

The Social Services & Well-being (Wales) Act 2014: An overview

Professor Luke Clements¹

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¹ Cerebra Professor of Law and Social Justice, the School of Law, Leeds University, solicitor and Special Adviser to the Joint Parliamentary Select Committee that scrutinised the draft Care Bill (the Care & Support Bill 2013).

Background

In 2011 the Law Commission proposed that the confusing patchwork of conflicting social care statutes be repealed and replaced by a single Act to which service users, carers and others could look to understand their rights.² The [Social Services and Well-being \(Wales\) Act 2014](#) is the Welsh Government's response to the Law Commission report and, if the aim was comprehensibility, it fails: it is often opaque and frequently reads like a regulation.³

The Act received Royal Assent on the 1st May 2014⁴ and came into force on the 6th April 2016. At that time it was the most substantial piece of primary legislation enacted by the Assembly.

Although the Act and the equivalent English Act (the [Care Act 2014](#)) were based on the same draft (essentially the precursor 2013 English 'Care and Support Bill') they are in the final forms materially different. In Wales the Government extended the scope of the Bill and amended the detail of many of its clauses – and in both nations the resulting Bills were further amended by their Parliament / Assembly. The 'headline' difference between the Acts is that the Welsh Act applies to people 'in need' of any age and their carers, whereas the English Act is largely confined to the needs of 'adults in need' and their adult carers. This briefing paper focuses on the provisions in the Welsh Act that deal with the rights of disabled children, adults in need and their carers.

Transitional provisions

In December 2015 the Welsh Government published details of the [transitional provisions](#)⁵ which states that where a person's needs were being met under existing legislation on the 6th April 2016 then the local authority will be under a continuing duty to provide for those needs (under the pre-existing legislation) until the person's needs are reassessed /reviewed. If the reassessment / review has not taken place before the 31st March 2017 (or the 1st October 2016 in the case of a child), then at that point the duty on the authority to provide services will derive from the 2014 Act.

The statutory codes and final regulations

The final [regulations](#) and the accompanying [codes of guidance](#) to the Act are most readily accessible at <https://socialcare.wales/hub/home>. The Act is divided into various chapters (referred to as 'Parts') and in general there is a code to each 'Part' of the Act. These are issued under section 145 of the Act which requires authorities to 'act in accordance with any relevant requirement contained in a code' and in relation to all matters to 'have regard to any relevant guidelines contained in it'. There is no code for Part 7 of the Act (safeguarding): instead '[statutory guidance](#)' issued under section 131 to which authorities are required to 'have regard'. The same approach has been taken in relation to the duty of local authorities and their partners to cooperate: [statutory guidance](#) has been issued on this duty.⁶

The final Codes are:

² Law Commission *Adult Social Care Law Com No 326*, HC 941 (Stationery Office 2011) para 3.2.

³ The Act has many provisions that should – at best – appear in subordinate legislation - see for example the sections ss41 and 43 and the provisions concerning people who refuse – sections 20, 22-23, 25-27.

⁴ General papers on the passage of the Bill through the Assembly can be accessed at www.senedd.assemblywales.org/ielssueDetails.aspx?Ild=5664&Opt=3

⁵ The [Social Services and Well-being \(Wales\) Act 2014 \(Commencement No. 3, Savings and Transitional Provisions\) Order 2016](#)

⁶ Under section 169 – see <http://gov.wales/docs/dhss/publications/151218part9en.pdf>

- [Part 2 Code of Practice \(General Functions\)](#)
- [Part 3 Code of Practice \(Assessing the Needs of Individuals\)](#)
- [Part 4 Code of Practice \(Meeting Needs\)](#)
- [Part 4 and 5 Code of Practice \(Charging and Financial Assessment\)](#) this was amended in April 2017
- [Part 6 Code of Practice \(Looked After and Accommodated Children\)](#)
- [Part 10 Code of Practice \(Advocacy\)](#)
- [Part 11 Code of Practice \(Miscellaneous and General\)](#)
- [Code of Practice on Measuring Social Services Performance](#)

The Care Council for Wales web 'hub' is the most accessible site for finding the relevant materials – <https://socialcare.wales/hub/sswbact>. It also has a link to the training materials commissioned by the Welsh Government for the implementation the Act – <https://socialcare.wales/hub/resources>

PowerPoints providing: (1) a basic over view of the Act; and (2) a detailed review of the Eligibility Criteria can be found at www.lukeclements.co.uk/resources/ .

Underpinning principles: 'well-being' (sections 2 and 5)

Local authorities are under a general duty (under section 5) to promote the well-being of people 'in need' and of carers. Well-being is defined widely in section 2, and in relation to adults it includes 'control over day to day life' and 'participation in work'. 'Control' is in many respects equivalent to 'choice' and the requirement to promote participation in work will be of especial importance to carers (both those caring for adults and those caring for disabled children).

Section 6 of the Act widens the duty on authorities to have regard to various factors (for example the individual's views, wishes and feelings, and the importance of promoting dignity). Materially, section 6(3)(a) stresses 'the importance of beginning with the presumption that the adult is best placed to judge' their well-being. This creates a default position (rather like the presumption of capacity in the MCA 2005) for which a local authority will have to produce evidence if it wishes to rebut.

In *R (JF) Merton LBC* (2017) – a case under the English Care Act 2014 – the High Court held that every aspect of the well-being duty was mandatory – and as James et al notes 'there is little of substance distinguishing the principle (and detail) of the well-being duty in section 1 of the English Act and sections 2, 5 and 6 of the Welsh Act'.⁷

Independent living

Section 6(3)(b) stresses 'the importance of promoting the adult's independence where possible'. This is amplified by para 56 of the [Part 2 Code of Practice \(General Functions\)](#) which states that the well-being duty 'includes key aspects of independent living as expressed in the UN Convention on the Rights of Disabled People⁸ [CRDP], in particular, Article 19.' Article 19 recognises the right of disabled people to 'full inclusion and participation in the community'; to choose where they live and with whom they live; and to

⁷ A James and L Clements 'Does the Judicial Review of a needs assessment under the Care Act 2014 matter in Wales?' in Rhydian: Wales Social Welfare Law on-line (2017) 5-7.

⁸ It appears that the UN has given states permission to use locally appropriate language when referring to the Convention. Due to concerns in Wales that the title insufficiently reflected the principles of the 'Social Model of Disability' it has been agreed that it can be referred to as the 'Convention on the Rights of Disabled People'.

have access to a range of community support services ‘to support living and inclusion in the community, and to prevent isolation or segregation from the community.’

Further reference to the CRDP is contained in Quality Standard 1 of the [Code of practice in relation to measuring social services performance](#) (considered below) which states that local authorities must ensure that all decisions they make in the exercise of their social services functions:

have regard to a person’s individual circumstances and the UN convention on the rights of children and the UN principles for older people and the UN convention on the rights of disabled people (p9)

Such express statements are of enormous value, particularly as the courts have shown a surprising willingness to have regard to the CRDP.⁹ It is to be hoped that the Welsh Government will follow this welcome recognition by considerably strengthening its unsatisfactory [Framework for Action on Independent Living](#) (2013) which purports to explain how it is fulfilling its obligations under the CRDP but which fails to include any commitment to change the law to protect the right to independent living as enshrined by Article 19.¹⁰ The [Framework](#) (2013) also fails to provide a definition of ‘independent living’ that accords with Article 19 of the Convention. It mentions the importance of removing ‘barriers’ to inclusion facing disabled people – but not the equally important requirement that states ensure that disabled people ‘have access to a range of community support services’.

A potential problem with the Act’s treatment of ‘well-being’, stems from section 2(3) which states that it includes ‘welfare’ as interpreted in the Children Act 1989. This could result in confusion / complexity – since the 1989 Act does not define ‘welfare’ in the context of local authorities’ duties and powers, although it does provide a checklist of considerations for the court. However, it has been suggested judicially that welfare and wellbeing are synonymous.¹¹

Definitions: people ‘in need’ and their carers ~ section 3

The Act replaces the ‘medical model’ language of the previous community care legislation, which required need to derive from ‘age’, ‘illness’, being ‘disabled’ and so on. In its place the Act speaks of ‘people who need care and support’ and of ‘carers who need support’. It is therefore (in general) impairment neutral: focusing on the person’s need and not the cause of that need. This approach is also adopted, to a degree, by the eligibility criteria (see below).

Disabled person

People who care for a disabled child are however an exception to the ‘impairment neutral’ rule and for this reason ‘disabled’ has to be defined: this is done (in section 3(5)) by giving it the same meaning as in the Equality Act 2010.¹² For the purposes of section 6 of the Equality Act 2010 a disabled person is someone who has a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities.

⁹ See for example *Burnip v. Birmingham City Council* [2012] EWCA Civ 629 and *R (Bracking and others) v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345.

¹⁰ Such a commitment is a requirement under Article 4 of the Convention and the CRPD Committee has stressed the need for states to ‘systematically revise; their domestic law ‘in order to bring it into line with the general principles and obligations contained in the Convention’ - see for example the Committee’s [Concluding observations on the initial report of Costa Rica](#) 12 May 2014 para 8.

¹¹ *Re G* [2012] EWCA Civ 1233 para 26. For an excellent analysis of this question see Dr Julie Doughty [How do you define a child’s ‘welfare’ as opposed to ‘wellbeing’?](#) (Community Care 2016).

¹² See Equality Act 2010 (Disability) Regulations 2010 (SI 2128) reg 3.

Carers

Section 3(4) defines a carer as a person who provides or intends to provide care for an adult or a disabled child (but paid care workers are excluded unless the local authority considers the nature of the relationship between the care worker and disabled person makes it appropriate to treat the person as a carer¹³). This is a major change to the previous definition – in that carers no longer have to establish that they are also ‘providing or intending to provide a substantial amount of care on a regular basis’.

Disabled children

The Equality Act definition of a disabled person is of little relevance to disabled children *per se*: the relevance is only to their carers. All children in need are eligible for an assessment (section 21). During the assessment process the eligibility criteria merely require (as outlined below) that the need arises either from their physical or mental ill-health, age, disability, dependence on alcohol or drugs, or other similar circumstances; or that the need is one that if unmet is likely to have an adverse effect on the child’s development. Importantly (as noted below), section 21(7) states that there is a presumption that disabled children have needs for such additional / substitute care and support.

Carers of disabled children

Section 24 of the Act imposes a duty on authorities to assess the needs of carers who are providing or intending to provide care for an adult or a disabled child. It is in this context that ‘disabled child’ bears the Equality Act 2010 definition:¹⁴ a definition that may be shown to be problematic, unless augmented by regulations.¹⁵ The 2010 Act and its regulations¹⁶ exclude from the definition people who misuse drugs and / or alcohol misusers as well as those with ‘a tendency to physical ... abuse of other persons’.¹⁷ It is difficult to see the logic of excluding from support the parents of such children – and the likelihood is that any attempt to do so by a local authority will be subjected to significant scrutiny by the courts and ombudsman. Authorities will of course have a power to assess and provide support in such cases.

UN principles (section 7)

The Act requires that persons ‘exercising functions’ under the Act have due regard to the UN Principles for Older Persons (1991) and the UN Convention on the Rights of the Child. The ‘due regard’ duty is an onerous one (considered much more demanding than merely ‘having regard’¹⁸) and this may well give rise to challenges to NHS and local authority policy changes (of the type that have characterised the obligations under the Equality Act 2010¹⁹ where a similar ‘due regard’ duty exists).

While there is a certain logic to the Act prioritising the UN Convention on the Rights of the Child – since it has already been given status in Welsh legislation (ie the Rights of Children and Young Persons (Wales) Measure 2011) – it is less obvious why the UN Principles for Older Persons have been given more prominence than the UN Convention on the Rights of

¹³ Section 3(7) and (8) and see the Part 3 Code of Practice page 7 – ‘A local authority can treat a person as a carer in cases where the caring relationship is not principally a commercial one’.

¹⁴ Section 3(5) Social Services and Well-being (Wales) Act 2014.

¹⁵ Which could provide for this – see section 3(6).

¹⁶ See Equality Act 2010 (Disability) Regulations 2010 (SI 2128) reg 3.

