

The Care Act 2014 overview

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This briefing builds on an earlier note that reviewed the basic provisions in the [Care Act 2014](#). It incorporates a consideration of the extensive volume of [draft Guidance](#) and the 18 sets of regulations published in June 2014.² A further briefing will consider the final guidance and regulations – expected in late October 2014.

This briefing (in the final pages – pages 27 - 28) also considers the measures in the [Children and Families Act 2014](#) which impact on young carers, disabled children and their carers.

This briefing is concerned with the impact of the legislation on disabled, elderly and ill people and their carers. It considers only briefly the purely macro / strategic challenges that local authorities will face in relation to such new obligations as ‘integration’ (with the NHS where possible) and ‘managing market failure’ (ie when one of its major providers goes out of business).

Overview

The Care Act 2014 repeals almost all of the principal adult social care statutes³ – the laws that oblige social services departments to assess and to provide services for disabled, elderly and ill adults as well as their carers. The list of ‘repeals’ is extensive including the National Assistance Act 1948, as well as the Acts and regulations that govern such things as direct payments, charging for social care, assessments (ie the NHS & Community Care Act 1990) and all the Carers Acts.

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). This has the result that an Act such as the Chronically Sick and Disabled Persons Act 1970 will be repealed in so far as it applies to people over 18 but not for those under that age. As a result of a vigorous campaign by a number of disabled children’s and carers’ organisations many of the problems concerning the rights of young carers, disabled children and parent carers 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 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.

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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>.

³ For a list of the proposed repeals – see Appendix E of the draft guidance www.gov.uk/government/uploads/system/uploads/attachment_data/file/317820/CareAct_cons_040614.pdf

Implementation timetable

The implementation timetable for the Care Act 2014 has been the subject of significant criticism. The draft guidance extends to over 400 pages and there are in addition 17 sets of regulations. Assuming the eventual regulations are approved by Parliament and the guidance finalised in the autumn – local authorities will then have less than 6 months to make the necessary (and major) reconfigurations (including training their workforce) before the Act comes into force: an Act described by the Government as ‘the most significant reform of care and support in more than 60 years’.⁴

The equivalent Welsh legislation ([Social Services & Well-being \(Wales\) Act 2014](#)⁵) is, in contrast, not coming into force until 2016.⁶ In July 2014 the [Public Accounts Committee](#) noted the concern of the Association of Directors of Adult Social Services (ADASS), about the timescales and expressed the view that ‘it may not be feasible for local authorities to implement all the proposed changes to the intended timetable.’⁷ In August 2014 a LGA survey revealed that 90% of authorities considered that the Care Act reforms were being put in jeopardy by the lack of adequate government funding.⁸

Draft guidance and regulations

While the ‘indecent haste’ with which the legislation is being implemented is of serious concern, it is necessary to note that there is much in the draft guidance and regulations to be welcomed – as this note explains. The guidance has the potential to metamorphose into the Code of Practice that the Law Commission and the Select Committee recommended and the English government rejected. The guidance is likely to be of considerable importance – in much the same way that the policy guidance accompanying the Community Care reforms in 1993⁹ proved to be highly influential in shaping that system.

The draft regulations¹⁰ detail specific obligations relating to [market oversight / business failure](#) (3 sets of regulations); the [assessment of need](#); [eligibility criteria](#); [advocacy](#); [charging](#); [choice of accommodation](#); [deferred payments](#); [personal budgets](#); [direct payments](#); the [NHS interface](#); [delayed hospital discharge](#); [ordinary residence](#) (2 sets of regulations); [portability](#) of care packages and [cross-border placements](#); and [registers](#) for people with visual impairments. The longest set of regulations concern charging and there are none on some key questions – notably adult safeguarding.

The guidance contains a number of ‘examples’ which (as with the MCA 2005 Code of Practice) have the potential to be of considerable value. Those in the draft guidance are however limp and sometimes confusing – and have the predominant outcome that once the person had been pointed in the right direction, there was no need to provide them with any local authority support. Hopefully the final guidance will address this problem.

⁴ Care & Support Minister Norman Lamb 15 May 2014 at www.gov.uk/government/speeches/care-bill-becomes-care-act-2014

⁵ For a detailed briefing on this Act - see www.lukeclements.co.uk/whats-new/.

⁶ There was a three year implementation period for the last major change to English adult social services law (NHS & Community Care Act 1990).

⁷ House of Commons Committee of Public Accounts Adult social care in England HC 518 (Stationery Office 2014) p.7 at www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/518/518.pdf accessed 13 July 2014

⁸ See Andy McNicoll *Lack of funding could threaten Care Act reforms, councils warn* in *Community Care* 7 August 2014 at www.communitycare.co.uk/2014/08/07/lack-adequate-funding-threaten-care-act-reforms-councils-warn/ accessed 11th August 2014.

⁹ Department of Health (1990) *Community Care in the Next Decade and Beyond: policy guidance*.

¹⁰ These can, collectively be accessed at www.gov.uk/government/uploads/system/uploads/attachment_data/file/315215/draft_regs.pdf

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. The regulations however stipulate that this is an adult who has ‘a physical or mental impairment or illness’.¹¹

Carer

A carer is someone 18 or over¹² 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)

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). The Act does not have such a set of principles¹³ – instead it contains a 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 there was a risk that it would prove to be of little practical application. Fortunately, the draft guidance goes a considerable way to dispelling this fear.

‘Well-being’ 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’.

The emphasis on the importance of ‘control’ has been seen as a cause for concern by some commentators: Lydia Hayes for example, while noting that the Law Commission expressly declined to include it as a ‘well-being principle’ on the grounds that ‘it is choice rather than control that is the key principle’,¹⁴ considers that it has the potential to be used as ‘tool of regressive employment reform’:¹⁵ in many respects the inclusion of ‘control’ can be seen as a further manifestation of the ‘responsibilization’ agenda.¹⁶ Despite the Law Commission’s comments, ‘choice’ does not appear as a well-being principle.

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;
- 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’;

¹¹ Draft Care and Support (Eligibility Criteria) Regulations reg 2, (Department of Health 2014).

¹² The Act has provisions for ‘young carers’ (ss63-64) – ie people who are under 18 – but these provisions use the term “young carers”.

¹³ Indeed the Act does not use of the word ‘independence’ in the sense of an ‘individual’s independence’.

¹⁴ Law Commission Adult Social Care Law Com No 326, Stationery Office HC 941 para 4.25

¹⁵ Lydia Hayes –publication pending.

¹⁶ Ferguson I (2007) *Increasing User Choice or Privatizing Risk? The Antinomies of Personalization*, British Journal of Social Work; vol 37: 387 – 403.

- 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.

A criticism made of the 'well-being' obligation and the above list in particular – concerns the failure to include an explicit reference to the right to 'independent living' - ie as protected by Article 19 UN Convention on the Rights of Persons with Disabilities (CRPD). The draft guidance, however, goes a good way to addressing this omission, stating that (para 1.18):

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. Supporting people to live as independently as possible, for as long as possible, is a guiding principle of the Care Act.

Such an express statement is of considerable value – not least because the courts and Ombudsmen have shown a surprising willingness to have regard to the Convention in recent judgments / reports.¹⁷

Well-being is defined as including being protected from 'abuse and neglect' (s1(2)(c)) and the draft guidance gives emphasis to this stating that 'it is not possible to promote wellbeing without establishing a basic foundation where people are safe and their care and support is on a secure footing' (para 1.24). The problem, as is noted below, is that the draft eligibility criteria do not list 'keeping safe' as an outcome and so on one interpretation it could be argued that being protected from 'abuse and neglect' will not in itself be an eligible need.

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.

