

Adult Social Care Legislation & Policy update

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Programme: session 1

Key adult principles and practice

- Overview Care Act, Statutory Guidance & principles;
- The duty to assess and to support 'adults in need';
- The duty to assess and to support carers;
- The eligibility criteria – managing finite resources;
- Care Planning
- Delegation and the independent sector ;

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Programme: session 2

Specifics

- Personal budgets and direct payments;
- Charging;
- Ordinary residence revisited;
- Continuity of care and statutory advocacy;
- s117 MHA 1983 and Care Act 2014 interface;
- Reform of social care funding

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The importance of evidence

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Evidence

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

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

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

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

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Statutory Guidance

Statutory Guidance ~ subject to routine revisions

Status of Guidance

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

Annexes

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

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Statutory Guidance

R (Ali Raja) v. Redbridge LBC [2020]

The power to provide urgent / interim support (ie before a full reassessment)

Heavy reliance on the Statutory Guidance

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The well-being principle

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Well-being

"Well-being" relates to:

- (a) personal dignity
- (b) physical / mental health / emotional well-being;
- (c) protection from abuse and neglect;
- (d) control over day-to-day life inc nature of care provided;
- (e) participation in work, education, training or recreation;
- (f) social and economic well-being;
- (g) domestic, family and personal relationships;
- (h) suitability of living accommodation;
- (i) the adult's contribution to society.

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Well-being

"Well-being"

LA must have regard to—

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

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Independent living

- The wellbeing principle is intended to cover the key components of independent living, as expressed in the UN Convention on the Rights of People with Disabilities (in particular, Article 19 of the Convention). Supporting people to live as independently as possible, for as long as possible, is a guiding principle of the Care Act

Guidance (para 1.19)

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

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Assessing needs

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Adults refusing assessments

Section 11

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

But is required to assess if the adult

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

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Adults refusing support

Ombudsman 2016

- Adult with significant disabilities including difficulties with communication and behaviour.
- Had eligible needs for equipment and personal care but on many occasions declined / cancelled services.
- Council closed the file

Ombudsman held this to be maladministration

- It was the Council's responsibility to ensure his needs were assessed and eligible needs met.

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Adults refusing support

- His behaviour meant this not straightforward but "*Council should have continued exploring alternative ways to achieve successful assessment and service provision*".
- This was not a case of Mr X choosing not to cooperate, but of his disability causing him difficulties in doing so.

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

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Cases of urgency

Section 19

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

(a) carried out a needs assessment or a financial assessment, or

(b) made an eligibility determination;

A LA may meet needs ... where, eg adult terminally ill (ie likely to die within the next 6 months)

R (Ali Raja) v. Redbridge LBC [2020]

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Eligibility criteria for adults in need

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An adult's needs meet the eligibility criteria if—

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

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unable to achieve an outcome if —

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

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significantly longer than normal**2016 ombudsman report (Kent CC)**

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

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Significant**Ombudsman**

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

Complaint against Milton Keynes Council 20/9/16

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Unable to achieve 2 or more of:

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

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Guidance para 6.106**managing and maintaining nutrition.**

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

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Managing & maintaining nutrition

A blind person.

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

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

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Well-being

relates to:

- (a) personal dignity
- (b) physical /MH /emotional;
- (c) protect abuse /neglect;
- (d) control day-to-day life;
- (e) work, education, training;
- (f) social & economic;
- (g) personal relationships;
- (h) suitable accommodation;
- (i) contribution to society.

regard to—

- (a) individual is best placed;
- (b) views, wishes and feelings;
- (c) all the circumstances;
- (d) participate in decisions
- (e) a balance between individual's and carers;
- (f) Protect abuse/ neglect;
- (g) minimum restrictions.

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Managing & maintaining nutrition

Ombudsman

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

Complaint ~ Hammersmith & Fulham 21 July 2016.

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Guidance para 6.106

being appropriately clothed

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

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Getting dressed

A blind person.

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

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

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Well-being

relates to:

- (a) personal dignity
- (b) physical /MH /emotional;
- (c) protect abuse /neglect;
- (d) control day-to-day life;
- (e) work, education, training;
- (f) social & economic;
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regard to—

- (a) individual is best placed;
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- (d) participate in decisions
- (e) a balance between individual's and carers;
- (f) Protect abuse/ neglect;
- (g) minimum restrictions.

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Clothing

Ombudsman

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

Complaint ~ Hammersmith & Fulham 21 July 2016.

