

The Care Act 2014

Luke Clements

www.lukeclements.com

Legislation intended to be repealed

- National Assistance Act 1948
- Chronically Sick and Disabled Persons Act 1970 (but only for adults)
- Health & Social Services & Social Security Adjudications Act 1983
- NHS & CC Act 1990
- Community Care (Delayed Discharges etc.) Act 2003
- Carers Acts
- Health & Social Care Act 2001 (DPs)

Not
s117 MHA 1983 nor DFGs etc

Statutory Guidance

Revised Statutory Guidance (December 2016)

Status of Guidance

- LAs must follow guidance unless they can demonstrate sound legal reasons for not doing so'. (s78 Care 2014)

Annexes

- Annex B, C, D, E Charging
- Annex G: Hospital Discharge

Definitions

Adult

- 'in need'
- has 'a physical or mental impairment or illness'.

Carer

- an adult who provides or intends to provide care for someone but not employed to do this.

Well-being

"Well-being" relates to:

- (a) personal dignity
- (b) physical / mental health / emotional well-being;
- (c) protection from abuse and neglect;
- (d) control over day-to-day life inc nature of care 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 adult's contribution to society.

Well-being

"Well-being"

LA must have regard to—

- (a) assumption that the 'individual' is best placed to judge well-being;
- (b) individual's views, wishes and feelings;
- (c) take into account all the individual's circumstances (and non-discriminatory in terms of stereotyping etc);
- (d) individual participating (with support if needs be) as fully as possible in decisions about them;
- (e) a balance between the individual's well-being and that of any friends or relatives involved in their care;
- (f) the need to protect people from abuse and neglect;
- (g) any restrictions kept to the minimum necessary.

Luke Clements Training

Well-being ~ the lens through with eligibility is to be viewed

Ombudsman

Maladministration for a LA to impose 'restrictive interpretations of Care Act outcomes' that fail to take proper account of an adult's well-being

Complaint ~ Hammersmith & Fulham 21 July 2016 para 25.

Luke Clements Training

Independent living

• 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

Guidance (para 1.19)

- *Burnip v. Birmingham City Council* (2012)
- *R (Bracking and others) v. SS DWP* (2013)
- *Mathieson v Sec State Work & Pensions* (2015)
- *Hurley v Sec State Work & Pensions* (2015)

Luke Clements Training

Care Act 2014

General

- Prevention;
- Integration (Better Care Fund);
- Information;
- High quality providers.

Cooperation

section 6 ~ general duty to cooperate

section 7 ~ specific duty to cooperate

Where LA requests co-operation of a 'relevant partner' (or vice versa) in relation to an 'individual with needs' or a carer, a carer of a child or a young carer, then they must comply with the request unless it would:

- (a) be incompatible with its duties, or
- (b) have an adverse effect on the exercise of its functions.

Duty to give reasons if refuses

Mirrors existing s27 Children Act 1989

Non-delegable (section 79(2))

Care & support (section 8)

Range of care & support for carers / adults in need

- a) accommodation in a care home or in premises of some other type;
- b) care and support at home or in the community;
- c) counselling, advocacy and other types of social work;
- d) goods and facilities;
- e) information and advice

Delegation

section 79

Enables LAs to delegate all of their functions under the Act – with few exceptions (eg safeguarding);

- (6) Act / omissions by delegated body to be treated as done / omitted to be done by the LA.

Many carers support groups already doing what are in effect LA 'assessments'

Assessment of adults in need

section 9

Duty 'to involve carer'

Carer blind assessments

- LAs must consider all of the adult's care ... needs, regardless of any support being provided by a carer. ... information on the care that [the carer provides]... can be captured during assessment, but it must not influence the eligibility determination.(para 6.15)

Adults refusing assessments

Section 11

A LA is not required to assess if there is a valid refusal:

But is required to assess if the adult

- lacks capacity to refuse and it is in their best interests; or
- is experiencing, or is at risk of, abuse or neglect.

Adults refusing support

Ombudsman 2016

- Adult with physical & mental disabilities including significant difficulties with communication and behaviour.
- He had eligible needs for equipment and personal care but on many occasions declined support / cancelled services.

Due to his medical conditions and disabilities, Mr X does not always respond in the most helpful way and at times this causes him to be disadvantaged

Adults refusing support

- Council policy to close the case to the allocated worker once the situation is stable
- *I could not see any point at which it might have been justified in saying it was stable.*
- It was the Council's responsibility to ensure his needs were assessed and eligible needs met.
- His behaviour meant this not straightforward but *"Council should have continued exploring alternative ways to achieve successful assessment and service provision"*.
- This was not a case of Mr X choosing not to cooperate, but of his disability causing him difficulties in doing so.

Complaint no. 15 008 589 Suffolk CC 10/10/16

Cases of urgency

Section 19

A LA may meet an adult's needs which appear to it to be urgent (regardless of OR) without having yet—

- (a) carried out a needs assessment or a financial assessment, or
- (b) made an eligibility determination;

A LA may meet needs ... where, eg adult terminally ill (within the meaning of s82(4) Welfare Reform Act 2012.

