

The Care Act 2014 overview

Professor Luke Clements¹

Overview

This briefing note concentrates on the basic provisions in the Care Act 2014. A subsequent briefing will look at the wicker detail within the draft Guidance and Regulations that were published in June 2014² for consultation.

A major problem with the Act is revealed in its long title – namely that it is an ‘Act to make provision to reform the law relating to care and support for adults and the law relating to support for carers’ The problem being in the word ‘adults’: many of the ‘community care’ and ‘carers’ statutes also have provisions relating to children (ie young carers; disabled children and parent carers). As a result of a vigorous campaign by a number of disabled children’s and carers’ organisations these problems have been addressed – but in large measure via provisions in the [Children and Families Act 2014](#). These changes are considered at the end of this briefing note (p.13) under the heading ‘*Provisions relating to disabled children, young carers and parent carers*’: the first part of the briefing being devoted to the changes that will be made by the Care Act 2014.

Background / timetable

- 2011 Law Commission Report;
- 2012 Draft Care & Support Bill published for consultation;
- 2013 Joint Select Committee Scrutiny Report March 2013;
- 2013 Care Bill introduced into Parliament (June);
- 2014 Royal Assent 14 May 2014;
- 2015 Partial implementation;
- 2016 The Dilnot (cap on care costs) reforms to be implemented.

Legislation to be repealed includes:

- National Assistance Act 1948
- Health Services & Public Health Act 1968
- Chronically Sick and Disabled Persons Act 1970 (but only for adults)
- Health & Social Services & Social Security Adjudications Act 1983
- Disabled Persons (Services, Consultation and Representation) Act 1986

¹ Cerebra Professor of Law, solicitor and Special Adviser to the Joint Parliamentary Select Committee that scrutinised the draft Care and Support Bill.

² The draft Guidance is entitled ‘Care and Support Statutory Guidance’ (431 pages) can be accessed at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/315993/Care-Act-Guidance.pdf and the draft regulations are accessible at <http://careandsupportregs.dh.gov.uk>.

- NHS & Community Care Act 1990
- Carers Acts
- Health & Social Care Act 2001 (the Act that concerns Direct Payments)

Terminology

Adult

The Act does not talk of disabled, elderly or of ill people: instead it uses the word ‘adult’ – but this is generally qualified as being an adult in need of care and support (ie an adult who has a physical or mental impairment or illness³).

Carer

A carer is someone 18 or over⁴ who provides or intends to provide care for someone but is not contracted to provide the care or providing the care as formal ‘voluntary work’.

Individual

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

Underpinning principles (section 1)

Well-being

The consultation process leading to the drafting of the legislation resulted in demands that the Act be underpinned by a coherent set of guiding principles (rather like those that apply in relation to the Mental Capacity Act 2005, s1). Many consultees argued that these principles should include (for example) ‘dignity’ and ‘independent living’ (ie that the care planning process should aim to promote independent living and should not subject anyone to indignity). The Act does not have such a set of principles⁵ – it merely has general duty to promote the well-being of individuals (ie adults and carers). The duty applies to local authorities and their staff / members when exercising ‘any function under Part 1 of the Act (ie sections 1-80).

“Well-being”

Well-being is so widely defined that it is quite possible that it will be of little practical application. It includes personal dignity, physical and mental health and emotional well-being; protection from abuse and neglect; control over day-to-day life; participation in work, education, training or recreation; social and economic well-being; domestic, family and personal relationships; suitability of living accommodation; and ‘the individual’s contribution to society’.

When discharging any obligation under the Act, the local authority must ‘have regard to’—

- the individual’s views, wishes, feelings and beliefs;
- the need to prevent/ delay the development of needs for care and support;
- the need to make decisions that are not based on stereotyping individuals;

³ Draft Care and Support (Eligibility Criteria) Regulations reg 2, (Department of Health 2014).

⁴ The Act has provisions for ‘young carers’ (ss63-64) – ie people who are under 18 – but these provisions use the term “young carers”.

⁵ Indeed the Act does not use of the word ‘independence’ in the sense of an ‘individual’s independence’.

- the importance of individual's participating as fully as possible in relevant decisions (including provision to them of necessary information and support);
- the importance of achieving a 'balance between the individual's wellbeing and that of any friends or relatives who are involved in caring for the individual';
- the need to protect people from abuse and neglect;
- the need to ensure that restrictions on individual rights /freedoms be kept to the minimum necessary.

