Care and Health Law

The Care Act and legal risk

Issues likely to lead to legal challenge – and why…

Presented by:
Belinda Schwehr
For Care and Health Law

belinda@careandhealthlaw.com
01252 725890 / 07974 399361
www.careandhealthlaw.com

Care Act Questions, six months in!

- Has your area been flooded with referrals for independent funded **advocacy**? What about for safeguarding advocacy? Surely **that's** been implemented?
- Is there any self assessment '*assurance*' going on, or is there just a computer based assessment system, running itself?
- Have there been any discussions going on anywhere about the difference between 'your/our' view, and 'my/his/her' view of what **wellbeing** means?
- Have there been any social workers who have dared to determine that no consequential significant impact was perceived by them, even though a person was unable to achieve in two or more areas of the eligibility regulations? That is legally possible, you know!
- Is eligibility being determined on a total needs basis, even counting **met** needs?
- Are **written decisions** about eligibility being given in every case, or even any single case? That's a Care Act legal duty, **did you know?**
- Is ***anyone*** applying the new **ordinary residence rules** for specified accommodation?
- And have **carers mutinied**, and flooded your First Contact centre, and demanded that they be given massive care packages on the back of their own entitlement to assessment for eligibility, based on a subjectively asserted threat to their mental health?
- Have young people been demanding **Transition** assessments at the age of 14?
- If the answer is no to lots of these questions, well - ***relief may be rife,*** back at the ranch, but it'd still be good to ask If Not, then Why Not, to our minds!

More provocative '6 months in' question:

- Are councils routinely explaining how their cost allocation tool or RAS works, as part of advice and information?
- How is review based care-planning going, for all the clients whose reviews have to be done before April 1st 2016?
- Are people arguing about their budgets, and succeeding? Is the DP rate the same as the councils contracted agency rate? Or more than the council can get the service for? Or less, even?
- How is charging going – is the council sure that it is not charging anyone more than it actually costs to buy them their service?
- Has the council changed its policy on how much capacity is needed to make a request for a DP, and organised a suitable person's agreement to sign - when it has to be THAT indirect sort of a payment that's going to be made to another person other than the service user?
- Has your council been made to change its policy that says that 'exceptional' circumstances are required before someone can pay their related carer through a direct payment?
- Has your council funded someone with extra money, to pay their relative for the admin of a DP?
- Have any more councils seen the benefit in persuading their health partners to agree a split package, for someone not quite qualifying for CHC?
- Is Support Planning for carers being done? Or is your council still just giving them carers money, even if they want actual help?
- Has any council actually tried to tell an eligible person and their advocate that the person's needs can be met perfectly well, by going to something that's called a 'universal service'? Is that legal?

The first case under the Act – about advocacy (and other things too!)

- **The case (*SG*) (involving Haringey) means it is unlawful to assess without one, when the duty could only conceivably be regarded as triggered…**

- **and that assessments made without one, when the duty *has* been triggered, are all prone to be declared invalid!**

- Of significance to ALL councils is the factor of **resourcing** an advocate, at a time when most will be stretched to capacity on the DoLS backlog. The council's barrister suggested that "demand exceeded supply", hopefully like, but the judge applied pure public law principles and held that that was no excuse in relation to a mandatory duty that had been acknowledged to have arisen.

- The woman in question had severe memory difficulties, could not count, could not tell the time and had severe difficulty in learning her way to new places and using public transport. She had post-traumatic stress disorder and resulting anxiety and depression. She struggled with all manner of basic tasks, including self care, preparing and eating food, management of simple tasks and taking medication. The judge said this:
- "[Haringey Council] appears to accept the claimant was entitled to, but did not have, an independent advocate when she was assessed under the Care Act, but contends nonetheless that this did not "lead to a flawed assessment process" because referral for such an advocate was made at the time of the assessment, and since then an independent advocate *has been appointed* in the form of Mind.
- [Haringey's barrister] …says the claimant's services have not been prejudiced as a result concerning the outcome of the assessment, but I agree with [SG's barrister] that **we simply do not know that**. I do accept the defendant's submission that there *may* be cases in which it is unlikely the presence of an independent advocate would make any difference to the outcome. This is not one of them, because **this appears to me *the paradigm case* where such an advocate was required, as in the absence of one, the claimant was in no position to influence matters."**

Why are we even bothering to think about *managing* Legal Risk?