- the person suffers from a progressive disease and the person's death in consequence of that disease can reasonably be expected within 6 months

Adult Criteria



Adult Support



Carer criteria

An adult's needs meet the eligibility criteria if—

- (a) the needs are caused by a physical or mental impairment or illness;
- (b) as a result of the adult's needs the adult is unable to achieve **two or more** outcomes; and
- (c) as a consequence there is, or is likely to be, a **significant** impact on the adult's well-being.

Luke Clements Training

Significant

Guidance

'Significant' is not defined

- 'Needs may affect different people differently ... Circumstances which create a significant impact on the wellbeing of one individual may not have the same effect on another' (para 6.108)

Luke Clements Training

Significant

Ombudsman

- Adult with complex mental health difficulties receiving support. Re-assessment found it would take significantly longer than would generally be expected to achieve outcomes associated with work, accessing community services, maintaining hygiene, and maintaining a home environment due to her mental health conditions.
- It then stated that the difficulties did not significantly impact her wellbeing.
- Maladministration ~ assessment provides no explanation why her wellbeing was not significantly impacted by her difficulties to achieve the specified outcomes.

Complaint against Milton Keynes Council 20/9/16

Unable to achieve 2 or more of:

- (a) managing and maintaining nutrition;
- (b) maintaining personal hygiene;
- (c) managing toilet needs;
- (d) being appropriately clothed;
- (e) being able to make use of the adult's home safely;
- (f) maintaining a habitable home environment;
- (g) developing and maintaining family or other personal relationships;
- (h) accessing and engaging in work, training, education or volunteering;
- (i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and
- (j) carrying out caring responsibilities the adult has for a child.

unable to achieve an outcome if —

- (a) is unable to achieve it without assistance;
- (b) is able to achieve it without assistance but doing so causes the adult significant pain, distress or anxiety;
- (c) is able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of the adult, or of others; or
- (d) is able to achieve it without assistance but takes significantly longer than would normally be expected.

Guidance on meaning of 'outcomes'

Luke Clements Training

Game Over for 'needs v. wants'

Regulations spell out what 'needs' are:

- If unable to 'achieve' two or more 'outcomes' and impact 'significant' then:
- LA must address this need;
- Must it do so in a way that enables the person to 'achieve the outcome' the regulations describe?
- The *McDonald* question?
- Section 1 principles ~ ie the assumption that the 'individual' is best placed to judge well-being;

Luke Clements Training

Guidance para 6.106

managing and maintaining nutrition.

- whether the adult has access to food and drink to maintain nutrition, and that the adult is able to prepare and consume the food and drink.

Luke Clements Training

Nutrition ~ eating / preparing

A blind person.

She said she needed help to (among other things) check the contents of her fridge; read cooking instructions; and have an escort to help her on occasional shop trips.

In the council's opinion although the need relates to eating / preparing meals this could be addressed by use of long-life foods, her freezer, and ready meals.

↑
Is this sufficient to stop the impact on her well-being being significant?

Luke Clements Training

Ombudsman decision?

Applying the Eligibility Criteria by specific reference to the well-being criteria what would the Ombudsman decide ??

maintaining personal hygiene

Adult unable to manage getting in or out of her bath
OT decides no need for a level access shower as she is able to maintain her hygiene by strip washing at the sink.

↑
Is this sufficient to stop the impact on her well-being being significant?

Ombudsman decision?

Applying the Eligibility Criteria by specific reference to the well-being criteria what would the Ombudsman decide ??

Guidance para 6.106

managing toilet needs

- LAs should consider the adult's ability to access and use a toilet and manage their toilet needs.

Guidance para 6.106

being appropriately clothed.

- LAs should consider the adult's ability to dress themselves and to be appropriately dressed, for instance in relation to the weather to maintain their health.

Getting dressed

A blind person.

She said she needed help to (among other things) sort clothes, so she did not wear stained or inappropriate clothing

In the council's opinion although the need related to dressing this was not a dressing outcome that was sufficiently significant for it to be eligible.

↑
Is this sufficient to stop the impact on her well-being being significant?

Ombudsman decision?

Applying the Eligibility Criteria by specific reference to the well-being criteria what would the Ombudsman decide ??

Luke Clements Training

Clothing

2016 ombudsman report (Dorset CC)

- The assessment recorded a need for help with dressing but no support made for an evening visit to help undress.
- It is logical to expect a person who needs assistance with dressing to need assistance with undressing. Being appropriately dressed for bed is equally as important as being dressed in day clothes

2016 ombudsman report (Kent CC)

- Assessment stated adult could wash and dress as "if he got too tired, he could rest and complete the task when able".
- Maladministration

Luke Clements Training

Guidance para 6.106

being able to make use of the home safely

- the adult's ability to move around the home safely, which could for example include getting up steps, using kitchen facilities or accessing the bathroom. This should also include the immediate environment around the home such as access to the property, for example steps leading up to the home.

Luke Clements Training

Guidance para 6.106

maintaining a habitable home environment.

- whether the condition of the adult's home is sufficiently clean and maintained to be safe. A habitable home is safe and has essential amenities. An adult may require support to sustain their occupancy of the home & to amenities, such as water, electricity, gas.

Luke Clements Training

maintaining a habitable home environment.

Adult with Multiple Sclerosis along with other health conditions. He has mobility difficulties and is an essential wheelchair user. He uses a walking stick to mobilise inside his home. He is below the capital threshold.