Prevention (section 2)

Local authorities will be under a general duty to provide a range of preventative services that they 'consider' will:

- (a) contribute towards preventing or delaying the development by adults in its area of needs for care and support;
- (b) contribute towards preventing or delaying the development by carers in its area of needs for support;
- (c) reduce the needs for care and support of adults in its area;
- (d) reduce the needs for support of carers in its area.

Given the very 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. In many local authorities this would require (in essence) disinvestment in crisis services and is not realistic.

There is however a longer term value to such a provision – in that it creates an expectation that such preventative support arrangements will be developed. Accordingly, when increased funding flows to social services (as it inevitably must) aspirational provisions of this kind may gain traction and prove to be significant.

Integration with the NHS (section 3)

Section 3 places a duty on local authorities to promote integration with health provision where it would—

- (a) promote the well-being of adults with needs & carers in its area; or
- (b) contribute to the prevention of the development of needs in adults / carers; or
- (c) improve the quality of care for adults / carers, provided

A component of this new duty includes the establishment of what has come to be called the 'Better Care Fund'.⁶ The legal mechanism for this fund is slightly complex - essentially s121

⁶ For technical detail about the fund see NHS England 'Better Care Fund Planning' at www.england.nhs.uk/ourwork/part-rel/transformation-fund/bcf-plan/ and Department of Health 'Better Care fund' guidance (2013) at www.gov.uk/government/publications/better-care-fund; and for general requirements for NHS / social services transfers see ss76 and 256/257 NHS Act 2006, the NHS (Conditions Relating to Payments by

Care Act 2014 amends s223B NHS Act 2006 to enable the Secretary of State to attach strings to payments he makes to the NHS Commissioning Board – including that the relevant NHS body have a pooled fund with its local authority(ies) aimed primarily at easing pressure on NHS acute beds – eg to facilitate hospital discharges / prevent unnecessary admissions; promote integrated packages of care etc. The current proposals envisages the NHS transferring to the fund for 2015 £3.8 billion – although this is not all ‘new’ money.⁷ There is considerable doubt as to whether the NHS will be able to make these ‘transfers’ and there is substantial research evidence to suggest that such ‘integrations’ are unlikely to be successful. Nevertheless there is a degree of ‘integration frenzy’ in political policies at the moment (much the same as the ‘personalisation frenzy’ that has ruled for the last 5 years) and so local authorities will have little or no choice but to be seen to be taking steps to create pooled budgets / integrated funding arrangements.

Information (section 4)

Local authorities will have an enhanced duty to provide adults in need / carers with information about care and support arrangements, including:- how the care system operates; the care and support choices they have (including the choice of providers); how to access this support and how to raise safeguarding concerns. The information duty will also include how to access independent financial advice – which will be of considerable relevance given the choices ‘self-funders’ will have to make under the new regime – particularly with regard to the Dilnot reforms (see below).⁸

Duty to promote effective high quality providers (section 5)

The Act contains a range of provisions designed to address the ‘supply side’ problems with the social care market – ie (a) the problems of large providers collapsing (such as Southern Cross failure in 2011) and (b) the increasing belief that the quality of services is generally poor and deteriorating. The provisions include ‘market oversight’ arrangements that will involve the Care Quality Commission – amongst others (ss 53 – 57 Care Act 2014) and a temporary duty on social services to intervene if a particular provider ‘fails’ (ss 48-52). Section 5 places a duty on local authorities to promote an efficient / effective local market ‘with a view to ensuring’ that there is a variety of providers and high quality services to choose from. A key problem concerning diversity / quality is that councils hold a dominant position in this market and have (due to their chronic underfunding) been requiring providers to deliver the same quantity of services each year whilst concurrently imposing cuts to the amount paid. The Select Committee⁹ considered that there had to be a mechanism that required local authorities to ‘properly take into account the actual cost of care when setting the rates they are prepared to pay providers’. Such a mechanism is not to be found in the

Local Authorities to NHS Bodies) Directions 2013 and the NHS (Conditions Relating to Payments by NHS Bodies to Local Authorities) Directions 2013.

⁷ The fund will, for example, include £130m CCG Carers’ Breaks funding; £300m CCG reablement funding; £350m capital grant (inc £220m DFGs monies); and it appears, some of the Care Act 2014 implementation monies – eg for training.

⁸ Department of Health Care and Support Legal Reform (Part 1 of the Care Act) Impact Assessment 61067 October 2013 para 1.25.

⁹ Joint Committee on the Draft Care and Support Bill, ‘Draft Care and Support Bill’ Stationery Office (2013) HL Paper 143 HC 822 para 113.