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Guidance para 6.106

maintaining a habitable home environment.

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

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Housework / nutrition

Complainant receiving a Direct Payment to cover her eligible needs;

On review:

- Although no change her DPs reduced by 7 hours pw
- Reduction for: (a) 'nutrition' need and (b) 'maintaining 'habitable home' need.

In both cases this justified by saying that her DLA should be used to pay for these.

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Housework / nutrition

Ombudsman noted:

The Care Act 2014 places a duty on councils to:

- assess a need of care and support.
- decide what the person's 'eligible needs' are – ie:
 1. needs result of a physical or a mental condition.
 2. because of those needs, they cannot achieve two or more of 10 specified outcomes;
 3. this has a significant impact on their wellbeing.
- Where eligible needs are identified these must be met

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Housework / nutrition

Ombudsman noted:

I can see nothing in the Care Act 2014 or the statutory guidance which allows the Council to require a person to use their benefits this way.

Haringey LBC 16 012 715 12 June 2017 (para 36)

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maintaining a habitable home environment.

Ombudsman decision :

An investigation found the council routinely telling people it would not fund support to maintain a habitable home, and that they should find the money themselves

- *In this case the council appears to have decided some needs are more important than others. This is contrary to the Care Act, which places equal importance on all eligible needs – it is designed to ensure councils do not pick and choose which they meet.*

Press Release ~ Hertfordshire CC 19000200 7 September 2020

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maintaining a habitable home environment.

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

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

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maintaining a habitable home environment.

2016 ombudsman report (Dorset CC)

- In finding maladministration the LGO held that the adult had an eligible need. Therefore he was entitled to receive such a service.
- The Care Act says "The local authority must also establish whether the individual wants to have their eligible needs met by the local authority. If the individual wishes to arrange their own care and support, the authority does not have to meet those needs".

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Guidance para 6.106

carrying out any caring responsibilities the adult has for a child

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

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Caring responsibilities for a child

A parent who was blind and who wanted support from a PA to enable her to take her children to school – so she could meet / socialise with other parents.

The council held this was not a social care need and that in any event her husband could take the children

Ombudsman

- The mother 'as responsible as her husband for looking after the children and s entitled to support to carry out her responsibilities as they have shared them between them'
- the council had failed to have regard to the whole family approach' advocated by the SG (para 6.65 – 6.73)

Complaint No. 17 012 768 (Staffordshire CC) 18 May 2018..

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Carers Assessments (s10)

Duty to assess

- No need for care to be 'regular & substantial'
- No need for a 'request'
- A 'duty' to meet eligible needs

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Carers Assessments (s10)

Basic principles

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

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Willing & able

Local Government Ombudsman (2016)

- Authorities must not assume a carer is willing or able to provide any care – including additional care arising from a reduction in the care package.
- It will be maladministration for a reduction to occur without assessing the carer and explicitly clarifying (and recording) whether she/he is 'able and willing' to provide the additional care.
- LA Local authority reduced adult in needs support without proper consideration of the impact on his carer.

Complaint London Borough of Bromley 7/9/16

Complaint Essex CC 30/11/16

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Carers Assessments

Private / combined assessments

- 'only if the adult to whom the needs or carer's assessment relates agrees' – s12(5)
- if 'either of the individuals concerned does not agree to a combined assessment, then the assessments must be carried out separately' (para 6.74)

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Eligibility criteria ~ carers (reg 3)

A carer's needs meet the eligibility criteria if

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

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

Outcomes

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

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Guidance para 6.123

engaging in work, training, education or volunteering

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

- 54% carers have had to give up work to care,
- Half of carers reduced their hours; 32% had refused a promotion/ taken a less qualified job due to caring responsibilities;
- 2.3 million people had to quit work to care;
- 3 million have reduced their working hours;

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Carer eligible vs adult non-eligible

section 20

(7) A LA may meet ... a carer's needs for support in a way which involves the provision of care and support to the adult needing care, even if the LA would not be required to meet the adult's needs ...

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

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Carers services

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

para 11.41

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Assessing young carers

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Young carers

Children Act 1989 s17ZA

Duty to assess a young carer 'on the appearance of need'

- A YC is "a person under 18 who provides or intends to provide care for another person" (but excluding paid / formal volunteers)
- Young Carers' (Needs Assessments) (England) Regulations 2015

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R (E) v. Islington LBC (2017)

Child had to translate into sign language for her deaf mother (& vice versa) and provide extra care for younger siblings;

- LA considered this 'highly inappropriate';
- LA accepted she had caring 'responsibilities beyond what is appropriate' but argued that these due to her mother's inadequate parenting;
- LA refused to undertake a YC assessment;

Held

- illogical - she was catering for needs arising out of her mother's deafness, even if mother's approach to parenting may have been a contributory factor.