'Needs' domestic assistance.

Social services advise that 'we no longer fund domestic work generally' and that he was not eligible because he could afford a cleaner: that the ... Act was "about what people can do for themselves".

↑
Is this sufficient to stop the impact on her well-being being significant?

Luke Clements Training

Ombudsman decision?

Applying the Eligibility Criteria by specific reference to the well-being criteria what would the Ombudsman decide ??

Luke Clements Training

maintaining a habitable home environment.

Adult assessed as having eligible needs for support with showering, washing her hair and dressing.

Her need for house-cleaning rejected on the basis that she should pay for this using her attendance allowance.

maintaining a habitable home environment.

Adult assessed as having eligible needs for support with showering, washing her hair and dressing.
Her need for house-cleaning rejected on the basis that she should pay for this using her attendance allowance.



DLA & provision

DoH guidance¹⁹ LAC (DH) (2012)03 noted that:

some local authorities were taking the mobility component into account when considering what social services to be provide

... councils have a duty to assess the needs of any person ... for whom the authority may provide ... community care services They have a further duty to decide, ... what, if any, services they should provide to meet the individual's needs.

This duty does not change because a particular individual is receiving the mobility component of DLA

Guidance para 6.106

developing & maintaining family / relationships

- whether the adult is lonely or isolated, either because their needs prevent them from maintaining the personal relationships they have or because their needs prevent them from developing new relationships.

Guidance para 6.106

accessing /engaging in work, training, education or volunteering

- whether the adult has an opportunity to apply themselves and contribute to society through work, training, education or volunteering, subject to their own wishes in this regard. ... includes physical access to any facility & support with participation in the relevant activity.

Guidance para 6.106

making use of necessary facilities or services in the local community including public transport and recreational facilities or services

- the adult's ability to get around in the community safely and consider their ability to use such facilities as public transport, shops or recreational facilities when considering the impact on their wellbeing. LAs do not have responsibility for the provision of NHS services such as patient transport, however they should consider needs for support when the adult is attending healthcare appointments.

making use of community facilities

Ombudsman report (2016)

Arranging travel to hospital is an NHS responsibility , but social care support for the disabled person while attending as an outpatient will be CA 2014 function.

Complaint concerned a disabled person who needed support with every aspect of his personal care.

On occasions outpatient visits would take 8 hours – during which he needed support throughout this time to be able to eat, drink and go to the toilet.

Complaint 15 015 000 Barnsley MBC 27/7/16

Luke Clements Training

Guidance para 6.106

carrying out any caring responsibilities the adult has for a child

- LAs should consider any parenting or other caring responsibilities the person has. The adult may for example be a step-parent with caring responsibilities for their spouse's children.

Bristol CC v. S (2015)
 Care proceedings (mother a disabled person)
 'There appears to be a profound lack of knowledge of the responsibilities that arise under the Care Act 2014'
 HH Judge Wildblood 4 para 10.

Luke Clements Training

Proportionate assessments

C&S (Assessment) Regulations 2014 (reg 3(1))
 LA must carry out an assessment in a manner which—

- (a) is appropriate and proportionate to the needs and circumstances of the individual to whom it relates; and
- (b) ensures that the individual is able to participate in the process as effectively as possible.

Proportionality concerns the nature of the assessment – not whether to undertake one.

Luke Clements Training

Fluctuating need

C&S (Assessment) Regulations 2014 (reg3(3))

- In a case where the level of the individual's needs fluctuates, LA must take into account the individual's circumstances over such period as it considers necessary to establish accurately the individual's level of needs.

SCIE 'resource'

- must fully explore 'the "good" and "bad" ... over a suitable period of time to provide as complete a picture of the range of fluctuation as possible.

Fluctuating need

Local Government Ombudsman

- Adult with complex 'well documented' physical and mental health problems including very loose joints.
- LA described her as 'difficult to assess ... on some days she can manage but on other days she cannot get out of bed'.
- LA discovered a music video which showed her doing cartwheels and appearing more mobile than she had indicated. From this point on LA dealt felt she was exaggerating /fabricating her need.

Fluctuating need

- Hospital consultants very concerned. LA said she had sent an email saying she did not want support from the Council.
- Ombudsman considered 'indicative of somebody in despair ... [who] appears to have given up'. [72]

In finding maladministration the ombudsman cited 2 extracts from Statutory Guidance"

1. The principle of promoting wellbeing should be embedded through the LA care and support system. During the assessment process, for instance, the LA should explicitly consider the most relevant aspects of wellbeing to the individual concerned, and assess how their needs impact on them.

Fluctuating need

2. The need to ensure that decisions are made having regard to all the individual's circumstances (and are not based only on their age or appearance, any condition they have, or any aspect of their behavior which might lead others to make unjustified assumptions about their wellbeing). Local authorities should not make judgments based on preconceptions about the person's circumstances, but should in every case work to understand their individual needs and goals.

