



THE CARE ACT 2014

Legal update to Community Care Live

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Overview

1. What were the key changes brought about by the Care Act?
2. Have they been implemented?
3. How have the courts interpreted the Act?

Overview

There is lots of commentary that implementation of the Act was (and is?) slow. See for example the comments of Judge Wildblood QC in the context of the need for a carers assessment in summer of 2015 (Re C (A Child)):

“There appears to be a profound lack of knowledge of the responsibilities that arise under the Care Act. I have mentioned that lack of understanding . . . in at least one newsletter that I have issued as the Designated Family Judge. Knowledge of that Act has to improve.”

Budget Cuts

- ADASS survey showed councils expected to make an 8% cut in adult social care budget in first year of the Care Act
- ADASS estimate a £4.6bn reduction in Council budgets in England since 2011
- Survey in July 2016 (again from ADASS) of social care directors found that only 36% expected to be able to comply with all of their statutory duties for the forthcoming year, with only 8% feeling confident for the year after that

What were the key changes brought about by the Care Act?

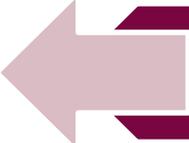
1. The 'general responsibilities' of local authorities
– s1-5 of the Act
2. National eligibility criteria
3. Carers' rights
4. Transition to adult services
5. Advocacy

Flaws with the old system

- Outdated – does not reflect the developing consensus that care should be “person centred”
- Numerous laws and regulations – unclear
- Local authorities can adopt different eligibility criteria – postcode lottery
- Carers struggling to access support
- Problems with coordinating care across different public bodies and authorities

The Care Act 2014

- New Act accompanied by new regulations and statutory guidance – completely replaces existing system
- Most came into force in April 2015. Much of the underlying process in accessing care and support remains the same, however there are some key new duties and rules which apply.



Section 1 - Wellbeing principle



Section 2 – preventing needs for care and support



Section 3 - Integration of care and support with health services



Section 4 – Information and advice



Section 5 – Diversity and quality of services

The wellbeing principle

- **Section 1** - The general duty of an LA is to promote the individual's 'wellbeing'.
- Applies when making any decisions under the Care Act.
- Consider:
 - Personal dignity (including treatment of the individual with respect)
 - Physical and mental health and emotional well-being
 - Protection from abuse and neglect
 - Control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);
 - Participation in work, education, training or recreation
 - Social and economic well-being
 - Domestic, family, and personal relationships;
 - Suitability of living accommodation;
 - The individual's contribution to society



- Luke Davey –v- Oxfordshire County Council – 39 year old man, quadriplegic, CP, very high care needs. 24 hour care package reduced by 40%. Judicial review proceedings issued and permission granted that OCC is in breach of several duties under the Care Act including the duty to promote the client’s wellbeing – risk to his psychological wellbeing when he is alone, the need to access the community, that not taken into account his own wishes and feelings, the risk if his personal assistants change. Interim relief granted and final hearing listed for later this year
- Can the principle be used to access better support? For example, if there are two different ways of meeting the needs, one is more expensive but would fit in better with the person’s wellbeing – can someone rely on the wellbeing principle here to get better support? Case law will develop this, but it may depend on the extent of the costs difference . . .

Preventing needs for care and support

- **Section 2** – LA must provide services or take steps which it considers will contribute towards preventing, delaying or reducing needs for care and support in its area.
- Applies to everybody – not just those with eligible needs. This can include:
 - Providing universal access to good quality information;
 - Supporting safer neighbourhoods
 - Promoting healthy and active lifestyles
 - Reducing loneliness or isolation
 - Providing support at an early stage to stop needs developing or becoming worse
 - Early intervention, such as fall prevention clinics, adaptations to housing, handyman services, and short term provision of wheelchairs or telecare services.
 - Services that maximise the independence for those already with complex needs, such as rehabilitation services, aids and equipment, adaptations
 - Provision of services to support carers, such as peer support groups or stress management classes.



- **Section 3** - Local authorities will be under a duty to ensure the integration of care and support services with health provision and health-related provision, where it considers that this would:
 - Promote the wellbeing of adults in its area;
 - Contribute to the prevention or delay in the development of needs for adults in its area; or
 - Improve the quality of care and support for adults that is offered.
- This places local authorities under a duty to liaise and coordinate services with the local CCGs and NHS bodies, to ensure a comprehensive programme of support can be provided.



