Care and Health Law

The Care Act and managing legal risk

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

- **Haringey**, as we know, got judicially reviewed for failing to discharge advocacy functions, and it was established that assessments without delivery upon a triggered advocacy entitlement, are simply ***invalid***.
- **Tameside** publicly announces that it prefers to disagree with what the Ombudsman says has been **unfair and improper running of top-ups**.
- **Medway and Bedford and Southampton** all consult over a policy of 'assisting' people into residential care when home care is not cheaper than a care home, whilst the provider sector asserts that the care home rate is not sufficient to avoid a top-ups 'bridge' in a large number of merely standard care homes in the first place.
- **Kent** is criticised by the LGO for taking the view that direct payments for a disabled child cannot be spent on 'childcare' to cover times when a parent is working (and applied that policy to a request in respect of a 16 year old!)
- **West Berkshire IS SUCCESSFULLY REVIEWED IN COURT for failing to consider spending any of its reserves to avoid cuts to disabled children's respite.**
- Councils' legal teams are 'prioritising' their backlog of cases for a welfare order in the Court of Protection, on the footing that the person affected can always issue proceedings if *they* don't. The courts, however, are BEGGING councils to make the applications and will then stay them. That's not expensive!!
- **Norfolk** gets complained about to the CQC, about breaching the Care Act. SCIE is paid to audit the legality of its Care Act implementation. The author of the report makes anonymous recommendations, spanning the whole customer journey, but calls it 'an opportunity', instead of an indictment.

Would just a *little* legal literacy help, maybe?

- If all we need is **competence** in practice, maybe the Advertising Standards Code would be a good starting point:

Legal, Decent Honest and Truth*ful*…

- 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 is 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 'only as much as is required to lessen the impact of inability to achieve, to something that's no longer '**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.
- 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 IN PUBLIC LAW TERMS…**.

The SCIE reviewer's summary of the concerns in Norfolk

The most concerning findings, or feedback received, can be listed:

- Some evidence of risk **of 'screening out',** before any attempt at assessment has been made, just based on what is said to be wanted (p.28);
- Evidence of a rigid **imposed framework for assessment process instead of a person-centred one** - in relation to locality, timing, and involvement of others (p.23);
- Inadequate **process** to support implementation of independent **advocacy** obligations (p. 20);
- Reports of weeks or even **months on a waiting list, after initial triage**, in some cases, for an assessment; (p.16)
- No recording of advice being given regarding reduction and prevention or information (p.29);
- **No information in advance** for service users regarding the assessment questions (p.13)
- Response times between telephone calls, elements of the individual pathway (assessment and PBQ) or referral and assessment very long; and individuals sometimes have to chase assessors (p.17);
- Absence of systemisation of proper discharge of obligations in cases of *fluctuating* need (p.23);
- **Absence of prompts as to the nine areas of well-being in the statute** (p.21);
- **A statement of eligibility conditions that is only partially correct and not fully accurate in the assessment form and fact-sheet** (p.21);
- Possible taking into account of the carer's input as relevant to eligibility as opposed merely to meeting needs (p.26);
- Assessment process that doesn't clearly identify clear *personal* outcomes or individuals' priorities around the wellbeing areas (p.23);
- **Absence of written reasons** for determinations of eligibility (p.24);
- Evidence of serious mis-statement of the law on and scope of carers' Direct Payments (p.31);
- Some elements from the core individual pathway sometimes **missing** (p.17);
- The space on the budget questionnaire for an answer to the question 'if you and your care assessor have not been able to agree on the answer for a question, please tell us about it here….' is generally not completed (p.31);
- Many of the cases reviewed, including carers' assessments, **lacking an initial review** following the implementation of the Plan (p.25);
- Providers reporting that about half the assessors do not always involve them in a service user's review (p.25);
- Carers reporting being told they are only entitled to one assessment per year and that the review does not generally happen unless they ask (p.25);
- A significant difference in practice between initiatives and policies in the localities that goes beyond tailoring the service to the needs of the local community, with an impact on the quality of practice (p.14);
- Based on quality assurance staff reviewing about 100 assessments every quarter…it is clearly acknowledged from this… that the quality of the recording and the level of detail need to improve (p.18);
- Health staff's level of knowledge of the Care Act, and its duties and principles, is not always sufficient to ensure aligned interventions with social care, and creates false expectations in local people regarding 'inaccurate' information on social care duties (p.15).
- NCC's relationship with providers, charities and user-led organisations is in need of development (p.15).
- Staff perception that too much valuable time is spent inputting on Care First and that senior management approval is needed for too many decisions (p.16).