Act and so it remains to be seen what the courts will make of the s5 duty – and whether there will be a further flow of cases in which providers challenge the rates imposed by local authorities.¹⁰

Cooperation

As part of the current ‘integration frenzy’ policy direction (see above) we see in the Act further obligations on public bodies to cooperate. ‘Exhortations to organisations, professionals and other service providers to work together more closely and effectively, litter the policy landscape’¹¹ and ss6 & 7 are now added to this list. Section 6 creates a general duty to cooperate and s7 a specific duty when requested by a local authority. Section 7 is new to adult social care – and is based on an existing provision in the Children Act 1989 (s27) and fills a gap. The problem under the present law is that there is a duty on social services to notify housing / health bodies if a health / housing need is identified in a community care assessment – but no obligation on the notified bodies to do anything. Section 7 enables social services to request assistance and this must be provided – unless it would be ‘incompatible with its duties, or have an adverse effect on the exercise of its functions’ (and in such a case the body must provide ‘reasons’. Whilst this looks to be a substantial power, there is little evidence that the corresponding power under the Children Act 1989 has been used to any great effect.¹²

Care and support (section 8)

Under the current legal regime the object of a community care / carers assessment is to determine (amongst other things) whether there is a need for ‘services’. The community care statutes¹³ provide exhaustive lists of services that can be provided and the Carers and Disabled Children Act 2000 provides a very generalised statement as to what a carer’s ‘service’ might be. The Care Act repeals these statutes and studiously avoids referring to the word ‘service’ when describing how a local authority should respond to an identified need. Instead, s8 contains an illustrative list what may be ‘provided’ to an adult in need or carer – namely:

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

The absence of such things as ‘adaptations’ ‘travel’; and ‘holidays’ (which are specifically cited in the current law) was considered problematical by the Select Committee and in response to a question it posed of the Department of Health, received confirmation from the

¹⁰ For example, *R (Sefton Care Association) v Sefton Council* [2011] EWHC 2676 (Admin).

¹¹ Clements L and Thompson, P. *Community Care & the Law* Legal Action 2011 para 13.33.

¹² See for example, *R Northavon DC ex p. Smith* 1994 3WLR 403 HL.

¹³ Primarily s2 Chronically Sick and Disabled Persons Act 1970 and ss 21 & 29 National Assistance Act 1948.

Department considered that these services did fall within the ambit of the list¹⁴ - and it is to be hoped that the regulations / guidance will make this explicit.

Local authorities will be able to charge (under s14) for the costs that they incur in providing care and support (under s8) to meet the 'needs' of individuals – ie carers as well as elderly ill and disabled people. The question arises therefore as to whether local authorities will start charging for such support as advocacy, social work and information (and indeed how 'social work' is to be defined). The question is all the more pressing since local authorities will be able to delegate assessments (and most of their other functions) to independent sector organisations (s79 – see below). In answer to a specific question on this point, the Minister (Norman Lamb) stated that these provisions do 'not give a power to local authorities to charge for carrying out a needs or carer's assessment in any circumstances'.¹⁵

Delegation (section 79)

As noted, local authorities will be able to delegate all of their functions under the Act – with few exceptions (eg safeguarding (ss42 – 47) and charging (s14). Section 79(6) makes it clear that ultimate responsibility in such cases still rests with the local authority (any acts /omissions by the delegated body will be treated as done / omitted to be done by the local authority). A series of pilots have run since 2011 to explore the potential for delegation: these have been small scale and almost all have been third sector not for profit organisations.¹⁶ Section 79 opens up the possibility of full scale delegation of quite a different order and might be contemplated by local authorities facing a steep rise in their assessment / care planning obligations resulting from their new duties to carers and to self funders (see below).

Charging (section 14)

As noted, local authorities will be able to charge for the cost they incur in providing social care support services. The detail will be set out in regulations. Under the current law, there is a duty to charge for residential care services and well established guidance (CRAG) explains how this operates. CRAG will cease to apply but it is likely that something similar will replace it – albeit that (with the Dilnot reforms – see below) significant changes are expected to the capital rules. In relation to non-accommodation charges, the current prohibition¹⁷ on local authorities levying a charge that is more than 'reasonably practicable' for the person to pay has been removed – despite advice by the Select Committee that it be retained.¹⁸ The detail of the new scheme will be in regulations and it appears that the intention is to create a standard formula for assessing charges (possibly not dissimilar to that under the current 'Fairer Charging' guidance). If this is so, it will be all the more necessary that there to be provision for charges to be waived where for one reason or another an individual's circumstances do not conform to the standard formula.

¹⁴ Joint Committee on the Draft Care and Support Bill, 'Draft Care and Support Bill' Stationery Office (2013) HL Paper 143 HC 822 para 168.