¹⁷ An exclusion that has been held to extend to children – see *X v Government Body* [2015] UKUT 0007 (AAC).

¹⁸ See for example *R (Meany, Glynn & Saunders) v Harlow DC* [2009] EWHC.

¹⁹ See for example, *R (Brown) v Secretary of State for Work & Pensions* (2008) [2008] EWHC 3158 (Admin).

Disabled People (CRDP) – since the Welsh Government has policies on each.²⁰ As noted above, however, the Codes have made explicit reference to the CRDP.

Statement of outcomes / local populations needs (sections 8 & 14)

Section 8 requires the Welsh Ministers to issue a ‘statement of outcomes’, which they did in August 2016.²¹ This is intended to be a strategic planning tool that will be used to assess whether the lives of people ‘in need’ in Wales are being materially improved by the new legislative framework. The Statement details eight outcomes and in respect of each, brief indicators as to what will be measured. The eight outcomes being: (1) Securing rights and entitlements: Also for adults: Control over day-to-day life; (2) Physical and mental health and emotional well-being: Also for children: Physical, intellectual, emotional, social and behavioural development; (3) Protection from abuse and neglect; (4) Education, training and recreation; (5) Domestic, family and personal relationships; (6) Contribution made to society; (7) Social and economic well-being: Also for adults: Participation in work; (8) Suitability of living accommodation.

The [Code of practice in relation to measuring social services performance](#) sets out six quality standards that local authorities ‘must’ achieve and on which their performance will be measured.²² In summary these are:

1. They must work with people who need care and support and carers who need support to define and co-produce personal well-being outcomes that people wish to achieve.
2. They must work with people who need care and support and carers who need support and relevant partners to protect and promote people’s physical and mental health and emotional well-being.
3. They must take appropriate steps to protect and safeguard people who need care and support and carers who need support from abuse and neglect or any other kinds of harm.
4. They must actively encourage and support people who need care and support and carers who need support to learn and develop and participate in society.
5. They must support people who need care and support and carers who need support to safely develop and maintain healthy domestic, family and personal relationships.
6. They must work with and support people who need care and support and carers who need support to achieve greater economic wellbeing, have a social life and live in suitable accommodation that meets their needs.

Section 14 places a duty on local authorities and LHBs to assess: (1) the care and support needs of the local population; and (2) the consequent need for care and support services to meet those needs. The process for measuring local authority performance in meeting outcomes has been described as ‘an absurd, methodologically flawed system that will measure nothing of value [and] distract social workers from important work’.²³

Prevention (section 15)

²⁰ See Welsh Government *A Declaration of Rights for Older People in Wales* (WG 2013) and Welsh Government *Framework for Action on Independent Living* (WG 2013). For a mundane explanation see Helen Taylor ‘Welsh Government’s legislation needs more focus’ in ‘Click on Wales’ February 20th, 2014 : it appears that the *Declaration of Rights for Older People in Wales* was only included in the Act because of a mistaken abstention – an Assembly member pressed the wrong voting button.

²¹ Welsh Government *The Well-being statement for people who need care and support and carers who need support* (2016).

²² Each authority must have arrangements in place to collect and return the data on the statutory performance measures detailed in this code of practice to the Welsh Government from May 2017 onwards – see [Code of practice in relation to measuring social services performance](#) p.11

²³ See Luke Clements *Keynote speech at BASW Cymru’s Annual Conference 2017: Social Services and Wellbeing (Wales) Act 2014: a critical overview* (BASW Cymru 2017).

The Act creates both a strategic and a practical duty in relation to preventative services. At a strategic level, local authorities and LHBs are under a duty to assess the extent of need for a range and level of preventative services (section 14). At the practical level, local authorities are required to provide / arrange for the provision of services that will contribute towards preventing / delaying / reducing the development of needs for care and support; minimising the effect on disabled people of their disabilities [sic]; helping to prevent people from suffering abuse or neglect and enabling people to live their lives as independently as possible. In relation to children in need there are additional specific provisions – aimed at reducing the need for court proceedings of all kinds (section 15(2)(f)).

Generalised guidance on the obligations local authorities and LHBs have in relation to the development of preventative services is provided in the [Part 2 Code of Practice \(General Functions\)](#) pages 37 – 46.

While the development of preventative services is to be welcomed, two caveats should be added. The first is a general one: that given the severe budget problems of most local authorities – and the lack of any significant ‘new’ money to accompany this legislation – it is difficult to see how (in the short term) this duty can be made to be more than cosmetic. To invest in preventative services, without new money would require a local authority to disinvest in an existing area. For many local authorities this would require (in essence) disinvestment in crisis services and is not realistic. The second caveat concerns the eligibility criteria to the Act. Objectively the Welsh Government is attempting to divert people in need away from formal support provision – since this will only be available if it is the only way of ‘overcoming the barriers’ they face. This might mean that a person would have to establish that preventative services had been tried (and had failed) before formal support is available (but see further discussion on this point in ‘eligibility criteria’ below).

Promoting social enterprises etc (section 16)

One of the most distinctive provisions in the Act concerns the requirement in section 16 that local authorities must promote both:

- the development of social enterprises / co-ops / third sector organisations to provide care and support and preventative services;
- care and support and preventative services that involve service users in the design and running of services;

Support for ‘not for profits’ is thought to be an imaginative idea – in that such enterprises are able to use all their income to develop a quality service without having to divert ‘profits’ to shareholders. A cautious endorsement of the use of third sector organisations in social care was given by 2013 research which however identified not inconsiderable barriers to entry such organisations encountered.²⁴ This note of caution remains, with 2017 research highlighting their need for (among other things) professional business support, accessible sources of financing and awareness by local authorities of how to develop commissioning arrangements. The report notes that ‘without a clear evidence base and a solution to the basic funding question of social care then it is unwise to view social enterprises as a policy panacea’.²⁵

²⁴ R Millar, K Hall and R Miller ‘A story of strategic change: becoming a social enterprise in English health and social care’ in *The Journal of social entrepreneurship*, (2013) 4(1), 4-22.

²⁵ L Cowie and I Rees Jones *Adult Social Care Social Enterprises and the Foundational Economy in Wales* WISERD Research Reports Series WISERD/RRS/0 (WISERD 2017).

The 2014 Act's preferment of such businesses is in stark contrast to the English Act which is likely to result in a significant increase in the privatisation of social care provision (particularly assessments²⁶).

Section 16 of the Act requires – in essence – that local authorities prioritise the support of 'social enterprise' care. It defines a social enterprise organisation as one whose activities are carried on for the benefit of society. The [Social Services and Well-being \(Wales\) Act 2014 \(Social Enterprise, Co-operative and Third Sector\) \(Wales\) Regulations 2015](#) (reg 3) stipulate that this requires it to be 'inclusive', involving 'people' and 'promoting well-being'. Regulation 4 defines inclusive as an activity for which regard has been had to the public sector equality duty (section 149 of the Equality Act 2010).

An uncritical promotion of social enterprise organisations could well have negative consequences – particularly if it marginalised the important role played by the public sector. This is especially so in rural areas where there may be no viable 'business plan' for a third sector enterprise and where the public sector is best placed to make provision and to offer choice. The fear must be that local authorities will see section 16 not so much as an opportunity to increase the range of service options for disabled people, but as a vehicle for offloading their in-house services.

Generalised guidance on the obligations on local authorities to promote the development of not for private profit organisations is provided in the [Part 2 Code of Practice \(General Functions\)](#) pages 47 – 61. The guidance stresses the importance of local authority awareness about procurement opportunities – particularly those presented by the [Public Contracts Regulations 2015](#)²⁷ - regulation 77 of which, for example, enables local authorities to give preference to 'not for profit' organisations for certain contracts relating to administrative, social, educational, healthcare and cultural services. As in the Code for Part 2, (para 282-283) the regulations include provisions designed to ensure that smaller suppliers and third sector organisations have a genuine opportunity to gain public contracts. Regulation 20 provides in particular for opportunities relating to organisations whose main aim is the social and professional integration of 'disabled or disadvantaged persons' and the regulations provide considerable flexibility where the procurement relates to an 'innovative' service that is not already available in the relevant market (reg 31).

Information (section 17)

Local authorities are under an enhanced duty to provide people in need and their carers with information about the care and support that is available in their area. The duty includes information about how the local care system operates; the choice of types of care and support, and the choice of providers in the local authority's area; how to access the care and support that is available; and how to raise concerns about safety / well-being of an adult who has needs for care and support. A 2016 report found that at least 7 Welsh local authority websites had no, or very limited detail regarding the assessment.²⁸

While this enhanced duty is to be welcomed – there are problems, and these concern the role of the NHS in the provision of information. The Act merely requires the relevant LHBs / NHS trusts to inform the local authority of the care and support they provide. Presumably if the relevant body is providing nothing – then all it need do is tell the local authority this – ie the NHS is allowed to be passive in this process.

²⁶ The Care Act 2014, section 79 enables local authorities to delegate nearly all their functions to the private sector – including assessments – see L Clements [Care Act 2014 overview](#) p.6.

²⁷ SI 102.

²⁸ Citizens Advice Cymru [Accessing and Paying for Social Care in Wales](#) (2016) page 22.

On a more positive note, section 14A of the Act requires²⁹ that local authorities and LHBs develop and publish a strategy to ensure that there is an adequate supply (in terms of range and level) of care and support services to meet the local demand. The duty places responsibility on the LHB for the elements of the strategy which relate to the health and well-being of carers. The Act (section 14(1)) provides for regulations to flesh out the scope of this duty and creates therefore the potential for a scheme very similar to that created by the [Carers Strategies \(Wales\) Measure 2010](#) (which has been repealed by the 2014 Act).

[Part 2 Code of Practice \(General Functions\)](#) pages 62-79 give generalised guidance on the obligations on local authorities to provide information, advice and assistance.

Registers of disabled people (section 18)

The Act has downgraded the previous duty on local authorities to maintain a register of disabled people in their area³⁰ to a power – save only for sight impaired, hearing impaired and for disabled children for which the duty remains. While many registers have been little used – there is considerable scope for their imaginative use: eg as databases to facilitate planning and as a means to target information appropriately to those who need it.

The duty to Assess

Assessments - general requirements

The duty to assess is mandatory if the person 'may' have a need for care and / or support. (sections 19, 21 and 24): there is no requirement for a request: the duty is triggered by the appearance of need. Once an assessment has commenced, then it has to be completed, which will include a consideration as to whether the person's needs meet the eligibility criteria. It appears that in practice some local authorities are suggesting that a 'what matters to you conversation' can obviate the need for an assessment. As James et al note this is mistaken: that it would legally 'be deeply concerning if people are being 'fobbed off' at the [Information Advice and Assistance] stage by a conversation masquerading as an assessment'.³¹

As noted below, the eligibility criteria consider (among other things) the availability of 'non-local authority' care and support. When undertaking the assessment, the Act and the regulations require the local authority to have regard to a wide range of factors and, provided these are considered, it is for the local authority to decide how wide and how deep the assessment ranges: ie what is 'proportionate in the circumstances'. This means that the local authority must look at the need for such things as: *support, preventative services, information, advice or assistance and also whether the individual works or wishes to do so; whether they want to participate in education, training or any leisure activity etc.*

Although the authority must consider these factors – it is up to the authority how it does this: it is for the authority to decide what is 'proportionate'. In this context, proportionality goes to the question of how wide and deep the assessment ranges – and not to whether it is undertaken at all.

²⁹ The genesis of section 14A is tortuous. In simple terms it was inserted by the [Well-being of Future Generations \(Wales\) Act 2015](#) section 33. The 2015 Act however repealed very similar provisions in the [National Health Service \(Wales\) Act 2006](#), section 40(2A), (2B) and (2C) which had been inserted by section 14 of the 2014 Act. These provisions were however repealed by the [Well-being of Future Generations \(Wales\) Act 2015](#) (Schedule 4 para 19) which came into force immediately before the 2014 Act. See also in relation to the development and publication of strategic plans sections 37 – 39 of the 2015 Act

³⁰ The National Assistance Act 1948 s29(4)(g) and LAC (93)10 appendix 2 para 2(2).