Some of the most worrying findings, of particular relevance to this presentation from the SCIE review of Norfolk's approach:

- Delivery of bald **statements** (i.e. 'we have to make cuts', 'I have some bad news, and we need to reduce the budget'), rather than explaining and discussing the situation and exploring potential alternatives (p.19);
- Staff inability and unpreparedness for **difficult conversations** about why cuts were being made and why they were thought defensible (p.18);
- **Non-compliant** care plans (in terms of s25 requirements) (p.29);
- Most people contributing to the review feel that the financial implications associated with personal budgets have become seen as **a barrier that gets in the way of meaningful conversations and meaningful lives** (p.10);
- Many stakeholders sense a need to make complaints, in order to be heard (p.15).
- **"Lack of time and budget reductions appear from case files and discussions to have compromised practice on some occasions"** (p.18);

The reviewer's comments about the Care Act training that had been organised

The review revealed that:

- "Training in the Care Act, 'Having Difficult Conversations', and 'Promoting Wellbeing' has been delivered - and a network of 'champions' have been identified to support staff in embedding the Care Act".

But the review continues:

- **"Many members of staff feel anxious about having difficult conversations with individuals, about meeting needs amid budget cuts…Time** pressures and the need to take up what was said to be three new cases each week, on top of what is perceived as an already big caseload, do not help maintaining or improving social care practice."

And this:

- "Many managers report that staff need greater skills to 'present to panel'. They stated that workers **need to have the 'ability to reflect on the story, not just to repeat it'.** Individuals report that council staff don't seem to have awareness of what their situation is like, that the level of knowledge and expertise of things like continuing health care; children, health and education plans; different types of disabilities and impact of these on behaviours and quality of life, etc. is not good enough. This is particularly the case, it was reported, **with competency-based staff, who themselves also were finding the pressures especially challenging."**

There was no reference to the **quality or the content** of this training in the SCIE review, and the findings would suggest that inadequacy, there, was the source of many of the problems.

So what should this mean - for sector leaders?

- The training of social work staff **in what their statutory role IS**, and how it is governed by law and legal principle, must surely be the most pressing issue for L&D staff and senior management, if we are really nationally wedded to the idea that only a few workers need to be *qualified*, as long as they are 'competent'.
- It is all very well to recommend that the council builds on current arrangements "by introducing a supervision and performance management framework based on a more specific mentoring and coaching approach".
- But the SCIE review itself avoids the elephant in the room related to training, to my mind. It is this: instilling a proper knowledge base (basic legal literacy) into senior management to frontline staff and even into the consciousness of elected Members, **is not being funded or prioritised, much, post Care Act.**
- I think it's because it is perceived **only** to make management of Care Act duties and discretions harder – because it is feared that more staff would then understand, and assertively raise, in supervision or client/carer conversations, the difference between unpalatable but lawfully defensible conduct, and clearly *indefensible* conduct, even if judicial review precedents remain thin on the ground.

What's the danger here, for social work?

- This is plain daft, and short termism. **Knowing what you can and cannot do, and what you must and must NOT do, and what you might be able to do if you worded it in a particular way, is a STRONG STRATEGIC SKILL,** exemplified in good, clean principled management.
- Being disdainful - or worse, *fearful* of legal literacy, creates a downward spiral of professionalism.
- In the original Equal Lives Complaint (of which there is no mention in the SCIE review!) a member of Norfolk's own staff (anonymously) had said this:
  - "The responsibility for shortcomings … does rest at least in part with senior managers who should be strongly resisting such drastic cuts and making it publicly, honestly and transparently clear to, and via, our politicians that we are no longer able to do the job we are asked to do without proper funding/investment."
- It is worth remembering that under s6(6) of the Local Authority Social Services Act 1970, there is STILL – not repealed by the Care Act - a mandatory *duty* on councils to furnish the Director with sufficient staff. **That is a democratic mandate for justifying protection of social services budgets, so that the social work safety net is sustainable – but apparently of NO POLITICAL INTEREST TO ANYONE, THESE DAYS. Hence the concern about *sleepwalking*.**
  - Section 6(6): A local authority which have appointed, or concurred in the appointment of, a director of social services, **shall secure the provision of adequate staff for assisting him in the exercise of his functions**.