In July 2014 the Public Accounts Committee referred to the severe problems local authorities faced in relation to adult social care funding and noted that the Department of Health accepted that it did 'not know whether some preventative services and lower level interventions are making a difference'.¹⁸ An [ADASS & LGA Joint Response to the Care Act Regulations and Guidance Consultation](#) (August 2014) expressed scepticism about investing in preventative services given the scale of the budget reduction their members were experiencing (para 21). A separate LGA report [Under Pressure](#) noted that '2015/16 is the year in which 60% of councils anticipate some degree of service reduction to help meet the budget gap' and that there was a 'significant lack of confidence' in the Government's funding projections particularly the in the assumption that legal reform will lead to saving. These reductions (on average of 12%) will impact on 'funding levels that have already been reduced by a third in the four years to 2014/15'.

¹⁷ See for example *Burnip v. Birmingham City Council* [2012] EWCA Civ 629 and *R (Bracking and others) v. Secretary of State for Work and Pensions* [2013] EWCA Civ 1345.

¹⁸ House of Commons Committee of Public Accounts Adult social care in England HC 518 (Stationery Office 2014) p.7 at www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/518/518.pdf accessed 13 July 2014

Given the very serious financial 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 this is unrealistic.

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.

The existing duties in relation to the provision of intermediate care and reablement are rolled over into the new regime: the draft guidance (para 2.9-2.11) endeavours to distinguish between different types of intermediate care and reablement – broadly suggesting that 'intermediate care' is a time limited structured programme of care to assist a person to maintain / regain the ability to live independently at home whereas 'reablement' is a species of intermediate care that helps the person regain capabilities to reduce their needs (ie through the use of therapy or minor adaptations).

Local authorities must develop a 'clear, local approach to prevention' (para 2.17); must identify 'unmet need' in order to identify strategies to improve the provision of such services; and must share this information with local partners (para 2.24).

A potential problem with the promotion of preventative services is that they can be used to restrict access to personalised support programmes. This appears to be a danger into which the Welsh reform programme is slipping – suggesting that individuals will have to establish that preventative services had been tried (and have failed) before formal support is available.¹⁹ The English scheme does not fall into this trap, with the draft guidance advising that 'if a person's needs are not to be met by the local authority, the authority must in any case provide in writing, information about what can be done to prevent, delay or reduce their needs ... [in order that] all people ... are provided with targeted, personalised information' (para 2.41).

Charging and preventative services

The current requirement that intermediate care and reablement must be provided without charge is carried into the new regime.²⁰ While it will continue to be a time-limited service, the draft guidance advises that 'where it is provided beyond six weeks, local authorities should consider continuing to provide it free of charge beyond six weeks in such circumstances' (para 2.48).

Where a local authority decides to charge for preventative services the draft guidance advises that it is 'vital to ensure affordability' and that it balances the 'affordability and viability ... with the likely impact of charging on the uptake by individuals' – and that this be considered individually as well as at a general policy level (paras 2.43 – 2.45).

¹⁹ For a discussion of this danger – see Luke Clements *The Social Services & Well-being (Wales) Act 2014: an overview* at www.lukeclements.co.uk/whats-new/

²⁰ Support provided up to six weeks, and minor aids and adaptations provided up to the value of £1,000: The Care and Support (Charging and Assessment of Resources) Regulations 2014 reg 3(3) and see para 2.46 of the draft guidance.

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

As noted above, this briefing is not directly concerned with Act's macro / strategic challenges to local authorities (and the NHS) of this kind – and so this major requirement is considered only briefly here.

A component of this new duty includes the establishment of what has come to be called the 'Better Care Fund'.²¹ The legal mechanism for this fund is slightly complex - essentially s121 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.²²

In July 2014 the Public Accounts Committee expressed concern about Government departments' understanding of the pressures on the adult social care system and that 'its policies to drive change (the Care Act and the Better Care Fund) are risky, are not supported with new money, and do not acknowledge the scale of the problem'.²³ This report confirms doubts 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 'cap on care cost' reforms (see below).²⁴

²¹ 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 Local Authorities to NHS Bodies) Directions 2013 and the NHS (Conditions Relating to Payments by NHS Bodies to Local Authorities) Directions 2013.

²² 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.

²³ House of Commons Committee of Public Accounts Adult social care in England HC 518 (The Stationery Office 2014) p.6 at www.publications.parliament.uk/pa/cm201415/cmselect/cmpublicacc/518/518.pdf accessed 13th July 2014

²⁴ Department of Health Care and Support Legal Reform (Part 1 of the Care Act) Impact Assessment 61067 October 2013 para 1.25.

The draft guidance explains that authorities ‘must establish and maintain a service for providing people with information and advice relating to care and support’ (para 3.10); that this must be provided for a variety of different formats; that the ‘duty in the Care Act will not be met through the use of digital channels alone’ and that the mix of provision will be expected to include ‘face-to-face contact’ (para 3.19). Increasingly information is only available on the internet and the effect of the so-called ‘digital divide’ is that significant sections of the population are thereby excluded – many of whom are disproportionately in need of care and support (eg older people, poor people, people with significant intellectual impairments).

Duty to promote effective high quality providers (section 5)

The Act (fleshed out by three sets of draft regulations²⁵) contains a range of provisions designed to address the ‘supply side’ problems of the social care market – ie (a) the problem 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. These provisions include ‘market oversight’ arrangements involving the Care Quality Commission (CQC) – 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). In July 2014 the Public Accounts Committee was of the view that the CQC (which will monitor the top 40 - 50 providers) lacked ‘the skills to undertake this expanded level of monitoring’.²⁶

[Regulations](#)²⁷ have now been issued to provide for eleven fundamental standards²⁸ of safety and quality that should always be met by providers of health and social care and draft [CQC guidance](#)²⁹ on how this is to be achieved (and policed) in practice.

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 National Audit Office consider that this relentless pressure by local authorities on fee rates is jeopardizing financial sustainability of some providers³⁰ and the ADASS accept that local authorities do not always consider the profit margins of their suppliers, or the impact that reducing fees will have on their viability.³¹ The Select Committee³² 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 Act and so it remains to be

²⁵ [Draft Care and Support \(Market Oversight Information\) Regulations 2014](#); [draft Care and Support \(Cross-border Placements\) \(Business Failure Duties\) \(Scotland\) Regulations 2014](#); and [draft Care and Support \(Market Oversight Criteria\) Regulations 2014](#)

²⁶ House of Commons Committee of Public Accounts Adult social care in England HC 518 (Stationery Office 2014) p.8 at www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/518/518.pdf accessed 13 July 2014

²⁷ The Health and Social Care Act 2008 (Regulated Activities) Regulations 2014.

²⁸ these being: Person-centred care; Dignity and respect; Need for consent; Safe care and treatment; Safeguarding service users from abuse; Meeting nutritional needs; Cleanliness, safety and suitability of premises and equipment; Receiving and acting on complaints; Good governance; Staffing; and Fit and proper persons employed.

²⁹ *CQC Guidance for providers on meeting the fundamental standards and on CQC’s enforcement powers* Consultation July 2014

³⁰ Report by the Comptroller and Auditor General Adult social care in England: overview HC 1102 Session 2013-14 (National Audit Office 2014) para 2.11-13.

³¹ House of Commons Committee of Public Accounts Adult social care in England HC 518 (Stationery Office 2014) p.13 at www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/518/518.pdf accessed 13 July 2014

³² Joint Committee on the Draft Care and Support Bill, ‘Draft Care and Support Bill’ Stationery Office (2013) HL Paper 143 HC 822 para 113.

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.³³

In contrast to this bleak background – the draft guidance is surprisingly direct and likely to be cited frequently in cases challenging arbitrary local authority rates. It reminds local authorities that the way they commission services is ‘a prime way to achieve effective market shaping’ (para 4.3) as these have a ‘significant influence on the market’ (para 4.6 and para 32).

