




Disabled children, carers and social care

Luke Clements

www.lukeclements.com



The importance of evidence



Evidence

Well-being – presumption that that the adult is best placed to judge' their well-being (s6(3));

Disabled child - a presumption that they have needs for additional / substitute care and support (s21(7));


Care plan – duty on council to give reasons for why it believes a care plan will meet the needs

Reviews – if they result in a reassessment – there is a need for evidence as to what this was;

Reductions in support – evidence that the carer is willing to undertake the extra caring that results



Definitions



Definitions (sections 2 - 4)

People who need care and support

- ie disabled / older adults etc

Eligibility criteria require that the needs arise:


- from physical or mental ill-health, age, disability, dependence on alcohol or drugs,;

Disabled child

- same meaning as in Equality Act 2010 s6

Carer

- a person who provides or intends to provide care for an adult or a disabled child (but is not paid to do so)



Equality Act 2010

Disabled person who

(a) ... has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on [their] ability to carry out normal day-to-day activities.

Section 6

Includes associative discrimination (ie treating a carer less favourably because of she is caring for a disabled child) –

Section 13 and see *Coleman v. Law* (2008)



European Convention on Human Rights

No definition

Little case law concerning the rights of disabled children

Substantial case law on adults with disabilities

- Institutional care
- Harassment – ie *Đorđević v. Croatia* (2012)

Considerable case law on children being taken into care because parents have a disability - *Kutzner v. Germany* (2002) *Kocherov v. Russia* (2016) *Re C (A Child)* [2014] EWCA (Civ Div)



Definitions (sections 2 - 4)

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Well-being



Well-being ~ section 2

- physical and mental health and emotional well-being;
- protection from abuse and neglect;
- education, training or recreation;
- domestic, family and personal relationships;
- contribution made to society;
- securing rights and entitlements;
- social and economic well-being;
- suitability of living accommodation.

for adults

- control over day to day life;
- participation in work




Well-being ~ section 6

LA must have regard to—

- the individual's views, wishes and feelings,
 - promoting and respecting the dignity of the individual,
 - the characteristics, culture and beliefs of the individual (including, for example, language), and
 - the importance of support to enable the individual to participate in decisions....
- for adults
- the presumption that they are best placed to judge their well-being, and
 - the importance of promoting independence if possible




Assessments

 **section 19 / 21**

Assessment of adults and children

Specific duty

- 'on the appearance of need'
- is 'carer blind'


 **section 24**

Carers' assessments

No longer a requirement to:

- Provide 'regular & substantial' care;
- To 'request' the assessment;

Now a **'duty'** to meet carer's 'Eligible Needs'

 **Assessment duty - general**

- Triggered by the 'appearance of need' – ie to anyone working for local authority;
- Includes future need (eg hospital discharge);
- Finances are irrelevant – assessment of needs precedes assessment of finances;
- Level of need is irrelevant;
- To any adult ordinary resident / within area (or the carer of any such adult);
- Refusal of assessment.



'What matters' conversations

- The duty to assess adults (s19), children in need (s21) and carers (s24) requires a decision as to the person's eligibility for support (ie a consideration of the eligibility criteria);
- A 'what matters conversation' *does not* appear in the Act, the Regulations nor the Code on Assessments
- Once it appears to a I that a person has needs an assessment involving reference to the eligibility criteria must (at law) be undertaken)



Eligibility



Eligibility Summary

Adults / carers

1. Need due to impairment or caring
2. Means you can't do one key activity
3. This need is not able to be met except with social services help

**Eligibility Regulations 2015 ~ Stage 1****Adults:**

- The need is due to physical or mental ill-health, age, disability, dependence on alcohol or drugs ...;

Children:

- As above – but additionally:
- the need is one that if unmet is likely to have an adverse effect on the child's development;

Carers:

- The need arises as a result of providing care for either an adult in need or a disabled child