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 its duties at all, or taking unfeasibly long about it - eg**
  - Not providing formal funded independent **advocacy** - where it is acknowledged to be necessary and an entitlement within the regulations;
  - Not providing reasons or ***written* reasons** when the law or the regulations say that these must be given (ie as in s13 or when saying no to a direct payment);
  - Stretching the assessment phase out, by offering *prevention* again and again, without coming off the fence about the eligibility question
  - Never **finalising** a care plan, for want of agreement about the size or content of a care plan - just offering 'reconsideration', again and again, and never actually saying 'this is our decision – we think we've done our job…'.
- **Not exercising *powers,* or making decisions, turning on professional judgement, without a very good reason – ie not *sensibly*, or by ignoring the guidance,!**
  - Eg: running a lawful waiting list for a scarce resource – but based on alphabetical order instead of need;
  - Not giving reasons for why an offered package or budget is considered to be enough…when the guidance clearly says that reasons should be stated, and the pre-existing case law such as *Savva* and *KM* makes it ***unarguably*** *unlawful* not to;
  - Leaving an eligible person **without services** whilst their package is argued about!

- **Not discharging council duties within the words used in the Act or Regulations – or ignoring the statutory purpose - eg**
  - Failing to allow a person to **require the involvement of a nominated person**, such as their existing advocate, in a social services decision, where this is required by the Act
  - Imposing a condition on a direct payment recipient as allowed, but the content of the condition **actually negates the whole point of the offer** – choice/control
- **Fettering the discretion of the council or its staff, or not doing decision-making fairly, so far as the implicit rules of procedural fairness are concerned...**
  - Failing even to consider exercising the ***power*** to provide services to those who are ineligible – remember, it might be best value or good for prevention, or simply to promote well-being.
  - Failing to consider giving a person direct payments to spend on a **close** relative in the same household, by having a rule internally that says 'we *never* do that…';
  - Not allowing a person to make **representations or provide evidence**, about what they say is wrong with the suggestion that a service available for free, locally, could be seen, appropriately, to 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**! There needs to be!!
- 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 culture spreads to the relationship with customers, in the end.

Complaints vs Judicial review

- The Complaints Process has never really been ***apt*** for dealing with matters of legality or policy or process, because no Local Authority could really be expected to admit that something that it has consciously adopted, decided or done, is actually not lawful, or reasonable or fair.
- For that reason, it is still possible (in England) to argue that a complaint is not an adequate or appropriate remedy for matters of alleged actual illegality – and that is an essential pre-requisite, in relation to getting permission to apply for judicial review – **you can be knocked back at the permission stage, which is mandatory, if you haven't used an alternative adequate remedy which you *could* have used. I'm fine with that - access to court costs this country *money*, after all…**
- Local Authorities will still receive challenges under Judicial Review if no alternative remedy is available. However, *that* form of legal process is not apt for cases where detailed **fact finding** would be needed before anyone could say whether what had happened or been decided was actually legally 'wrong' – the Court of Protection can do that sort of a probe, in the context of best interests, but not the Administrative Court – it has what's called **a supervisory jurisdiction only, not an original or appellate jurisdiction**. So sometimes, using both systems, and the complaints system first, is necessary, to get to the bottom of what has actually happened, or been considered, behind closed doors.

The Monitoring Officer's independent governance function

– clients, providers and advocates are going to learn about this much more effective way of complaining, in a council near yours, very soon!

- Anyone who is dissatisfied with a social services 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.
- The complaint process takes ages, and the complaints person cannot tell the council to change its policies or practices, only how the staff failed to live up to those, if the complaint was justified. **You can't go to the ombudsman until you've at least tried to complain.**
- **And the complaint system can't be made to give you an injunction to continue a disputed budget or plan, pending resolution of the complaint.**
- There is no appeal, only internal review, up through 2 or 3 more layers of probably ground-down staff… and then only if you know to ask for that to happen. This isn't even statutory, but it is referred to in the Guidance, if disputes arise or agreement is not reached.
- However, there is also the **council's monitoring officer** as an addressee of a special kind of complaint and **this route is never mentioned anywhere in local government advice and information services or central government information.** That's a bit of a shame, since it's free, and can save a lot of aggravation for everyone (everyone except the poor Monitoring Officer, that is).