The problem of course is not merely that of driving down standards as cost reductions are required, but of driving out smaller providers as only the larger corporations are able to compete on cost. The guidance addresses this concern requiring that local authority commissioning procedures ‘must encourage a variety of different providers and different types of services’ (para 4.34), including ‘voluntary and community based organisations, including user-led organisations, mutual and small businesses’ (para 4.35) and should support people who ‘micro-commission’ their own care (para 4.42). While the draft guidance envisages that local authorities may have ‘approved lists and frameworks that are used to limit the number of providers they work with’ it requires that they ‘must have regard to ensuring that there is still a reasonable choice for people who need care and support’ (para 4.36).

The draft guidance encourages ‘outcomes based commissioning’ – ie that instead of a local authority simply commissioning ‘units of provision to meet a specified need (eg hours of care provided)’ it moves towards specified outcomes for the individual which ‘emphasise prevention, enablement, ways of reducing social isolation and promotion of independence as ways of achieving and exceeding desired outcomes, as well as choice in how people’s needs are met’ (para 4.15). The draft guidance cautions however that this move should not, have the result of disadvantaging or excluding ‘smaller, specialist, voluntary sector and community-based providers’ (para 4.16).

The draft guidance also contains a timely reminder to local authorities that they ‘understand relevant procurement legislation’ and in particular make themselves aware of the fact that ‘there is significant flexibility in procurement practices’ which can ‘support effective engagement with provider organisations and support innovation in service delivery, potentially reducing risks and leading to cost-savings’ (para 4.86) and that this includes an obligation ‘to consider added social value when letting contracts’ under the Public Services (Social Value) Act 2012³⁴ (para 4.91).

Workforce issues

The social care workforce has been a direct victim of local authority pressure on providers to reduce their fees. The guidance stresses the importance of authorities ‘fostering a workforce which underpins the market’ (para 4.18) and encouraging (by for example providing funding – para 4.26) ‘training and development’. Local authorities when commissioning services must assure themselves that their fee levels do not (among other things) compromise the service provider’s ability to: (1) ‘meet the statutory obligations to pay at least minimum wages; (2) ‘provide effective training and development of staff’ (para 4.28); and (3) pay remuneration that is:

at least sufficient to comply with the national minimum wage legislation for hourly pay or equivalent salary. This will include appropriate remuneration for any time spent travelling between appointments (para 4.27).

³³ For example, *R (Sefton Care Association) v Sefton Council* [2011] EWHC 2676 (Admin).

³⁴ For guidance on the application of the Act see guidance at www.gov.uk/government/news/government-reviews-ground-breaking-social-value-act

The draft guidance advises that where a provider has previously been in breach of national minimum wage legislation it should in general be excluded from the tendering process (para 4.89).

Cooperation

As part of the current ‘integration frenzy’ at the macro policy framing, 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’³⁵ and sections 6 & 7 of the Care Act 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. It 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’. Although this looks to be a substantial new power, there is little evidence that the corresponding provision in the Children Act 1989 has been used to any great effect.³⁶

Services / care and support responses (section 8)

Under the current legal regime the object of a community care / carers assessment is to determine (among other things) whether there is a need for ‘services’. The community care statutes³⁷ provide exhaustive lists of services that can be provided and the Carers and Disabled Children Act 2000 provides a generalised statement as to what a carer’s ‘service’ might be. The Care Act repeals these statutes and (in keeping with its ‘outcomes’ rhetoric) avoids referring to the word ‘service’ when describing what may be provided to meet a person’s needs. Instead, section 8(1) contains an illustrative list of 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 asked the Department of Health, received confirmation that the Department considered that these services did fall within the ambit of the list.³⁸ The Committee expressed the hope that the subsequent guidance would ‘make clear that the list is not intended to limit the ways in which a local authority might meet any eligible needs or agreed outcomes, removing any possible ambiguity on that point’ (para 170). Unfortunately the draft guidance does not make this sufficiently clear.

Support such as home adaptations, equipment and transport is often vital to enable ‘adults in need’ to live independently in the community. The facilitation / provision of suitable

³⁵ Clements L and Thompson, P. *Community Care & the Law* Legal Action 2011 para 13.33.

³⁶ See for example, *R Northavon DC ex p. Smith* 1994 3WLR 403 HL.

³⁷ Primarily s2 Chronically Sick and Disabled Persons Act 1970 and ss 21 & 29 National Assistance Act 1948.

³⁸ Joint Committee on the Draft Care and Support Bill, ‘Draft Care and Support Bill’ Stationery Office (2013) HL Paper 143 HC 822 para 168 - 170.

adaptations / equipment requires explicit guidance, given that the overlap of responsibilities between housing and social services authorities will remain (with such support being capable of being delivered under both the Housing Grants, Construction and Regeneration Act 1996 and the Care Act 2014). This subject has attracted a disproportionately high number of complaints to the Local Government Ombudsman – particularly the failure of social services authorities to be aware of their responsibilities (which will now rest in section 8). The guidance needs to reiterate and build on the current guidance on this question.³⁹ Equivalent guidance is required in relation to the responsibility to ensure: (1) adequate transport for individuals in need; and (2) the responsibilities of local authorities for the social care support needs of disabled people in education (currently the subject of specific duties under Chronically Sick and Disabled Persons Act 1970, s2). Many such ‘adults in need’ will not be eligible for a Plan under the Children and Families Act 2014 and so it is essential that guidance be retained and amplified in relation to (what will be) the responsibilities under the Care Act 2014, section 8.

Despite the best intentions of those drafting the legislation, section 8(2) slips out of the ‘outcomes’ mode and gives examples of the ways need may be met which include the ‘service’ word – namely:

- (a) by arranging for a person other than it to provide a service;
- (b) by itself providing a service;
- (c) by making direct payments.

Local authorities will be able to charge (under section 14) for the costs that they incur in providing care and support (under section 8) 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 support such 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 (section 79 – 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’.⁴⁰

Delegation (section 79)

Local authorities will be able to delegate all of their functions under the Act – with few exceptions (eg safeguarding (sections 42 – 47) and charging (section 14)). Section 79(6) makes it clear that ultimate responsibility in such cases will still rest 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.⁴¹ 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). In anticipation of these reforms all English local authorities have been given power to delegate virtually all of their adult social services powers.⁴²

³⁹ Guidance that will of course cease to apply when the Care Act 2014 comes into force.

⁴⁰ 14 January 2014 column 154 Public Bill Committee.

⁴¹ www.scie.org.uk/workforce/socialworkpractice/pilots.asp

⁴² The Contracting Out (Local Authorities Social Services Functions) (England) Order 2014 SI No. 829 made pursuant to the Deregulation and Contracting Out Act 1994 s70(2) and (4) and s77(1).

Assessment of adults in need (section 9)

The Act, draft regulations and guidance create important and welcome obligations on local authorities in relation to the advocacy and safeguarding needs of individuals that are identified during the assessment and care planning processes: these are addressed below under the 'Advocacy' and the 'Safeguarding' headings below.