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Duty to provide care & support

section 18 ~ support for adults in need

Duty to provide applies where:

- Individual is ordinarily resident in LA area; and
- Individual has eligible needs: and
 - Individual's finances below maximum allowance; or
 - Individual's finances above maximum allowance and they ask the LA to provide (but not if in a care home)

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Care & Support Plans

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

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

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Care & support plans

Evidence based:

- Elderly person with dementia in family arranged care home (she was not coping in her own home);
- She had depression, anxiety attacks, barricaded the doors, needed to visit family to have a shower and had family member stay with her for up to five nights a week;
- Assessment identified need with 6 outcomes;
- Council refused to support the care home placement as her needs could 'easily' be met at home;
- Maladministration: must explain explain how that would be possible.

Complaint ~ Gloucestershire CC 17 002 906 (2017)

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Care & Support Plans

Local Government Ombudsman

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

Complaint against Kent CC 20/10.2016

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Care & Support Plans

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

- ie if the assessment identifies a need for (say) 10 hours of personal care services a week – then this need must be met precisely and it is not something that the LA can 'trim' because it has to make cutbacks due to resource shortages.

R v Islington LBC ex p Rixon (1997)

- There can be no 'maximum' packages

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Care & support plans

Local authority financial difficulties

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

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Care & support plans

Funding Panels

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

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Funding panels

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

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

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

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Funding panels

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

Complaint 15 020 384 Bromley LBC 7/9/16

Panels must provide reasons for any decision to reduce a care package as well as having a 'proper record' of what information it took into account when reaching its decision.

Complaint 16/003/985 Lewisham LBC 8/8/17 para 38

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Delegation

section 79

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

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

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

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Contracting out

Councils cannot contract out responsibility for care when they contract out the provision: poor quality care by a council funded provider is poor quality care by the council itself.

Michael King Local Government and Social Care
Ombudsman 27 February 2018

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Close of Session 1

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Programme: session 2

Specifics

- Personal budgets and direct payments;
- Charging;
- Ordinary residence revisited;
- Continuity of care and statutory advocacy;
- Safeguarding – overview update;
- s117 MHA 1983 and Care Act 2014 interface.
- Care Funding Reforms

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Personal Budget (s26)

Guidance:

- The PB must always be an amount sufficient to meet the person's care and support needs
- Must be broken down into the amount the person pays and the amount the LA will pay.

s26 creates a duty to provide a 'transparent budget in a care and support plan' and a failure to do so will be a breach of public law

CP v. NE Lincolnshire Council [2018]

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Personal Budget

Local Government Ombudsman

- Profoundly disabled adult cared for by her mother who had her own health problems: she had eligible care needs for 9 of the 10 outcomes.
- LA assessed a need for 52 wks care a year including 6 weeks respite care. Residential respite not appropriate so the respite funding used for extra home support.
- LA provided a DP of £849.57 a week to meet her normal eligible care needs.

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Personal Budget

Local Government Ombudsman

Detailed explanation as to how DP calculated – ie:

DP to be used to buy agency support:

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

Total £849.57.

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Personal Budget

Local Government Ombudsman

Normal rate £849.57.

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

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Personal Budget

Local Government Ombudsman

Normal rate £849.57.

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

Maladministration

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

Complaint against Kent CC 13/12/2016 para 18

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Direct Payments (ss 31 - 33)

The Direct Payment regulations 'soften' the presumption against making payments to spouses / partners / relatives living in the same house;

- payments can be made 'if the LA considers it is necessary to do so'; and
- payment can include not only the cost of meeting the adult's need – but also for the cost of providing administrative and management support or services

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Direct Payments

- LAs 'must not restrict choice or stifle innovation'
 - pre-payment cards cannot be mandatory nor may they 'limit choice and control' as direct payments should 'encourage flexibility and innovation'
- Statutory Guidance para 12.4 and 12.59*
- NICE 2018 Guidance on DPs states that their care plans should be flexible to 'accommodate changes to a person's priorities, needs and preferences' and that in order to facilitate this, local authorities should consider 'agreeing a rolling 3-monthly budget so that people can use their money differently each week'.