**Eligibility Regulations 2015 ~ Stage 2****The need relates to one or more of these outcomes:**

- ability to carry out basic self-care or domestic routines;
- protection from abuse or neglect;
- involvement in work, education, learning, leisure ...;
- maintaining family / significant personal relationships;
- development & maintenance of social relationships and involvement in the community;

in the case of an adult

- fulfilment of caring responsibilities for a child;

in the case of a child

- achieving developmental goals

**Eligibility Regulations 2015 ~ Stage 2**

basic self-care ~ tasks part of normal daily life including—

- eating and drinking;
- maintaining personal hygiene;
- getting up and getting dressed;
- moving around the home;
- preparing meals;
- keeping the home clean, safe and hygienic

Additional ground for carers

- fulfilment of caring responsibilities for a child;



Eligibility Regulations 2015 ~ Stage 3

Adults

The adult is not able to meet that need, either—

- (i) alone,
- (ii) with the support of others willing to provide;
- (iii) with the assistance of services in the community to which the adult has access.



Eligibility Regulations 2015 ~ Stage 3

'not able' to do something if it:

- causes significant pain, anxiety or distress
- endangers health or safety of the person or another
- takes that person significantly longer than would normally be expected



Eligibility Regulations 2015 ~ Stage 3


Children

Neither the child, the child's parents nor other persons in a parental role are able to meet, either—

- (i) alone or together
- (ii) with the care and support of others who are willing to provide that care and support; or
- (iii) with the assistance of services in the community to which [they] have access; and

the child is unlikely to achieve one or more of the child's personal outcomes unless—


- (i) the LA provides ... care /support to meet the need; or
- (ii) the LA [makes a direct payment].

 **Eligibility Regulations 2015 ~ Stage 3**

Children
 The regs are silent on 'carers willingness'?"
 On a literal interpretation – if they are 'able' the disabled child is not 'eligible'.


BUT
 Section 24(4)(b)
 Carers assessment 'must assess the extent to which the carer is willing, and will continue to be willing' to care;

Section 21(7)
 A disabled child is presumed to need care/ support in addition to ... the care/ support provided by the child's family'

 **Carers: the 'can & can only test'**

Carers could be advised to:
 state that they are not able (and therefore not willing) to provide care unless the LA first determines that the individual is eligible.
 Then, and only then, will they be able (and therefore willing) to discuss the nature and extent of the care (if any) they might be willing to provide.

As noted below, carer ability and willingness must be recorded explicitly

 **Eligibility Regulations 2015 ~ Stage 4**

The need is such that the adult / carer is unlikely to achieve one or more of their personal outcomes unless—

- the LA arranges their care/ support (or provides DPs)

Is this really a 4th ground?



Eligibility Summary

Adults / carers

1. Need due to impairment or caring
2. Means you can't do one key activity
3. This need is not able to be met except with social services help



Case studies



'services in the community to which the adult has access'

Code Part 4

32. The eligibility criteria must not be used as a tool to require individuals to demonstrate they have exhausted every other possible avenue of support before becoming eligible for local authority assistance.



Where does the onus lie?

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.
- Local authority then stated that the difficulties did not significantly impact her wellbeing.
- **EVIDENCE???**



'is unlikely to achieve ... unless'

- 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



Nutrition ~ eating / preparing

Code 4 Annex 1 p35

Adult who is blind and needs 'to develop mobility, communication and life skills (e.g. meal preparation) from a rehabilitation officer. He may also need specialist equipment.

Assessment duty triggered

1. Need due to impairment or caring
2. Means you can't do one key activity
3. This need cannot be met by assistance to which the person has access



Nutrition ~ eating / preparing

Code 4 Annex 1 p35

Needs

1. mobility, communication and life skills (e.g. meal preparation) from a rehabilitation officer.
2. needs specialist equipment.

Where each of these can be provided by community based services - supporting [his] capacity to self-care - then [he] will not be regarded as having eligible needs.

Should any of these services not be available or be insufficient to help [him] to meet his personal outcomes, then that need will become an eligible need and services will be provided through a care and support plan.



Nutrition ~ eating / preparing

Ombudsman Case

A blind person who considered that she needed help to check the contents of her fridge; read cooking instructions; and have an escort to help her on occasional shop trips.

Assessment duty triggered

1. Need due to impairment or caring
2. Means you can't do one key activity
3. This need cannot be met by assistance to which the person has access



Nutrition ~ eating / preparing

Needs

1. help to check the contents of her fridge;
2. read cooking instructions; and
3. 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.