Complaint against West Sussex CC 5/12/2016

Assessment of adults in need

Guidance

- Where appropriate, an assessment may be carried out over the phone or online. ...
- local authorities should consider whether the proposed means of carrying out the assessment poses any challenges or risks for certain groups, particularly when assuring itself that it has fulfilled its duties around safeguarding, independent advocacy, and assessing mental capacity

Appropriately trained assessors

Guidance

- social workers and occupational therapists can provide important support and may be involved in complex assessments which indicate a wide range of needs, risks and strengths ...
- assessors must be 'appropriately trained'.
- if an 'assessor does not have the knowledge of a particular condition or circumstance, they must consult someone who has relevant expertise'

Carers Assessments (s10)

Duty to assess

- Largely codifies previous Carers Acts – but drops
 - the 'regular & substantial' requirement
 - the 'request'
 - creates 'duty' to meet eligible needs

Luke Clements Training

Carers Assessments (s10)

Local Government Ombudsman

Hospital discharge

The duty is not only to involve carers in the hospital discharge (see below) but also to assess a main carer before the discharge occurs/

In the ombudsman's opinion it was also important for the carer to have been at the assessment.

Complaint no 16 003 456 against Surrey CC 8 Sept 2016

Luke Clements Training

Carers Assessments (s10)

What is 'care'?

- both practical and emotional support (para 6.18)
- Section 1 physical /mental health /emotional well-being?

Previous guidance

- may relate to being 'anxious and stressed waiting for, or actively seeking to prevent, the next crisis'.

Luke Clements Training

Carers Assessments (s10)

Basic principles

- whether the carer able / willing to provide and continue to provide the care;
- the impact on the carers 'well-being';
- the outcomes the carer wishes in day-to-day life;
- whether the carer works or wishes to (and / or) to participate in education, training or recreation.

Carers Assessments

Private / combined assessments

- 'only if the adult to whom the needs or carer's assessment relates agrees' – s12(5)
- if 'either of the individuals concerned does not agree to a combined assessment, then the assessments must be carried out separately' (para 6.72)

Eligibility criteria – carers (reg 3)

A carer's needs meet the eligibility criteria if

- The needs arise as a consequence of providing necessary care for an adult
- The effect of the carer's needs is that any of the circumstances specified below apply to the carer
- As a consequence there is, or is likely to be, a significant impact on the carer's well-being.

1. Needs arise as a consequence of caring for an adult;
2. One of the circumstances listed below exists;
3. A significant impact on the carer's well-being occurs

Outcomes

- (a) the carer's physical or mental health is, or is at risk of, deteriorating;
- (b) the carer is unable to achieve any of the following outcomes—
 - i. carrying out any caring responsibilities the carer has for a child;
 - ii. providing care to other persons for whom the carer provides care;
 - iii. maintaining a habitable home environment in the carers home (whether or not this is also the home of the adult needing care);
 - iv. managing and maintaining nutrition;
 - v. developing and maintaining family or other personal relationships;
 - vi. engaging in work, training, education or volunteering;
 - vii. making use of necessary facilities or services in the local community, including recreational facilities or services; and
 - viii. engaging in recreational activities.

Carers & Eligibility

The carer's physical or mental health is, or is at risk of, deteriorating

- 56% carers have a caring related health condition
- 43% of carers had sought medical treatment for depression, stress or anxiety since becoming a carer;

Guidance para 6.123

carrying out any caring responsibilities the carer has for a child

- any parenting or other caring responsibilities the carer has for a child in addition to their caring role for the adult. eg, the carer might be a grandparent with caring responsibilities for their grandchildren while the grandchildren's parents are at work..

Guidance para 6.123

providing care to other persons for whom the carer provides care

- any additional caring responsibilities the carer may have for other adults. eg, a carer may also have caring responsibilities for a parent in addition to caring for the adult with care and support needs.

Guidance para 6.123

maintaining a habitable home environment

- whether the condition of the carer's home is safe and an appropriate environment to live in and whether it presents a significant risk to the carer's wellbeing. A habitable home should be safe and have essential amenities such as water, electricity and gas.

Guidance para 6.123

managing and maintaining nutrition

- whether the carer has the time to do essential shopping and to prepare meals for themselves and their family.

Guidance para 6.123

developing and maintaining family or other significant personal relationships

- whether the carer is in a position where their caring role prevents them from maintaining key relationships with family and friends or from developing new relationships where the carer does not already have other personal relationships.

Luke Clements Training

Guidance para 6.123

engaging in work, training, education or volunteering

- whether the carer can continue in their job, and contribute to society, apply themselves in education, volunteer to support civil society or have the opportunity to get a job, if they are not in employment.

Luke Clements Training

Guidance para 6.123

making use of necessary facilities or services in the local community

- whether the carer has an opportunity to make use of the local community's services and facilities and for example consider whether the carer has time to use recreational facilities such as gyms or swimming pools.

Luke Clements Training

Guidance para 6.123

engaging in recreational activities

- whether the carer has leisure time, which might for example be some free time to read or engage in a hobby.

Carer eligible vs adult non-eligible

section 20

- (7) A LA may meet ... a carer's needs for support in a way which involves the provision of care and support to the adult needing care, even if the LA would not be required to meet the adult's needs ...
- (8) Where a LA is required by this section to meet some or all of a carer's needs for support but it does not prove feasible for it to do so by providing care and support to the adult needing care, it must, so far as it is feasible to do so, identify some other way in which to do so.