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 section 1(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)⁴³ however para 6.23 of the draft guidance states that:

In cases where an individual's needs are easily recognisable an assessment may be carried out over the phone or online. However, local authorities should be aware of the risks attached with such an approach. For example, where assessments are

There appears to be a downgrading (or at least a welcome acceptance of reality) of the value of 'supported self-assessments'. Rhetorically they have promoted the unrealistic notion of disabled people identifying their own needs and mapping out their support – with a social worker giving gentle guidance and the benefit of her or his wisdom. In reality they have too often been the posting of a Self Assessment Questionnaire (SAQ) to the person in need and then running the ticked boxes through a Resource Allocation System (RAS): highly impersonalised and designed to reduce care costs: to 'lower expectations'. The draft guidance requires individuals who are able and willing to undertake a supported self-assessment be offered one (para 6.51) but that: (a) the local authority 'must assure itself that' it 'is an accurate and complete reflection of their needs' (para 6.55); and (b) that regardless of what the individual may think 'the final decision regarding eligibility will rest with the local authority' (para 6.59)

The draft guidance gives useful emphasis to the need for assessors to be 'appropriately trained', but also states that registered social workers are 'uniquely placed to be involved in complex assessments which indicate a wide range of needs, risks and strengths'. In so doing the implication is that for non-complex cases social workers may not be necessary (para 6.5). The general (and welcome) tenor of the draft guidance is, however, that assessors must be 'appropriately trained'. Para 6.76, for example states that if an 'assessor does not have the knowledge in carrying out an assessment for a specific condition, they must consult someone who has experience of the condition' and at para 6.74 it states that local authorities must 'ensure assessors have received suitable and up to date training to carry out assessments' including specific condition expertise 'for example when assessing an individual who has autism, learning disabilities, mental health problems or dementia' (para 6.74).

The draft guidance requires that assessments be 'person centred, involving the individual and any carer that the adult has, or any other person they might want involved' (para 6.7) and that they must 'establish the total extent of needs' (para 6.8). Local authorities are also required to 'provide in advance, and in accessible format, the list of questions to be covered in the assessment' (para 6.37).

⁴³ 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>

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. While 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. There is a 'clear consensus' among local authorities that the 'costs related to carers – in terms of both assessments and associated services pose one of the greatest financial risks to the reforms going live in 2015/16'.⁴⁴ While the Act may not lead to many more carers requesting an assessment the increased cost will result from carers having to be assessed 'on the appearance of need'.

The principal duty is only owed to adult carers caring for people 18 or over – however the Act contains specific provisions covering carers of disabled children in transition and young carers in transition into adulthood (considered below – sections 58 – 66). These are complemented by measures in the Children and Families Act 2014 which provide for significant new duties in relation to parent carers and young carers as well as enhanced obligations on local authorities to 'identify any children who are involved in providing care' (para 6.46 of the draft guidance). The need for local authorities to adopt a whole family approach to the provision of care (ie regardless of whether the obligation derives from the Care Act 2014 or the Children and Families Act 2014) is emphasised by the draft guidance for example at para 6.65, which states that local authorities 'may combine an assessment of an adult needing care and support with a carer's assessment and an assessment relating to a child (including a young carer)'.

The 'carer blind' element to the new regime is perhaps the most important new 'explicit' dimension to the draft guidance and one that is mentioned repeatedly – for example at para 2.39, which reminds local authorities that they 'should not assume that others are willing or able to take up caring roles, and where necessary a carer's assessment should always be offered. Children should not undertake inappropriate or excessive caring roles that have an impact on their development.'

The Act also 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.

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).

The draft guidance only provides an overview of the core issues of relevance to carers – and inevitably there will be a need for this to be augmented by more expansive carer specific

⁴⁴ ADASS & LGA Joint Response to the Care Act Regulations and Guidance Consultation (August 2014) para 51.

guidance. One issue that this guidance will need to address is the interlinking responsibilities to carers of people detained under the Mental Health Act 1983. The new Code of Practice for the 1983 Act, for example, fails to make it clear that the Care Act applies to carers of people who have been detained. This must however be the case, given how much more widely 'carer' has been defined (under section 10(3) – ie that carers no longer need to be providing (or intending to provide) substantial amounts of care on a regular basis). This will also be that case in relation to the parent carers and the young carers of people aged less than 18 who are detained under the 1983 Act. The complementary / parallel provisions under the Children and Families Act 2014 are considered below.

Eligibility criteria (section 13)

Where an assessment identifies that an individual has needs for care / support then the authority must decide if these needs are sufficient to meet the eligibility criteria. The present legislation makes no reference to 'eligibility criteria' – they are at present only located in guidance (commonly referred to as FACS⁴⁵). The Care Act places 'eligibility criteria' (for both adults in need and carers) on a statutory footing and the [draft Care and Support \(Eligibility Criteria\) Regulations 2014](#) detail separate criteria for adults in need and for carers.

Adults in need eligibility criteria

For adults in need, the criteria are similar to those currently applied – save only that the 'bands' (ie critical, substantial, moderate and low) are dispensed with and there is only one requirement – which the person will either meet or not. Put crudely - the requirement is broken down into three components: (1) are the needs caused by a physical or mental impairment or illness; (2) is the adult, as a consequence of these needs, unable to achieve one or more specified outcomes; and (3) does this pose a significant risk to that person's wellbeing. 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.

Regulation 2 of the draft regulations details outcomes as being: (a) carrying out some or all basic care activities; (b) maintaining family or other significant personal relationships; (c) accessing and engaging in work, training, education or volunteering; (d) accessing necessary facilities or services in the local community including medical services, public transport, educational facilities, and recreational facilities or services; and (e) carrying out any caring responsibilities the adult has for a child.

Draft regulation 3 specifies that 'basic care activities' means essential care tasks that a person carries out as part of normal daily life including - (a) eating and drinking; (b) maintaining personal hygiene; (c) toileting; (d) getting up and dressed; (e) getting around one's home; (f) preparing meals; and (g) the cleaning and maintenance of one's home. The draft guidance states that this is not 'an exhaustive list and local authorities may consider other comparable care activities' (para 6.87) however the phrasing of the draft regulations in relation to 'outcomes' does not suggest that the list is merely 'illustrative'.

A particular problem with this formulation of eligibility relates to the interface with the safeguarding obligations (considered below). This duty (under s42(1)) is predicated on the person having 'needs for support' and, problematically, 'being free from abuse' is not a

⁴⁵ '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*.

specified 'outcome'. It is to be hoped that the final regulations will be phrased so as to make 'keeping safe' an outcome.⁴⁶

The draft eligibility criteria require local authorities to look at 'impacts' ie 'to understand the adult's needs in the context of what is important to him or her' (para 6.87). The implication being that (as with the current FACS criteria) the decision will continue to be subjective and made on the basis of the assessor's professional opinion.

As noted above, the draft regulations and guidance are unequivocal concerning the input of carers. This is ignored during the assessment process of the adult and the determination of eligibility. As the draft guidance states (para 6.91):

The eligibility determination must be made without consideration of whether the adult has a carer, or what needs may be being met by a carer at that time. The determination must be based solely on the adult's needs and if an adult does have a carer, the care they are providing will be taken into account when considering whether the needs must be met

The assessment process involves identifying 'needs' and then determining whether any of these are 'eligible needs'. This is important and distinct from the care planning phase – which is the process by which arrangements are identified which will ensure these eligible needs are addressed. The two phases are distinct – essentially two sides of an equation: on one side there are the needs that have to be met by the local authority and on the other are the details of how they are going to be met. For this reason the draft guidance requires that local authorities 'produce a written record of their determination and the reasons for it, for the individual concerned or their advocate, if they have one' (para 6.99). Even if the local authorities decides that none of the person's needs are eligible needs, it must nevertheless provide the person 'with written information and advice about what could be done to meet or reduce their needs, or to delay or prevent the development of further needs' (para 6.101).

Having determined that there are eligible needs, the local authority moves to the care planning process which has two parts: (1) it must consider what can be done to meet the eligible needs; and (2) it must carry out a financial assessment if it proposes to make a charge for meeting those needs (para 6.101). The draft guidance emphasises the importance of separating these two parts – so that 'an assessment of the individual's financial situation should come after the assessment and must not affect the local authority's decision to carry out an assessment' (para 6.12).