Eligibility Regulations 2015 ~ Stage 2

basic self-care ~ tasks part of normal daily life including—

- (i) eating and drinking;
- (ii) maintaining personal hygiene;
- (iii) getting up and getting dressed;
- (iv) moving around the home;
- (v) preparing meals;
- (vi) keeping the home clean, safe and hygienic

Additional ground for carers

- (vii) fulfilment of caring responsibilities for a child;



Well-being ~ section 6

LA must have regard to—

- the individual's views, wishes and feelings,
- promoting and respecting the dignity of the individual,
- the characteristics, culture and beliefs of the individual (including, for example, language), and
- the importance of support to enable the individual to participate in decisions....

for adults

- the presumption that they are best placed to judge their well-being, and
- the importance of promoting independence if possible



Nutrition ~ eating / preparing

Ombudsman

Maladministration for a LA to fail to recognise that 'fresh food is essential to meet nutritional needs' and that 'consumption of fresh food once it has started to perish carries a significant health risk'

Complaint ~ Hammersmith & Fulham 21 July 2016.



Getting dressed

A blind person considered that she needed help to 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.



Eligibility Regulations 2015 ~ Stage 2

basic self-care ~ tasks part of normal daily life including—

- (i) eating and drinking;
- (ii) maintaining personal hygiene;
- (iii) getting up and getting dressed;
- (iv) moving around the home;
- (v) preparing meals;
- (vi) keeping the home clean, safe and hygienic

Additional ground for carers

- (vii) fulfilment of caring responsibilities for a child;



Getting dressed

Ombudsman

Maladministration for a LA to fail to recognise the importance to an adult's personal dignity of wearing clean, presentable and appropriate clothes

Complaint ~ Hammersmith & Fulham 21 July 2016.



Assessing need

- What will happen if care and support is not available?
- The greater the risk to the person's well-being the greater the onus is on the LA to meet that need – or to give cogent reasons as to why this is not necessary.
- Well-being includes physical, mental, social and emotional well-being as well as the ability to engage in employment, education, training, leisure and social activities.



Proportionate assessments

Assessments should be 'proportionate in the circumstances'

- Adults ~ section 19(6);
- Children ~ section 21(6)
- Carer's ~ section 24(7).

Proportionality goes to the scope and depth of an assessment – and not (of course) to the question of whether one is undertaken: the duty to assess (where a need may exist) is obligatory.



Care & Support Planning

What the assessed need are

How the need is to be met

- the level & frequency of the help that is to be provided;
- who is going to provide it;
- which agency is responsible for what service;
- what the objectives of are providing help(outcomes);
- when is the care being provided (times / days / dates);
- what the carers are willing to do;
- who is the coordinator and their contact number;
- who to contact in emergencies;
- what the contingency plan is if things go wrong;
- who is monitoring the plan;
- When the review is to happen.



Copies of assessments and care plans

The individual / their authorised representative and /or parents must be given a copy of:

- their assessment
Assessment Regs 2015 reg 6
- all elements of the assessment and eligibility as well as their care and support plan
Part 4 Code paras 24 and 95.



Duty to provide care & support adults

Section 35 ~ 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



Reviews & reassessment



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.



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



Respite / short breaks

Section 34(1)

- LAs may / must meet the needs of people assessed as eligible (ie carers or disabled people)
- The need may be met directly or by providing support to another person



Respite / short breaks

Section 34(2)

Needs can be met in many ways – eg:

- (a) accommodation in a care home, children's home or premises of some other type;
- (b) care and support at home or in the community;
- (g) direct payments.

ie covers a sitting service /night sitting service, day centre /after-school (or summer holiday) club.



Respite / short breaks

The duty to meet the needs is non resource-dependent.

- ie if the assessment identifies a need for (say) 10 hours of sitting services a week, or of one weekend a month for the child to be accommodated away from the home – then this need must be met precisely and it is not something that the LA can 'trim' because it has to make cut backs due to resource shortages.