Care & support plans

Respite and replacement care

- Where the carer is eligible for support but the adult being cared is not – and accordingly 'does not have their own personal budget or care plan' (para 11.42) – the carer could (eg) request a direct payment, and use that to commission their own replacement care from an agency (para 11.44).
- If such a type of replacement care is charged for... then it would be the adult needing care that would pay, not the carer, because they are the direct recipient of the service (para 11.45)

Respite & replacement care

Respite and replacement care

- For the purposes of charging, the PB which the carer receives must specify the costs to the LA and the costs to the adult, based on the charging guidance
- In this case, "the adult" refers to the carer, because they are the adult whose needs are being met. However, in instances where replacement care is being provided, the carer should not be charged;
- if charges are due to be paid then these have to be met by the adult needing care. Any such charges would not be recorded in the personal budget, but should be set out clearly and agreed by those concerned.

Respite & replacement care

Replacement care & NHS continuing healthcare?

What if the replacement care (identified in carer's assessment) is for an adult in receipt of NHS CC funding?

- NHS would be responsible for this.
- What if it failed / refused to provide this?

Social services could make a section 7 request

Where LA requests co-operation of a 'relevant partner' in relation to an 'individual with needs' or a carer, a carer of a child or a young carer, then it must comply with the request unless it would:

- be incompatible with its duties, or
- have an adverse effect on the exercise of its functions

Carers services

- relaxation classes, training on stress management, gym or leisure centre membership, adult learning, development of new work skills or refreshing existing skills (so they might be able to stay in paid employment alongside caring or take up return to paid work), pursuit of hobbies such as the purchase of a garden shed, or purchase of laptop so they can stay in touch with family and friends.

para 11.41

Duty to provide care & support

section 18 ~ support for adults in need

Duty to provide applies where:

- Individual is ordinarily resident in LA area; and
- Individual has eligible needs: and
 - Individual's finances below maximum allowance; or
 - Individual's finances above maximum allowance and they ask the LA to provide

Delayed until
2020 for care
home
placements

Luke Clements Training

Care & support plans

section 25 ~ Care and support plans
 Similar to current – but makes PBs mandatory for adults in need and carers

section 26
 Amount of a PB is

- The cost to the local authority of meeting the adult's needs

Luke Clements Training

Care & Support Plans

Key components of any care and support plan (para 10.36):

- the needs identified by the assessment;
- the extent to which the needs meet the eligibility criteria;
- how the LA is going to meet the needs;
- the desired outcomes of the adult 'in need';
- the outcomes the carer wishes to achieve (inc work, education and recreation);
- the personal budget ...;
- information / advice on what can be done to reduce the needs / prevent or delay development of needs ;
- where a direct payment ... , the needs to be met via the DP, the amount and frequency of the payments.

Luke Clements Training

Care & Support Plans

Local Government Ombudsman

- Care and support plans should include effective contingency plans.
- The fact that these may be difficult to predetermine in certain cases does not mean that they are absolved from this responsibility

Complaint against Kent CC 20/10.2016

Luke Clements Training

Copies

Guidance

The assessment

- the individual 'must be given a record of their needs or carer's assessment' (section 12(3) / 12(4) & para 6.98).

Care Plan

- the local authority must give a copy of the final plan in a format that is accessible to the person for whom the plan is intended, any other person they request to receive a copy, and their independent advocate if they have one. (section 25(9) / 25(10) & para 10.87)

Luke Clements Training

Care & Support Plans ~ clarity

- A 2016 ombudsman report concerned a severely disabled applicant's support plan listed as one outcome being able to 'manage financial matters and assist with correspondence and communication as necessary'. His support plan stated he was to have advocacy to help with all finances, bills and paperwork.
- The CA 2014 advocacy service did not feel the advocate should be doing anything other than advocacy and declined to provide the service.
- Maladministration by not making it clear that the need was not for advocacy but letter reading and help with finances and bills.

Complaint against Surrey CC 3/6/16

Luke Clements Training

Care & Support Plans ~ meeting needs

- A 2016 ombudsman report concerned a young man with Down's Syndrome assessed as having substantial needs including an outcomes to form 'peer group relationships' and prevent isolation.
- A suitable supported housing placement identified which had a resident of a similar age.
- LA withdrew this having found a cheaper placement but this was occupied by older people.
- In finding maladministration the ombudsman held that Care plans 'should not only cover how a person's physical needs will be met. They should also address the person's social needs and emotional wellbeing.'

Complaint against Barking & Dagenham LBC 8/6/2016.

Luke Clements Training

Care & support plans

Funding Panels

... . In some cases, panels may be an appropriate governance mechanism to sign-off large or unique personal budget allocations and/or plans. Where used, panels should be appropriately skilled and trained, and local authorities should refrain from creating or using panels that seek to amend planning decisions, micro-manage the planning process or are in place purely for financial reasons. ... (para 10.85)

Luke Clements Training

Funding panels

A panel rejected an assessor's identification of the adult having eligible needs:

- I am not persuaded that this panel was purely looking at compliance with the Care Act and cost effectiveness. If this was its remit, it failed to do this adequately. It is possible Miss X's needs could be met in other ways but with proper care and support planning in consultation with Miss X. Not through a decision in direct contravention of the care manager's recommendations by a panel who was not involved in the assessment.