³¹ A James and L Clements What matters to Carers? *Is a 'What Matters' conversation an assessment?* in Rhydian: Wales Social Welfare Law on-line (2017) 1-4.

Having completed the assessment, if the authority is satisfied that the person has needs for care and / or support, then it must decide if any of these needs meet the eligibility criteria: it is the need for 'support' that is the triggering issue, requiring that the authority take the assessment to the next stage. Section 32 states that where an authority has done an assessment which has revealed that the person has needs for care / support then it must decide if these needs meet the eligibility criteria and, if they do, then it must meet those needs by providing assistance in a variety of ways (listed in section 34).

The [Care and Support \(Assessment\) \(Wales\) Regulations 2015](#) (reg 2) require that there must be a named person for every assessment and that she / he must have the skills, knowledge and competence to carry out the assessment and have received training in the carrying out of assessments (reg 3). [Part 3 Code of Practice \(assessing the needs of individuals\)](#) at para 43 stipulates that for this purpose the appropriate levels of qualification 'include':³²

- either a registered social work or social care practitioner holding a professional qualification at level 5 or above
- or a person holding a social care qualification at level 4 or above, which includes knowledge and skills undertaking [sic] person centred assessment, under the supervision of a registered social work or social care practitioner

Assessments must consider — (a) the person's circumstances, (b) the person's personal outcomes, (c) the barriers to achieving these outcomes, (d) the risks if these outcomes are not achieved, and (e) the person's strengths and capabilities (reg 4). [Part 3 Code of Practice \(assessing the needs of individuals\)](#) at page 27 considers the risks of meeting need – and contains the troubling suggestion that risk consists of the person 'becoming too dependent on services and undermine their potential for meeting their personal outcomes'. It however stresses the importance of the assessment being 'undertaken jointly with the user' so that it is 'led by their preferences and wishes in relation to achieving and enhancing their ability to meet their personal outcomes'. 2016 research on the implementation of the Act found that many participants considered that the assessment process 'felt like a 'tick box' exercise, fitting people into 'neat administrative boxes' which meant it was unlikely to provide a bespoke outcome'.³³ The research also (perhaps surprisingly) found that person-led assessments 'placed too much onus on the individual and their ability to communicate what support they needed': that 'many felt they would have benefitted from knowing what services were available in advance and how those services might help them'.³⁴

Copies of assessments must be 'offered' to the person assessed (reg 6) and reviews must be undertaken when there has been a 'significant' change in circumstances (reg 7).

In relation to the assessment of children in need, assessment guidance is also found in the statutory codes under [Part 6](#) (which is concerned with the special position of 'looked after and accommodated' children). The guidance in relation to children in need stipulates a maximum timescale for completion of the assessment (namely 42 working days from the point of referral³⁵).

National Assessment and Eligibility Tool

The intention was that the Welsh Government would develop a standard template for assessments – a 'National Assessment and Eligibility Tool'. This appears to have been shelved, but the [Part 3 Code of Practice \(assessing the needs of individuals\)](#) at paras 54- 63

³² The use of the word 'include' is clearly intended to create ambiguity – in the sense that the list is illustrative rather than exhaustive.

³³ Citizens Advice Cymru [Accessing and Paying for Social Care in Wales](#) (2016) page 25.

³⁴ Citizens Advice Cymru [Accessing and Paying for Social Care in Wales](#) (2016) page 25.

³⁵ Para 78 of the Part 3 Code.

identifies a minimum record that must emerge from the assessment. It stresses (para 56) that it is essential ‘that all practitioners responding to individuals, families or to referrers are familiar with the principles which underpin the assessment of need and are aware of the importance of the information collected and recorded at this stage.’ The obligation to record all of the ‘core data set’ only comes into being when an individual’s needs are deemed to be eligible and a care and support plan, or support plan in respect of a carer, is required (para 59). The Core Data Set comprises (para 59):

| | |
|--|--|
| NHS Number | Preferred Language / Communication |
| Title | method / Accessibility requirement |
| Surname | Name(s) of Carer(s) / People with |
| Forename(s) | Parental Responsibility |
| Preferred Name | Relationship |
| Address and Postcode | Contact Details for Carer(s) / People |
| Date of Birth | with Parental Responsibility |
| Telephone | Is this a child on the Child Protection |
| Email Address | Register? |
| Sex | Contact details of Lead Assessment |
| GP Name and address | Co-ordinator |
| School name and address | Contact details of Lead Care Coordinator |
| Occupation | Information taken by (name) |
| What other assessments have been undertaken by other agencies? | Designation |
| | Organisation |
| | Date |

The Five Key Elements

The guidance (at para 63) Act advises that the assessment process (including consideration of the eligibility criteria) require a comprehensive analysis of five inter-related elements³⁶, namely:

- the person’s circumstances;
- their personal outcomes;
- the barriers to achieving those outcomes;
- the risks to the person or to other persons if those outcomes are not achieved; and
- the person’s strengths and capabilities.

Guidance on these five elements is set out in Annex 1: Guidance on Five Elements of Assessment.

Assessment of adults in need (section 19)

The Act makes little change to the duty to assess adults in need. The duty is triggered on the appearance of need (ie there is no need for a request) and the duty exists regardless of the wealth of the person or the level of their needs. There is a duty to involve carers ‘so far as is feasible’.

The [Part 3 Code of Practice \(assessing the needs of individuals\)](#) at para 80 makes it clear that when undertaking an assessment the authority ‘must identify all presenting needs including those which would be deemed as eligible if a carer was not meeting those needs’. Although care provided by a ‘willing carer’ is not ignored for eligibility purposes (unlike in the English scheme – see below) the Code explains that carers’ support must be identified:

so that the local authority is able to respond appropriately and quickly where the carer or the child’s family becomes unable or unwilling to meet some or all of the identified care and support

³⁶ The five key elements are analysed in greater detail in Annex 1 to the [Part 3 Code of Practice \(assessing the needs of individuals\)](#).

needs (para 80).

Assessment of children in need (section 21)

The duty to assess the needs of a child 'in need of care and support' is a very positive development – not least because there was no explicit statutory duty to assess under the previous legal regime (ie the Children Act 1989, s17).³⁷ As with adults in need, the duty is triggered on the appearance of need and the duty exists regardless of the wealth of the person or the level of their needs. As is noted below, the outcome of an assessment may be a specific duty on the local authority to provide support.

In relation to disabled children, section 21(7) creates a presumption that they have needs for additional / substitute care and support. The relevant guidance stresses that in undertaking the assessment, local authorities must:³⁸

identify all presenting needs including those which would be deemed as eligible if a carer was not meeting those needs. This is so that the local authority is able to respond appropriately and quickly where the carer or the child's family becomes unable or unwilling to meet some or all of the identified care and support needs

Carers Assessments (section 24)

The Act not only consolidates the existing three Carers Acts,³⁹ it also removes: (1) the requirement to establish that the carer is providing or intending to provide 'a substantial amount of care on a regular basis'; and (2) the requirement that carers 'request' an assessment – the assessment obligation is triggered by the 'appearance of need' ('where it appears to a local authority'). The duty is therefore proactive – as page 7 of the [Part 3 Code of Practice \(assessing the needs of individuals\)](#) states:

The duty is triggered if it appears to the local authority that a carer may have needs for support. The duty to assess applies regardless of the authority's view of the level of support the carer needs or the financial resources he or she has or the financial resources of the person needing care.

Section 24 requires that carers must be fully involved in their assessments and makes clear that the duty to assess applies regardless of the authority's view of the level of the carer's needs for support, or their financial situation (s24(3)). It also requires that specific consideration be given to:

- the extent to which the carer is able, and will continue to be able, to provide care, and the extent to which the carer is willing, and will continue to be willing, to do so (s24(4));
- whether the carer works or wishes to do so (s24(5));
- whether the carer is participating in or wishes to participate in education, training or any leisure activity (s24(5));

Carers Wales is assessing the extent to which the Act is having its intended positive impact on carers. The on-line survey is at www.carersuk.org/wales/news/track-the-act.

³⁷ Although in *R (G) v. Barnet LBC and others* [2003] UKHL 57 the House of Lords held that in general such a duty existed in public law.

³⁸ Para 80 to the Part 3 Code.

³⁹ The Carers (Recognition & Services) Act 1995; Carers & Disabled Children Act 2000; and the Carers (Equal Opportunities) Act 2004.

Young carers

Unlike the English legislation,⁴⁰ the 2014 Act does not need to distinguish between the rights of adult carers and those of young carers (as it covers carers of any age). Nevertheless section 42 places a specific duty on local authorities to meet the needs of young carers (termed 'child carers'). The duty arises if the person for whom they care is ordinarily resident in the local authority's area and the young carer meets the standard carers eligibility criteria.

The Act then gets overly complicated. If the young carer'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 (convoluted) mental capacity criteria (s43).

The standard eligibility criteria (see above)⁴¹ require that: (a) the young carer'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 additionally a specific young carer criteria is available – namely 'achieving developmental goals'; and (c) the can and can only test (ie that the need cannot be met by the young carer 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').

The Codes provide limited guidance concerning young carers, but Codes 3 and 4 stipulate:

The assessment also 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. If the carer is a child, 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 local authority of whether a child carer is actually a child with care and support needs in his or her own right and who therefore should be assessed under section 21 of the Act.⁴²

As with all assessments, the authority must, for both adult carers (s24(4)(c)) and young carers (s24(4)(d)), seek to identify the outcomes that they wish to achieve, for young carers this is qualified by it being 'to the extent' that it is 'appropriate having regard to the carer's age and understanding', and the views of the parents of the young carer on this question and their well-being generally (s24(4)(d)). Young carer 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)).

As with the assessment duty owed to disabled children, (s21(6)) the way a carer's assessment is undertaken should be 'proportionate in the circumstances' (s24(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.

Parent carers

As noted above, section 24 places a duty on the local authority to assess carers providing support for an adult or disabled child who is based in their area. The assessment must consider whether carer has a need for support and what those needs are. Importantly 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)).

⁴⁰ sections 63 – 64 Care Act 2014 and section 17ZA Children Act 1989.

⁴¹ The Care and Support (Eligibility) (Wales) Regulations 2015 reg 5

⁴² Part 3 Code (Assessing the needs of individuals) page 7 (repeated in the Part 4 Code (Meeting Needs) at para 50).

The section 24 assessment duty requires that the authority assess the extent to which the carer is able / will continue to be able, to provide care. However the Eligibility regulations (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'.

This is problematic as it does not stipulate that the parent carer must be 'willing', (contradicting section 24 of the Act): it fails therefore to acknowledge that parents of disabled children are also carers of disabled children. While this might be comprehensible (but unduly harsh) for the child's parents – it is incompressible that the coercion to care should extend to 'relatives who play a role in looking after the child' – which is the definition given to 'other persons in a parental role' (reg 4(2)(ii)).

Summary of the carer assessment duty:

Stage 1

There is a pro-active duty on local authorities to offer assessments to all carers where it 'appears' to the authority (ie any arm of the authority) that they 'may' have needs for support.

Stage 2.

The Act (s24) requires an assessment of all such carers (unless they make a valid refusal – (sections 25 – 27)). Frequently the nature of the need will not be clear until such an assessment has been undertaken.

Stage 3

When undertaking an assessment, section 24 and the regulations require the local authority to have regard to a wide range of factors and section 24(7) states that, provided these are considered, the 'nature of the needs assessment ... is one that the local authority considers proportionate in the circumstances'. This means that the local authority must look at the need for such things as: *support, preventative services, information, advice or assistance, and also whether the carer works or wishes to do so; whether they want to participate in education, training or any leisure activity etc.* Although the authority must consider these factors – it is up to the authority how it does this: it is for the authority to decide what is 'proportionate'.

Stage 4

Having completed the assessment, if the authority is satisfied that the person has needs for 'support' then it must decide if any of these needs meet the eligibility criteria: it is the need for 'support' that is the triggering issue, requiring that the authority take the assessment to the next stage.