- **Section 4** - LAs must establish and maintain an information and advice service relating to care and support for adults and carers.
- Applies to all adults (not just those with eligible needs)
- Must provide specific information on such things as:
 - How care and support is provided in the local authority's area;
 - The choice of support that is available and how it can be accessed;
 - How to raise concerns about the safety or wellbeing of an adult who has needs for care and support.
- Stat guidance suggests that advice should also include information on such matters as available housing and housing-related support, effective treatment and support for health conditions, the availability of befriending services, and the availability of aids and adaptations etc.

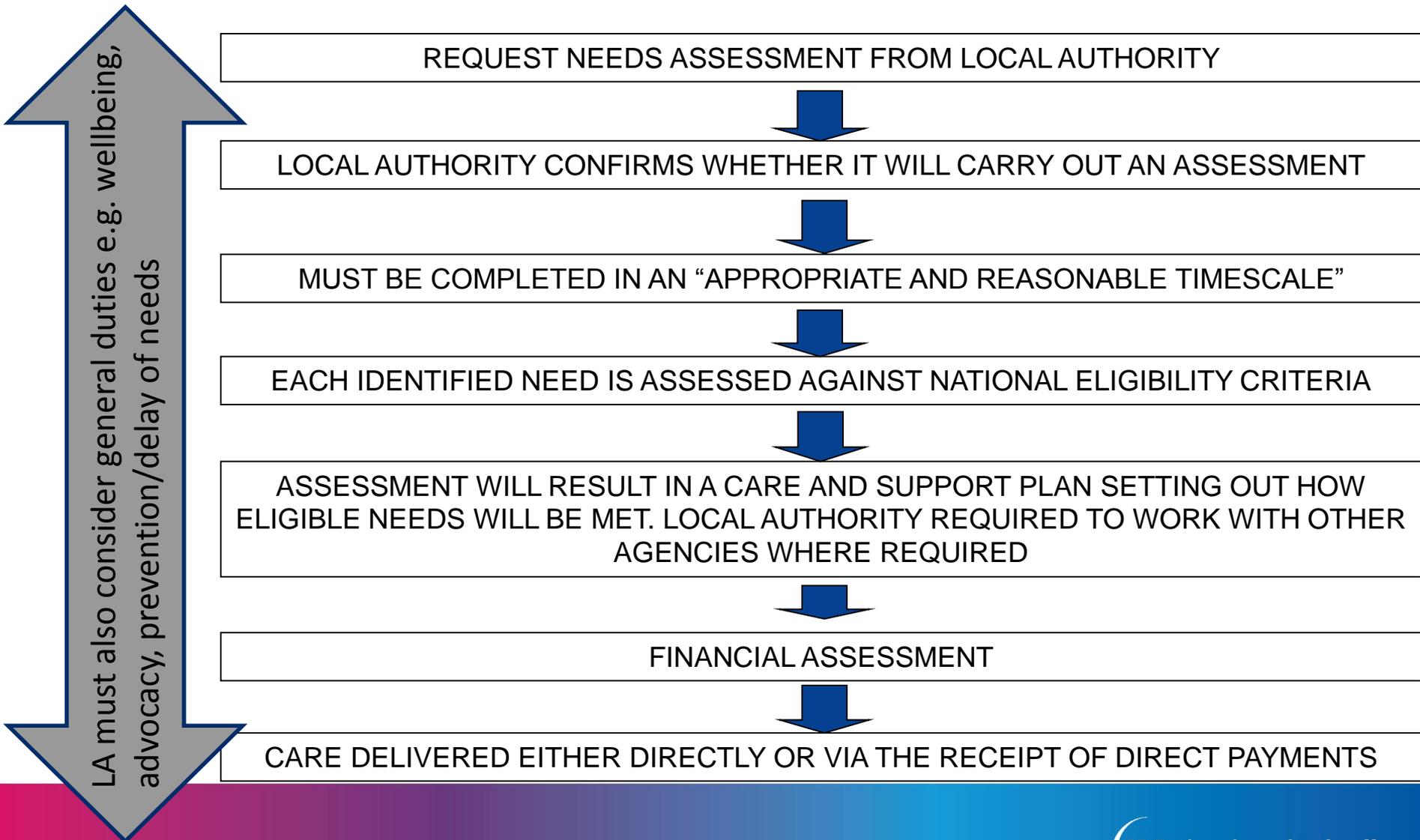


- Section 5
- A local authority must promote the efficient and effective operation of a market in care services, and should ensure that:
 - People have a variety of providers to choose from;
 - People have a variety high quality services to choose from; and
 - People have sufficient information to make an informed decision about how to meet the needs in question.