Respite / short breaks

A 2016 ombudsman report

Adult with LD who lived with his parents. His care package had for many years included 50 days of replacement care to enable his parents to have a break.

On review this was reduced to 14 days although his needs had not changed and the sustainability of his parents in maintaining their support was recorded as at risk.

In finding maladministration the ombudsman held that the LA had to provide an explanation as to the reasons for the reduction: that it 'needs to show what circumstances have changed to warrant this reduction in respite provision'.



Respite / short breaks

It was not acceptable for the council to state that it would offer emergency respite if the need arose:

- The parent's need for 'weekends away and a little social life are not emergencies but part of a planned sustainable support regime'.
- The Council's assessment does not address these sustainability issues ... the impact on the carers' daily lives and non caring activities must be included.

Complaint against Sefton MBC 23 Aug 16.



Young carers



Young carers

Section 42 places a duty on LAs to meet the needs of young carers (termed 'child carers') if the person for whom they care is based in the LA area and the YC meets the standard carers' eligibility criteria.

However if the YC's needs are addressed by providing additional support to the person for whom they care, then the duty only arises if additionally that person satisfies the financial eligibility rules (s42(4)) and (overly complex) mental capacity criteria (s43).



Young carers

The eligibility criteria [1] require that:

- (a) the YC's needs arise from their caring role;
- (b) that the need relates to one of the standard list (ie ability to carry out self-care or domestic routines; protection from abuse or neglect; involvement in work, education, learning etc) but an additional specific YC criteria – namely 'achieving developmental goals'; and
- (c) the need cannot be met by the YC alone or with the support of others who are willing to provide that support; or 'with the assistance of services in the community to which the carer has access'.

[1] The Care and Support (Eligibility) (Wales) Regulations 2015



Young carers

- LAs must, seek to identify the outcomes that YCs wish to achieve (s24(4)(d)) 'to the extent' that it is 'appropriate having regard to the carer's age and understanding', as well as their parents views on this and their well-being generally (s24(4)(d)).
- A YCs assessments must also pay particular regard to the developmental needs of the child, and whether it is appropriate for the child to be providing the care at all (s24(5)(c)).




Young carers

- The assessment ... must have regard to whether the carer works or wishes to work and whether they are participating or wish to participate in education, training or leisure activities.
- [for YCs] the assessment must have regard to his or her developmental needs and the extent to which it is appropriate for the child to provide the care.
- This should lead to consideration by the LA of whether [the YC] is actually a child with care and support needs ... who ... should be assessed under s21.

Part 3 Code p7 and Part 4 Code para 50.




Parent carers



Parent carers

s24 places a duty on the LA to assess:
 When a carer is providing support for an adult or disabled child who is based in the LA area;
 The assessment must consider

- Whether carer has a need for support; and
- what those needs are.
- a disabled child is presumed to need care in addition to, or instead of, the care and support provided by the child's family (s24(7)).



Parent carers

s24 states clearly that the LA must:

- assess the extent to which the carer is able / will continue to be able, to provide care;
- assess the extent to which the carer is willing, and will continue to be willing, to do so;
- presume that a disabled child is in need of care in addition to, or instead of, the care and support provided by the child's family.



Parent carers

The Eligibility regs (reg 4) stipulate that a disabled child is only eligible for care / support if their need cannot be met by (among others):

- The child's parents nor other persons in a parental role' are able to meet, either—
- This is problematic as it does not stipulate that the carer must be 'willing' (contradicting g s24 of the Act)



Parent carers

The Eligibility regs (reg 5) are equally problematic in relation to the needs of a carer for support – stipulating that eligibility only arises if:

- the carer is unable to meet the need (i) alone; (ii) with the support of others who are willing to provide that support; or (iii) with the assistance of services in the community to which the carer has access;
- again it fails to mention that a carer must also be 'willing' - contradicting s24 of the Act.