¹⁵ 14 January 2014 column 154 Public Bill Committee.

¹⁶ www.scie.org.uk/workforce/socialworkpractice/pilots.asp

¹⁷ S17 Health and Social Services and Social Security Adjudications Act 1983.

¹⁸ Joint Committee on the Draft Care and Support Bill, 'Draft Care and Support Bill' Stationery Office (2013) HL Paper 143 HC 822 para 196.

Assessment of adults in need (section 9)

The duty in the Care Act to assess adults in need is closely aligned to the existing duty (under s47 NHS and Community Care Act 1990). As with the current law, the duty is triggered by the appearance of need and arises regardless of the 'level' of those needs or the person's financial resources (it applies – as now - to self-funders). The assessment must have specific regard to the well-being criteria (ie s1(2) above) and must involve the adult and any carer. It is difficult to see how this can be achieved without a face to face assessment (unless the adult agrees this is not necessary).¹⁹ Decisions as to whether an individual is eligible for support following an assessment will depend in general upon their needs satisfying the 'eligibility criteria' (considered below).

Carer support ignored

The draft 'eligibility criteria' regulations make explicit that the decision about whether an adult has eligible needs, is made on the basis that it does not take into account any support that is being provided by third parties (ie carers). Instead, where a person receives support from a carer, this will be taken into account during the development of the care and support plan. Whilst this has always been considered to be the legal position – it is the first time it has been expressed with such precision in legislation.

Carers Assessments (section 10)

The Act makes material changes to the current duty to assess carers' needs. The new duty is triggered by the appearance of need and is no longer dependent upon the carer providing (or intending to provide) regular / substantial care or on the carer making a request. The principal duty is only owed to adult carers caring for people 18 or over – however the Act contains a specific provisions for carers of disabled children in transition and for young carers in transition into adulthood (considered below - ss58 – 66) and the Children and Families Act 2014 contains significant new duties in relation to parent carers and young carers (see below).

The Act makes explicit a number of principles (some of which are currently only found in guidance), including that the assessment must ascertain:

- 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.

¹⁹ The government has indicated that the question will be addressed in guidance – see Care Bill Public Bill Committee *Tuesday 14 January 2014(morning)* at <http://www.publications.parliament.uk/pa/cm201314/cmpublic/care/140114/am/140114s01.htm>

In common with assessments of 'adults in need', decisions as to whether a carer is eligible for support following an assessment will depend in general upon their needs satisfying the 'eligibility criteria' (considered below).

Eligibility criteria (section 13)

Where an assessment identifies that an individual has needs for care / support then the local authority must decide if these needs meet the eligibility criteria. The present legislation makes no reference to 'eligibility criteria': they are currently to be found in guidance (commonly referred to as FACS²⁰). Eligibility criteria (for both adults in need and carers) will now be placed on a statutory footing and the actual criteria detailed in regulations. Draft regulations have been issued for consultation²¹ and these have separate criteria for adults in need and for carers. For adults in need the criteria are very similar to the current criteria – save only that the 'bands' (ie Critical, Substantial, Moderate and Low) are dispensed with and there is only one criteria – which the person will either meet or not. Put crudely - the criteria are based on whether (1) the person is unable to carry out a basic activity; and (2) the consequence is a significant risk to that person's well being. A number of commentators have suggested that the new criteria place the threshold of entitlement closer to the existing 'moderate' band than the 'substantial' band. The criteria for carers measure (put broadly) whether as a consequence of providing care the carer is unable to undertake certain key roles / tasks (ie household activities / other caring responsibilities / employment / education / recreation) or that their health is at significant risk. These draft criteria are also thought by many to be more generous than those currently in place.

Duty /power to provide care & support for adults /carers (section 18 - 20)

The duty on local authorities to meet the eligible needs of disabled, elderly and ill people is retained and widened by the Care Act. The present legislation does not (in general) apply to 'self-funders' (ie people whose savings are above the capital limit – currently £23,750) and there is only power to meet a carers assessed needs – not a 'duty'. Both these limitations will be removed. Where an individual's needs (ie a carer or an 'adult in need') meet the eligibility criteria then there will be a duty to ensure their care and support needs are addressed. The only stipulation being that they are ordinarily resident in the local authority's area (as at present) and that if their assets are above the financial limit, that they 'ask the authority' to meet their needs.