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Charging

Power to charge – not a duty (section 14) ;

- Councils cannot charge more than 'reasonably practicable' for the person to pay (SG para 8.2)
- Wicked detail in the Annexes to Statutory Guidance LGO Annual Report 2018 - 2019
- 66% of cases now finding faults in the system – many 'appear to be driven by attempts to ration scarce resources' ... 'more complaints about charging ... and found fault in a larger proportion' of those investigated.
- regularly seeing problems with how budgets ... are calculated & the way ... charges are communicated.

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Charging

***R (SH) v Norfolk County Council* [2020]**

The applicant's impairments were such that she would never be able to participate in paid work

The LA significantly reduced its MIG – the minimum income a person should be left with after the charge

The court held that the policy was unfair, perverse and discriminatory.

- It had a disparate impact on people who had more severe impairments. It was 'manifestly without reasonable foundation' and contrary to the ECHR Articles 14 and Article 1 of the first Protocol.

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Charging & DRE

Annex C para 40 of SG includes:

- privately arranged care services (eg respite care), the additional costs of special dietary needs due to illness or disability; above average heating costs and special clothing or footwear etc.

Ombudsman cases have included:

- telephone bills, hair braiding, live in carers food costs, holidays, transport costs, pet care costs etc.

The ombudsman has stressed the need for councils to be 'flexible'.

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Charging & DRE

An adult with 'severe' autism and ritualised behaviour - eg;

- she would not bite into food except for a particular burger in a fast food restaurant and that she would only drink boxed drinks (she would not drink if she could see the liquid);
- Statutory Guidance (Annex C para 41) states that 'what is disability-related expenditure should not be limited to what is necessary for care and support'
- Councils policy and practice ignored this:

It limited DRE costs to those associated with the person's social care assessment and even then it required that these costs 'must be verified with receipts'.

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Charging & DRE

- The ombudsman held this to be maladministration noting (at para 41) that there may well be occasions when it is not possible to 'evidence every spend or provide a detailed breakdown of every cost.'
- Council's should consider each application on its merits'.
Complaint 17 015 118 East Sussex CC 25 July 2018.

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Capital disregards ~ property

Main residence value ignored unless the person is in a care home; then it is ignored:

- if the stay is temporary or
- The first 12 weeks of a permanent stay;

If permanent, disregarded if occupied by:

- the resident's partner or former partner; or
- a relative who:
- is aged 60 or over, or
- is aged under 18 and is a child whom the resident is liable to maintain, or
- is incapacitated.

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Ordinary residence

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Ordinary residence cases

Shah v Barnet LBC (1983)

- a regular, habitual mode of life in a particular place, the continuity of which has persisted despite temporary absences.
- A person's attitude is only relevant in two respects;
 - the residence must be voluntarily adopted, and
 - there must be a settled purpose in living in the particular residence.
- whether of short or long duration.

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Care Act 2014

Assessing social care needs

- The duty to assess adults in need and carers' does not depend upon 'ordinary residence'

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Special rules for: 'prescribed accommodation'

1. Care home – ie registered under the CSA 2000;
2. Shared lives scheme accommodation
3. Supported living accommodation.

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Choice of Accommodation regulations

- Right to choose prescribed accommodation in England
- Right for third parties to 'top-up' the cost of more expensive accommodation.
- A positive duty to advise potential residents / carers of these rights

Care and Support & After-care (Choice of Accommodation)
Regulations 2014 / Annex A Statutory Guidance

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Deferred payments rights

CA 2014 ss34-36 & SG chapter

Right to a deferred payment arrangement arises where:

- (a) the needs are to be met by the provision of care in a care home;
- (b) the assets (excluding the value of the person's home) are less than (or equal to) the capital limit; and
- (c) their home is not disregarded

A positive duty to advise potential residents / carers of this right

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The two 'deeming provisions' (s39)

1. A person is deemed to be OR in the area in which s/he was OR immediately before prescribed accommodation was provided.
2. A patient for whom NHS accommodation is provided is deemed to be OR in the area in which s/he was resident before the NHS accommodation was provided.

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Self funders

First deeming provision (placements in 'prescribed accommodation') only applies if LA 'made the arrangements' for the accommodation

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Self funders

R (Greenwich LBC) v SS Health (2006)

- D – a self funder in a Bexley residential home
- Due to problems at the home had to move urgently.
- The only suitable placement put forward by Bexley was a home in Greenwich – to which she moved.
- 4½ weeks later capital drops below maximum limit and she becomes entitled to LA funding.