What does the Monitoring Officer have to do?

s5(2) of the Local Government and Housing Act 1989 ….says this: 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 (that means a *statute*, like the Care Act, or *Regulations* like the Assessment Regulations) or rule of law (that's a principle in the wider COMMON law applicable to public bodies)

… **to prepare a report to the authority with respect to that proposal, decision or omission…. and to arrange for a copy of it to be sent to each member of the authority.**

All such actions and proposals are automatically suspended during the time when the report is being considered by the members.

This is a personal, **non-delegable** duty, for the named MO/their Deputy, although s/he can take advice from specialist lawyers if the matter is not clear to them, using their own expertise. The MO is protected from dismissal other than through special steps, thus guaranteeing independence.

It is a high level form of governance and management of legal risk, designed to minimise the need for legal proceedings. The council is obliged to furnish the MO with the resources to do the job, so if s/he needs a barrister's opinion, they have to pay for that. **Independent advocates' reports should be sent to this person as well as to the council, in my view.**

The elected members – when they get such a report - must consider an MO's report within 21 days. That would be the Cabinet Lead for Adult Social Care, and the response would reassure the Monitoring Officer that the relevant issue had been sorted out.

What do head lawyers do **in practice**, when they receive a referral?

- Lots of head lawyers just write back and say 'I don't agree that a report is triggered by what's happened', without giving any reasons, about the alleged facts, the department's explanation, or even summarising the legal advice that they may have sought from an expert, before responding.
- **That might be maladministrative or even a breach of statutory duty in its own right, on the individual part of the Monitoring Oficer.**
- However, even if not, the LGO has recently criticised **Kent** for not willingly engaging with a very careful complaint to the council, where the mother had produced coherent arguments, and lots of law, ie effectively even doing the work for the legal department:
  - 67. The Council did not deal properly with Mrs B's complaints.
  - At each stage of the complaints process **the Council simply referred Mrs B back to its policy**. That is despite the fact Mrs B provided details of Government guidance, legislation and a Welsh Ombudsman report which supported her view that the Council should consider her need to work when carrying out its assessments.
  - The Council should have responded to the various points Mrs B put to it.
  - **Failure to do that is *fault*.**

Some explain - very rationally – the ASC approach, ignoring that there is clear law and guidance making it unlawful!

This is an example from a necessarily nameless authority in dispute over funding with a parent carer who wishes *not* to care, for **just 6 hours a day** but who still accommodates her adult daughter with challenging behaviour whilst bringing up other children with her partner: **the council has offered to use the courts to remove the daughter instead, using court process, without explaining how the offered budget WILL MEET ASSESSED NEEDS!**

It is appropriate to base assessments and provision on current circumstances and is not appropriate to base provision on statements by carers as to what they may or may not do in future in terms of increasing or decreasing their support for an individual. Statements of that nature cannot be used to proactively pressure the local authority into providing supports over and above the supports that have been determined based upon the most recent assessment of current circumstances. If circumstances change, and in particular if private care previously provided is suddenly withdrawn entirely, whether by choice or some other external factor such as ill-health, then the appropriate course of action is to reassess needs. Such reassessment may or may not result in increased provision of support within the family home but may instead lead to some other care arrangement being proposed.

Examples of 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… about advocacy, the mode of assessment, whether a service is a response to an assessment or offered by way of prevention, dealing with apparent refusals to be assessed….
- 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 – access to a TEAM can be managed this way **but not access to an assessment itself.** So you need a mop-up team doing assessments for people who don't quite fit a team's specialist expertise – like 'high functioning' ASD clients.
- Getting any of the mode, level, skill factor or timing decisions, wrong, for a proper assessment *beyond* your 'front door'.
- Turning people away at this point, without identifying whether you are

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

  B) saying that they have just actually had one from you (without their realising it or having had an advocate?) and that they're not eligible – (also tricky!) or

  C) just saying 'Try this first, and let us know whether it works....' (*can* be ok but not prudent, without, at least, 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 to your area, here, yet...

Examples of Advocacy Accidents!