Stage 5

Section 32 states that where an authority has done an assessment which has revealed that the person has needs for care / support then it must decide if these needs meet the eligibility criteria and if they do then it must meet those needs by providing assistance in a variety of ways (listed in section 34). The support may be provided to the carer – although more commonly it will be provided to the disabled person as a form of replacement care. The range of supports include (for example): (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; (c) services, goods and facilities; (d) information and advice; (e) counselling and advocacy; (f) social work; (g) direct payments; (h) aids and adaptations; and so on (s34(2)).

Carers and combined assessments (section 28)

Section 28 enables a local authority to combine the carer's assessment with the assessment of the person in need – but only where the parties consent. The only exception to this relates to children under the age of 16 where section 28(6) provides that an assessment can be combined if the authority is satisfied that 'combining the needs assessment would be consistent with the child's well-being'. [Part 3 Code of Practice \(assessing the needs of individuals\)](#) at para 37 states that this would only be where the authority considers that it would be 'beneficial'.

Local authorities must display flexibility on this question and pay particular attention to the needs of parent carers – for whom a separate assessment may well be beneficial in most cases. It would be an unlawful fettering of an authority's discretion to adopt a rigid rule of always combining such assessments.

Eligibility criteria (section 32 - 33)⁴³

Once the local authority has gathered the relevant information the Act and [The Care and Support \(Eligibility\) \(Wales\) Regulations 2015](#)⁴⁴ require that it decides if the person's 'needs' are such that they meet the eligibility criteria – and if so, that care and support is made available to address those needs.

The eligibility criteria regulations create a process with four stages, and in general terms the criteria apply to all people in need (adults, children and carers) although there are slight variations. The stages are as follows:

1. The need arises for a specified reason (ie disability / caring)
2. The need relates to certain key activities ('outcomes')
3. The person (or if a child, their parent(s)) is unable to meet that need even with the available support from others / the community
4. The need can't be met without the local authority providing / arranging support services or Direct Payments

Considering these stages in more detail, the position is as follows:

Stage 1

The eligibility criteria require that for:

Adults in need (reg 3)

- The need arises from their physical or mental ill-health, age, disability, dependence on alcohol or drugs or other similar circumstances;

Children in need (reg 4)

- The need arises from the same factors as for an adult (above) or is one that if unmet is likely to have an adverse effect on the child's development;

Carers (reg 5)

- The need arises as a result of providing care for either an adult in need (as described by reg 3 above) or a disabled child.

Stage 2

The need relates to a set of standard tasks (regs 3, 4 and 5):

- Ability to carry out self-care or domestic routines [see below for a definition of 'self-care'];

⁴³ For a background briefing on eligibility see Amy Clifton, [Who will be entitled to care and support in Wales?](#) National Assembly for Wales Research Service 10th July 2015.

⁴⁴ SI 1578 (W. 187).

- Ability to communicate;
- Protection from abuse or neglect;
- Involvement in work, education, learning or in leisure activities;
- Maintenance or development of family or other significant personal relationships;
- Development and maintenance of social relationships and involvement in the community

'basic self-care' is defined by reg 1 as 'tasks that a person carries out as part of 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

In addition to the standard tasks listed above, the regulations have two specific eligible tasks – one for adults and one for children. These are:

For adults / adult carers

- Fulfilment of caring responsibilities for a child;

For children / child carers

- Achieving developmental goals.

Stage 3

The person (if a child – then 'and his / her parents') 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.

This element effectively makes a person ineligible if their carer indicates they are willing to provide support. It is conceptually flawed since it confuses 'eligible need' with the support that is provided to meet a need. The English criteria do not fall into this error. As the [Statutory Guidance](#) to the Care Act 2014 states (para 6.119):

The eligibility determination must be made based on the adult's needs and how these impact on their wellbeing. Authorities must only take consideration of whether the adult has a carer, or what needs may be met by a carer after the eligibility determination when a care and support plan is prepared.

The approach of the Welsh criteria is not only problematic for carers: it can also cause significant problems for individuals in need.

An obvious example concerns a situation where a disabled person with substantial care needs is having all these needs met by a 'willing' carer. In this case the local authority would determine that the disabled person is ineligible and the file would be closed. Subsequently the carer becomes unable to continue caring. In that case the local authority would have to be contacted and a new assessment requested – and of course considerable delay / harm to wellbeing could result. Para 83 of the [Part 3 Code of Practice \(assessing the needs of individuals\)](#) seeks to mitigate the flawed approach to eligibility in Wales – by stating:

Where a carer is suddenly unable to meet a care and support need the requirement for a re-assessment must not prevent or delay the local authority from taking urgent and immediate action to meet the care and support needs of the adult or child. Such action should be informed by the most recent assessment undertaken.

The [Statutory Guidance](#) to the Care Act 2014 is alive to this danger and the English criteria take a diametrically opposite approach, stating at para 6.119:

... . Local authorities are not required to meet any eligible needs which are being met by a carer, but those needs should be recognised and recorded as eligible during the assessment process. This is to ensure that should there be a breakdown in the caring relationship, the needs are already identified as eligible, and therefore local authorities must take steps to meet them without further assessment

A further example of the dangers of the approach in the Welsh scheme concerns a disabled person who has a need for intimate care and a strong objection to a family carer providing that support.⁴⁵ If however the family carer were to indicate she/he is willing to provide the relevant care, this could make the disabled person ineligible and therefore remove from them the opportunity of exercising control over their care arrangements.

To correct this perverse element within the criteria, carers could be advised to state clearly, that they are not able (and therefore not willing) to provide care unless the local authority has first determined that the individual in need is eligible. Then, and only then, will they be able (and therefore willing) to discuss with the individual in need and the authority the nature and extent of the care (if any) they might be willing to provide.

Stage 4

He / she is unlikely to achieve one or more of the personal outcomes unless the local authority provides or arranges care and support to meet the need (including by a Direct Payment).

It is difficult to see how – in practical terms – this requirement raises a distinct question to that at the third stage. One possible interpretation is that a person may be unable to carry out one of the basic tasks detailed in stage 2 – but this is not of concern to them. This however seems problematical. Alternatively it might be that, the inability to carry out the task does not have a significant impact on them. Although this is a less problematical way of making practical sense of the fourth ground, the phrase ‘significant impact’ does not appear in the eligibility criteria (it is however a key requirement of the English criteria).

The ‘can’ and ‘can only’ test

The Welsh Government initially described the above criteria as creating a ‘can and can only’ test. This attracted considerable criticism, including the suggestion that it placed the onus on individuals to prove that they had tried generalised community support services (and that these had failed) before they could then access personalised support (such as a direct payment). The Minister strongly rejected this analysis, asserting:⁴⁶

I have read of the anxiety that has been raised that the Act somehow requires users to demonstrate exhaustively that they have explored every other possible avenue of support before becoming eligible for local authority assistance. That is emphatically not the case under these regulations. The responsibility here lies with the assessor, not with the person being assessed

The [Part 4 Code \(Meeting Needs\)](#) restates the Minister’s assurance in the following terms: 33. 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.

⁴⁵ See for example [Cerebra Legal Entitlements Research Project Digest of Cases 2014 Terri’s Story](#) p30.

⁴⁶ Mark Drakeford *The Minister for Health and Social Services National Assembly for Wales The Record of Proceedings* 14/07/2015. However the Assembly Research Service in its *Key issues for the Fifth Assembly* (2016) report indicates that the ‘can and can only’ criteria remains – see page 42, Amy Clifton ‘The future of social care’ and see also Stephen Boyce ‘Carers’ Week 2016’ in *In Brief* (National Assembly for Wales Research Service 2016) which refers to the eligibility criteria’s ‘can and can only’ test and notes that there ‘are worries that this may mean more of this burden [caring] will fall on carers.’

33. It is the responsibility of the local authority to identify and record ... how the personal outcomes will be achieved.

Eligibility and parents caring for disabled children

In relation to people with a 'parental role'⁴⁷ caring for disabled children, the eligibility regulations appear incongruous. The regulations fail to distinguish between a 'parent' and a 'carer' and, importantly fail to recognise that a parent of a disabled child fulfils both roles. This is most evident in the regulations failure to appreciate that such a person may not be able to provide care for their child – an omission that appears inconsistent with the provisions of the primary statute. Section 24(4), for example, requires that authorities:

- (a) assess the extent to which the carer is able, and will continue to be able, to provide care for the person for whom the carer provides or intends to provide care,
- (b) assess the extent to which the carer is willing, and will continue to be willing, to do so,
- (c) in the case of a carer who is an adult, seek to identify the outcomes that the carer wishes to achieve,

....

Section 24(5) then requires that authorities must have regard to—

- (a) whether the carer works or wishes to do so,
- (b) whether the carer is participating in or wishes to participate in education, training or any leisure activity, and

....

This detail in section 24 and the silence in the regulations pose the question as to how the regulations can be squared with the obligations in the primary statute to consider the 'ability / willingness / work, education etc aspirations'. The mere fact that the regulations make no mention of these factors cannot mean they are not relevant (subordinate legislation cannot undermine the primary statute).

Take for example a hard-pressed parent of a disabled child (or indeed an aunt⁴⁸ caring for her disabled nieces / nephews) who states, during an assessment, that she is unable to continue caring (unless support is provided) and that it is essential that she continue in paid work. What would be the position if the local authority then ignores these factors and focuses solely on the eligibility regulations and in accordance with these, determines that she is ineligible for support.

The above analysis suggest that there could be a good case for arguing that the regulations are either *ultra vires* the Act; or that there has to be read into them a requirement to consider the issues mandated by subsections 24(4) and 24(5); or that there is a general public law duty to give reasons as to why the factors mandated in subsections 24(4) and 24(5) are not determinative in the particular case.

It is self-evident that 'educating, nursing and caring' are activities fundamental to parenthood. It is equally self-evident that parents require others to help educate their child; help nurse their child and if the child or the parent has special needs, help care for the child. The failure of the regulations to recognise that a person may be passionately committed to being a parent (ie 'willing' in the pedestrian language of the Act) but incapable of providing 24 x 7 care for their child, is a glaring omission from the legislative framework and one that will have to be filled by guidance and if needs be, case law.

⁴⁷ Which phrase is defined as including 'relatives who play a role in looking after the child' – see The Care and Support (Eligibility) (Wales) Regulations 2015 [reg 4\(1\)\(c\)](#).

⁴⁸ At law such a person has 'responsibility' to care and yet, because they come within the definition of a 'person in a parental role' ('relatives who play a role in looking after the child' –The Care and Support (Eligibility) (Wales) Regulations 2015 [reg 4\(1\)\(c\)](#)) their willingness to care and/or their desire to work or to participate in education / training appear to be ignored by the regulations.

Copies of assessments

Local authorities must provide a copy of the assessment to the adult / their authorised person or where the assessment is a of child's needs, to the child, their parents and any other person authorised to act on behalf of the child.⁴⁹ The Part 4 Code of Practice (Meeting Needs) stresses that the authority must not only provide these persons with a record of all elements of the assessment and eligibility tool (para 24) but it should also provide 'a copy of the care and support plan, support plan or closure statement (as the case may be) to the person to whom the plan or closure statement relates and to any person authorised to act on behalf of that person' (para 95).

Care and support (section 34)

Under the previous legal regime the object of a community care / carers assessment was to determine (among other things) whether there was a need for 'services' - and the legislation⁵⁰ contained exhaustive lists of services that could be provided for adults in need. The 2014 Act repeals these statutes and provides an illustrative list of 'ways in which a local authority may meet needs' (for people in need and / or carers), namely:

- a) accommodation in a care home, children's home or in premises of some other type;
- b) care and support at home or in the community;
- c) services, goods and facilities;
- d) information and advice.
- e) counselling and advocacy;
- f) social work;
- g) payments (including direct payments);
- h) aids and adaptations;
- i) occupational therapy.

Duty to meet needs (sections 35 - 45)

The Act (as with the previous legislation) places a duty on local authorities to meet the eligible needs of adults. It however strengthens the nature of this 'right' in relation to 'children in need' and for carers as it converts what was formerly a 'target duty / power' into a specific duty to have their eligible needs met. There is, in addition, a duty to meet the needs of people who, although their needs are insufficient for the purposes of the 'eligibility criteria' are nonetheless considered to be at risk of abuse or neglect. This provision is considered under 'safeguarding' below.