The current rule – that the eligibility criteria can be sidestepped for people whose needs are urgent – is carried forward into the new regime. The draft guidance advises that where 'an individual with urgent needs approaches or is referred to the local authority, the local authority should provide an immediate response and meet the individuals care and support needs and it then provides as an example, 'where an individual's condition deteriorates rapidly, they will need a fast-track response to ensure their needs are met' (para 6.21).

Carers eligibility criteria

The eligibility criteria for carers (put broadly) measure 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 thought by many to be more generous than those currently in place.

The draft guidance also addresses directly, a not uncommon misunderstanding among local authorities; it does this by asserting that 'carers' eligibility does not depend on whether the adult for whom they care has eligible needs' (para 6.92). Accordingly the fact that an adult is not eligible for support is irrelevant in so far as the carers assessment is concerned.

⁴⁶ Ideally in regulation 2(2) or (but less satisfactorily) 'keeping safe' as a 'basic care activity' under regulation 2(3).

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. There is no 'duty' under the current legislation to meet carers' eligible needs, nor (in general) to meet the needs of 'self-funders' (ie people whose savings are above the capital limit – currently £23,750). 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. Even if a self funder with eligible needs does not ask the local authority to meet their needs – the local authority will (once the 'cap on care costs' comes into force in 2016) be under a duty to provide them with a statement (an 'independent personal budget' – see below) detailing what the cost would be to the local authority of meeting their needs – since this notional budget will count towards the 'cap'.

The Government's impact assessment considers that these new obligations 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.⁴⁷ The LGA has expressed 'major concern' as to the validity of these calculations.⁴⁸ The ADASS has also raised concerns about the preparedness of local authority for the influx of self-funders and whether the individual fee levels paid by councils are capable of withstanding challenge – ie of whether they reflect the actual costs of the service providers.⁴⁹

Self funders

The National Audit Office has confirmed the general perception that a 'cross-subsidy' exists by which self funded care costs proportionately more than local authority funded care. In doing so, it has warned of the risks that this is causing to the financial sustainability of some providers.⁵⁰ In this context, the Public Accounts Committee concluded that the Government does 'not know the extent of cross-subsidisation between self-funders and local authority funded users'.⁵¹

Until the 'cap on care costs' comes into force in 2016, the incentive for self-funders to have their care and support needs assessed and / or arranged by a 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.⁵² 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

⁴⁷ 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_FINAL_.pdf. 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>

⁴⁸ See Andy McNicoll *Lack of funding could threaten Care Act reforms, councils warn* in Community Care 7 August 2014 at www.communitycare.co.uk/2014/08/07/lack-adequate-funding-threaten-care-act-reforms-councils-warn/ accessed 11th August 2014.

⁴⁹ ADASS *Procurement Survey Report 2014* July 2014 para 7.3 at www.adass.org.uk/adass-procurement-survey2014/ accessed 2nd July 2014.

⁵⁰ Report by the Comptroller and Auditor General Adult social care in England: overview HC 1102 Session 2013-14 (National Audit Office 2014) para 2.11-13.

⁵¹ House of Commons Committee of Public Accounts Adult social care in England HC 518 (Stationery Office 2014) p.13 at www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/518/518.pdf accessed 13 July 2014

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

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'.⁵³ In 2014 the Public Accounts Committee noted that neither the Government nor the ADASS understood fully the challenges that local authorities will face in commissioning and providing adult social care and supporting carers.⁵⁴

The full financial impact of the cap on costs will only crystallise when people start hitting the 'cap' and this is not likely to arise for several years. However until that time the administrative cost of keeping track of all these accumulating 'independent personal budgets' will be very considerable and almost certainly significantly in excess of the £175m the Government as allocated for this in 2015-16.⁵⁵

Care and support planning – principles

Concern has (as noted above) been expressed about the agenda underlying the Act's insistence on user 'control'. Control is however very much the issue: para 10.2 of the draft guidance states that there 'should be a default assumption that the person, with support if necessary, will play a strong leadership role in planning.'

The draft guidance (para 10.18) lists the key components of any care and support plan⁵⁶ - namely:

- the needs identified by the assessment;
- whether, and to what extent, the needs meet the eligibility criteria;
- the needs that the authority is going to meet, and how it intends to do so;
- for a person needing care, for which of the desired outcomes care and support could be relevant;
- for a carer, the outcomes the carer wishes to achieve, and their wishes around providing care, work, education and recreation where support could be relevant;
- the personal budget;
- information and advice on what can be done to reduce the needs in question, and to prevent or delay the development of needs in the future;
- where needs are being met via a direct payment, the needs to be met via the direct payment and the amount and frequency of the payments.

Para 10.67 of the draft guidance contains a particularly welcome requirement – that:

Upon completion of the plan, the local authority must give a copy of the final plan in a format that is accessible to the person for whom the plan is intended, any other person they request to receive a copy, and their independent advocate if they have one.

⁵³ Department of Health *Caring for our future Consultation on reforming what and how people pay for their care and support* July 2013 para 278 at www.gov.uk/government/uploads/system/uploads/attachment_data/file/239393/CONSULTATION_CaringForOurFuture_acc.pdf

⁵⁴ House of Commons Committee of Public Accounts Adult social care in England HC 518 (Stationery Office 2014) p.12-13 at www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/518/518.pdf accessed 13 July 2014

⁵⁵ Department of Health *Consultation on funding formulae for implementation of the Care Act in 2015/16. Allocations for additional assessments for the cap, universal deferred payment agreements and social care in prisons* for the financial year ending April 2016 (the consultation closes on 9 October 2014) at www.careknowledge.com/uploadedFiles/Redbox/Pavilion_Content/Our_Content/Social_Care_and_Health/webw_atch_for_CK_only/2014/201407/Consultation_document.pdf accessed 11th August 2014

⁵⁶ Unless excluded by the Care and Support (Personal Budget Exclusion of Costs) Regulations 2014 – which concerns the exclusion of costs associated with the provision of intermediate care (including reablement support) services.

The draft [Care and Support \(Independent Advocacy Support\) Regulations 2014](#) and guidance place substantial (and also welcome) obligations on local authorities in relation to the provision of advocacy support for people with impaired capacity and this is considered separately below. An example of this new duty is however at para 10.16 which states:

Where the person has substantial difficulty in being actively involved with the planning process, and they have no family and friends who are able to facilitate the person's involvement in the plan, the local authority must provide an independent advocate to represent and support the person to facilitate their involvement.

Charging (section 14)

As noted, local authorities will be able to charge for the cost they incur in providing social care support services. 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 replicated in large measure by the draft [Care and Support \(Charging and Assessment of Resources\) Regulations](#) and the draft guidance (including Annexes B, C, D and E). The draft regulations ([Care and Support and Aftercare \(Choice of Accommodation\) Regulations 2014](#)) and the draft guidance (detailed in Annex A) extend the current topping up and the 'choice of accommodation' rights into the new regime and choice of accommodation will be extended to shared lives, supported living and extra care housing settings.

Until the new 'cap on costs' provisions come into force (expected in April 2016) the regime will continue largely as at present. Although the draft guidance makes much of the fact that the charging regimes of residential and non-residential care will be governed by 'a single legal framework' (para 8.1) the reality is that they will be dealt with differently by the regulations and guidance. At law a significant difference with the new process is that for residential care accommodation local authorities will have discretion to charge – whereas it is currently a duty.

The upper capital limit is stated as being £23,250 (which would mean no increase for 2014-15) and lower limit at £14,250. There will be a notional interest charged on capital falling between these figures on the same basis as present. There will continue to be a personal expense allowance – and the same services must be provided without charge as at present – ie intermediate care / reablement; community equipment, and costing £1,000 or less; services under section 117 of the Mental Health Act 1983 and so on.