- The ASC leadership needs to understand the legal framework in the context of how law works: this is ***public*** law, and it's full of **margin** for the unique and unpredictable situations in which the job has to be done – it is **hard** to bring a successful challenge against a council in this sphere, even though when it happens, we all get to hear about it!
- Public law duties are not the same as negligence: councils have a duty TO care, (ie to meet needs) rather than OF care, but there's no obvious standard to which they needs have to be met, now that we do not have FACS – it's honestly only just as well as to lessen the impact of inability to achieve, to something that's not significant.
- That is, there are statutory duties to discharge, and that **must happen** - even if the department runs out of money – the duties are council *corporate* duties; and if they are not done the council can be **legally challenged – but not just for doing them *poorly*.** That is what the **complaints** system and the **ombudsman** are for.
- DoLS and best interests thinking have attracted more challenge than everything that has ever happened in adult social care.
- The highest courts in the land have given councils **protection against actions in negligence**, in the social work managerial context – even in safeguarding – just like the police. So all anyone has to do is practise defensibly.

However, that doesn't mean we don't need to keep our eyes open

- **Major trends for consideration – are you asking for trouble, in relation to these?**

Your council's corporate approach to well-being, person-centredness, carers, choice and control

Your SAB's approach to its role in relation to safeguarding

The focus on prevention, advice and information – to keep people ticking over without too much input

Your commitment to information and advocacy rights - to bring detachment to social work processes

What your message to staff is about the urgency of re-professionalisation of social work judgement, through the exercise of discretion based on concepts such as 'significant impact'; and the emergence of contracts officers who treat social care law as a strategic tool!

Changes to ordinary residence, continuity, Choice Rights, and transitions

Commissioning – is it just business as usual or do they grasp that they can now be sued?

The broadening ambit of social care, and the relationship with Health

Charging and deferred payments - and what you should be doing with regard to self funders, now we are not having Dalton

Management of disputes, now that we are not having appeals

Things to look out for in local practice

With **statutory duties and discretions**, the most likely risks of being challenged for acting unlawfully will arise from a council's

- **Not doing these duties at all, or taking unfeasibly long about it**
  - Eg: not providing advocacy where it is acknowledged to be necessary and an entitlement;
  - Not offering direct payments for a particular client group not formally excluded from the opportunity;
  - Stretching the assessment phase out, by offering prevention again and again, and never saying when there will be an eligibility decision;
- **Not doing them sensibly, or in accordance with the guidance, without a good reason!**
  - Eg: running a waiting list for a scarce resource based on alphabetical order instead of need;
  - Not giving reasons for why an offered package or budget is considered to be enough…;
- **Not doing them legally, within the words used in the Act or Regs – or ignoring the statutory purpose**
  - Failing to allow a person to require the involvement of a nominated person in a decision where this is required, or regarding their relative as their informal supporter without getting the person's consent or making a BI decision.
  - Imposing a condition on a direct payment recipient that negates the whole point of the offer – choice/control
- **Fettering discretion or not doing decision making fairly, so far as procedural fairness rules are concerned...**
  - Failing to consider giving a person direct payments to spend on a close relative in the same household;
  - Not allowing a person to make representations in respect of their position on ability to achieve or what is wrong with the suggestion that a service available for free locally could appropriately meet a person's needs.

And with a **new piece of legislation, in an era of government cuts**, the real risk comes from

- Not understanding what's changing, or where to check that out – staff don't know what they don't know, or when they are on a legal wobble…
- Not following guidance because the staff are not familiar with it – there is no culture of self-starting for study purposes in adult social care…or even private reading!
- Not being ready to be challenged, and thus driving people to visit likely looking lawyers…lots of councils are run on a command and control basis, with staff genuinely afraid to raise questions about legality, and that spreads to the relationship with customers, in the end.

The Monitoring Officer's function – advocates WILL learn about this much more effective way of complaining, soon!

- Anyone who is dissatisfied with a decision made by the local authority can make a complaint about that decision. The local authority must make its own arrangements for dealing with complaints in accordance with the 2009 regulations.
- The local authority's arrangements must ensure that those who make complaints receive, as far as reasonably practicable, assistance to enable them to understand the complaints procedure or advice on where to obtain such assistance.