As with the previous law:

- a local authority's primary responsibilities are to persons 'ordinarily resident' in their area (section 194) or to children 'within the local authority area';
- a local authority has power to provide care and support for those whose needs are insufficient for eligibility criteria purposes; and
- certain people are ineligible for support if they are subject to immigration control (section 46).

Separate sections address the duties in relation to adults, disabled children, carers of adults and carers of children and these are considered below.

The duty to meet the needs of adults (section 35)

⁴⁹ The Care and Support (Assessment) (Wales) Regulations 2015. 1305 (W. 111) reg 6 and see also Part 3 Code of Practice (assessing the needs of individuals) para 116.

⁵⁰ Primarily s2 Chronically Sick and Disabled Persons Act 1970 and ss 21 & 29 National Assistance Act 1948.

The duty to meet the care and support needs of an adult are little different to those under the previous legal regime – save only that this duty is extended to self-funders (below). Section 35(6) states that the duty to meet the needs of an otherwise eligible adult ‘does not apply ... to the extent that the local authority is satisfied that those needs are being met by a carer’. The potentially negative impact of this provision can be neutralised if (as discussed above) the carer has been explicit in stating: (a) they are unwilling to provide care unless (and until) the individual is assessed as eligible; and (b) that even then the nature and extent of the care (if any) they might be willing to provide will have to be the subject of specific discussion and specific agreement.

Self-funders

Section 35(4)(b) places a duty on local authorities to meet the eligible needs of adults ordinarily resident in their area:

- (i) ... [whose] ... financial resources are at or below the financial limit,
- (ii) ... [whose]... financial resources are above the financial limit but the adult nonetheless asks the authority to meet his or her needs; or
- (iii) ... [who lack] capacity to arrange for the provision of care and support and there is no person authorised to make such arrangements under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult’s behalf.

As (ii) makes clear, therefore, the duty to meet the needs of adults extends to ‘self funders’ - ie people who have assets above the financial limit (£24,000⁵¹) and who ask the local authority to meet their needs.

For care home residents there could be a significant incentive for self-funders to ask the local authority meet their needs as they seek to get the price of their placement at the local authority rate (rather than the self funder rate): a change that may have a distorting impact on the market.⁵² Self-funders are however liable for the full cost of the placement and may have an additional cost if authorities make a charge for ‘putting in place the arrangements for meeting’ these needs (section 59(3)).⁵³ [Part 4 Code of Practice \(Meeting Needs\)](#) (para 75) advises:

In some circumstances an individual with means above the financial limit may need support from the local authority to make arrangements for their care and support. If the needs meet the eligibility criteria and the individual asks the authority to meet those needs, the local authority will be under a duty to make arrangements with the placement provider. In such cases the local authority will be the contract holder with the provider and the individual will be deemed to be ordinarily resident in the area of the local authority in which they were ordinarily resident immediately before the placement, such that the local authority which made the placement would continue to be responsible. The rate at which the local authority commissions the placement is a matter for local authority determination

Cap on costs

The major incentive for self-funders to seek a local authority assessment of their eligible needs would have come about if the Welsh Government had introduced a ‘cap on care’ costs of the kind proposed, but now abandoned in England. This – in effect – would have offered self funders a free insurance policy: that if assessed as having eligible needs, there would be a cap on the potential costs that they would have to pay. The idea, while

⁵¹ The Care and Support (Charging) (Wales) Regulations 2015 SI 1843 (W. 271) reg 11(2).

⁵² Either causing care homes severe financial difficulties or local authorities (if they have to start paying a larger overall rate.)

⁵³ In such cases there may also an adverse impact on self-funders’ social security benefits (ie the loss of their DLA/PIP or AA / care component).

superficially attractive, is considered by some to be profoundly flawed.⁵⁴ In November 2015 the Welsh Government announced that it too would be shelving this policy proposal.⁵⁵

The duty to meet the needs of children (section 37)

The 2014 Act materially improves the legal rights of some disabled children to support. Under the previous legislation, although authorities were under a ‘specifically enforceable duty’ to provide community based support services for disabled children,⁵⁶ the nature of the duty to provide residential care (such as overnight respite care) and the duty to support non-disabled ‘children in need’ was less clear. The 2014 Act clarifies the position by placing a specifically enforceable duty on local authorities to provide all children with the care and support they are assessed as needing, or to protect them from harm.

The section 37 duty to meet needs does not apply to children who are ‘looked after’ (s37(6)) – i.e. ‘accommodated’ or subject to a care order. These children are covered by a tranche of provisions under Part 6 of the Act. The duties imposed on local authorities to provide their support under Part 6 largely replicate sections in Part III Children Act 1989 (discussed below). Given that looked-after children have significantly worse well-being outcomes than other children, the purpose of excluding them from s 37 is unclear. This unsatisfactory state of affairs needs to be clarified.

Transition

A troubling omission from the Act concerns the absence of provisions detailing local authority responsibilities to disabled children and carers when a young person is in transition into adulthood (apart from for ‘Looked After Children’). It appears that the Act does not repeal or codify the (often ignored⁵⁷) duty to consider the transition needs of children with Special Educational Needs Statements under the Education Act 1996.⁵⁸ This means that the duties under the Disabled Persons (Services, Consultation and Representation) Act 1986 sections 5 and 6 remain – namely the duty when the child is 14, that the relevant social services officer be contacted with a view to a social care assessment of the young person’s needs being undertaken – so that services are in place when educational provision ceases.

Although the idea underpinning the Act is that local authority responsibilities for disabled people will exist from ‘cradle to grave’ the reality is that different departments and teams with different budgets and local criteria will often be responsible for disabled children to those responsible for adults. Transition problems will almost certainly occur as frequently as they do under the current legislation.⁵⁹

Good practice dictates that with any transfer of responsibility for care, that the person in need and their carers remain at the centre of the process: that their care, support and well-being needs are maintained throughout the process and that the responsible teams work together and share information in a timely manner to ensure that this happens (see by analogy Annex 2 to the Part 11 Code).

⁵⁴ See for example, L Clements ‘Adult social care law reform’ in *Elder Law* (2013) Issue 3 Volume 3 pp219-224.

⁵⁵ Written Statement - *Further Update on Reform of the Arrangements for Paying for Social Care and Support* 11 November 2015.

⁵⁶ Under the Chronically Sick and Disabled Persons Act 1970, section 2.

⁵⁷ See for example Local Government Ombudsmen Reports on complaint 08/001/991 against the Isle of Wight Council, 4 June 2009.

⁵⁸ In 2013 the Welsh Government published a ‘Table of intended repeals showing where related provision is found in Bill published 2013’ LFGT048813 Doc 1 with subheading ‘NB this list may be subject to further minor change’. This document was (at 2nd September 2014) no longer accessible on the internet.

⁵⁹ See S Broach, L Clements & J Read *Disabled Children: A Legal Handbook* (Legal Action 2010) chapter 10. It should also be noted that the key current Act that provides for the needs of disabled people the Chronically Sick and Disabled Persons Act 1970 is also one that applies from the cradle to the grave.

In relation to 'looked after' children, under the [Part 6 Code of Practice \(Looked After and Accommodated Children\)](#), the obligation (when a looked after child is about to turn 16) is for the local authority to:⁶⁰

prepare a pathway plan to assist that young person with the transition to adulthood and leaving care. The pathway plan will build upon the child's existing Part 6 care and support plan, which will be subsumed within the pathway plan

The duty to meet the needs of adult carers & young carers (sections 40 - 44)

The Act imposes a duty on local authorities to meet the eligible needs of carers – both adult carers and young carers. In some of the most convoluted sections and subsections known to social care, the Act then considers all the possible permutations of carers being over / under 18; carers and 'people in need' having / lacking capacity to agree to their care arrangements; carers and those 'cared for' having assets above and below the financial limits. The long and the short of it however is that local authorities are under a specifically enforceable duty to provide care and support in such cases unless they can produce cogent reasons / evidence to explain otherwise.

A problematical curiosity concerning young carers is that they are only entitled to support if (among other things) their needs meet the eligibility criteria (section 42(3)). Adults and children in need are however entitled to support if they are at risk of abuse or neglect (even if they fail to meet the eligibility criteria). This important exception does not apply to young carers. The reasoning is almost certainly that a young carer who is at risk of abuse is likely to be eligible in their own right (ie as a 'child in need') – as [Part 4 Code of Practice \(Meeting Needs\)](#) para 40 explains:

As is the case with adults, a local authority must meet the needs of children which the local authority considers it is necessary to meet in order to protect the child from abuse or neglect or a risk of abuse or neglect or in order to protect the child from other harm or risk of such harm. This is an overriding duty on a local authority irrespective of any application of, or outcome from, the determination of eligibility. A local authority's duties in respect of looked after children are contained within Part 6 of the Act.

Short break services

Unlike in England, there is no Welsh legislation (from April 2016) that is specifically labeled 'short breaks' or targeted on the rights of families with disabled children to 'short breaks'. The previous provisions were repealed by the 2014 Act and this has been the subject of adverse comment.⁶¹ The Welsh Government has however undertaken to publish guidance (a 'technical briefing') concerning the continuation of the duties for provision of short breaks. The commitment to produce such guidance was noted in a 2014 Children's Commissioner for Wales report⁶² concerning short breaks. It stated that the 'benefits of short breaks for children and young people cannot be underestimated' and that 'positive feedback from children and families about the value of their short breaks provision has been overwhelming' (p7). At page 11 of the report it was noted that:

Welsh Government has committed to ensuring that the continuing need for short break service provision is recognised in the regulations and codes of practice which will accompany the Social Services and Well-Being (Wales) Act.

⁶⁰ At para 57 and para 398 – 466.

⁶¹ See for example Clements L [Why implementation of new Welsh social care legislation must be delayed in Community Care](#) 19th November 2015.

⁶² Children's Commissioner for Wales [Full Lives: A study of short breaks provision for children and young people with disabilities and their carers in Wales](#) (2014).

While such guidance will be a welcome addition, it is clear that the core provisions of the Act are designed to provide a range of support services for families with disabled children and (although not specifically named) 'short breaks' are one of these essential support services.

Once a local authority has determined that a disabled child (or her / his carers) have eligible needs, then the authority must prepare a plan⁶³ that explains the 'operational detail' - the 'how, who, what and when'.⁶⁴ The plan must describe how the need is to be met, by whom, in what way and when this will be done. As the Ombudsman has stressed, an assessment must result in a care plan that identifies the child's needs, what is to be done about these needs, by whom and when. If a direct payment is made, it must specify precisely what need these payments are intended to meet, why this level of payment is considered appropriate, or what outcome this will result in.⁶⁵ A copy of the assessment record must be offered to the disabled child and their parent(s).⁶⁶

The guidance gives considerable emphasis to the provision of timely support for families, stressing for example that it is 'important to identify early on what needs the family has and provide appropriate support and / or make appropriate referrals'.⁶⁷

The duty to meet the needs of the child and / or his / her carers is strict in the sense that it is non resource-dependent. Accordingly, 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 local authority can 'trim'⁶⁸ because it has to make cut backs due to resource shortages.⁶⁹

The need for short breaks support may arise either from a disabled child's assessment or that of his / her carers: as section 34(1) of the 2014 Act explains, a local authority may meet a person's needs by arranging for 'something to be provided to a person other than the person with [the assessed needs]'. Section 34(2) provides examples of what can be provided in such cases and this includes the three most common mechanisms for facilitating short breaks – namely (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. Examples of (b) would include sitting service (including a night sitting service) as well as a day centre and an after-school (or summer holiday) club.

Where the need has been assessed as eligible, the Act (section 51) and the relevant regulations⁷⁰ and guidance⁷¹ enable the parent to require the local authority to make them a direct payment rather than arrange the necessary care. In such a case the direct payment must be sufficient to purchase the care and support to the required level. Not infrequently a local authority will have a standard hourly rate which may be insufficient to secure the services of a care worker who requires special skills – and of course in such cases, the local authority will have to increase the hourly rate to ensure that a suitably skilled person can be retained,

Short breaks and 'looked after' children

⁶³ Section 54 Social Services and Well-being (Wales) Act 2014.