- Not having enough, so as to delay assessment or other stages. Er, it's a **duty**.
- Failing to *spot* that someone would experience **substantial difficulty,** at the right point – there are at least 4 common ones – assessment, planning, revisions and safeguarding.
- Forgetting to get the **consent** of the person to the informal support from their informal involving person, which would save the council having to put in an advocate….
- Finding *willing* involvers to be **inappropriate** for obviously daft and challengeable reasons
- Finding ***un***willing involvers to be appropriate, regardless, and thus failing to appoint;
- Forgetting that alongside advocacy, a capacitated person has a right to require a council to involve a person of their own choosing, (at their own expense) 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...(nb are your council's advocates actually **CARE ACT AWARE**? You need them to be, to help your own staff stay on the right side of the law, surely?!!)
- Not applying the consent conditions properly in relation to sharing the same advocate
- **Simply failing to tell your staff how to *access* one of these very special creatures!**

Examples of Prevention Pitfalls!

- Signposting, without finding out if there are actually any vacancies or services still functioning out there, when encouraging someone to give it a go.
- Assuming that people can buy their own: simply no good if the services are not **affordable** to ordinary people – sending them out to ***those*** is a perverse disincentive to taking personal responsibility if it would be cheaper to have the services put in a care package, and subsidised through the charging system!!
- 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 suitable preventive or universally available services which were available at the time, in my view.
- 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 councils can't charge for any **duty-based** equipment provided ***by themselves***, in **any** circumstances.

Examples of 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 focusing on 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….they are still unable.
- 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 willing and able human help.
- Appearing not to be taking any account of desired outcomes or the person's own view of the impact arising from the difficulty – doing a *Norfolk*….
- Insisting that significant impact needs to be counted in 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 – how does one show engagement, without this? It is SO simple to do the right and defensible thing!!

Care Planning and Budget Bungles - and RAS Wrangles!

- Waiting for informal carers to collapse before providing respite to the service user.
- Cutting 20% from the available budget for the whole RAS and assuming that packages that are now magically 20% less for everyone will somehow still be lawful!!
- Ignoring s25 on what a care or support plan must ***have in it***.
- Ignoring Choice of Accommodation legal requirements or misinterpreting them – re a 'keep people in borough' policy for instance – the rate elsewhere is your starting point now, not your in-borough rate – see Annex A on Choice.
- Not even monitoring whether a plan is working, and thus spotting safeguarding issues in a timely manner.
- Signing off care plans with *obviously* 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 payment mode just because it would cost more, done that way, than if the council were doing the buying in bulk. Juicy test case material!
- Not commissioning for ***reasonable, objective sufficiency*** and holding customers to that inadequate discharge of responsibility by saying 'we have no more money'.
- No reasons being given for why a given offer of anything is professionally realistically and conceivably believed to be enough to deserve 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.

Examples of 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 any good reason Eg the council doesn't *like* their nominee but won't say why.
- 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, to a direct payment, or to enough of one, based on likely cost to IT.
- 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 grasping that the False & Misleading Information offence can now be used to ask unregulated PAs, probing safeguarding questions….
- 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 from anyone, 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 own name
- Paying net, when there is a really good reason to pay gross, and charge separately.

Examples of Carer Conundrums!

- Refusing to even 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 the meeting of assessed eligible need, somehow, defensibly, if they don't want to, any longer
- Applying the wrong criteria to them – the regulations have two sets – different ones, with a different definition of 'unable to achieve'….
- Thinking that they can still *just* be signposted to carers' preventative 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, especially for **replacement care**, which is never, never allowed to be charged to a carer.

Examples of Ordinary residence Ordeals!

- Not distinguishing between s117 people and everyone else – it is a bit different and there's not been a determination as yet, so we don't know if the guidance on s117 changes is even correct!
- 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 on that 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 me that Shared Lives clients *do* move as licensees or tenants, in most cases, now, and will qualify under *that* rule, but **not** the Shared Lives rule which is over extremely narrow application to people whose care *and* accommodation have been contracted for by the council or the Shared Lives service.
- Not understanding the role of incapacity, or solutions to it, for those wanting to move as tenants (deputyship can give rise to a private arrangement, even if it's the *council* taking deputyship)
- Putting it in the care plan before the cost of the separate 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 or time frames; not knowing what evidence *matters*
- Mixing up the **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*….

Examples of Choice Crises and Top-up Terrors!

- Thinking that public procurement obligations 'trump' choice rights, even now.
- 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, first, to the ones that are considered *suitable* by the authority, as the decision maker, in light of the individual's needs and the care planning process!
- 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 – doing a *Tameside.*
- 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 for standard care plus the so-called wants, 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...
- Cost Capping the cost of homecare to the equivalent cost of residential care, and *delivering* insufficient funding to meet the *known* needs in the own home setting, based on 'choice', when the person has no other way to meet their own needs.