However, there is also the **council's monitoring officer** as an addressee of a special kind of complaint:

s5(2) of the Local Government and Housing Act 1989 …. it shall be the duty of a relevant authority's Monitoring Officer, if it at any time appears to him, that **any proposal, decision or omission by the authority, …**has given rise to, or is likely to or would give rise to—

(a) a contravention …of any enactment or rule of law

… **to prepare a report to the authority with respect to that proposal, decision or omission.**

This is a personal, non-delegable duty, and is a high level form of governance and management of legal risk. Independent advocates' reports should be sent to this person, in our view. The members must respond to an MO's report within 21 days.

First contact foolishness

- Not reconfiguring First Contact services, so as to have at least some senior qualified staff up there – with antennae, for sensitive decision-making confidence, and legally aware supervision…
- Setting up implicit thresholds to getting *past* this point, to assessment 'proper' - like one's IQ, severe or enduring mental illness, having a diagnosis, etc
- Getting the mode, level, skill factor or timing wrong for a proper assessment *beyond* your 'front door'.
- Not at least offering people 'a supported self assessment' if they have capacity to take part in one, and not allowing them to say who they want *involved*, and involving *them* in the process as per the statutory rules.
- Turning people away at this point, without identifying whether you are

  A) purporting to be actually denying them an ***assessment*** and if so, why,

  B) saying that they have just actually had one from you (without their realising it) and that they're not eligible - or

  C) just saying 'Try this first, and let us know whether it works....' without following up
- Saying no on the basis of an ignorant view of ordinary residence rules
- Saying no on the basis that they've not moved here yet...

Advocacy accidents

- Not having enough, so as to delay assessment or other stages. Er, it's a **duty**.
- Failing to spot someone would experience **substantial difficulty,** at the right point
- Forgetting to get the **consent** of the person to the informal support from their informal involving person
- Finding *willing* involvers to be **inappropriate** for obviously challengeable reasons
- Finding ***un***willing involvers to be appropriate, regardless, and thus failing to appoint
- Forgetting that alongside advocacy, a person has a right to require a council to involve a person of their own choosing, and that people are best interests consultees of people lacking capacity, in whose wellbeing they are interested, unless or until a council decides that to be inappropriate or impracticable...
- Overlooking the exceptions to the exception: ie where, notwithstanding the existence of a willing and appropriate informal involver, councils *must* appoint an independent advocate in any event!! (conscientious material disagreements)
- Appointing people who don't have the skills or knowledge or the qualification within a year...
- Appointing insufficiently independent people – hard because the regs fail to make it clear as to whether it is a contracted advocacy *organisation* that must be independent, and not *otherwise working* for the council - or the advocate, him or herself, in person….

Prevention Pitfalls

- Signposting, without finding out if there are actually vacancies or services out there still!
- Assuming that people can buy their own: no good if the services are not **affordable** to ordinary people – perverse disincentive to take personal responsibility.
- Not listening conscientiously as to why a person won't **avail** themselves of preventive services, but then taking that into account as relevant to significant impact considerations at the eligibility stage. If councils want to be brave and take it as relevant to significant impact, they'd need to make sure that there was ***no*** *very good reason*, or only a completely **indefensible** one, like racism, for the person's having turned down access to preventive or universally available services which were available at the time.
- Getting in a mess about what can be charged for if merely preventive, and what **can't** be. There is a separate charging power in the Act and Regs for prevention services, so in principle, councils CAN charge – but not if it's reablement or intermediate care (a programme…) and nb they can't charge for equipment **they** provide in **any** circumstances.