⁶⁴ *R (J) v Caerphilly CBC* [2005] EWHC 586 (Admin); (2005) 8 CCLR 255.

⁶⁵ Local Government Ombudsman complaint number 13 002 982 against Birmingham City Council 12 March 2014.

⁶⁶ Reg 6 The Care and Support (Assessment) (Wales) Regulations 2015 si 1305 (W.111) and para 116 to the Part 3 Code.

⁶⁷ Para 70 of the Part 3 Code.

⁶⁸ In *R v Islington LBC ex p Rixon* (1996) Times 17 April; 1 CCLR 119 Sedley J put it thus: 'The practice guidance ... counsels against trimming the assessment of need to fit the available provision'.

⁶⁹ Complaint 01/C/03521 against North Yorkshire 19th August 2002.

⁷⁰ Care and Support (Direct Payments) (Wales) Regulations 2015 SI 1815 (W. 260).

⁷¹ The Code of Practice on the exercise of social services functions in relation to Part 4 (Meeting needs) of the Social Services and Well-being (Wales) Act 2014.

Short breaks can also be provided by the child spending time in an overnight placement: for example, a foster home or respite care centre. These arrangements are covered by separate regulations⁷² and the [Part 6 Code of Practice \(Looked After and Accommodated Children\)](#). Paras 288 – 301 of the code provide advice on the legal obligations relating to such children (under the heading ‘Short breaks’). While it emphasises (at para 289) that ‘short breaks will often be provided as part of a disabled child’s care and support plan’ (ie under Parts 3 and 4 of the Act) it states (para 288):

Sometimes it will be appropriate to place a child with a foster carer or in a residential setting for a short period of time only – for example, if the child is disabled and it is necessary to place the child away from home temporarily while the parents have a break from caring.

Unfortunately the guidance in the Part 6 Code is far from helpful as to the legal position in such cases.⁷³ It suggests (para 290) that where such a placement occurs ‘the local authority may decide’ that the short break support is provided under section 76(1)(c) of the Act.⁷⁴ The guidance provides a list of factors that should be considered in determining whether the care is provided under section 76(1)(c) or under the general duty to meet the needs of the child under section 37 of the Act (at para 292). Where it is decided that the child is accommodated under section 76(1)(c) then the placement must comply with the relevant ‘looked after’ children regulations⁷⁵ - however these will generally be of a lighter touch in terms of administrative record keeping⁷⁶ - provided that the child is:

- (1) not subject to a care order; and
- (2) is receiving a pre-planned series of short breaks in the same setting, and
- (3) where (a) no single placement lasts for more than 4 weeks; (b) at the end of the placement the child returns home to the care of the parents; and (c) the short breaks don’t exceed 120 days in a year.

Care & support plans (section 54 - 55)

The duty to prepare care / support plans for individuals whose needs have been assessed as eligible is sustained in the new legislation.

In preparing a care / support plan the local authority must involve:

- (1) the person for whom it is being prepared; together with (if applicable)
- (2) any person with parental responsibility for the child; and if ‘feasible’
- (3) the person’s carer / or (in the case of a carer) the person for whom she / he carers.

The detail of local authority care planning obligations is provided in [The Care and Support \(Care Planning\) \(Wales\) Regulations 2015](#) and the [Part 4 Code of Practice \(Meeting Needs\)](#) although in most respects the process has changed little. Thankfully the Code avoids the patronising phrase ‘respectful conversations’⁷⁷ and makes less use of the word ‘citizen’:

⁷² The Care Planning, Placement and Case Review (Wales) Regulations 2015 SI 1818 (W.261).

⁷³ The Code, for example, at para 291 suggests that the obligation under this section is a ‘power’ when it is clearly a ‘duty’. The difficulty arises because section 76 has no ‘power’ to accommodate (unlike section 20(4) of the Children Act 1989) – ie in cases where the child does not meet the strict requirements of s76(1) but nevertheless the authority considers it necessary to treat the child as ‘accommodated’ to safeguard or promote their welfare.

⁷⁴ This is broadly equivalent to the duty under section 20(1) Children Act 1989 in England.

⁷⁵ The Care Planning, Placement and Case Review (Wales) Regulations 2015 SI 1818 (W.261).

⁷⁶ Regulation 62(3) – and see paras 295-301 of the Part 6 Code.

⁷⁷ Sadly this phrase does make a guest appearance in the Part 3 Code page 8.

language that so bedevilled the 2014 [Integrated Assessment, Planning and Review](#) guidance.⁷⁸

Charging (section 59 - 73)

Local authorities are empowered (but not obliged) to charge for the care and support they provide / arrange to be provided (under sections 35 – 45) to meet a person's needs. The charge can only relate to the 'cost that the local authority incurs in meeting the needs to which the charge applies' (s59(2)). This restriction is designed to ensure that local authorities do not charge for the actual assessment process – even if the person in need is a 'self-funder'.

The Act also requires that the charge imposed be no more than is 'reasonably practicable for the person to pay' (section 66) which is a welcome 'carry over' from the previous legal framework.⁷⁹ The wicked detail is provided in the (amended) Care and Support (Charging) (Wales) Regulations 2015⁸⁰ and the [Part 4 and 5 Code of Practice \(Charging and Financial Assessment\)](#). The regulations (regs 7 and 22) stipulate that the maximum charge for non-residential care and support is at £80.00 per week⁸¹ which has had the perverse effect of reducing the charges for wealthy people but not for the poorest. Since poverty is the greatest barrier that disabled people face in their struggle to 'live independently' it is vital that the Government get this right. In terms of the obligation to have a rational policy that progressively realises the international human rights obligations of Governments,⁸² such a policy appears to be the antithesis of what is required.⁸³ The personal expenses allowance for adults in residential care was increased in April 2018 to £28.50 per week.⁸⁴

NHS interface (section 47)

Section 47 is concerned with the contested question of 'Continuing NHS Healthcare' – for which Wales has particular problems⁸⁵ (and for which in 2014 it issued revised guidance⁸⁶). In relation to this question both the English and Welsh Bills commenced with the same phrasing. However a number of amendments were made to the English Bill to ensure that the current boundary between local authority responsibilities and the NHS (as defined in the *Coughlan* Court of Appeal judgment⁸⁷) remained unchanged. Sadly no such amendments were made in Wales. The result is a potentially serious problem, since the wording in the Act is materially different to the wording used by the court in *Coughlan*.

The *Coughlan* judgment confirmed that local authorities were prohibited from funding nursing care that the NHS was required to provide but that they could fund nursing care if it was (1)

⁷⁸ Welsh Government *Integrated Assessment, Planning and Review Arrangements for Older People: Guidance for Professionals in supporting the Health, Care and Well-being of Older People* (2014).

⁷⁹ Health and Social Services and Social Security Adjudications Act 1983, s17.

⁸⁰ The Care and Support (Charging) (Wales) Regulations 2015 SI 1843 reg 7, as amended.

⁸¹ Increased from £70 by the Care and Support (Charging) (Wales) (Amendment) Regulations 2018 SI 123 reg.2(a) and 2(d).

⁸² See for example Article 28 UN Convention on the Rights of Persons with Disabilities and Article 23 Convention on the Rights of the Child.

⁸³ A rational 'capabilities' approach would presumably exempt people on means tested social security benefits before imposing a fixed upper limit – see for example Amartya Sen 'Human rights and capabilities' in *Journal of Human Development* (2005) 6 (2): 151–166.

⁸⁴ Care and Support (Charging) (Wales) Regulations 2015 SI 1843 reg 13 as amended by the Care and Support (Charging) (Wales) (Amendment) Regulations 2018 SI 123 reg.2(c).

⁸⁵ See for example, Wales Audit Office Report *Implementation of the National Framework for Continuing NHS Healthcare* 13 June 2013.

⁸⁶ Welsh Government *Continuing NHS Healthcare: The National Framework for Implementation in Wales* (2014).

⁸⁷ *R v. North and East Devon health authority ex p Coughlan* [2000] 2 WLR 622: [2000] 3 All ER 850.

merely ancillary or incidental to the provision of social care support and (2) of a 'nature' that one would expect a social services authority to provide. Although section 47 makes it unlawful for local authorities to fund nursing care unless it is 'incidental or ancillary' to social care, it contains no prohibition in relation to the second element – namely as to the 'nature' of the nursing care'.

In the absence of firm action by the Welsh Government, LHBs will inevitably seek to argue that the Act materially undermines the rights of patients to 'Continuing NHS Healthcare' funding. Unless this is the (unstated) intention of the Welsh Government, this failing will need to be addressed directly in the regulations and in the Code. A clear statement would also be welcome – on the lines of the statement made by the English Minister that:⁸⁸

The provisions [in the English Act] 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'.

It is however strongly arguable that the silence of the Welsh Government on this question (and the lack of any formal adjustment in the funding allocations for health and social care in Wales) is best interpreted as evidencing an intention that the health / social care boundary remain unchanged by enactment of the 2014 legislation.

NHS and Direct Payments

Although the Courts have previously held that the NHS Act 2006 did not permit direct payments to be made in relation to NHS responsibilities and in *R (Harrison) v Secretary of State for Health and others* (2009),⁸⁹ in *Gunter v SW Staffordshire PCT* (2005)⁹⁰ Collins J held that there was nothing in principle in the NHS Acts to preclude a health body making direct payments to an Independent User Trust (IUT) which would then arrange for the patient's health care needs. The Social Services and Well-being (Wales) Act 2014 s50(4)(c) permits direct payments to be made to a 'responsible person' – ie someone other than the adult in need. This option was not available when *Harrison* was considered⁹¹ and it is arguable that the judgment needs reviewing in Wales to take account of this development and the subsequent *SW Staffordshire* decision. It is also arguable that *Harrison* was wrongly decided. An appeal against it was withdrawn when the case became academic due to the implementation of the right to direct payments for NHS patients in England eligible for continuing care funding.

Direct Payments (sections 50 - 53)

The Act specifies how an entitlement to a direct payment arises, how the amount of a direct payment is to be calculated and how the payment is to be administered. The detail of the scheme is spelled out in regulations – [The Care and Support \(Direct Payments\) \(Wales\) Regulations 2015](#). Section 53(9) of the Act makes a material change to the previous law – in that it enables direct payments to be used to purchase care and support from (among others) 'the authority which made the payment'. Guidance on the scheme is provided in the [Part 4 Code of Practice \(Meeting Needs\)](#) – although, disappointingly this is less detailed than the guidance under the previous legislative regime.

⁸⁸ Public Act Committee Report 16 January 2014 (page 205/208).

⁸⁹ [2009] EWHC 574 (Admin) 23rd March 2009.

⁹⁰ [2005] EWHC 1894 (Admin) 26/08/05.

⁹¹ The power to make such payments was made possible by the Health and Social Care Act 2008, s146.

The Act extends direct payments to cover residential care costs. There is little explanation as to how this will work in practice. In fact it is only acknowledged (in formal guidance⁹²) in the [Part 11 Code of Practice \(Miscellaneous and General\)](#) which makes it clear, when discussing the ordinary residence deeming rule (page 33), that this is the case (namely by stating that the rule 'also applies where a person takes a direct payment and arranges their own care and support'). The potential problems that will arise by permitting direct payments to be used for long periods of residential care, would appear to outweigh any benefits.⁹³ The complexity of the resulting scheme has caused the English Government to postpone such payments until 2020:⁹⁴ the Welsh Government appears to have no such concern.

The other major difference between the legislative arrangements for Direct Payments in England and Wales is their unavailability in Wales for people eligible for NHS Continuing Healthcare funding – a difference that the Welsh Government intends to retain.⁹⁵

Welsh Independent Living Grant (WILG) scheme.

Although payments from the Independent Living Fund (ILF) ceased in England in June 2015 these have continued – in effect – in Wales for the short term through the WILG scheme.⁹⁶ The existing ILF entitlements of disabled people will continue to be paid from the WILG until April 2018. From this date WILG recipients will be reassessed by local authorities 'to identify the outcomes they are seeking to achieve and agree a package of support to meet these' such that by 31 March 2019 'all recipients having their support needs met through a package provided by their local authority'.