Complaint. 15 017 591 Brighton & Hove CC 30/8/16.

Luke Clements Training

Funding panels

Reports from assessors that are required to go to a 'panel' must include a recommendation from the assessor as to her or his professional opinion as to what care is required.

Complaint 15 020 384 London Borough of Bromley 7/9/16

Luke Clements Training

Care & support plans

Local authority financial difficulties

- A local authority's finances are relevant when it decides *how* to meet the eligible needs of an individual 'but not *whether* those needs are met'. (para 10.27)
- LAs 'should not set arbitrary upper limits on the costs [they are] willing to pay to meet needs through certain routes' (para 10.27)

Luke Clements Training

Charging

section 14

- Power to charge – not a duty
- Annexes to Guidance replicate (largely) CRAG / Fairer Charging Guidance
- Loss of ability to impose charges for unpaid fees – under HASSASSA 1983
- Differences – eg DLA

Luke Clements Training

Reviews / reassessments

Section 27(1)

- Duty to keep under review care and support plans
- Expectation that plans will reviewed at last every 12 months and a 'light-touch review 6-8 weeks after the plan and personal budget signed off' (para 10.42 / 13.32)
- Reviews must person-centred, accessible and proportionate: must involve the 'person needing care and also the carer where feasible' (para 13.2)
- Purpose is identify if the person's needs / circumstances have changed' (para 13.4).
- The 'review must not be used as a mechanism to arbitrarily reduce the level of a person's personal budget' (para 13.4).

Luke Clements Training

Reviews / reassessments

Local Government Ombudsman (2016)

- Authorities must not assume a carer is willing or able to provide any care – including additional care arising from a reduction in the care package.
- It will be maladministration for a reduction to occur without assessing the carer and explicitly clarifying (and recording) whether she/he is 'able and willing' to provide the additional care.

Complaint London Borough of Bromley 7/9/16

- LA Local authority reduced adult in needs support without proper consideration of the impact on his carer.

Complaint Essex CC 30/11/16

Luke Clements Training

Personal Budget

Guidance:

- The personal budget must always be an amount sufficient to meet the person's care and support needs
- Must include the cost to the LA of meeting the person's needs which the LA is under a duty to meet, or has exercised its power to do so.
- This overall cost must then be broken down into the amount the person must pay, following the financial assessment, and the remainder of the budget that the authority will pay.

Luke Clements Training

Personal Budget

- The expectation that PBs will change as the care and support planning process progresses.
- Start with an 'indicative amount';
- 'final amount of the personal budget confirmed through this process' (para 11.7).
- No need for a Resource Allocation System (RAS) to generate a figure
- 'complex RAS models of allocation may not work for all client groups' (para 11.23)
- 'regardless of the process used, the most important principles in setting the personal budget are transparency, timeliness and sufficiency' (para 11.24).

Luke Clements Training

Personal Budget

Local Government Ombudsman

- Profoundly disabled adult cared for by her mother who had her own health problems: she had eligible care needs for 9 of the 10 outcomes.
- LA assessed a need for 52 wks care a year including 6 weeks respite care. Residential respite not appropriate so the respite funding used for extra home support.
- LA provided a PB of £849.57 a week to meet her eligible care needs which contained detailed costing as to how calculated and a PB of £659 a week for respite care with no calculations.

Luke Clements Training

Personal Budget

Local Government Ombudsman
Maladministration

- LA had failed to explain how £659 was enough to meet the daughter's need for respite care
- Had adopted a "one size fits all" approach to people with physical disabilities .

Complaint against Kent CC 13/12/2016 para 18

Luke Clements Training

Direct Payments (ss 31 - 33)

Little change – but:

1. The regulations 'soften' the presumption against making payments to spouses / partners / relatives living in the same house;
 - payments can be made 'if the LA considers it is necessary to do so'; and
 - payment can include not only the cost of meeting the adult's need – but also for the cost of providing administrative and management support or services
2. Expected to extend to residential care ???

Luke Clements Training

Continuity of care (portability)

sections 37-38

- If 1st authority notifies 2nd authority that person is moving;
- When move happens:
- If 2nd authority not assessed / or put in place care plan for adult in need and/or carer:
- Then 2nd authority must meet the same needs as 1st authority
- Until it has assessed / produced care plan

If 2nd authority's assessment of adult / carer differs from 1st authority's it must provide written explanation

Luke Clements Training

Continuity of care (Ombudsman)

- An OR dispute between two councils – which included allegations that a letter had not been received when the disabled person moved to the new authority.
- The ombudsman report states that the 'records held by the councils show a lack of interest in ensuring one or the other took responsibility for Mr Y's care needs. Both councils lost sight of the key priority which was the wellbeing of Mr Y. Council A's evidence of attempts to communicate with Council B do not relieve it of the responsibility to fund Mr Y until the dispute was resolved.

Complaint against Oxfordshire CC & Barnet LBC 16/8/16

Luke Clements Training

Continuity of care (Ombudsman)

- A disabled person's 1st council notified new authority of intended move on the 31st August and provided it with an up-to-date assessment.
- 2nd council failed to assess until the 27th August. SW recommended same package as previously but on the 23rd November council's panel reduced this substantially and the new package backdated to the 31st August.
- Maladministration:
- no evidence panel considered (a) previous assessment, or (b) impact on primary carers (parents).
- failure to fund existing level of care from the date of move until it made a decision on the level of funding it would provide.