Assessment aggravations and eligibility embarrassments

- Not covering all of the domains that an assessment should cover. The client is not the real decision maker, even when they're saying that they've not got a problem…or that they have no needs…. You have to be a *professional*.
- Overlooking the definition of inability – it is a **stretched** one. So even if staff start out with the person's assets and strengths, it doesn't mean that they don't count as unable to do something – for instance, if they are getting assistance, so don't see the difficulty as a big problem….
- Overlooking the need to be carer blinkered in relation to ability or impact – ie forgetting that staff must assess the person's ability without regard to the existence of current help.
- Appearing not to be taking any account of desired outcomes or the person's own view of the impact arising from the difficulty
- Insisting that significant impact needs to be counted over criteria of the council's **own making** which by their wording, make some of the 10 eligibility domains less likely to matter….
- Paperwork with no spaces for the client/involver/carer/any relevant person's advocate to assert a different view

Care Planning and Budget bungles and RAS wrangles

- Ignoring s25 on what a care plan must have in it.
- Ignoring Choice of Accommodation legal requirements or misinterpreting them – re a 'keep people in borough' policy for instance.
- Not monitoring whether they are working, and thus spotting safeguarding issues in a timely manner.
- Signing off care plans with too little response or money to meet needs
- Funding up to the cost to the *authority*, and never any more than that, effectively not meeting need via direct payments if it would cost more, that way.
- Not commissioning for reasonable objective sufficiency and holding customers to that inadequate discharge of responsibility by saying 'we have no more money'.
- No reasons given for why a given offer of anything is believed to be enough to be appropriate.
- Ignoring the MCA and DoLS at the care planning stage and getting into more *Somerset* or *Cheshire West* or *Milton Keynes* moments
- Ignoring any other relevant and applicable legal principle, including human rights.

Direct Payment disasters

- Giving them to people who lack capacity to request a direct payment, direct to *them*
- Getting the role of the client's *nominee* mixed up with the role of the authorised person to whom the council can give the direct payment separately and accountably,
- Refusing people a direct payment when they have enough capacity to request one, without a good reason Eg the council doesn't *like* their nominee
- Thinking that the council could buy the service for less because ***it's*** been crushing the market with its dominant purchasing position, and translating that into a NO.
- Not having a clear policy on when or if the council will ever fund the administration of the direct payment separately, and/or by close relatives in the same household
- Not ever imposing **conditions**, so not managing public money properly
- Allowing monitoring outcomes to go **unaddressed**, despite concerns
- Not ever recouping unspent money from one particular group - **discriminatory**
- Recouping it too savagely without regard to all relevant circumstances
- Imposing conditions that are **unreasonable**: like having a payment card as the only option when it's not even in a bank account in the person's name
- Paying net, when there is a really good reason to pay gross

Carer crises

- Refusing to treat someone as a carer because they are not doing 'enough', in the council's opinion…
- Telling them that they ***must*** care, or being economical with the truth that councils **need** them to care but have to back fill if they don't want to
- Applying the wrong criteria to them – the regulations have two sets – different ones
- Thinking that they can still just be signposted to carers' services – without making it clear that they can insist on an eligibility decision as well
- Giving them money even if they are rocky enough just to want a service – they'd have to consent to a Direct Payment before that's a proper response.
- Trying to give carers a sum of money that has no rational evidence basis, and which would only be appropriate if there was a **discretion** to meet needs as now, instead of a **duty** to meet eligible assessed unmet needs of carers.
- Ignoring carers of people in care homes – practical and emotional support is enough.
- Ignoring carers of people with CHC status
- Mixing up the carer charge with the service user or recipient charge.

Ordinary residence ordeals

- Not distinguishing between s117 people and everyone else – it is a bit different
- Not deciding what you think specialist accommodation IS or means: goodness knows what we are supposed to do about this: premises '**intended** for adults with care and support needs' 'where personal care is **available if required**…'??
- Not understanding that continued o/r turns on the client's needing **personal care, not just care and support, and it being written up in the Care Plan that the accommodation aspect is the ONLY way to meet need!!**
- Not being consistent across client groups as to whether social care clients who move into personally contracted for accommodation are covered and continue as o/r – it seems to us that Shared Lives clients *do* move as licensees or tenants, in most cases, and will qualify under *that* rule, not the Shared Lives rule.
- Not understanding the role of incapacity or solutions to it, for those wanting to move as tenants (deputyship = a private arrangement)
- Putting it in the care plan before the cost of the care has been worked out, in specialist care and support provision arrangements and thus falling into dispute in specialist cases
- Not deciding whose job it is to decide, in-house or leaving a client in a provider's setting without an interim contract, because of a dispute….
- Not abiding by the new dispute resolution rules and time frames
- Mixing up **choice** rules and o/r rules, just because they appear to be structured in the same way. One applies to placements, and the other applies to placements and tenancies….

