home. The limit remains at four weeks and where there has been more than one period of residence within four weeks of a previous stay, these are added together. The guidance states that this limit is imposed to promote people's independence and to encourage them to remain at home rather than moving to a long-term care home placement.
27. The guidance discourages direct payments from being used to pay for services from the local authority that made the payment, other than where this is a one-off or irregular purchase. It states at paragraph 12.55:

> As a general rule, direct payments should not be used to pay for local authority provided services from the 'home' local authority. Where a person wishes to receive care and support from their local authority, it should be easier and less burdensome to provide the service direct to the person. This will also avoid possible conflicts of interest where the local authority is providing the direct payment, but also promoting their services for people to purchase.

28. The guidance also makes it clear that local authorities may not restrict the services or service providers from whom the person may commission care and support. It is not permitted to restrict the use of the payment to 'authorised providers'. Further, whilst the use of pre-paid cards is not prohibited and their value, in appropriate circumstances, is recognised, the guidance sates at paragraph 11.59:

> It is also important that where a pre-paid card system is used, the person is still free to exercise choice and control. For example, there should not be blanket restrictions on cash withdrawals from pre-paid cards which could limit choice and control. The card must not be linked solely to an online market-place that only contains selected providers in which to choose from. …

29. Finally, as currently, direct payments may be terminated where there has been a serious contravention of the rules or where the conditions set out in s. 31 or s. 32 of the Act are no longer met. The payments should only be terminated as a last resort. The guidance emphasised the responsibility upon a local authority that has decided to terminate direct payments to ensure that the person is not left without the care and support that is needed because of a gap in provision when direct payments are terminated.

Care Act 2014

New challenges

Tony Harrop-Griffiths

Eligibility

The criteria, which are to be applied throughout England, set a minimum threshold for adult care and support needs that all local authorities must meet. This means that a person who is eligible for care and support in Tower Hamlets should also be eligible in Berwick-on-Tweed and in Cornwall and in the areas of all social services authorities in between – and vice versa. This is intended to put an end to the 'post-code lottery' and in theory the only variation permissible will be that authorities can choose to meet ineligible needs as well. It is likely, however, that many, if not the majority, will not, because the Department of Health has deduced it is possible there will be an increase in the number of people (who are currently in the moderate band) who are eligible.

From a lawyer's perspective the interesting issue is the extent to which, if at all, it will be open to a local authority to decide on eligibility for itself within the bounds of rationality.

On the one hand there appears to be some scope for judgment, in, for example, deciding whether a person is appropriately clothed or his home environment is habitable and in deciding whether he would suffer significant pain, distress or anxiety in trying to achieve an outcome without assistance – but, on the other hand, the Guidance makes it clear that whether something has a significant impact on a person's well-being depends on how he perceives this rather than on what others may think.

The decisive point, however, may well be the wording of section 13(1) and (7) and of regulation 2, which in combination provide as follows: *Where an authority is satisfied on the basis of a needs assessment that its subject has needs for care and support it must determine whether any of these meet the criteria, which they do if they come within the regulation.* Although the authority has to be satisfied, which indicates the exercise of judgment, that there are needs there is no such provision or anything similar as regards deciding whether the criteria are met. Claimants' lawyers may well argue therefore that eligibility is a question of fact.

Destitution

It is likely that in this age of austerity the same lawyers will look upon the coming into force of the Act as an opportunity to try to obtain more for their clients, particularly in the form of accommodation and subsistence, than they can at the moment. Some may even go so far as to say that even where there is only be a power to meet a person's needs for care and support this must be exercised because otherwise there would be a breach of Article 3 of the ECHR by reason of destitution.

Authorities may, however, be able to make two arguments of their own.

The first concerns section 21 (of the Care Act), which provides that an authority may not meet needs for care and support if the person concerned is excluded from State benefits and his needs for care and support have arisen solely because he is destitute or because of the actual or anticipated effects of destitution. Neither 'care' nor 'support' are defined but they are distinct concepts and the former is likely to equate to looking after and the latter to other assistance, including the provision of accommodation. A destitute person may need care not because of destitution but because of, for example, a physical impairment – but he would need *ordinary* accommodation together with it as a result of destitution, in which case the authority may be prevented by section 21 from providing this. If, however, he needs *specialised* accommodation, such as in a nursing home, this would not be as a result of his destitution but because of his ailment.

The second concerns the test for eligibility. A destitute person's need for *ordinary* accommodation cannot be said to arise from, for example, a physical impairment but from destitution and it is difficult also to see how a need for such accommodation can be related to the impairment. In any event the outcomes suggest they relate to someone who already has their own home (e.g. 'maintaining a habitable home environment') and there is only an inability to achieve an outcome if 'assistance' is needed – this term is not defined but is unlikely to include the provision of accommodation (or of other essential living requisites such as food).

Ordinary residence

Section 39 provides that where an adult has needs for care and support that can be met only if he is living in accommodation of a type specified in regulations and he is living in such accommodation, he is to be treated as ordinarily resident in the area in which he had that status immediately before he began to live in such accommodation. Regulations specify this accommodation to be in a care (or nursing) home, in a shared lives carer's home and in a supported living arrangement.

The intention is not only to replace the deeming provision in section 24(5) of the National Assistance Act 1948 but to extend it to these other forms of accommodation, no doubt in part in order to prevent 'dumping'.

There are two interesting points about section 39. The first is that, unlike section 24(5), it does not just relate to when a local authority provides the accommodation in question. Therefore, for example, a person who has been a self-funder in a care home would come within its wording as at the point, say, when her capital dips below the set amount and she has needs for care and support from the authority. Imagine she was ordinarily resident in authority A's area on going into the home, which is in authority B's area, and has since become ordinarily resident in authority B's area *as a matter of fact*. Nonetheless there is the argument that come 1 April she is ordinarily resident in authority A's area *as a matter of law* because she ticks all the section 39 boxes, even though she may have moved into the home many years before.

Now imagine there is another person, who was ordinarily resident in authority A's area on going into supported living accommodation, which is in authority B's area, and who has since become ordinarily resident in authority B's area *as a matter of fact*. Again, there is the argument that come 1 April she is ordinarily resident in authority A's area *as a matter of law* because, again, she ticks all the boxes, even though she may have moved into the home many years before. Indeed, there may previously, before 1 April, have been a dispute between the two authorities about her ordinary residence and authority B may have eventually accepted or been told by the Secretary of State that she had this status in its area – even so, there appears to be no reason why she does not again become ordinarily resident in authority A's area one second after midnight on 1 April.

Recovery of debts

By section 69, any sum due to a local authority under Part 1 of the Act is recoverable as a debt due to it and a sum is recoverable under the section within 6 years of it becoming due if it becomes due on or after 1 April and in any other case within 3 years of it becoming due. As such a sum can only become due on or after 1 April it is difficult to see what 'in any other case' may mean but, what is worse, the intention behind it is founded on a mistaken interpretation of the corresponding section in the National Assistance Act 1948!

There is, however, something in the same section that makes sense, using both meanings. From 1 April the costs incurred by an authority in recovering or seeking to recover a sum due to it under Part 1 of the Act are recoverable as a debt due to it. This will cover not only the costs incurred in recovering charges from a 'service-user' but also those incurred in pursuing a successful ordinary residence claim against another authority.