Continuity of care (portability) (sections 56)

The Act prescribes the way local authorities transfer responsibility for the care and support of people when they move from one authority area to another. It does this by attempting to embed 'good practice' (ie what should happen) into legislation. The problem is that there are no sanctions if either authority fails to act properly – and so an individual may have to make a complaint / go to the Ombudsman if a problem occurs.

Section 56 contains a number of procedural obligations – which may be fleshed out further by regulations (section 56(6)) - but none appear to have been made. The only guidance provided relates to the process for resolving the inevitable disputes that this provision will create (and this is found in the [Part 11 Code of Practice \(Miscellaneous and General\)](#)).

In essence the portability 'right' provides that where a local authority (the 'sending'⁹⁷ authority) is providing care and support for an adult or a child in need and another authority (the receiving authority) is notified that he / she intends to move into their area (and it is

⁹² The Explanatory Memorandum to The Care and Support (Direct Payment) (Wales) Regulations 2015 [21 October 2015] (para 4) notes that '*Direct payments may be used for any identified need for care and support which a local authority is to meet. This includes community care and support and short term and long term residential care and support.*'

⁹³ These problems include the potential uncertainty about the 'ordinary residence' of people who enter residential care using direct payments and the risk that such residents may be more vulnerable to demands by providers that they 'top-up' local authority payments.

⁹⁴ In January 2016 the English Government announced that it had decided to postpone the 'national rollout of direct payments in residential care' until 2020 - see www.local.gov.uk/web/guest/care-support-reform/-/journal_content/56/10180/7643648/ARTICLE

⁹⁵ The First Minister (Carwyn Jones) First Minister's Questions 25 March, 2014 – see National Assembly's Record of Proceedings.

⁹⁶ Welsh Government *Written Statement - Future Support Arrangements in Wales for Former Independent Living Fund Recipients*: Rebecca Evans Minister for Social Services and Public Health 3rd November 2016.

⁹⁷ The English Act was amended to remove what was thought to be derogatory language of 'sending and 'receiving' authorities – and speaks instead of 'first' and 'second' authorities.

satisfied that this is likely to happen) then it must (among other things) undertake an assessment of their needs. If the assessment has not been completed by the time the person actually moves, then the receiving authority must meet the needs identified by the sending authority 'in so far as that is reasonably practicable' until its assessment and care plan is put in place.

A problem that has yet to be fully resolved, concerns individuals who move to live in England, Scotland and Northern Ireland. There is however a brief (one page) protocol setting out '[Principles of Cross-Border Continuity of Care within the United Kingdom](#)' which aims:

to maintain the adult's wellbeing and prevent them from falling into crisis; ensure that the adult is at the centre of the process; and that responsible authorities should work together and share information in a timely manner to ensure needs are being met both on the day of the move and subsequently.

Annex 2 of the [Part 11 Code of Practice \(Miscellaneous and General\)](#) also provides some detail on this.

Choice of accommodation rights (sections 57)

The Act provides for regulations - [The Care and Support \(Choice of Accommodation\) \(Wales\) Regulations 2015](#) – that entitle adults in residential accommodation to choose their care home anywhere in the UK. These permit a 'topping up' payment being made by a third party where the care home is more expensive than 'the cost that the local authority would usually expect to incur'. There is substantial evidence concerning the improper imposition of topping up payments⁹⁸ – largely due to the local authority 'usual rate' being too low. The 'choice' provisions look to continue to sustain the considerable litigation resulting in judgments against local authorities in such cases.⁹⁹

The Welsh provisions now differ significantly from the English scheme – where the choice of accommodation rights extend to 'supported living' and to 'Shared Lives' schemes.

Support under s117 Mental Health Act 1983

The duty on health and social care bodies to provide support services under s117 remains and is distinct – ie not covered by the 2014 Act. This means that the assessments to determine eligibility for section 117 aftercare support derive from the duty under the NHS & Community Care Act 1990, section 47(1) and so this section survives the general repeal of pre-SSWB Act legislation. This in turn would appear to mean that the eligibility criteria (discussed above) do not apply to such assessments (notwithstanding that Schedule 2 states that section 117 is a social services function).

Under the pre-SSWB Act regime 'after-care services' were not defined by the 1983 Act. The English Care Act 2014 however inserted a new subsection (6) into the 1983 Act to limit services to those:¹⁰⁰

- (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).

The amendment applies to both England and Wales.

⁹⁸ See for example [Local Government Ombudsman Report concerning Solihull MBC 14 014 177](#) (11 January 2016) and also Anna Passingham, James Holloway and Simon Bottery *Care home top-up fees: the secret subsidy* (Independent Age 2013).

⁹⁹ See for example, *Forest Care Homes Ltd v Pembrokeshire County Council* [2010] EWHC 3514 (Admin).

¹⁰⁰ The amendment simply enacts in legislation the interpretation provided in *R (Mwanza) v. Greenwich & Bromley LBCs* (2010 [2010] EWHC 1462 (Admin) 15 June 2010).

The Welsh Act (in contrast to the English Act) is silent concerning ordinary residence for the purposes of s117; the right to 'choice of accommodation' for persons subject to s117;¹⁰¹ and the right 'top-up' section 117 care and support packages.¹⁰²

In relation to ordinary residence and s117, the position is explained in the Part 11 Code p.32 which states that under s117 local authorities and LHBs:

have a duty to provide mental health aftercare services for people ... who are in need of such services. These services must have the purposes of "meeting a need arising from or related to the person's mental disorder" and "reducing the risk of a deterioration of the person's mental condition and, accordingly, reducing the risk of the person requiring admission to a hospital again for treatment for mental disorder." The range of services which can be provided is broad.

The duty on local authorities to commission or provide mental health aftercare rests with the local authority for the area in which the person concerned was ordinarily resident immediately before they were detained under the 1983 Act, even if the person becomes resident in another area where they are detained, or on leaving hospital. The responsible local authority may change, if the person is ordinarily resident in another area immediately before a subsequent period of detention which would require section 117 aftercare services.

The English Statutory Guidance (para 19.65) provides the following guidance:

Under section 117 of the 1983 Act ... if a person is ordinarily resident in local authority area (A) immediately before detention under the 1983 Act, and moves on discharge to local authority area (B) and moves again to local authority area (C), local authority (A) will remain responsible for providing or commissioning their after-care. However, if the patient, having become ordinarily resident after discharge in local authority area (B) or (C), is subsequently detained in hospital for treatment again, the local authority in whose area the person was ordinarily resident immediately before their subsequent admission (local authority (B) or (C)) will be responsible for their after-care when they are discharged from hospital.

Many individuals entitled to support under MHA 1983 s117 will also have support needs under the SSWB Act 2014 – ie support needs that are not related to the mental disorder which resulted in their detention for treatment.¹⁰³ Since the two Acts take a slightly different approach to ordinary residence, there is the risk the authority responsible for the support needs under the 2014 Act may be different to local authority responsible for the provision of care and support under MHA 1983 s117. This problem is addressed by the 2014 Act s194(4A) which provides that an adult who is being provided with accommodation under MHA 1983 s117 is to be treated for the purposes of the 2014 Act 'as ordinarily resident in the area of the local authority or the local authority in England, on which the duty to provide the adult with services under that section is imposed'.¹⁰⁴ Although this provision only applies to accommodation, this would appear to all that is needed (due to the deeming rules relating to 'accommodation' under the CA 2014 not being replicated by the MHA 1983).

¹⁰¹ See *R (Wiltshire) v Hertfordshire CC* [2014] EWCA Civ 712 19 para 20.

¹⁰² See *Statutory Guidance Annex A: Choice of accommodation and additional payments* para 39.

¹⁰³ MHA 1983 s117(6).

¹⁰⁴ ie the local authority in whose area the person was ordinarily resident immediately before being detained for treatment under the MHA 1983: Inserted by The Social Services and Well-being (Wales) Act 2014 (Consequential Amendments) Regulations 2016 SI 413 (W.131) reg 313.

Looked after children etc (sections 74 - 125)

Part 6 of the Act (sections 74 – 125) largely re-enacted the provisions in Part 3 of the Children Act 1989 relating to 'looked after and accommodated children' – including independent reviewing officers, the Children Leaving Care provisions, secure accommodation etc. The principal regulations are [The Care Planning, Placement and Case Review \(Wales\) Regulations 2015](#) and the principal guidance is contained in the [Part 6 Code of Practice \(Looked After and Accommodated Children\)](#). This briefing does not cover the detail of this aspect of the Act. A review of the relevant law can be found at the [Children's social care law in Wales](#) website.

Concern has been expressed about the likely impact of Part 6. In essence it repeals Part 3 of the Children Act 1989 and in so doing abolishes familiar concepts such as 'children in need'. Commenting on this reform the (then) Children's Commissioner for Wales expressed deep concern that the reformed Act did not recognise 'the distinct circumstances of children and young people'. Referring to the stated intention of the Welsh Government that the Act would 'as far as is possible, integrate and align arrangements so that there is a common set of processes, for people' the Commissioner said that he failed to understand 'how the replacement or restatement of parts of existing legislation relating to children will give greater effect to the best interests of the child.'¹⁰⁵

In addition to maintaining the [Children's social care law in Wales](#) website [Dr Julie Doughty](#) of Cardiff Law School has written a number of important briefings in this field including:

- A summary of the relevant law in the Rhydian on-line Journal Volume 1 pp. 8-1 'Looked-after children and the Social Services and Well-being (Wales) Act 2014' which can be accessed [by clicking here](#); and
- A 2018 update of the relevant law in the Rhydian on-line Journal Volume 2 pp. 27-30 'Recent developments in children's social care law and policy relating to Wales' which can be accessed [by clicking here](#).
- A 2016 paper in the Community Care Journal expressing concern about the 2014 Act's conflation of the 'well-being' principle with Children Act concept of 'welfare'. To access the paper '[How do you define a child's 'welfare' as opposed to 'wellbeing'?](#)' [click here](#).

Prisoners (sections 185 - 188)

The Act provides welcome clarification as to local responsibilities for prisoners who have care and support needs and provides that for adults the responsible local authority for 'ordinary residence' purposes is the one in which the prison is located (section 185). For young people in custody the responsible local authority for 'ordinary residence' purposes is generally the local authority they were based in (or receiving support from) immediately before detention (section 186).

Detail on the new obligations is provided in the Part 11 Code of Practice (Miscellaneous and General). It makes clear that the s185 – 188 duties apply to all adult prisoners who are detained in Wales and to all young people who are ordinarily resident in Wales – even if they are detained in England.

The Code details the very extensive duties owed to young people and in relation to adults it states (pages 7-8) that authorities:

must support an adult with care and support needs in the secure estate in Wales just as they would for someone in the community. The local authority must design its care and support procedures to be able to meet the care and support needs of those within the secure estate. The delivery of care and support arrangements operating in the community setting may need to be adjusted to meet the needs of the population and the regime of the secure estate.

¹⁰⁵ Children's Commissioner for Wales, [Annual Report 2014, Policy and Public Affairs](#).

In relation to advocacy rights the Part 11 Code states (page 16):

Advocacy must be provided for those in the secure estate in the same way as for those living in the community. Advocacy can be provided by family, friends or someone's wider support network. There will be occasions where this primary advocacy source is unavailable/ cannot gain ready access and in these instances, local authorities must ensure that an independent advocate is provided, at no cost to the individual, in order that they can be fully engaged and able to participate in the process

Safeguarding (section 126 – 142))

Part 7 of the Act deals with 'safeguarding' both for adults and children – although safeguarding obligations are a theme that runs through the entire Act: 'protection from abuse and neglect' is defined as a key ingredient of 'well-being' (section 2); services are to be developed to prevent people from suffering abuse or neglect (section 15(2)); abuse or neglect can trigger 'eligibility' (section 32); and support services can be provided when deemed necessary to protect people from abuse or neglect (section 35(3) and section 37(3)).