Choice and top-up terrors

- Thinking that public procurement obligations 'trump' choice rights
- Thinking that the choice right simply passes to the relatives, if the person is incapacitated
- Just offering a list of registered or contracted providers: it's the council's job to point to the ones that are considered *suitable* by the authority, which is the decision maker!
- Thinking that the council can take a figure out of thin air and say that anything above that is a top-up – even if the figure is arbitrarily low
- Not vetting the offeror of the top-up for their own financial standing: it's the council's risk – and leaving the client insecure for want of payment!
- Not contracting for the whole amount when the council is acting as the buyer – **the rules still require it**
- Offering **one** home in the area that takes the asserted rate for the package even if it's horrible - and even if it isn't, has no vacancies at the time....
- Not using the usual rate in another authority where that's the person's choice – and *there*, of course, the concept of **usual rate** still applies, because the person won't *have* a personal budget for the meeting of needs in another borough.
- Letting the providers double charge, by not taking steps against private top ups for things already covered by the council's contract...

Reviews risk-running

- Not getting everyone onto a properly arrived at Care Act care plan in one year – **ie by April 2016**
- Ignoring the regs and guidance as to the longest anyone should go without review – the 'expectation' is **annually**.
- Mixing up *service* **and/or FEES reviews**, with review of whether the **package/budget** is working to deliver the meeting of needs and outcomes – and sending out cost brokers to do the latter!!
- Ignoring providers' evidence in *their* reviews, and not organising your own or **formally adopting theirs as yours – you gotta HAVE one on record…**
- Rejecting requests for revisions of the plan when it would be unreasonable to do so, on **a change of circumstances**
- Revising a plan so as to impose a change the manner of provision or the provider, whilst contending that there is no suggestion that the person's actual needs are thought to have changed, without doing **a proportionate re-assessment. It will 'affect the *plan*'…**
- This is very likely to attract attention because of the old legal principle that care plans are sacrosanct until a lawful re-assessment – particularly where there is a disagreement that the new 'method' will feasibly work, or as to whether it will meet the client's outcomes – and in particularly where the new provider involves a change in someone's personal care provision, or in the place where they actually live or have day services (because of human rights).

Safeguarding sloppiness...

- Treating the DoLS backlog as if the Safeguards have already been **abolished**, and not even prioritising the cases where there is a dispute about capacity, strong objections to the situation or relatives about to go nuclear, regarding the lack of access to their loved ones that you have imposed
- Valuing integration with Health so much, that *their* budget driven difficulties in commissioning, blind your Supervisory Body to the idea that 10 months is not a short time to be inappropriately cared for, whilst being deprived of your liberty (the recent *Surrey* case)
- Ignoring the wishes and feelings of the client who actively **prefers** the life they have, even though they know their loved one's behaviour towards them is not nice
- Marginalising a suspected neglecter or abuser, without having it out with them: they are an MCA best interests consultee **unless you decide otherwise**, but you have to be up front about it.
- Assuming that you don't ever have to ***do*** a s135 or a Public Health Act removal, because 'hoarding is a life-style choice'…
- Ignoring **property protection** duties for those in care homes or hospital if they can't manage to take care of their goods or pets
- Not ever **asking** the SAB to use the special information sharing power in support of front line safeguarding enquiries
- **Delegating** safeguarding formal decision making in breach of the Act, ie to Mental Health Trusts, as opposed to causing them to make enquiries subject to supervision from safeguarding HQ…..

Conclusion: your organisational culture matters for defensible decision making

- How seriously is supervision taken? Whistleblowing? Attention to workload? Training in the legal framework, for middle managers, which is translated into local practise?
- If staff question the legality of something they've been asked to do, is this regarded as helpful, or as an irritation?
- Do senior managers go to legal update training? Legal awareness is going to be an inherent part of being skilled for management – it's a strategic *tool* and not a pain or a hindrance to meeting performance targets.
- Do members expect to be able to demand a change of policy or an exception to be made at the drop of a hat? That sort of culture feeds a perception of 'he who shouts loudest…', and saps morale.
- A well **governanced** council keeps its staff happier and more engaged....

Some scenarios to challenge your thinking!