NEEDS ASSESSMENTS, SUPPORT PLANS, ELIGIBILITY

Process for obtaining support



- **Care and Support (Eligibility Criteria) Regulations 2014**

- ✓ The needs must arise from or be related to a physical or mental impairment or illness; and
- ✓ As a result of the needs, the adult must be unable to achieve two or more of the specified outcomes; and
- ✓ As a consequence of the above there is, or is likely to be, a significant impact on the adult's well-being.

- **Specified outcomes:**

- Managing and maintaining nutrition;
- Maintaining personal hygiene;
- Managing toilet needs;
- Being appropriately clothed;
- Being able to make use of the adult's home safely;
- Maintaining a habitable home environment;
- Developing and maintaining family or other personal relationships;
- Accessing and engaging in work, training, education or volunteering;
- Making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and
- Carrying out any caring responsibilities the adult has for a child.

- **Notes:**

- No definition of what “significant” impact on wellbeing is
- “Unable” to achieve two or more of the specified outcomes doesn’t really mean unable:
 - Unable to achieve it without assistance
 - Is able to achieve it without assistance but doing so causes the adult significant pain, distress or anxiety
 - Is able to achieve it without assistance but doing so endangers or is likely to endanger the health of the adult and others
 - Is able to achieve it without assistance but doing so takes significantly longer than it would otherwise take

- **Incidentally:**

R (GS) v London Borough of Camden [2016] EWHC 1762
and *R (SG) v Haringey LBC and SSHD [2015] EWHC 2579*

both held that accommodation is **not** a 'need for care and support' under s18 of the Care Act

CARERS' RIGHTS

- Carers have the same rights in law to those they care for
- Applies mostly to adult carers caring for other adults although new duties to carry out carers assessments on transition to adult services
- New duty to assess carers on appearance of need – **s.10**
- Carers assessments must consider (**section 10(4)**):
 - The carer's needs and the impact of the caring role
 - Things that a carer wants to achieve in their own day to day life
 - Whether the carer is willing and able to carry on caring
 - Whether they work or want to work, whether they want to study or do more socially
- Where agreed, a combined assessment can be undertaken

- Just like for disabled adults, then consider eligibility:
 - Their needs arise as a consequence of providing necessary care for an adult;
 - The effect of the carer's needs is that any of the following circumstances apply:
 - The carer's physical or mental health is, or is at risk of, deteriorating;
 - The carer is unable to achieve any of the specified outcomes:
 - As a consequence of the above there is, or is likely to be, a significant impact on the carer's wellbeing.

Specified outcomes:

- Carrying out caring responsibilities the carer has for a child;
- Providing care to other persons for whom the carer provides care'
- Maintaining a habitable home environment in the carer's home (whether or not this is also the home of the adult needing care)
- Managing and maintaining nutrition
- Developing and maintaining family or other personal relationships;
- Engaging in work, training, education or volunteering;
- Making use of necessary facilities or services in the local community, including recreational facilities or services; and
- Engaging in recreational facilities.

- Lots of criticisms that these aspirations are not taking place in reality: Survey of more than 6,000 carers carried out by Carers UK revealed
 - 29% had waited at least 6 months to be assessed.
 - Only 36% felt the assessment properly considered the support they needed for their own physical and mental health
 - Only 33% felt that they got all the information they needed as part of the assessment (21% saying they got little or no helpful information)

TRANSITION

- **Important guidance about what to do when somebody approaches age of 18. . .**

1. Child's needs assessment – section 58

- Where it appears likely that a child will have needs for care and support after reaching age of 18
- And where it would be of significant benefit to the child
- And where there is consent (or where child is not competent or lacks capacity, if in their best interests)
- Then the local authority must carry out a child's needs assessment

- **Purpose of the assessment:**
 - Whether the child has needs for care and support, and what those needs are; and
 - Whether the child is likely to have needs for care and support after meeting the age of 18, and if so what those needs are.
- **Must include:**
 - Details of how the child's needs may impact upon wellbeing as defined in section 1
 - Outcomes that the child wants to achieve
 - Whether, and to what extent, the provision of care and support might contribute to those outcomes

Transition provisions

- Section 59(4) – having carried out a child’s needs assessment, LA must give:
 - An indication as to which of the child’s needs are likely to meet the eligibility criteria after the age of 18; and
 - Advice and information about what can be done now in order to meet or reduce the needs now; and what can be done to delay or prevent further or more extensive needs developing.
- Once the child turns 18, the LA has the power to consider the assessment as being a ‘needs assessment’ under the Care Act.
- Alternatively – section 66 confirms that any assessment carried out under s.17 of the Children Act or EHC Plan should continue to remain in force until needs assessment and support plan have been determined