Held – Although Bexley had contacted the home & arranged a visit for D, such that she had not chosen the new home - nevertheless D had ceased to be '**OR**' in Bexley. Her house had been sold and she was no longer living in the area, and therefore her ties were severed.

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R (Cornwall CC) v. SS Health 2015

Statutory Guidance (para 19.21) highlights the Court's reference to the 'underlying purpose' of the OR regime namely:

- to ensure that 'an authority should not be able to export its responsibility for providing the necessary accommodation by exporting the person who is in need of it' (**para 54**).

87

s39 Care Act 2014

The NHS deeming provision:

- A patient for whom NHS accommodation is provided is deemed to be OR in the area in which s/he was resident before the NHS accommodation was provided.

88

No settled residence

- When a person presents him/herself to a social services authority and claims to have no settled residence or fixed abode, the authority is advised that it should normally accept responsibility
- *R (S) v Lewisham LBC, Lambeth LBC & Hackney LBC* (2008) 'that the provision of services ... should not be delayed because of uncertainty about which authority is responsible'

89

s117 Mental Health Act 1983

Patients detained under:

- s3 MHA 1983
 - (or a criminal provisions)
- when discharged
- free after care services under s117 MHA 1983.
 - Joint NHS / social services duty

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S117 MHA 1983

Joint responsibility of NHS & LA

NHS deeming rule applies:

- ie on discharge, the responsible LA is generally the one in whose area the individual was OR before admission to hospital:

But

No LA deeming rule:

- ie that a person is OR in the area in which they were based immediately before prescribed accommodation was provided by an authority.

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S117 Mental Health Act 1983

R (M) v Hammersmith & Fulham LBC (2010)

- Accommodated in a care home in Hammersmith LBC funded by Hammersmith: therefore OR in..... ?
- Admitted to hospital after an accident and on discharge placed in a care home in the Sutton LBC care home funded by Hammersmith LBC: therefore OR in..... ?
- Admitted to a psychiatric unit under s2 MHA 1983 and on discharge returns to same care home in Sutton LBC: therefore OR in..... ?
- Admitted again but this time under s3 and on discharge returns to same care home: therefore OR in..... ?

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S117 Mental Health Act 1983

R (Worcestershire CC) v SS Health & SC (2021)

- s117(2) requires a local authority / NHS body to continue to fund the aftercare needs of a person under s117 until such time as the:
- NHS ... and the local social services authority 'are satisfied that the person concerned is no longer in need of such services'.

The Court considered that Worcester had not made such a decision (and that its duty to fund was not brought to an end by the re-sectioning in Swindon).

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S117 / CA 2014 overlap

Section 39(4) CA 2014

- An adult who is being provided with s117 accommodation is to be treated for CA 2014 purposes as OR in the area of the LA on which the duty to provide the adult with services under s117 is imposed.

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s117 Mental Health Act 1983

section 75

- "after-care services' are now defined
- subsection (6) limits services to those:
 - (a) 'arising from or related to the mental disorder' and
 - (b) reducing the risk of a deterioration of the person's mental condition (ie that may require re-admission)

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s117 Mental Health Act 1983

Assessments

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

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s117 Mental Health Act 1983

Supported Living

When accommodation is part of a person's section 117 aftercare, it must be free to the person. Councils and NHS organisations should not advise people to claim benefits such as Housing Benefit to pay for accommodation that is part of their section 117 aftercare. '.

Complaint no 20 006 910 13 (Lewisham LBC) April 2021 and

Complaint no 21 004 603 (Luton BC) March 2022 (where the s117 funded care home de-registered to a supported living placement).

97

Continuity of care (portability)

sections 37-38

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

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

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Continuity of care (Ombudsman)

- A disabled person's 1st council notified new authority of intended move on the 31st August and provided it with an up-to-date assessment.
- 2nd council failed to assess until the 27th August. SW recommended same package as previously but on the 23rd November council's panel reduced this substantially and the new package backdated to the 31st August.

Maladministration:

- no evidence panel considered (a) previous assessment, or (b) impact on primary carers (parents).
- failure to fund existing level of care from the date of move until it made a decision on the level of funding it would provide.