- A council spends £14 an hour on care.
- An eligible person wants £16 per hour, by way of a direct payment - not for a *luxury* service but for the exact same service spec that the council would provide through contract - because the local *market* finds it rational to charge individuals more than it charges the council, because the council, of course, buys in bulk and pays quickly and accept a standardised service – which not all individuals actually *do*.
- **What would you expect the LA panel to say? What would an advocate say?**
- **My view, based on legal literacy, is that if the person meets all the other conditions for a direct payment then the council should – to be lawful – offer to pay what it will likely cost the person taking the direct payment to buy that same service that would be cheaper for the council to buy. See over for reasons.**

Reasons for the conclusion

- **The personal budget must be sufficient to meet the needs assessed as needs in the assessment. The needs relate to the concept of inability to achieve, across specific domains, as defined in the regulations. Meeting the need really only requires the reduction of the impact on the inability to something that no longer causes significant impact to the person's wellbeing – it does not mean making the person's life subjectively ideal.**
- **The personal budget must be the cost to the council of meeting the need – the statute says so.**
- **A direct payment is a deployment route for the money, but one which might logically cost more than the cost of care to the council. But the council gains by having one less person to contract for, and monitor the provider's performance.**
- **A direct payment is a right based on meeting 4 conditions – the statute says so.**
- **One of those conditions however, is that the council thinks it's appropriate to meet the needs by the method of a direct payment. Appropriate is a woolly word!**
- **Assuming the person meets all the other conditions, saying no to a direct payment of more than the cost to the council amounts to saying that cost is a relevant consideration with regard to the question of appropriateness. That is specifically provided for in the NHS health budgets system – there's a value for money criterion – but there is none in the social care system. That matters, in legal terms, for interpretation. So my guess is that a council can**
- **a) say yes to a direct payment to promote control over a person's day to day life, and pay the <u>sufficient</u> amount, even though it costs more**
- **b) say you can have a direct payment but only for needs, not wants, and that in this case, having a direct payment is *itself* a want, and not a right – which will be challengeable in the courts**
- **Or c) say that there is an implicit right to say no to a direct payment when it would cost more that way than through a council contract, which is also a controversial position**

Next one…

- A person with epilepsy wants to go to live in Sutton in a specialist provider's flats on HB – he wants his council to continue to pay for him, and the flats count as 'specified accommodation'. The rent will be covered under the benefits rules appertaining to 'excepted' accommodation.
- Trouble is, the **care** package charge is £2300 a week. There is no cheaper competitor *there*, but there is one here.
- **Must the council accept liability for the person's understandable desire to move to somewhere else? Are we all free to go and live wherever we fancy, regardless of the cost?**
- **My view is that we are *not*, and that disabled people are no better off, in terms of a want. But I do not mean that the council could not be made to pay for the care, if it was the only appropriate care in the area in question, to meet the need. Reasons overleaf.**

Reasons, for anyone who needs them…

- The specified accommodation rules mean that one council is liable for a service user in another area. The person is free to make their own arrangements in tenanted settings that qualify as specified accommodation, if they are able to. That must mean that the going rate in the destination area is the rate that the 'sponsoring' original council must pay.
- However, no person has the right to choose the non residential provider of their choice. They can choose the tenancy, and the admission to or tenure of supported living CANNOT be tied to having care from a particular provider.
- This means that a person who goes to another area to take up accommodation as a tenant takes the risk that the council will find another provider, not the one associated most closely with the premises, and contract with them, instead. This will make clients unwilling to just 'go' and thus put extra pressure on specialist providers to drop their fees to keep the premises full of people who need their care.
- No council can refuse to pay the amount NEEDED, so very often there will be a debate about whether the provider is providing what is wanted, or what is actually needed. The council is the decision maker on that point, but needs to be able to point to competitors to be able to evidence the position that the preferred provider is over providing, or that there is a viable adequate alternative IN THAT AREA.
- A person might offer to pay a top up if they accept that what is on offer is more of a want than a need; a person might contend that no other provider could do an adequate job.
- But fundamentally, the specified accommodation policy MUST mean that the going rate in the area of choice is the rate, that must be paid for the personal budget.
- Many housing associations won't be able to just give the tenancies to people who want them: they would be tied to nomination rights.
- For some people, therefore, upping sticks and must moving, and using the continuity provisions and not the deemed continuing ordinary residence rules, might be the better strategy – ie presenting oneself to the destination authority, and saying that "I am coming, AND please note, withOUT a care plan acknowledging my need to be supported in specified accommodation: please deal with me on that basis!"