A 2016 ombudsman's report

- Single mother with two children: one with significant disabilities & in need constant supervision.
- Council advised her that it expected parents to organise their work responsibilities around the needs of their children: that it was not its responsibility of to provide direct payments solely to enable parents to work
- But she could use the respite breaks she received to enable her to work



A 2016 ombudsman's report

Maladministration

- Council has failed to understand the law.
- The child's assessment and carer's assessment should 'feed into each other'.
- Council knew son needed constant supervision.
- Council also knew mother in full time work and the nature of her job meant she could not pursue flexible working.
- These were key factors but neither the son's assessment nor the carer's assessment properly considered those issues



A 2016 ombudsman's report

- Government guidance clearly states authorities should not assume a carer is happy to continue in their caring role.
- Councils are required to consider whether a carer wishes to work.
- Nothing in the assessments to suggest the Council properly considered the impact on ... if she did not receive support during school holidays.
-

Kent County Council No. 14 015 230 7 June 2016.



Direct Payments

Sections 50 – 53

- The Care and Support (Direct Payments) (Wales) Regulations 2015 contain the detail
- DPs can now be used to purchase care and support ... from any person (including, among others, the authority which made the payment);
- Must be sufficient to purchase assessed needs;
- Purchase residential care (unlike in England)



Direct Payments

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 DP of £849.57 a week to meet her normal eligible care needs.



Direct Payments

Local Government Ombudsman

Detailed explanation as to how DP calculated – ie:

DP to be used to buy agency support:

- 18 hours at the social rate of £12.24;
- 10 hours at the unsocial rate of £13.36;
- six 30 minute double handed calls at the social rate of £7.01 per call;
- eight 30 minute double handed calls at the unsocial rate of £7.72 per call.

Total £849.57.



Direct Payments

Local Government Ombudsman

Normal rate £849.57.

LA then stated that the weekly respite rate - ie when mother not providing unpaid care) would be its standard 'respite care rate'



Direct Payments

Local Government Ombudsman

Normal rate £849.57.

LA then stated that the weekly respite rate - ie when mother not providing unpaid care) would be its standard 'respite care rate' of £659 a week (no calculations provided).

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



Disabled Facilities Grants

Covered by the:

Housing Grants, Construction and Regeneration Act 1996

- Maximum mandatory sum ~ £36,000
- Adaptations can also be funded under the 2014 Act – and a duty to meet needs under this Act;
- Adaptations above the statutory maximum can also be funded under the Regulatory Reform Order 2002 ('RRO')
- Regulation 3(a) the Care and Support (Charging) (Wales) Regulations 2015 states that a 'local authority may not impose a charge for care and support provided or arranged— (a) to meet the needs of a child'.



DFGs & adaptations

Costs above 36,000

What priority?

- | | | |
|--------------|--------------|-------------------|
| • HGCRA 1996 | DUTY | FREE |
| • SSWBA 2014 | DUTY | FREE |
| • RRO | POWER | CHARGEABLE |

A James & L Clements 'Disabled Facilities Grants in Wales: the legality of charging families for home adaptations to accommodate the needs of disabled young people' in Rhyddan On-line Journal Volume 2 pp. 5-11 at <http://www.lukeclements.co.uk/rhyddan-online-journal/>



Adaptations & SSWBA 2014

Care & Support (Eligibility) Regs 2015 – reg 4

- the need arises from the child's physical or mental ill-health disability
- the need is one that if unmet is likely to have an adverse effect on the child's development;
- the need relates to 'ability to carry out self-care' – ie 'moving around the home'
- the need is one that neither the child, the child's parents nor other persons in a parental role are able to meet,
- the child is unlikely to achieve one or more of the child's personal outcomes unless—the local authority provides or arranges care and support to meet the need.



Housing & SSWBA 2014

R (KS) v Haringey LBC [2018]

- Mother and 2 disabled children one with ASD severely challenging and no sense of danger – risk to self and disabled brother (with whom she had to share a room).
- First floor flat with balcony
- Social services assessment identified serious risks
- Referred to housing
- Housing assessed but did not change family's priority;

Held

- Social services had to meet need
- Housing had to do more (ie use its discretion)



Disabled Facilities Grants

Disabled Children and the Cost Effectiveness of Home Adaptations & Disabled Facilities Grants: a Small Scale Pilot Study

www.lukeclements.co.uk/publications/



Disabled Facilities Grants

ASC young people with severely challenging behaviour

- Number of adaptations total cost £300,000
- Avoided the cost 14 years' Looked After Child funding.
- If one adopts a figure of £2,000 per week for the cost of accommodating such a child then the total cost ... amounts to almost £1.5 million



Transport

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



SEN / social care interface



SEN / social care interface

Inter-authority funding arguments

The ombudsman has held that one or other authority should 'grasp the nettle' and provide support before entering into negotiations to decide which one is in fact responsible.