The Government's impact assessment considers that this will increase in the number of assessments (for new care users) by between 180,000 and 230,000 in 2016/17 and the number of reviews (for people already receiving care) by between 440,000 and 530,000 in 2016/17 – increasing local authority costs by over £2bn per annum.²²

²⁰ 'Fair Access to Care Services' although the 2002 Department of Health guidance that bore this name was replaced in 2010 by *Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care. Guidance on Eligibility Criteria for Adult Social Care, England 2010.*

²¹ Department of Health *Draft national minimum eligibility threshold for adult care and support: A discussion document* (2013) and see also The Care and Support (Eligibility Criteria) Regulations 2014 at <http://careandsupportregs.dh.gov.uk/category/eligibility/> accessed 19 June 2014

²² Department of Health Social Care Funding Reform Impact Assessment IA No: 9531 8 April 2013 at www.gov.uk/government/uploads/system/uploads/attachment_data/file/197939/Social_Care_Funding_Reform_IA

Until the 'cap on care costs' comes into force in 2016, the incentive for self-funders to have their care and support needs arranged by the local authority will be limited. Care home residents would however benefit if they are able to get the price of their placement at the local authority rate (rather than the self funder rate) which in itself will have a distorting impact on the market.²³ The main benefits will however flow once the 'cap on care costs' comes into effect in April 2016 together with the new capital rules (considered below). Many adults who may benefit from the cap will want to ensure that their care costs start to be recorded on the 'taxi meter' from the first day that these provisions take effect (ie 1st April 2016). There is likely therefore to be a surge of demand from self-funders in advance of this date. In consequence the Government believes that local authorities should 'consider beginning assessing people who arrange their own care and support from November 2015'.²⁴

Cap on costs (sections 15 - 16)

The Act implements aspects of the Dilnot Commissions proposals.²⁵ The Commission recommended that the lifetime contribution an individual should make to their care costs should be capped at a maximum of £35,000. The Government has indicated however that when implemented in 2016, the maximum will be £72,000.²⁶ The figure will only apply to social care costs and it is proposed that for residents in care homes, £12,000 pa of their care home fees will be deemed to be for 'daily living costs' (ie accommodation, food etc). Ignoring the annual inflation up-rating, it would therefore take over 5½ years for a person paying £25,000 pa care home costs to reach the maximum figure. Only then would they feel any benefit from the proposals (and by then they would have paid over £135,000.00 in care costs).

In 2016 there will also be changes to the capital limits - rising from the current £23,750 to £118,000 – if a home is included in the calculation – and £27,000 if not. The lower capital limit will rise to £17,000. The assumption will continue that every £250 above the lower limit will yield notional income of £1 per week. This means that for someone with savings of £117,000 who seeks local authority assistance, they will have a contribution of £20,000 pa. from the capital – and at the same time lose their DLA / Attendance Allowance care component (because they are local authority supported).

The proposals – in effect – offer self funders with significant capital a free insurance policy. Once assessed as having 'eligible needs' they will have an account opened by the local authority and (in the current jargon) the 'Dilnot taxi meter' will start ticking. The self funder can then purchase their care privately and the local authority will record this on their 'care

[FINAL .pdf](https://www.gov.uk/government/publications/the-government-published-a-series-of-impact-assessments-alongside-the-care-bill). All the Care Bill impact assessments can be accessed at <https://www.gov.uk/government/publications/the-government-published-a-series-of-impact-assessments-alongside-the-care-bill>

²³ Either causing care homes severe financial difficulties or local authorities (if they have to start paying a larger overall rate

²⁴ Department of Health Caring for our future Consultation on reforming what and how people pay for their care and support July 2013 para 278at www.gov.uk/government/uploads/system/uploads/attachment_data/file/239393/CONSULTATION_CaringForOurFuture_acc.pdf

²⁵ Commission on Funding of Care and Support *Fairer Care Funding: The Report of the Commission on Funding of Care and Support* 2011

²⁶ It is likely that there will be a graduated maximum depending on the age that the person first becomes in need of care - and possibly nil if the need exists when the person is 18.

account' (s29) – having agreed their 'independent personal budget' (s28), namely their social care expenditure (ie the amount attributable to 'daily living costs' having been deducted). This will of course give rise to disputes / complaints / ombudsman interventions concerning the amount to be recorded and result in many requests for reassessments when care needs increase. The Act provides for a new statutory appeals process to deal with (amongst other things) this expected increase (s72). Care accounts will be up-rated for inflation each year, transferred when the person moves to a new local authority and retained for 99 years (s29(2)).²⁷

Deferred payments (sections 34-36)

There will be right to have a deferred payment in relation to a person's property – although under the new scheme local authorities will be able to charge interest on the loan and interest on their expenses in creating the charge to secure the loan. Although the detail is to be provided in regulations – it appears that the Government intends the right to be limited to people with under £23,750 savings.