The guidance states (para 8.2) that a single set of principles will condition local authority approaches to charging, namely:

- Ensure that people are not charged more than it is reasonably practicable for them to pay;
- Be comprehensive, to reduce variation in the way people are assessed and charged;
- Be clear and transparent, so people know what they will be charged
- Promote wellbeing, social inclusion, and support the vision of personalisation, independence, choice and control;
- Support carers to look after their own health and wellbeing and to care effectively and safely;
- Be person-focused, reflecting the variety of care and caring journeys and the variety of options available to meet their needs;
- Apply the charging rules equally so those with similar needs or services are treated the same and minimise anomalies between different care settings;
- Encourage and enable those who wish to stay in or take up employment, education or training or plan for the future costs of meeting their needs to do so;
- Be sustainable for local authorities in the long-term.

Welcome as is the requirement that 'people are not charged more than it is reasonably practicable for them to pay' this represents (for people receiving non-residential care support) a dilution of their legal rights. At present the prohibition is contained in the statute⁵⁷ and so is only capable of being removed by Parliament (whereas guidance can be re-written on Ministerial whim). The advice by the Select Committee that the prohibition be retained in statute (or at least in regulations) has therefore been rejected.⁵⁸

One problem with the approach of applying 'the charging rules equally so those with similar needs or services are treated the same' is that local authorities may start charging carers for services. The guidance anticipates this problem – but in a relatively 'limp' section seeks to argue that charging carers is not inevitable stating (para 8.45):

Local authorities are not required to charge a carer for support. a local authority should consider how it wishes to express the way it values carers within its local community as partners in care, and recognise the significant contribution carers make. ... Local authorities should consider carefully the likely impact of any charges on carers, particularly in terms of their willingness and ability to continue their caring responsibilities.

A novel introduction to the charging regime is the possibility of 'light touch' financial assessment for certain groups (paras 8.18 - 8.22). Most obviously this will apply to people who are wealthy and don't want to undergo the indignity of being assessed – but nevertheless do wish to have the local authority care manage their support plan (see below). The guidance suggests however that this may extend to other groups – for example where there is only a 'small or nominal amount' charged for a particular service and person is 'clearly able to meet' the cost – or where a person is 'in receipt of benefits which demonstrate that they would not be able to contribute towards their care and support costs' and the guidance then gives the example of 'jobseekers allowance'.

Major reforms to the charging regime – particularly the capital allowances – are expected when (and 'if') the 'cap on costs' reforms come in – and these are considered below.

Cap on costs (sections 15 - 16)

The Act implements aspects of the Dilnot Commissions proposals.⁵⁹ 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 £72,000.⁶⁰ The figure will only apply to social care costs and will not apply to the costs incurred by self-funding carers. 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 for the cost of their accommodation and their food etc). Ignoring the annual inflation up-rating, it would take 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). Even at this stage the full costs would not be met – as residents would still be liable for their daily living costs – ie a contribution of £12,000 pa (inflation uprated).

In 2016 it is also proposed that changes will be made 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

⁵⁷ S17 Health and Social Services and Social Security Adjudications Act 1983.

⁵⁸ Joint Committee on the Draft Care and Support Bill, 'Draft Care and Support Bill' Stationery Office (2013) HL Paper 143 HC 822 para 196.

⁵⁹ Commission on Funding of Care and Support *Fairer Care Funding: The Report of the Commission on Funding of Care and Support* 2011

⁶⁰ 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.

with savings of £117,000 who seeks local authority assistance, they will have a contribution of £20,000 pa. from the capital (ie over £400.00 per week) – 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 account’ (section 29) – having agreed their ‘**independent personal budget**’ (section 28 – see below), 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 (section 72). 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 (section 29(2)).⁶¹

Deferred payments (sections 34-36)

The right to have a deferred payment in relation one’s main residence is retained and entrenched under the new regime. [The Care and Support \(Deferred Payment\) Regulations 2014](#) enable local authorities to charge interest on the loan and interest on their expenses in creating the charge to secure the loan (pencilled in at between 3.5% and 5% in the draft regulations (reg 9)). The right to a deferred payment will be subject to a number of conditions including a maximum capital allowance of £23,750 (reg 2(2)(c)).

The Government has proposed additional funding to cover the cost of new deferred payment agreements at £108.5m for 2015-16.⁶²

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.’⁶³ 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 20(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’. Direct support to meet carers’ needs will be provided under section 8 – in the same way as it would be provided for elderly, ill and dependent people.

The cap on costs provisions do not apply to the costs incurred by carers in purchasing support to meet their needs.

⁶¹ 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).

⁶² Department of Health *Consultation on funding formulae for implementation of the Care Act in 2015/16. Allocations for additional assessments for the cap, universal deferred payment agreements and social care in prisons* for the financial year ending April 2016 (the consultation closes on 9 October 2014) at www.careknowledge.com/uploadedFiles/Redbox/Pavilion_Content/Our_Content/Social_Care_and_Health/webw/atch_for_CK_only/2014/201407/Consultation_document.pdf accessed 11th August 2014

⁶³ 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.

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 judgment⁶⁴) remained unchanged. The phrasing of section 22 appears to achieve this aim, and the Minister has confirmed that.⁶⁵

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'.

This helpful statement is materially undermined by provisions in the draft guidance and regulations.⁶⁶ These have been detailed in a separate briefing⁶⁷ but in summary concern:

Accessing medical services: The [draft Care and Support \(Eligibility Criteria\) Regulations 2014](#) shunt responsibility for travelling to an NHS facility to social services⁶⁸ – which means (among other things) that: (a) for this service all patients will now be means tested; (b) the vast majority will have to pay

Help with medication: At law, the administration of prescription medication is a health function: one that stems directly from a doctor's decision. Para 4.88 of the draft guidance however shunts to social services the responsibility to arrange (and therefore charge) for 'home-care visits of 15 minutes or less ... for services like checking whether medicine has been taken'. Not only is this objectionable as a matter of principle, it is also contrary to the Care Act 2014, s22(1) (and the *Coughlan* judgment⁶⁹) which states that social services can only undertake a health task if (among other things) it is 'merely incidental or ancillary' to a social care task. Checking on 'whether medicine has been taken' is a health task. If the only reason for the visit is to do this – then it is not 'incidental or ancillary' to a social care task and so is not something social services could do.

Training carers in healthcare tasks: para 2.12 of the (draft) statutory guidance states that social services have responsibility for (among other things) training carers 'to feel confident performing basic health care tasks'. It is difficult to see how this function could be anything other than an NHS responsibility. The suggestion that it is now a social services responsibility is all the more troubling given that (as noted above) social services would be able to charge the carer and/or the disabled person for this training.

Creating ambiguity: at para 6.68 the draft guidance states (correctly) that although 'local authorities cannot arrange services that are the responsibility of the NHS they *may provide or arrange healthcare services where they are simply incidental or ancillary to doing something else to meet needs for care and support*'. Whilst this is strictly correct – it is most certainly not correct in relation to people who are eligible for 'NHS Continuing Healthcare' funding. The problem is that statement appears in the section of the draft guidance headed 'NHS Continuing Healthcare'. Its effect can only be create confusion and undermine the clear principles established in the *Coughlan* judgment.

⁶⁴ *R v. North and East Devon health authority ex p Coughlan* [2000] 2 WLR 622: [2000] 3 All ER 850.

⁶⁵ Public Act Committee Report 16 January 2014 (page 205/208).

⁶⁶ 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.

⁶⁷ L. Clements [NHS Continuing Healthcare: the draft Care Act 2014 regulations and guidance](http://www.lukeclements.co.uk/nhs-continuing-healthcare-the-draft-care-act-2014-regulations-and-guidance/) at www.lukeclements.co.uk/nhs-continuing-healthcare-the-draft-care-act-2014-regulations-and-guidance/

⁶⁸ Regulation 2(2)(d).