Examples of Reviews Risk-Running

- Not getting everyone onto a properly arrived at Care Act care plan in one year – **ie by April 2016 and hoping that there's no need to use the new criteria.**
- Ignoring the regs and guidance as to the longest anyone should go without review – the 'expectation' is **annually** – and it's the rule for those on Direct Payments.
- 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!! They are not competent care planners!
- Ignoring providers' evidence in *their* reviews, and not organising your own or **formally adopting theirs as yours – you've got to 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 still be such as to '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).

Examples of 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 open.
- Assuming that you don't ever have to ***do*** a s135 or a Public Health Act removal, because of a culture that says '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 s45 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…..and never arguing with a **hospital** about the difference between complaints, performance, quality issues, serious incidents … and abuse or neglect…

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 practice?

- 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. **I am now doing it by webinars, that build up monthly, interactively - and ensure that you get to keep the recording even if you are too busy to attend the live event.**

- Do the 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 an even arguably more *luxurious* 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 or making them able to achieve all that they could NOT.***
- **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 one less person whose provider's performance must be monitored….**
- **A direct payment is a right, but one 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! So what does appropriate MEAN then?**
- **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 is best off avoiding a legal risk and saying yes to a direct payment to promote control over a person's day to day life, and paying the sufficient amount, even though it costs a little more…**
- **The alternative - saying 'yes, 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, so you can have one but only at the amount it would cost us' – which will be challengeable in the courts for the same reason as above….and because control over how one's care is delivered is explicitly part of wellbeing!!**
- **It is up to councils, and the fact that there are no judicial reviews about this, can only mean councils are taking some sensible legal advice, to my mind…**

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 in the person's current home area.
- Must the council accept the burden of the liability for the person's understandable desire to move to somewhere else?
- Are we all absolutely entitled to go and live wherever we fancy, regardless of the cost?
- My view is that we may be free to, if we're paying for whatever we need when we get there, but that we are not really ABLE to exercise that choice if we need something to be paid for out of public money. Disabled people are no *better* off, in terms of a want to move elsewhere – none of us moves to somewhere where it's too expensive or difficult to commute from, do we?
- **But I do not mean by that, 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 – continuing ordinary residence – not choice of accommodation, makes this a distinct possibility. Reasons overleaf.**
- **It's one very good reason why ADASS and the LGA really need all councils to be good at fostering competition and good diversity of provision!!**

Reasons, for anyone who needs them…

- The specified accommodation rules mean that one council can remain liable for the SERVICES a service user who chooses to move to 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 expect to have to pay.
- Many housing associations won't be able to just give the tenancies to people who want them: they would be tied to nomination rights. This is strategically condoned by government and the CQC even though it might well make them into registrable care homes.
- The person moving to private accommodation can't be stopped from taking up a tenancy if there are no nomination rights to use to block this. **How annoying for councils!! How irritating of the private sector to move into this field!!**
- However, no person has the legal right to choose the non residential provider of their choice. They can choose the *tenancy*, but the admission to or tenure of supported living CANNOT be tied to having care from a particular provider without a registration offence occurring…. See *Alternative Futures* for more info on de facto tying of the two elements together….
- 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. Any other provider will want a good price to take on that aggravation, given how we've organised specialist supported living.
- This sort of impasse about price will probably make clients unwilling to just 'go' and will thus put extra pressure on specialist providers to drop their fees in order to keep the premises full of people who need their care. Quite clever of the legislature!

- 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 merely *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, and will still need a viable adequate alternative IN THAT AREA – or to fight a judicial review.
- A person might well offer to pay a top up if they accept that what is on offer from the preferred provider *is* more of a want than a need; a person might equally contend that no other provider could feasibly do an adequate job – they know very little about the person's condition..
- But fundamentally, the specified accommodation and continuing ordinary residence policy for people moving as tenants, not merely as placement clients, MUST mean that the going rate for the necessary care, in the area of choice is the rate, that must be paid, as a lawful personal budget. This will cause disputes and delay.
- For some people, therefore, upping sticks and just 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: so please deal with me on that basis – I don't want continuing O/R with my old council!"
- **This sort of mess could only happen in a place as surreal as the English adults social care sector, in my view. Do not even ask what the situation is if CHC is up for debate, or even harder, a split package!!**