Care & support for carers (section 20)

Section 20 creates a duty to meet the assessed needs of carers and is, as the Government states 'the first ever legal entitlement to public support, putting them on the same footing as the people for whom they care.'²⁸ The duty rests with the local authority responsible for the adult in need and extends to self-funders (ie carers with assets above the new maximum limits) who request help.

Section 20(7) makes clear that a local authority may meet some or all of 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 adult has not been held to be eligible for support. Section s20(8) states that where the adult is refusing to accept the care (that would address the carer's need) the local authority must 'so far as it is feasible to do so, identify some other way in which to do so'.

NHS Interface (section 22)

A number of amendments were made to the Bill to ensure that the current boundary between local authority responsibilities and the NHS (the so called 'NHS Continuing Care' boundary as defined in the *Coughlan* Court of Appeal judgment²⁹) remained unchanged. The phrasing of section 22 appears to achieve this aim, and the Minister has confirmed that.³⁰

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

²⁷ The Commission's report ignored almost entirely the bureaucracy that its scheme would generate – stating only that there 'will be some additional administration as a result' (p.64).

²⁸ Department of Health *The Care Bill explained: Including a response to consultation and pre-legislative scrutiny on the Draft Care and Support Bill* Cm 8627 (The Stationery Office 2013) para 73.

²⁹ *R v. North and East Devon health authority ex p Coughlan* [2000] 2 WLR 622; [2000] 3 All ER 850.

³⁰ Public Act Committee Report 16 January 2014 (page 205/208).

This helpful statement is materially undermined by provisions in the draft guidance and regulations³¹ which must be clarified in the consultation process (a subsequent briefing will consider the draft guidance and regulations).

Care & support plans (section 25-26)

The current duty to prepare care / support plans for individuals whose needs have been assessed as eligible is sustained in the new legislation. The most significant difference under the new regime is that every such plan for an 'adult' must have a 'personal budget' (s25(1)(e)). Since most local authorities already do this – it will probably make little practical difference.

In preparing a care / support plan the LA must involve (amongst others the adult for whom it is being prepared; 'any carer that the adult has', and 'any person who appears to the authority to be interested in the adult's welfare'. In relation to carers, the requirement is to involve the carer for whom it is being prepared, 'the adult needing care, if the carer asks the authority to do so' and any other person whom the carer asks.

Section 26 states that the amount of a personal budget is 'the cost to the local authority of meeting those of the adult's needs which it is required or decides to meet'. The Select Committee expressed concern that this phrasing was different to the current requirement (in relation to direct payments) – namely that the amount be that which the "the authority estimate to be equivalent to the reasonable cost of securing the provision of the service concerned": it considered that the word 'reasonable' was important and should be included in the Act. In response the Government stated that the wording meant that the amount had to be 'sufficient to meet' the adult's needs.³² The Select Committee was not reassured by this response – but it is to be presumed that this requirement will be spelled out in the regulations and statutory guidance when published.

Direct Payments (sections 31-33)

The new legislation provides for an almost identical 'direct payments' regime as at present and the detail (as with the current system) is to be in regulations. The only significant change is that direct payments will be available for residential care placements. This change is expected to come into force in April 2016 and pilots in 18 local authority areas are currently underway.³³

³¹ See for example The Draft Care and Support (Eligibility Criteria) Regulations reg 2(2)(d), (Department of Health 2014) and the Care and Support Statutory Guidance' para 2.12 and para 4.88.

³² In 2011 the Law Commission published a report [Adult Social Care Law Com No 326, Stationery Office HC 941] para 207-208.

³³ See Department of Health Policy Research Unit in Policy Innovation Research *Direct Payments in Residential Care Trailblazer Programme Evaluation Preliminary report* 2014 at www.piru.ac.uk/assets/files/DP%20Trailblazer%20Preliminary%20report.pdf. The pilot sites are Enfield LBC, Havering LBC, Redbridge LBC, Surrey, Hertfordshire, Norfolk, Bristol, Cornwall, Dorset, Lincolnshire, Milton Keynes, Nottinghamshire, Staffordshire, Hull, North Lincolnshire, Gateshead, Manchester and Stockport.

Continuity of care (portability) (sections 37-38)

The Act prescribes the way local authorities transfer responsibility for the care and support of an adult – when she or he moves from one local 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 the first or second local authority fails to act properly – and so (as now) an individual would have to make a complaint/ go to the Ombudsman if a problem occurs.³⁴

Sections 37 – 38 are replete with detailed procedural obligations – but in essence they provide that where a local authority (the 1st local authority) is providing³⁵ care and support for an adult and another authority (the 2nd authority) is notified that the adult intends to move into their area (and it is satisfied that the intention is genuine) then it must (amongst other things) undertake an assessment of the adult’s needs (and those of any carers they may have). If the assessment(s) have not been completed by the time the adult actually moves, then the second authority must meet the needs identified by the 1st authority (until its assessment is complete).