⁶⁹ The legal boundary between the responsibility of the NHS & social services to fund an individual's care needs: as defined in *R v. North and East Devon health authority ex p Coughlan* [2000] 2 WLR 622 para 30(e).

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 (among 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.

As noted above, para 10.67 of the draft guidance obliges local authorities to provide 'a copy of the final plan in a format that is accessible to the person for whom the plan is intended, any other person they request to receive a copy, and their independent advocate if they have one.'

Personal budgets

Section 26 states that the amount of an adult's 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. The Select Committee was not reassured by this response. The draft guidance goes some way to allay these concerns, stating at para 11.9 that:

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

It follows from the above, that a personal budget may include an amount attributable to support that the local authority funds as a 'discretion' (ie support that it considers is needed – but which does not meet the eligibility criteria). Since the amount that an individual pays for their care will be added (from April 2016) to their 'Dilnot tax meter' – towards their 'cap on costs' – the guidance needs to make clear whether the charges for discretionary services are included for 'cap on costs' purposes. If these charges do not count – then there is an obvious temptation for local authorities to include them in the plan as a discretionary support.

The draft guidance anticipates that some local authorities may continue to use Resource Allocation Systems (RAS), but cautions against ones that are overly 'complex' (para 11.22 and states that 'regardless of the process used, the most important principles in setting the personal budget are transparency, timeliness and sufficiency' (para 11.23).

There is no duty to provide a personal budget for carers – however the draft guidance considers the possible complexities that may arise when it is unclear as to whether a particular service is for a carer or for the 'adult' – para 11.39 advising that local authorities:

should consider how to align personal budgets where they are meeting the needs of both the carer and the adult needing care concurrently. Where an adult has eligible needs for care and support, and has a personal budget and care and support plan in their own right, and the carer's needs can be met, in part or in full, by the provision of care and support to that person needing care, then this kind of provision should be incorporated into the plan and personal budget of the person with care needs, as well as being detailed in a care and support plan for the carer.

Independent personal budgets

Where a local authority arranges a person's care, this will be provided through the personal budget. Where the care is arranged independently of the authority (ie by a self-funder) this will be recorded as an 'independent personal budget' which will apply from April 2016. As discussed above, the Act (section 28) provides for such budgets solely to identify the sum that the authority is required to add to the 'Dilnot taxi meter' for 'cap on costs' purposes.

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 found in the [regulations](#)⁷⁰ and the guidance. 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.⁷¹

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.⁷²

Sections 37 – 38 are replete with detailed procedural obligations – but in essence they provide that where a local authority (the 1st local authority) is providing⁷³ 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 (among other things) undertake an assessment of the adult's needs (and those of any carers he or she 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).

Chapter 20 of the draft guidance fleshes out how the process should operate – but signally fails to deal with what will happen when a person moves and the second local authority fails to act properly – for example by failing to fund the person's needs to the same level as the first authority until it has completed its assessment. The draft guidance should have cautioned against the first authority stopping the funding in such cases – but it does not.

⁷⁰ [The draft Care and Support \(Direct Payments\) Regulations 2014](#).

⁷¹ 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.

⁷² 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.

⁷³ 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').

Safeguarding (sections 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' guidance⁷⁴) – for example the duty to make enquiries / decide what action should to be taken.

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 is meant 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 Act⁷⁵ 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 Act⁷⁶ contains (in addition) a power of removal. Not only are such powers absent from the English Act, the existing National Assistance Act 1948 section 47 power to remove, is repealed. The Care Act 2014 does however retain the obligation on local authorities to protect property (section 47).

There has been some discussion about whether safeguarding is or is not a statutory function⁷⁷ - but this is arguably academic: social services authorities are subject to an overarching range of public law obligations and positive duties under the Human Rights Act 1998.⁷⁸ The failure to provide for specific statutory powers to protect adults and to identify the obligation to support people to 'stay safe' is nevertheless problematic.⁷⁹

Safeguarding referrals recorded by local authorities' rose 13% between 2011 and 2013 (of which 43% were substantiated) and this is thought to be either an increased awareness of abuse 'or may reflect overstretched resources and pressure within the system'.⁸⁰

As noted above, there is a significant problem with the way the [draft Care and Support \(Eligibility Criteria\) Regulations 2014](#) fail to define 'keeping safe' as an 'outcome' or indeed as a 'basic care activity'. This means that on a strict interpretation, the mere fact that an adult is being abused would not (without more) trigger the local authority safeguarding obligation under section 42 – since the person would not without more have 'care & support needs'. The draft guidance seeks to paper over this problem (without explaining the legal basis for the assertion) by stating (para 6.25):

When carrying out an assessment local authorities may identify that the person is at risk of abuse or neglect. Where they suspect that the person is at risk they must carry out an enquiry to consider if the person is experiencing abuse or neglect and decide what action is The action

⁷⁴ 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*.

⁷⁵ Social Services and Well-being (Wales) Act 2014 s127.

⁷⁶ Adult Support and Protection (Scotland) Act 2007, ss 7, 8, 11 & 14.

⁷⁷ See for example Belinda Schwehr 'Why the Care Act 2014 guidance on safeguarding short-changes social workers' Community Care 21 July 2014 at www.communitycare.co.uk/2014/07/21/care-act-2014-guidance-safeguarding-short-changes-social-workers/#.U84GckAvCpo accessed 22nd July 2014.

⁷⁸ See for example *Đorđević v. Croatia* Applic no. 41526/10 24th July 2012. Whilst the Court of Appeal was unable to find fault with a local authorities severe failure to protect adults in *X & Y v Hounslow LBC* [2009] EWCA Civ 286 – this determination must be open to question, given that the case was the subject of a friendly settlement at the European Court of Human Rights – with the UK making a compensation payment of €57,000 – see *X, Y & Z v. UK* Application no. 32666/10 by 5 July 2012

⁷⁹ The defect in the Act could be addressed by including in The Care and Support (Eligibility Criteria) Regulations 2014 as an outcome (in regulation 2(2) 'keeping safe'.

⁸⁰ House of Commons Committee of Public Accounts Adult social care in England HC 518 (Stationery Office 2014) p.8 at www.publications.parliament.uk/pa/cm201415/cmselect/cmpubacc/518/518.pdf accessed 13 July 2014

taken should reflect the risk to the person and is not subject to the national eligibility criteria. This enquiry should not disrupt the assessment of the person's care and support needs ...

Safeguarding is of course a difficult subject for the draft guidance to address – since it is at present (and will remain) a patchwork of differing / overlapping powers and duties arising out of: vetting and barring legislation; the MCA 2005; Guidance (ie 'No Secrets'); CQC and its inspections regime; local authority commissioning responsibilities and its duty of care; the human rights obligations of public bodies and their powers to seek declaratory relief. The Act, by failing to provide new powers, fails to clarify / simplify the system. This is however all the more reason why the draft guidance should be assured, authoritative and clear. It is none of these: it does not 'guide' and in a number of respects it is materially defective. A number of commentators have noted that the safeguarding section is the least satisfactory: Lucy Series suggesting that it 'lacks legal literacy'.⁸¹

On one level, it is perhaps not surprising that this chapter of the draft guidance is so disappointing. The political regime is most comfortable when discussing autonomy – and is particularly queasy when discussing paternalism: the state's duty to protect the 'vulnerable' – even the word engenders fear in those charged with the writing of policy.

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 section 18 – see above).

Independent advocacy (section 67)

Section 67 of the Act and the draft regulations place a duty on local authorities to arrange independent advocacy if the authority considers that: (1) an individual would experience 'substantial difficulty' in participating in (amongst other things) their assessment and / or the preparation of their care and support plan; and (2) there is no one appropriate available to support and represent the person's wishes. As the draft guidance states at para 7.3:

Local authorities must arrange an independent advocate to facilitate the involvement of a person in their assessment, in the preparation of their care and support plan and in the review of their care plan, if two conditions are met. The aim is to provide assistance; first, to people who have substantial difficulty in being fully involved in these processes and second where there is no one appropriate available to support and represent the person's wishes.