Complaint 96/C/3868 Calderdale MBC 24 November 1998 and see PSOW WAG (Health Commission Wales) Cardiff and Vale NHS Trust Third Report, Session 2008-2009 HC 858 (TSO, 2009).



SEN / social care interface

Inter-authority funding arguments

A disabled YP behaviour so severe that his school was unable to cope with him even on a 2:1 and yet his mother was left to cope alone with him at weekends and in school holidays.

- Ombudsman accepted that his SEN may not have required a residential school, she found that the social services authority had failed to take appropriate action to accommodate him

Complaint no 13 010 519 Birmingham CC 31 March 2014



Additional Learning Needs and Education Tribunal (Wales) Act 2018

Expected timetable:

- September 2018 draft Code of Practice
- Spring 2018: detailed implementation guidance;
- Autumn 2018: consultation on regs / Code of Practice;
- 2019: Assembly scrutiny of regs / Code
- End of 2019: approval and publication Code;
- 2020: implementation training;
- September 2020: Act comes into force;
- Summer 2023: current system phased out entirely.



NHS and continuing care



11 & 12 GEO. 6. *National Assistance Act, 1948.* CH. 29.



CHAPTER 29.

An Act to terminate the existing poor law and to provide in lieu thereof for the assistance of persons in need by the National Assistance Board and by local authorities; to make further provision for the welfare of disabled, sick, aged and other persons and for regulating homes for disabled and aged persons and charities for disabled persons; to amend the law relating to non-contributory old age pensions; to make provision as to the burial or cremation of deceased persons; and for purposes connected with the matters aforesaid.

[13th May 1948.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

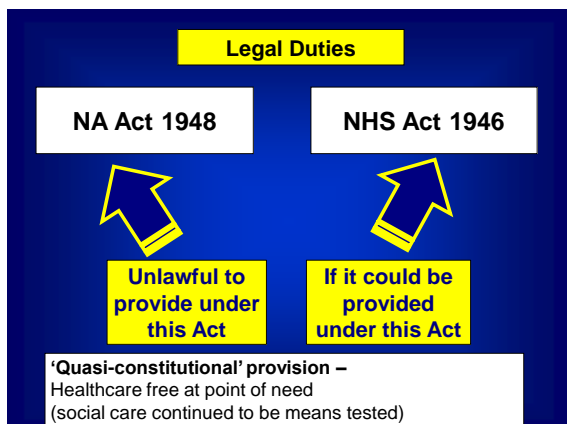



NHS Wales ~ the Law

Welfare Services.


29.—(1) A local authority shall have power to make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons who are blind, deaf or dumb, and other persons who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.

(8) Save as provided in the last foregoing subsection, nothing in this section shall authorise or require a local authority to make any provision authorised or required to be made (whether by that or by any other authority) by or under any enactment not contained in this Part of this Act.



 **Coughlan (1999)**

The distinction between those services which can and cannot be so provided is one of degree which in a borderline case will depend on a careful appraisal of the facts of the individual case. However, as a very general indication as to where the line is to be drawn, it can be said that if the nursing services are:

 **Coughlan (1999)**

(1) merely incidental or ancillary to the provision of [social care] which a local authority is under a duty to provide to the category of persons to whom section 21 refers and



Coughlan (1999)

(2) of a nature which it can be expected that an authority whose primary responsibility is to provide [social services] can be expected to provide,

Then they can be provided (by SS).

The Quantity / Quality test

Limits of social care provision
Unlawful for social services to provide any social care support if person above the limit



NHS Wales ~ the Law

Children Act 1989

Amended the NA Act 1948

Welfare Services aged 18 or over
29.—(1) A local authority shall have power to make arrangements for promoting the welfare of persons to whom this section applies, that is to say persons who are blind, deaf or dumb, and other persons who are substantially and permanently handicapped by illness, injury, or congenital deformity or such other disabilities as may be prescribed by the Minister.