The safeguarding duty applies to people 'at risk'. For an adult this is someone experiencing (or is at risk of) abuse or neglect, and has needs for care and support and as a result of those needs is unable to protect himself or herself against the abuse or neglect or the risk of it (section 126(1)). A child is at risk if experiencing (or is at risk of) abuse, neglect or other kinds of harm, and has needs for care and support (whether or not the authority is meeting any of those needs) (section 130(4)).

Section 197 defines abuse as physical, sexual, psychological, emotional or financial¹⁰⁶ and which may occur in any setting. Neglect is defined as a failure to meet a person's basic physical, emotional, social or psychological needs, which is likely to result in an impairment of the person's well-being.

As noted above, people who are considered to be at risk of abuse or neglect are legally eligible for care and support – even if their needs (in terms of achieving specified outcomes) are otherwise insufficient for the purposes of the 'eligibility criteria'.

The Act creates a National Independent Safeguarding Board (section 132) and provides (in regulations) for local Safeguarding Boards for adults and for children, whose objectives are essentially to 'protect and to prevent'. In large measure the Act puts on a statutory footing much of the pre-2015 safeguarding guidance (ie 'In Safe Hands'¹⁰⁷) – including the imposition of a duty on public bodies to report abuse of adults (s128) and children (s130) and to make enquiries where there is reasonable cause to suspect that a person is at risk.¹⁰⁸ The power to protect property of people being accommodated by a local authority or LHB has also been retained (section 58).

In statutory terms, the most significant new provision concerns 'adult protection and support orders' (section 127). This provides for an 'authorised officer' of a local authority to obtain an order from the magistrates court that entitles them to speak in private with a person suspected of being at risk in order to ascertain whether she / he is making decisions freely and whether he / she is at risk. The [Adult Protection and Support Orders \(Authorised Officer\) \(Wales\) Regulations 2015](#) reg 3 requires that a local authority only authorise a person to apply for an adult protection and support order 'who has relevant experience, has

¹⁰⁶ Section 197 defines financial abuse as including (a) having money or other property stolen; (b) being defrauded; (c) being put under pressure in relation to money or other property; (d) having money or other property misused.

¹⁰⁷ National Assembly for Wales (2000) *In Safe Hands*.

¹⁰⁸ Section 126(2) for adults and section 130(3) for children.

completed appropriate training and is an officer of the authorising authority' – but if this is not practicable it can authorise any officer of the authority.

Statutory Guidance in relation to Part 7 of the Act has been issued as four separate 'Working Together to Safeguard People' volumes:

- 1 – Introduction and Overview
- 2 – Child Practice Reviews
- 3 – Adult Practice Reviews
- 4 – Adult Protection and Support Orders

These volumes (and templates that can be used to support child and adult practice reviews) these can be download from the Social Care Wales Hub.

Only time will tell whether these measures will be effective. The Act has taken a middle way – between the English Act, which provides no new safeguarding powers, and the Scottish Act¹⁰⁹ which contains (in addition to a power of entry) a power of removal. There is a fear that the Welsh option may be the worst of both worlds – since it provides no power to do anything if the person is found to be 'at risk' and it repealed the power of removal under National Assistance Act 1948.¹¹⁰ This fear may prove to be ill-founded since the police have extensive powers in such cases.¹¹¹ The problem of course is that 'law and order' is not a devolution issue and so the extent to which the regulations and Code can dictate the safeguarding role to be fulfilled by the police is limited.

For an excellent critical analysis of the Act's Safeguarding provisions see John Williams, '[Adult safeguarding in Wales: one step in the right direction](#)' in the Journal of Adult Protection, Vol. 19 Issue: 4, pp.175-186.

Independent advocacy (sections 181- 183)

Although sections 181 – 183 provide for regulations to be made concerning the provision of 'advocacy',¹¹² the Welsh Government has decided not to implement this statutory duty (in contrast to the position in England¹¹³). The explanation for this failure is that a Code of Practice is sufficient as 'advocacy is a golden thread throughout the Act'.¹¹⁴

The [Part 10 Code of Practice \(Advocacy\)](#) is detailed and as noted above it is something that authorities must 'act in accordance with'. The Code specifies (chapter 10 para 47) that:

Local authorities must arrange for the provision of an independent professional advocate when a person can only overcome the barrier(s) to participate fully in the assessment, care and support planning, review and safeguarding processes with assistance from an appropriate individual, but there is no appropriate individual available;

The Code devotes time to describing the types of advocacy that exist, but fails to explain what forms of advocacy authorities must commission to satisfy their obligations and what it means by an 'independent advocate'. The Act merely speaks about 'services which provide

¹⁰⁹ Adult Support and Protection (Scotland) Act 2007, ss 7, 8, 11 & 14.

¹¹⁰ Section 47 – repealed by section 129 of the 2014 Act.

¹¹¹ The English Government when arguing that a power of entry was not necessary, cited existing police powers under the Police and Criminal Evidence Act 1984 section 17(1)(e) 'to enter premises for the purposes of "saving life or limb or preventing serious damage to property" as well as powers under the Domestic Violence, Crime and Victims Act 2004, the Fraud Act 2006 the Mental Capacity Act 2005 and the High Court's Inherent jurisdiction – see comments of the Minister of State, Department of Health (Norman Lamb) House of Commons Public Bill Committee 21st January 2014 (morning) at 270-271.

¹¹² Defined by section 181(2) as 'services which provide assistance (by way of representation or otherwise) to persons for purposes relating to their care and support'.

¹¹³ Section 67 Care Act 2014 places a duty on authorities to provide advocacy support – and regulations detailing the nature of the obligation have also been issued – namely The Care and Support (Independent Advocacy Support) (No. 2) Regulations 2014 SI 2889.

¹¹⁴ Welsh Government PowerPoint 'Part 10 - Advocacy' slide 11.

assistance (by way of representation or otherwise) to persons for purposes relating to their care and support' (section 181(2)). The right to an independent advocate only arises where (among other things) there is not an 'appropriate individual' and the Code's explanation as to the necessary attributes of an 'appropriate individual' would appear to give an indication as to what the necessary attributes are of an independent advocate. At chapter 13 para 63 it states:

Appropriate individuals are expected to support, represent and to facilitate the individual's involvement in securing their well-being outcomes. Whilst often this will be a family member, friend or someone in the wider support network it is likely that some people may not find it that easy to fulfil this role. For instance, a family member who lives at a distance and who only has occasional contact with the person; a spouse who also finds it difficult to understand the local authority processes; a friend who expresses strong opinions of their own prior to finding out those of the individual concerned. It is not sufficient to know the person well. The role of the appropriate individual is to support the individual's full engagement and participation in determining their well-being outcomes.

Chapter 10 para 50 of the Code identifies those functions 'where local authorities must consider individuals' needs for advocacy support', and these are wide ranging - including the provision of information and preventative services; assessments of need, care planning, meeting needs, direct payments, portability of support, reviews, and the safeguarding of property

Further materials (including training materials) concerning the advocacy provisions can be accessed from the [Social Care for Wales information hub](#).¹¹⁵

Human Rights Protection

The Act continues the human rights protection of certain people receiving social care. The protection covers situations where care or support is arranged by a local authority for an adult or a carer, or is paid for (directly or indirectly in full or in part) by the authority and the care is provided by a registered care provider. Unlike the situation under the previous legislative regime protection extend to people in their own homes as well as to people in a care home. In such cases the care provider is deemed to be a public authority for the purposes of the Human Rights Act 1998.¹¹⁶

Complaints (section 171 - 180)

Part 10 of the Act provides for further reform of social services complaints procedures (adults and children – as well as for privately funded care). The 2012 Consultation on reforming the social services complaints process¹¹⁷ proposed aligning the system closer to the English system where the third stage of a complaints process had been removed and the Ombudsman is able to investigate complaints by self-funders concerning their social care services.

In August 2014 the Welsh Government introduced the new complaints process in accordance with the proposals, ie by removing the right to an independent panel hearing. The regulations¹¹⁸ and policy guidance¹¹⁹ underpinning the new procedure make few other

¹¹⁵ See <https://socialcare.wales/hub/hub-resource-sub-categories/advocacy>.

¹¹⁶ This protection derives from the Care Act 2014 section 73(1)(b) because 'human rights' is not a devolution issue. The protection only extends to adults, since the English Act (primarily) only addresses the needs of adults.

¹¹⁷ Welsh Government *Making things better - Review of Social Services complaints* (2012).

¹¹⁸ The Social Services Complaints Procedure (Wales) Regulations 2014, SI 1794 (W. 187) and the Representations Procedure (Wales) Regulations 2014, SI 1795 (W. 188). The two sets of regulations streamline

changes to the substance or process of complaining in Wales. Complaints can be made by anyone (including a child) who is / was entitled to receive a service from social services – or by their representatives. Local authorities must appoint a Complaints Officer to manage the process although the Director has overall responsibility. The regulations require that any complaint must be acknowledged within 2 days of receipt and within 10 days of this there must be a discussion (possibly over the phone¹²⁰) with the complainant.¹²¹ The guidance advises that at the Stage 1 ‘local resolution’ process the ‘emphasis should be on achieving service user satisfaction rather than avoiding a Formal Investigation’. Although the regulations require that the discussion take place ‘within 10 days’ it does not state explicitly that it must also be concluded within this period – but this appears to be the intention of the statutory scheme.¹²²

The Formal Investigation stage arises if the first stage has failed or ‘if the seriousness of the complaint means that a first stage is inappropriate’, or if the ‘complainant has asked that their complaint be progressed immediately’ to this stage (para 71). The local authority must compile a record of the complaint within 5 working days of the date that it is received as a Formal Investigation and the investigation stage ‘must be completed, and a full written response issued to the complainant, within 25 working days of the start date’ (para 75) although there is provision for this to be exceeded in ‘exceptional cases’ (para 76). This stage involves an independent investigator – but ultimately the local authority decides ‘whether or not the complaint is upheld’ (guidance para 88).

Ordinary residence (section 194 - 195)

The law concerning the determination of a person’s ‘ordinary residence’ is largely unchanged by the Act – and the two ‘deeming’ rules are preserved. The first deeming rule (now found in section 194(4)) concerns adults in NHS accommodation: such people are deemed to be ordinarily resident in the area in which they were immediately before they entered the NHS accommodation / ambulance.

The second deeming rule (now found in section 194(2)) concerns adults whose accommodation is arranged by a local authority in the area of another local authority. Contrary to expectations, the Act continues to restrict this rule to cases where a local authority arranges accommodation in a registered care home – see the [Care and Support \(Ordinary Residence\) \(Specified Accommodation\) \(Wales\) Regulations 2015](#): the draft regulations¹²³ had indicated that this would be extended to include ‘adult placement scheme accommodation’.¹²⁴

Government Default powers (sections 149 – 161)

the complaints procedures for adults and children. In simple terms SI 1794 does this for adults and SI 1795 for children.

¹¹⁹ Welsh Government *A guide to handling complaints and representations by local authority social services* August 2014 (Policy Guidance).

¹²⁰ Para 67 of the guidance.

¹²¹ Reg 16, The Social Services Complaints Procedure (Wales) Regulations 2014 No. 1794 (W. 187) and reg 17 The Representations Procedure (Wales) Regulations 2014 No. 1795 (W. 188).

¹²² Para 115 of the guidance requires that every year each authority publish basic details about the operation of the scheme, including the ‘number of complaints and representations that exceeded the statutory timescale for Local Resolution (10 working days)’.

¹²³ The draft Care & Support (Ordinary Residence) (Specified Accommodation) (Wales) Regulations 2015 reg 4.

¹²⁴ Namely ‘accommodation which is provided together with personal care to an adult by an individual in the individual’s own home under the terms of an agreement between that individual and a person who is registered under Part 2 of the Care Standards Act 2000 as the provider of an adult placement scheme’ – and see also the Adult Placement Scheme (Wales) Regulations 2004 SI 1756 (W.188).

The Act provides the Welsh Ministers with extensive powers to issue 'Directions' to local authorities and to intervene. Given the current reality of fragmented and underfunded local authorities this is a power that may have to be used – and a failure by the Welsh Ministers to consider its use may open the Government to challenge (most obviously by way of a judicial review).