Next one:

- A carer who is well informed about carers' rights is on a package of support that costs £75 a week – the service user's other 'own' needs cost £450 a week to meet. (ie £525 when added together). The cost of a residential care service would be £550 a week.
- **The service user is deteriorating.**
- **Your local council's policy is that it will not fund more than the gross cost of residential care, at home, and it's counting the carer support as well.**
- **What will the client, family or advocate say?**
- My view is that a council *can have a* policy *to AIM 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. *Need* to be at home is a different thing from a preference to remain at home with one's relatives or other carers.
- If it wants this to be *understood*, so that it influences most carers to go on caring, without further funding, then it has to start to take people's 'No' to a care home, for a final answer, and walk away, but only after some very unpalatable conversations with everyone involved – including the Members and the legal department: not a role for the junior end of the profession! Reasons and more on the next slide….

Reasoning for anyone who needs it

- Having a cost **cap**, for instance, rigidly applied, 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, pure and simple - a quick way to getting JR'd.
- In this scenario, I think that paying £525 a week to keep supporting a person in their own home when a care home would cost £550 is obviously good, all round.
- If the cost of meeting needs *increases*, and care in a care home would not be inappropriate, in professional terms, then a council is entitled to consider if that's sustainable in times of financial difficulties. It must weigh up human rights, wellbeing, best interests consultation input, etc,
- I am not saying that the person could then be offered £550 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 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 to be sustained – if the council wants to send a positive but firm message to carers.
- Carers do 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 (unless it was agreed to be an aspect of their specific NEED).
- If the professional view is defensibly that a person could not appropriately be cared for in any setting ***other*** than the person's own home with people they trust, for those people it would well illegal, inhumane as well as *cost-ineffective* to *refuse* to pay for the carer's direct support or respite.
- If a council ultimately *chooses* to support a person to stay at home, I do not think it is legal to cost cap the inputs that will be paid for to the cost of meeting need in another setting, even if it's because the person would *prefer* to stay at home. There's no scope for bargaining one's way out of a statutory duty.
- If the person has no way of meeting the shortfall, I'd be loathe to tell a council it could actually cap the budget it delivered into that setting, and the council can't force a direct payment on an unwilling person.
- If my elected Members **forbad** us to walk away from the person, for PR concerns, or if I had insufficient capacity in my local care home sector anyway, to accommodate people within it, I'd be even more worried.

My last one for today:

- 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 all ask for top-ups – not big ones, but across the relevant client group sector.
- The providers are also lobbying for an increase in the standard rate, and threatening to bring judicial review proceedings.
- The mood is very grim, to whomsoever you care to speak.
- **What are the implications for the eligible service user, do you think? And for the council, the commissioners, the care planners?**
- **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, their full legal rights regarding choice of a care home – where the threshold of an adequate rate for standard care, is crucially a matter of a defensible evidence basis - and that 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 of Accommodation 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 wouldn't – or haven't been properly consulted, the rates have not been set lawfully, and the apparent top-up shortfalls would not ever have been 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 actually quite *correct,* in terms of guidance.
- What *is* clear is that if a council officer knows that the top-up rates are 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, even if they start off willing to pay.
- **Why is that not seen as institutional abuse, involving assessors, interim budget setters, care planners, commissioners, senior management and Members, ultimately, who agree a rate to be paid, without being clear what it means for what will be left out of the original proposed plan?**

Thank you for reading this!

- My business delivered 500 days of training of this nature, 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.
- **I'm now doing monthly Wednesday webinars for anyone who wants to know more about the legal framework:** see www.SchwehrOnCARE.co.uk/webinars and /calendar

- **We believe that Legally Literate Leadership is an idea whose time has finally come, within adults' social care…**

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

Belinda's offerings

- www.careandhealthlaw.com – my serious website
- www.SchwehrOnCARE.co.uk – my blog and gateway to online purchase of my new 2hr x 1 or 2 a month **webinar series**
- Belinda@careandhealthlaw.com – I do offer consultancy but I do charge after the first half an hour. Get the facts nailed down first before contacting me. I live in Surrey if you need to visit.
- Tel no. 07974 399361
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- **My next offering is going to be 1 hour webinars for junior staff on smaller tighter topics regarding the Care Act – January 2017**