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

99

Safeguarding

sections 42 - 47

Duty to make enquiries if adult

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

Duty to have a Safeguarding Board

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

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What is abuse / neglect (para 14.17)

Physical abuse / Sexual abuse / Modern slavery

Domestic violence / Psychological abuse;

Financial abuse (section 42(3));

Discriminatory abuse:

- including 'harassment, slurs etc because of race, gender and gender identity, age, disability, sexual orientation or religion'

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What is abuse / neglect (para 14.17)

Organisational abuse:

- eg 'neglect and poor care practice' in a hospital or care home including 'neglect or poor professional practice as a result of the structure, policies, processes and practices within an organisation'

Neglect / Self-neglect:

- a wide range of behaviour neglecting to care for one's personal hygiene, health or surroundings and includes behaviour such as hoarding

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Safeguarding

Guidance

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

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NHS Continuing Healthcare responsibilities

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Key issues

1. An area regulated by the law;
2. The law gives only a general 'steer' as to where the boundary lies;
3. Accordingly decisions of the court and Ombudsmen important - the '*benchmark cases*';

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Key issues

Example

s275(1) NHS Act 2006 (interpretation)

"illness" includes mental disorder and any injury or disability requiring medical or dental treatment or nursing,

s1(2) Mental Health Act 1983

"mental disorder" means any disorder or disability of the mind;

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Legal limit of social care

There is a 'limit to social care' under the CA 2014, section 22.

If the person has needs above a certain level (the *Coughlan* criteria)

- It is unlawful for social services to fund their care
- All their health and social care needs have to be funded by the NHS

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Coughlan (1999)

- She is tetraplegic;
- doubly incontinent,
- requiring regular catheterisation;
- partially paralysed in the respiratory tract,
- with consequent difficulty in breathing; and
- subject not only to the attendant problems of immobility but to recurrent headaches caused by an associated neurological condition

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Coughlan (1999)

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

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Coughlan (1999)

- (1) merely incidental or ancillary to the provision of [social care] which a local authority is under a duty to provide [under the social care legislation] and

110

Coughlan (1999)

- (2) of a nature which it can be expected that an authority whose primary responsibility is to provide social services can be expected to provide,
Then they can be provided (by SS).

The Quantity / Quality test

111

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
Royal Courts of Justice
Date: 16 July 1999

R. v. NORTH AND EAST DEVON HEALTH AUTHORITY

- Respondent
- Ex parte PAMELA COUGHLAN
- Applicant
- SECRETARY OF STATE FOR HEALTH
- Intervener
- and
- ROYAL COLLEGE OF NURSING

118. Miss Coughlan needed services of a wholly different category.

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National Framework for NHS Continuing Care

October 2007

Revised 2009, 2012, 2018 and 2022

Decision Support Tool (DST)

- 11 different care domains

Checklist

Fast-track Pathway Tool

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[DST] What it's NOT

- An another assessment
- A decision MAKING tool
- Suitable for every individual's situation
- A substitute for professional judgement

DoH Resource pack: Introduction Module 1: slide 19

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Social care funding reform and the 'cap on costs'

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Cap on costs

sections 15-16

Dilnot (2016)

- Recommended cap at £35,000 (max £50,000);
- Cap will be £84,000
- Board & accommodation (Daily Living Costs) assumed to cost £12,000 pa (2017 prices);
- DLC liability continues even when cap 'hit';
- Lower cap / no cap for young disabled people (<25)
- Lower cap for those with under £20K (currently 23.25K)

'Taxi meter'

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Government proposal

Domiciliary care charges –

- No detail – the same but capital max at 20K

Residential care charges

- Assets over £100,000 pay full costs of care home
- Assets between £20,000 and 100,000 pay 20% of capital per year plus charges from income
- Assets under £20,000 no charge from capital but continue to pay charges from income

Cap on lifetime care payments of £86,000

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Cap on costs

The Institute & Faculty of Actuaries calculations show that people will have to pay out at least £140,000 before the cap comes into force.

92% of men and 85% of women will not benefit from the cap

S Neville & A Gray

the cap will mean that the majority of people will still be paying just as much on their social care as they would have before the cap.

Demos Press Release

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Cap on costs

**‘There will be as a result
some additional administration’ [1]**

The duty to prepare an ‘independent
personal budget’ (s24(3) & s28) and

to keep a ‘care account’ for that individual
and retain it for 99 years – s29)

aka ‘a vast bureaucracy’

[1] Fairer Care Funding. The report of the Commission on Funding of Care and Support (Dilnot Commission) July 2011 Volume 1 page 64

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