Safeguarding (section 42 – 47))

The Act places on a statutory footing some of the safeguarding obligations that are at present, only located in the guidance (principally the ‘No Secrets’ guidance³⁶). Section 42 contains the 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 him/herself against the abuse / neglect.

The Act does not explain what it means by ‘abuse’ – save to specify that it includes financial abuse which is broadly defined – eg including putting the adult ‘under pressure in relation to money or other property’ and/or the adult ‘having money or other property misused’.

The Act provides no new powers to protect adults from abuse – merely ‘process’ obligations (eg to have a Safeguarding Board; to undertake investigations and to require individuals to provide information etc). The Welsh Act³⁷ provides a power of entry – to enable social services to gain access and to speak with a person suspected of being abused – and the Scottish Act³⁸ contains (in addition) a power of removal. Not only are such powers absent from the English Act, the existing s47 National Assistance Act 1948 power to remove, is repealed. The Care Act 2014 does however retain the obligation on local authorities to protect property (s47).

³⁴ The Act adopts many of the provisions in Baroness Jane Campbell’s Social Care Portability Bill 2012 – but not those that required one local authority to reimburse the other if it had failed to comply with its responsibilities during such a transfer.

³⁵ Or if the adult is a self funder and the local authority is keeping a care account for that person for the purposes of the ‘cap’).

³⁶ Department of Health and Home Office (2000) *No Secrets: guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse.*

³⁷ Social Services and Well-being (Wales) Act 2014 s127.

³⁸ Adult Support and Protection (Scotland) Act 2007, ss 7, 8, 11 & 14.

Human Rights Protection section 73

The Care Act extends the current Human Rights Act 1998 protection for care home residents funded by a local authority. Section 73 provides that where care or support is arranged by a local authority, or paid for (directly or indirectly, and in whole or in part) by the authority and that care is provided by a registered care provider to an adult or a carer either in their own home or in care home – then the provider is deemed to be a public authority for the purposes of the 1998 Act.

After April 2015, therefore, the human rights protection will include individuals (ie carers or adults in need) who receive care / support from a registered care provider in their own homes or the community and will also cover 'self-funders' who have asked the local authority to undertake their care and support arrangements individuals (ie under s18 – see above).

Independent advocacy (section 67)

The Act places a duty on local authorities to arrange independent advocacy if the authority considers an individual would experience 'substantial difficulty' in participating in (amongst other things) their assessment and / or the preparation of their care and support plan. The duty does not arise if the local authority is satisfied that there is some other person who is an appropriate representative (provided that person is not engaged in providing care for the individual in a professional capacity or for remuneration).

New statutory appeals process (section 72)

At a fairly late stage in the Bill process the Government introduced an amendment to provide for a new social care appeals system. It is not entirely clear why this was done – but it may be to enable the Government to react to the expected increase in challenges, when significant numbers of self-funders are catered for in the system. The Act merely provides for regulatory powers to flesh out what this system might look like. The Government has however stated that it will consult on its proposals and issue draft regulations / guidance 'later this year' (ie 2014), and that the new process will:

1. be a flexible, local, proportionate system avoiding unnecessary bureaucracy;
2. include an element of independence from the local authority;
3. seek to avoid duplication with existing arrangements for complaints and redress .

s117 Mental Health Act 1983 (section 74)

Currently 'after-care services' are not defined by the 1983 Act. The Care Act inserts a new subsection (5) into the 1983 Act to limit 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).

The Act confirms that ordinary residence for the purposes of s117 is determined by where a person was based immediately before they were detained and gives the Secretary of

State power to resolve ordinary residence disputes. It also inserts a new 's117A' that provides for regulations to introduce a limited 'choice of accommodation' for persons subject to s117.³⁹

Provisions relating to disabled children, young carers and 'parent carers'

Disabled children in transition (sections 59 – 60 Care Act 2014)

Although the primary purpose of Part 1 of the Care Act 2014 is to reform adult social care law, the Act also contains provisions relating to disabled children and carers 'in transition' to adulthood. These are overly complicated – as the Act contains considerable detail on the issue of consent / capacity to consent and what must be included in the assessment.⁴⁰ Put simply however: a local authority must undertake a needs assessment of a disabled child if it considers that the child is likely to have needs for care and support after becoming 18 and that the assessment would be of significant benefit to the child. Such an assessment is referred to as a 'child's needs assessment'. If a local authority decides not to undertake such an assessment it must give reasons for its refusal.