NHS Wales ~ the Law

Children Act 1989

Came into force October 1991
Disabled people under 18 ~ right to social care covered by Part III 1989 Act
Not Part III of NA Act 1948



NHS Wales ~ the Law

Children Act 1989

- provides for means testing of social care services (s29);
- contains no 'limits of social care' provision;
- nothing in the Parliamentary debates to suggest an intention to convert 'free at point of need' healthcare for children to a means tested service



R (T, D & B) v Haringey LBC (2005)

- Disabled child
- Tracheostomy (a tube in the throat) which needed, suctioning about three times a night.
- "It is quite common now for children who have tracheostomies to be discharged from hospital and cared for at home (para 5)
- Great Ormond Street Hospital provides training for parents in how to manage those requirements at home; the Claimant mother has been trained fully in those areas" (para 7)



R (T, D & B) v Haringey LBC (2005)

Mother argued that the respite care should be funded by social services and not the NHS.

Mr Justice Ouseley (para 61) (citing *Coughlan*)

- the provisions of the Children Act are not to be regarded in general as reducing or replacing the important public obligations ... set out in the [NHS Act]. I do not see that the impact there of section 21(8) of the NAA 1948 means that the principles enunciated were peculiar to that Act"



R (T, D & B) v Haringey LBC (2005)

- although on a broad interpretation of Children Act 1989 duty 'to safeguard and promote the welfare of children by providing a range and level of services appropriate to' could cover what are essentially medical needs – but 'such an interpretation would turn the social services authority into a substitute or additional NHS for children.



R (T, D & B) v Haringey LBC (2005)

- That would be ... an impermissibly wide interpretation, creating obligations on a social services authority which are far too broad in the context of other statutory bodies and provisions covering the needs of children' (para 68).



**NHS Wales
The guidance**



NHS Wales ~ the guidance

1995 guidance [WHC (95/7)]

- Applied to both adults and children (para 8)

2004 Guidance [54 NAFWC 41/2004]

Applied to both adults and children

while the principles underpinning this guidance are essentially the same for children and adults, the arrangements for decision-making and the delivery of care are likely to be different (para 4).



NHS Wales ~ the guidance

2010 guidance [WAG *Continuing NHS Healthcare: The National Framework for Implementation in Wales*]

- Applied to adults only (as does the current (revised) 2014 Framework)

the 'assessment of and provision for care for children and young people will be addressed in detail in a separate document' (para 1.6).





Social Services & Well-being (Wales) Act 2014

Reinstates an explicit limit of social care
Section 47(1) adopts the wording of *Coughlan* and applies to people in need of all ages
Came into force in April 2016

A LA may not meet a person's needs for care and support ... by providing ... a service which is required to be provided under a health enactment, unless doing so would be incidental or ancillary to doing something else to meet needs under those sections.



2014 (adult) DST (p49)

Continuing NHS Healthcare

- A complete package of ongoing care arranged and funded solely by the NHS, where it has been assessed that the individual's primary need is a health need.
- It can be provided in any setting. Where a person lives in their own home, it means that the NHS funds all the care that is required to meet their assessed health and social care needs.



Health social services interface

Once a child or YP is held to be eligible for NHS CC then all their health and social care services needs are the responsibility of the NHS.

This does not mean that social services 'walk away' as clearly they will continue to have non-service provisions responsibilities.



NHS Continuing Care & Young People

Children's services retain responsibility for safeguarding /associated social work functions:

- helping parents with the emotional problems of caring for disabled children;
- providing carer support services ie services delivered solely to the parents / siblings;
- giving information
- signposting.



Looked after & accommodated children

- Looked after children (s74) have the same rights to NHS CC funding as any other child.
- LA required to provide funding (and supervision) for a foster parent etc and for the cost of any social care accommodation (s76) but the NHS duty to provide services applies as with any other child.
- LA responsible for ensuring the child has an IRO obligations under the Care Planning, Placement and Case Review regs