Next one:

- A carer who is well informed about carers' rights is on a package that costs £375 a week – it covers respite. The service user's other needs cost £450 a week to meet. The cost of a residential care service is £650 a week.
- **Your local council's policy is that it will not fund more than the cost of residential care.**
- **What will the advocate say?**
- **My view is that a council can have a policy to meet need in a cost effective way, as long as it doesn't allow cost to be the only driver or determinant of care planners' professional discretion as to what is an appropriate way to meet need. Reasons and more on the next slide**

Reasoning for anyone who needs them

- Having a cost cap, for instance, would mean undermining the care planner's view about managing impact to wellbeing, or even a best interests decision about an appropriate service setting. It would also be an over-rigid fetter of discretion, a quick way to getting JR'd.
- In this scenario, I think that paying £825 a week to keep supporting a person in their own home when a care home would cost £650 is not a great idea in times of financial difficulties. I am not saying that the person can be offered £650 as a take it or leave it offer. I am saying that there needs to be conscientious weighing up of the pros and cons of making a different offer to the service user – and a working very hard with the carer to think about other ways of lightening their burden or reducing the impact of the caring role for them, without taking on any more care work that has to be funded. The carer does not have a right to care, and also be supported by the State, regardless of the cost, any more than the service user could demand to be cared for in their own home, regardless of the cost.
- Equally there are some people who literally could not appropriately be cared for in any setting other than the person's own home and for those people it could well be inhumane as well as *cost-ineffective* to refuse to pay for the carer's respite.

Last one:

- The council's asserted *usual* rate or guide price for care home care, is £450 a week, but only 20% of care homes in the area take that rate – the rest ask for top-ups.
- The providers are also lobbying for an increase in the standard rate, and threatening to bring judicial review proceedings.
- The mood is very grim, whoever you speak to….
- **What are the implications for the client, do you think?**
- **My view is that the council's legal obligation is to provide a personal budget that meets needs, whilst giving the person who needs a care home, certain rights regarding choice of a care home – and this extends to anywhere in the country, even if that's just a want, and not a need, to go there – according to the guidance and the policy promises before the Act became law.**
- More on the next page.

More thinking for anyone who wants to use it

- **Under the old law, that right of Choice was based on the usual rate, above which a top up would be charged for aspects that would be seen as wants and not needs, like a view, or a nice carpet, etc.**
- **The cheapest available home was not the logical test of the *usual* rate. The council could not rationally set an arbitrary rate: it had to be a rational one based on the evidence. If homes were willing to take less than it costs, then so be it – that would be their choice, but if they don't – or haven't been properly consulted, the rates have not been set lawfully, and the apparent top ups would not be proper top ups.**
- **Under the old law if only 20% of the homes in the area were willing to sign up to the so-called usual rate, 80% of them would be saying 'This doesn't make it viable in terms of our business interests to be in contract with the council', and the council MUST be able to provide enough care home care for those who are eligible, and need that form of a service.**
- **The new law merely requires that the personal budget be *sufficient* to meet the needs, but the guidance suggests that the council MUST be able to show the person one suitable home that has a vacancy at the asserted rate for the PB – amounts over that being able to constitute a top up. The guidance says that councils SHOULD be able to point to more, but that one is a legal minimum. I doubt that that is correct.**
- **What is clear is that if a council officer knows that the top up rate is running high, the asserted rate is probably not sufficient, and that amounts to knowingly cost shunting the cost to the topper upper, outside the legal framework.**

Thank you for reading this!

- We have done 500 days of training through a team of 20 trainers, in the first half of 2015.
- The courses suite, the rates, the public procurement arrangements and our quality assurance policy and rationale are all able to be found on the Training and Webinars page of www.careandhealthlaw.com
- We never give an opinion about what the law means without having a reason to go with it.
- **We believe that Legally Literate Leadership is an idea whose time has finally come, within adults' social care…**

Belinda Schwehr, Care and Health Law

You can contact me on belinda@careandhealthlaw.com, or 07974 399361