Parent carers in transition (sections 61-62 Care Act 2014)

In very similar terms, ss61 – 62 of the Act places obligations on local authorities to assess the disabled child's parents during this transition process. In simple terms⁴¹ the Act provides that a local authority must undertake a needs assessment of the carer of a disabled child if it considers that the carer is likely to have needs for support after the child becomes 18 and that the assessment would be of significant benefit to the carer. Such an assessment is referred to as a 'child's carer's assessment'. If a local authority decides not to undertake such an assessment it must give reasons for its refusal.

Parent carers in general (section 90 Children & Families Act 2014)

The Children & Families Act 2014, s90 amends the Children Act 1989 (by adding s17ZD and s17ZE) to oblige local authorities to assess parent carers (referred to in the Act as 'child's carers') on the 'appearance of need' – ie if it appears to a local authority that a parent carer may have needs for support (or is requested by the parent) then it must assess whether that parent has needs for support and, if so, what those needs are. Such an assessment must include an assessment of whether it is appropriate for the parent to provide, or continue to provide, care for the disabled child, in the light of the parent's needs for support, other needs and wishes.

The assessment must also have regard to.

- the well-being of the parent carer ('well-being' has the same meaning as s1 Care Act 2014), and

³⁹ See *R (Wiltshire) v Hertfordshire CC* [2014] EWCA Civ 712 19 para 20.

⁴⁰ Important as these issues are – it is a level of detail one would have expected to find in the regulations rather than the primary statute.

⁴¹ The Act, again, contains overly complicated provisions on the issue of consent / capacity to consent and what must be included in the assessment – see footnote above.

- the need to safeguard / promote the welfare of the disabled child and any other child for whom the parent carer has parental responsibility.

Having undertaken such an assessment the local authority must then decide whether the parent has needs for support; whether the disabled child for has needs for support; and if so whether those needs could be satisfied (wholly or partly) by services under Children Act 1989, s17.

There is in addition a strategic duty on the local authorities to take reasonable steps to identify the extent to which there are parent carers within their area who have needs for support.

Young carers

At the moment, 'young carers' is not a term that appears in any legislation. For a local authority to have an obligation to a young carer (ie someone aged under 18 who provides care on an unpaid basis for another person), she or he has to be labeled a 'child in need' – for the purposes of Children Act 1989, s17. This has now changed, as both the Care Act 2014 and the Children and Families Act 2014 address the needs of 'young carers' directly.

Young carers in transition (sections 63 – 64 Care Act 2014)

The Care Act 2014, ss 63 – 64 concern young carers 'in transition'. The Act (in simple terms⁴²) requires a local authority to undertake a needs assessment of a young carer if it considers that she/ he is likely to have needs for support after becoming 18 and that the assessment would be of significant benefit to him / her. Such an assessment is referred to as a 'young carer's assessment'. If a local authority decides not to undertake such an assessment it must give reasons for its refusal.

Young carers in general (section 96 Children & Families Act 2014)

The Children & Families Act 2014, s96 inserts a new s17ZA into the Children Act 1989 to address the needs of young carers. This creates detailed obligations (many of which will be fleshed out in regulations) including a duty to assess a 'on the appearance of need' (ie without a 'request' having to be made (s17ZA (1)) and a strategic duty on the local authorities to take reasonable steps to identify the extent to which there are young carers within their area who have needs for support (s17ZA (12)). The provisions will come into force in April 2015 to coincide with Care Act implementation. It is expected that where eligible needs are identified in relation to young carers, local authorities will have to either provide support under s17 CA 1989 to the young carer or demonstrate that the 'cared for person's' assessment has provided adequate care and support to prevent inappropriate care being required from the young carer.

⁴² The Act contains overly complicated provisions on the issue of consent / capacity to consent and what must be included in the assessment – see footnote above.

Continuity of support for disabled children / young carers in transition (section 67)

The Care Act 2014, s67 creates a complex set of provisions,⁴³ the effect of which is (in essence) that the assessments of disabled children / young carers that take place before the young people become 18, will either continue to apply when they become 18 until reviewed⁴⁴ or if the local authority do not treat the assessments as a continuing obligation – then they must reassess.

⁴³ These are delivered by inserting in the CA 1989 new sections (s17ZB and s17ZC) and also by amending the Chronically Sick and Disabled Persons Act 1970 by adding a new s2A.

⁴⁴ ie be treated as a 'needs assessment under s60 Care Act 2014'.