Complaint against Isle of Wight Council 9/8/16.

Luke Clements Training

Ordinary residence (ss39 – 41)

Basic principle remains – OR is your 'base'

Two 'deeming rules'

1. If in an NHS facility, OR is where person was based immediately before the NHS accommodation
2. Modification to second 'rule'

If a LA arranges and funds care in a care home then the person is deemed to be OR in the LA's area even if the care home is in another area

This is extended to cover 'shared lives scheme' and supported living accommodation in England.

LA responsibility only attaches if the care and support 'can be met only' in the specified accommodation

Luke Clements Training

Hospital Discharge

s74; Sch 3; Discharge of Hospital Patients Regs 2014; Guidance Annex G to Statutory Guidance

Stress importance of notifying / involving patient & carer; Assessment Notice maximum 7 days before admission

- penalty if not assessed / provided support before 11am on the "the relevant day".
- relevant day is date specified by NHS proposes or 2 days (which ever is later) (provided issued before 2pm)

Discharge Notice at least one day before the proposed discharge

Emphasis on local protocols

Luke Clements Training

Hospital Discharge

Previous exemptions for weekends and Bank Holidays no longer to apply

- All days potentially reimbursable.
- social services only liable if delay is solely attributable to its failure
- a refusal by the patient or carer of a package has the effect of absolving social services from its liability

Payment

- £155 per day London
- £130 per day elsewhere

Luke Clements Training

NHS interface

section 22 ~ NHS Continuing Care

Retains the current legal position (detailed in the 1999 *Couglan* case)

Minister's statement:

- The provisions in section 22 are not intended to change the current boundary—let me place that clearly on the record—and we do not believe that they will have that result. The limits on the responsibility by reference, as now, to what should be provided by the NHS remain the same'.

Public Bill Committee Report 16 January 2014 (page 205/208)

Luke Clements Training

Safeguarding

sections 42 - 47

Duty to make enquiries if adult

- with care & support needs:
- is experiencing, or is at risk of abuse of neglect; and
- is unable to protect self against the abuse / neglect

Duty to have a Safeguarding Board

- No power of entry / removal;
- Abolition of s47 NAA 1948 power;
- Retains power to protect property (s47)

Luke Clements Training

Safeguarding

Guidance

- The decision to carry out a safeguarding enquiry does not depend on the person's eligibility, but should be taken wherever there is reasonable cause to think that the person is experiencing, or is at risk of, abuse or neglect (para 6.55)
- LAs must make enquiries, or cause another agency to do so, whenever abuse or neglect are suspected in relation to an adult and the LA thinks it necessary to enable it to decide what (if any) action is needed to help and protect the adult (para 14.93)

Independent advocacy

sections 67 -68

- Duty to arrange independent advocate if LA considers an individual would experience **substantial difficulty** in participating in (amongst others):
 - their assessment/ preparation of care & support plan;
 - a safeguarding enquiry / review
- Not apply if LA satisfied some other person who is an appropriate representative (provided that person is not engaged in providing care for the individual in a professional capacity or for remuneration).

Independent advocacy

sections 67 -68

substantial difficulty in —

- (a) understanding relevant information;
- (b) retaining that information;
- (c) using or weighing that information as part of the process of being involved;
- (d) communicating the individual's views, wishes or feelings

Independent advocacy

For example, a person with mid-stage or advanced dementia, significant learning disabilities, a brain injury or mental ill health may be considered to have substantial difficulty in communicating their views, wishes and feelings. But equally a person with Asperger's may be considered, as may a frail older person who does not have any diagnosis but is confused as a result of an infection, or a person who is near the end of their life and appears disengaged from involvement and decision-making.

Para 7.16

Luke Clements Training

Independent advocacy

Local Government Ombudsman (2016)

- Sister complained about LA the failure to provide support for her LD siblings after it closed a supported employment scheme they attended.
 - The council accepted they had eligible needs but due to the way it handled the complaint Miss A lost confidence in the council and stopped responding to the council's emails. As a result the sisters received no support.
- Maladministration.
- LA should have identified the need for a statutory advocate given the impasse between officers and complainant.

Complaint against Walsall MBC 8/12/2016

Luke Clements Training

R(SG) v Haringey LBC (2015)

A refugee with severe mental health problems, spoke no English, was illiterate and had significant memory difficulties.

Care Act 2014 support was refused. The assessment was done without consideration of the need for an advocate.