The draft guidance explains that a person experiences 'substantial difficulty' when this exists in relation to any one of four areas - namely (para by 6.27):

understanding the information provided; retaining the information; using or weighing up the information as part of the process of being involved; and communicating the person's views,

⁸¹ Lucy Series *Care Act 2014: Consultation on Draft Guidance & Regulations* (2014)
<http://thesmallplaces.wordpress.com>

wishes or feelings. Where a person has substantial difficulty in any of these four areas, then they need assistance.

If there is a significant difficulty in relation to any of these four areas, then the local authority 'must find someone appropriate and independent to support and represent the person, for the purpose of facilitating their involvement' (para 6.28). Not infrequently this role will be fulfilled by a family member or friend (draft guidance para 7.18) but if there is no one appropriate, then the local authority must arrange for an independent advocate.

Section 67(3) specifies that the duty applies in relation to any of the following:

- a needs assessment (under section 9);
- a carer's assessment (under section 10);
- the preparation of a care and support plan or support plan (under section 25);
- a review of care and support plan or support plan (under section 27);
- a child's needs assessment (under section 60);
- a child's carer's assessment (under section 62);
- a young carer's assessment (under section 65).

The [draft Care and Support \(Independent Advocacy Support\) Regulations 2014](#) detail (among other things) the competency requirements for independent advocates – requiring (a) appropriate experience; (b) having undertaken appropriate training; (c) being competent to represent and support the individual; (d) integrity and good character; and (e) arrangements to be in place for appropriate supervision.

The Government has allocated £14.5m in 2014-15 for this service and is advising local authorities to 'map out which staff need to refer people to them and ensure they are trained to know who to refer and how to refer' and not to commission too small a service or 'one that is poor quality'.⁸²

Lucy Series, in commenting favourably on the advocacy provisions and the draft guidance suggests that what is being required goes beyond advocacy and encompasses a duty of 'support and the duty to involve'.⁸³ Her paper also highlights the overlap between Care Act 2014 duty and the more limited obligation under the Mental Capacity Act 2005 to appoint an Independent Mental Capacity Advocate (IMCA). In her opinion there are at least 6 reasons why the Care Act advocate will be 'far superior' to the IMCA – one being that advocates under the 2014 Act will be better paid – being allocated 17 hours per referral compared with the 8 hours allocated to IMCA's.

Prisons

Section 76 of the Act provides welcome clarification as to local responsibilities for prisoners who have care and support needs and provides that the responsible local authority for 'ordinary residence' purposes is the one in which the prison is located (section 76(1)). However on release the prisoner will be presumed to be ordinarily resident in the area that he or she was resident immediately before the start of their sentence (para 17.47).⁸⁴ This is a presumption that appears to be easily rebutted, since para 17.42 suggests that on release a prisoner's 'ordinary residence will generally be in the authority where they intend to live on a permanent basis'.

The Act starts from the principle that all 'adults in custody, as well as offenders and defendants in the community, should expect the same level of care and support as the rest of the population' (para 17.6). It however provides a list of Care Act entitlements that will not

⁸² Lucy Bonnerjea *Advocacy and the Care Act* PowerPoint (Department of Health 2014)

⁸³ Lucy Series *Care Act 2014: Consultation on Draft Guidance & Regulations* (2014)

<http://thesmallplaces.wordpress.com>

⁸⁴ Para 17.47 also advises that the deeming provisions in section 39 of the Care Act 2014 do not apply to people who are leaving prison

be available to prisoners – for example the right to direct payments and to choice of accommodation. Provisions such as the right to continuity of care do however apply (see draft guidance para 17.41) as does the duty to ‘to involve’ the person in need in all aspects of the assessment and care planning process’ (para 7.6). Where a local authority is made aware that an adult in a custodial setting may have care and support needs, then, as the draft guidance para 17.20 states ‘they must carry out an assessment as they would for someone in the community’,

The Government have allocated £11.2m in 2014-15 for the additional costs associated with the clarification of the duty to prisoners.⁸⁵

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 s117.⁸⁶

⁸⁵ Department of Health *Consultation on funding formulae for implementation of the Care Act in 2015/16. Allocations for additional assessments for the cap, universal deferred payment agreements and social care in prisons* for the financial year ending April 2016 (the consultation closes on 9 October 2014) at www.careknowledge.com/uploadedFiles/Redbox/Pavilion_Content/Our_Content/Social_Care_and_Health/webw_atch_for_CK_only/2014/201407/Consultation_document.pdf accessed 11th August 2014

⁸⁶ See *R (Wiltshire) v Hertfordshire CC* [2014] EWCA Civ 712 19 para 20.

Provisions relating to disabled children, young carers and ‘parent carers’

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’ into adulthood (ie young carers and the parents of disabled children who are in the transition process). These provisions are designed to mesh with reciprocal provisions in the [Children and Families Act 2014](#), which are also scheduled to come into force in April 2015. At the time of writing this overview (30th September 2014) the Department for Education has yet to publish its draft guidance to these provisions in the [Children and Families Act 2014](#). The following commentary is therefore limited to a review of the primary legislative provisions – but will be updated as soon as the draft guidance is published.

It is understood that the Department for Education has prepared (but not published) draft regulations concerning local authority duties to young carers (under the new section 17ZB(8) Children Act 1989 – see below) but that it does not intend to use its regulatory powers under the new section 17ZE(4) and (5) to prepare draft regulations concerning the rights of the parents of disabled children. It is also understood that the Department for Education proposes to provide advice concerning the substantial new obligations to disabled children and to young carers / parent carers in an updated version of [Working together to safeguard children](#) (2013). The delay in preparing the draft *Working together* guidance is of particular concern given that the 2013 guidance has been the subject of significant criticism and to be in urgent need of redrafting to make it fit for purpose for disabled children, their carers and for young carers (since it is a present ‘dominated by the notion of child protection’ and ‘conceptually ... predicated on the need to ‘intervene’ rather than of providing support to families in terms of eligibility assessments and services’).⁸⁷

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

The Care Act 2014 provisions relating to disabled children (as well as those concerning carers ‘in transition’ to adulthood) 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.⁸⁸ 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. Para 1.23 of the draft guidance to the Care Act is however helpful in advising that ‘control’ not only encompasses the idea of from one area to another – but also ‘from children’s services to the adult system without fear of suddenly losing care and support’.

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

In very similar terms, sections 61 – 62 of the Act places obligations on local authorities to assess the disabled child’s parents during this transition process. In simple terms⁸⁹ 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.

⁸⁷ Clements L and Thompson, P. *Community Care & the Law* Legal Action 2011 para 23.22 and 23.36.

⁸⁸ 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.

⁸⁹ 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.

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

The Children & Families Act 2014, section 90 amends the Children Act 1989 (by adding s section 17ZD and section 17ZE) 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 the Care Act 2014 section 1), and
- 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, section 17.

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, section 17. 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, sections 63 – 64 concern young carers 'in transition'. The Act (in simple terms⁹⁰) 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, section 96 inserts a new section 17ZA 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

⁹⁰ 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.

need' (ie without a 'request' having to be made (section 17ZA (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 (section 17ZA (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 section 17 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.

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

The Care Act 2014, section 67 creates a complex set of provisions,⁹¹ 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 reviewed⁹² or if the local authority do not treat the assessments as a continuing obligation – then they must reassess.

⁹¹ 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.

⁹² ie be treated as a 'needs assessment under s60 Care Act 2014'.