In striking down the decision the court held that it was a: 'paradigm case where such an advocate was required, as in the absence of one the claimant was in no position to influence matters'

Luke Clements Training

s117 Mental Health Act 1983

Patients detained under:

- s3 MHA 1983
- (or a criminal provisions)

when discharged

- free after care services under s117 MHA 1983.
- Joint NHS / social services duty

s117 Mental Health Act 1983

section 75

- 'after-care services' are now defined
- A new subsection (5) limits services to those:
 - (a) 'arising from or related to the mental disorder' and
 - (b) reducing the risk of a deterioration of the person's mental condition (ie that may require re-admission)
- Ordinary residence clarified & dispute procedure created

s117 Mental Health Act 1983

Assessments

- s117 assessments under NHS & CC Act 1990
- CA 2014 assessments of Adults under s9 CA 2014
- CA 2014 assessments of carers (even if caring for an 'exclusive' s117 person, under s10 CA 2014)
- No eligibility criteria for s117

S117 Mental Health Act 1983

- **R (M) v Hammersmith & Fulham LBC (2010)**
- Accommodated under [Care Act 2014] by Hammersmith in Hammersmith: therefore OR in..... ?
- Admitted to hospital after an accident: and on discharge enters Sutton care home funded by Hammersmith: therefore OR in..... ?
- Admitted to a psychiatric unit under s2 MHA 1983 and on discharge returns to same care home: therefore OR in..... ?
- Admitted again but this time under s3 and on discharge returns to same care home: therefore OR in..... ?

S117 & Ordinary Residence

Primary social care obligation rests with LA in which the person was OR immediately before being detained.

- if OR in LA (A) before detention and moves on discharge to LA (B) and moves again to LA (C)
- LA (A) will remain responsible
- Unless patient, having become OR in (B) or (C), is subsequently detained in hospital for treatment again

Ordinary Residence s117 & CA 2014

As the OR rules under the CA 2014 and s117 differ it is possible that a person's responsible LA could be different under the 1983 Act and under the CA 2014.

CA 2014 s39(4) provides that an adult who is being provided with accommodation under s117 is to be treated for the purposes of the CA 2014 as ordinarily resident in the area of the LA responsible for the s117 support.

Prisons

Section 76

provides welcome clarification as to local responsibilities for prisoners who have care and support needs and provides that the responsible local authority for 'ordinary residence' purposes is the one in which the prison is located

Prisons

Section 76

LAs responsible for prisoners who have care and support needs

Responsible LA is the one in which the prison is located

On release the prisoner will be presumed to be ordinarily resident in the area resident immediately before the start of their sentence

but easily rebutted (para 17.50) suggests that on release a prisoner's ordinary residence may be the authority 'to which they plan to move'.

Prisons

'All adults in custody, as well as offenders and defendants in the community, should expect the same level of care and support as the rest of the population'. (para 17.9)

A few Care Act entitlements not be available to prisoners – for example the right to direct payments and to choice of accommodation.

Where a LA is made aware that an adult in a custodial setting may have care and support needs, then 'they must carry out an assessment as they would for someone in the community' (para 17.17)

Transitions into adulthood

Care Act 2014

Luke Clements Training

Transitions ~ Care Act 2014

General formula

Where it appears to a LA that:

1. it is 'likely' that [person] will have care & support needs after transition
2. it to be of significant benefit to be assessed;

Must assess (with consent / BI assessment)

LA must give reasons if it refuses to assess

Luke Clements Training

Transitions ~ at 18

- LA must decide whether to treat the assessment as a needs assessment under the 2014 Act.
- Must consider when the it was carried out and if any of the circumstances have changed
- **The Statutory Guidance** (para 16.64) where it is decided that the YP's or carer's needs are to be met under the Care Act the authority must 'undertake the care planning process as for other adults – including creating a care and support plan and producing a personal budget'

Luke Clements Training

Transitions ~ at 18

s66 Care Act 2014 enables the Children Services & Adult Services to decide the best time to transfer when is best transfer their respective responsibilities.

SEND Code states (para 8.67):

- Under no circumstances should young people find themselves suddenly without support and care as they make the transition to adult services. Very few moves from children's to adult services will or should take place on the day of someone's 18th birthday.

Transitions ~ at 18

Section 66 enables support under CA 1989 s17 and/or CSDPA 1970 s2 even though the young person has reached the age of 18.

The Statutory Guidance stresses (para 16.67) the importance of ensuring that families are not faced with a gap in provision of care and support on the relevant 18th birthday and if by that date the necessary care and support not in place then the existing services must be continued until the 'relevant steps have been taken'

General responsibilities

Children & Families Act 2014

Young carers

Duty to assess YC 'on the appearance of need'

- A YC is "a person under 18 who provides or intends to provide care for another person" (but excluding paid / formal volunteers)
- Detailed assessment regulations
- LAs must identify the extent to which there are YCs within their area who have needs for support

s96 C & F Act 2014 amends Children Act 1989 (s17ZA)

Parent carer

Duty to assess PC 'on the appearance of need'

- A PC is an adult 'who provides or intends to provide care for a disabled child for whom the adult has parental responsibility'
- The PC assessment must have regard to the well-being of the PC;
- "well-being" has same meaning as in Care Act 2014.
- LAs must identify the extent to which there are PCs within their area who have needs for support

s97 C & F Act 2014 amends Children Act 1989 (s17ZD)

Parent carer

Duty to assess PC 'on the appearance of need'

- A PC is an adult 'who provides or intends to provide care for a disabled child for whom the adult has **parental responsibility**'
- The PC assessment must have regard to the well-being of the PC;
- "well-being" has same meaning as in Care Act 2014.
- LAs must identify the extent to which there are PCs within their area who have needs for support

s97 C & F Act 2014 amends Children Act 1989 (s17ZD)