Transition provisions

2. Child's carers needs assessment:

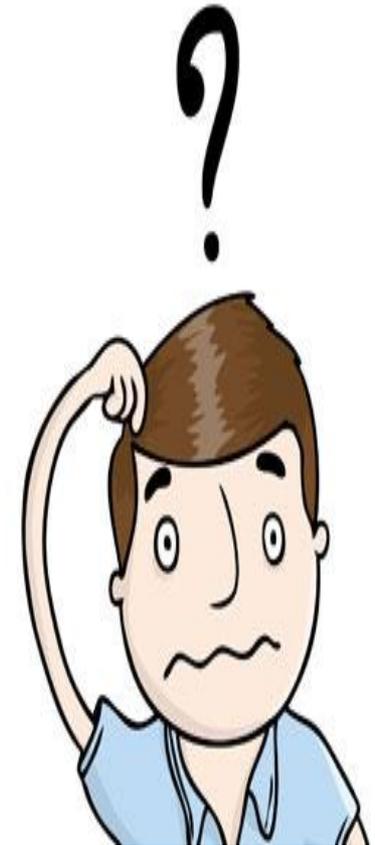
- Similar provisions apply for a child's carer, before the child has reached the age of 18.
- Under section 60, assessment should be carried out where of significant benefit to the carer and it is likely that the child they are caring for will have needs for care and support after 18
- Need to consider willingness of carer to provide care beyond 18, the wellbeing principle, whether carer wants to participate in work or education.
- LA has the power to meet the child's carers needs under s.62.

3. Young carers needs assessment:

- E.g. child caring for an adult – assessment carried out where of significant benefit and it is likely that they will have needs for care and support after reaching age of 18

Advocacy

- Under **section 67 of the Care Act**, local authorities will be under a duty to provide an independent advocate where an adult may have “substantial difficulty” in doing one of the following:
 - Understanding relevant information;
 - Retaining that information;
 - Using or weighing up that information;
 - Communicating their views, wishes or feelings.



Advocacy

- Duty to provide an advocate does not apply where there is an appropriate person to represent the individual, e.g a family member, and where the person consents.
- Two important exceptions to this rule where an advocate **must** be appointed:
 - The assessment or care plan is likely to result in an NHS body making arrangements for the provision to that individual of accommodation in a hospital for 28 days or more, or a care home for 8 weeks or more, and where the local authority is satisfied that it is in the person's best interests to have an advocate appointed.
 - There is a disagreement on a material issue between the individual supporting the disabled adult/carer and the local authority, and where it is agreed that providing an advocate would be in the best interests of the disabled adult/carer.

Role of the advocate

- Support the individual during assessment process, review process, financial assessment process. Help to ascertain views and wishes.
- Help the individual to understand an LA's decisions and challenge them if they want to do so
- Where necessary – make representations to the LA – e.g. written report, which must be responded to by the LA in writing
- If disputes cannot be resolved they are under a duty to challenge the LA – legal proceedings?
 - **Regulation 5(a)** – must “assist the individual in challenging the local authority’s decisions if the individual so wishes”

Role of the advocate

R (SG) v Haringey LBC and SSHD [2015] EWHC 2579 –

- SG had severe mental health problems, memory loss, severe post traumatic distress order, required assistance with most areas of daily living. Haringey accepted that she did not have an advocate, but that the failure to appoint her one did not render her care assessment and care plan unlawful as she would not have been prejudiced as a result. Unsurprisingly the court had little sympathy for that argument, or that “demand currently outstrips supply”.
- Assessment declared unlawful and Haringey was ordered to redo the claimant’s care assessment after an advocate had been appointed to assist her with the process.

So what has happened since April
2015?

Update since April 2015

- Proposed financial cap on cost of care due to come into force in April 2016 has been put on hold.
- Measurable changes include:
 - LAs have updated their care assessment and carers' assessment templates to include new elements such as wellbeing and the new eligibility criteria
 - All LAs should have contracts with advocacy organisations to provide specific Care Act advocacy services
 - All LAs should have information and advice available on their websites regarding adult social care and services in the local area.

However....

Lots of elements of the Care Act implementation are harder to monitor. E.g.:

- To what extent are new care assessments and care plans actually now “holistic” and “person centred”? Budgetary pressures remain.
- How much emphasis is being placed on wellbeing, and the duty to prevent, reduce or delay needs from developing or becoming worse? Hard to measure compliance.
- How many LAs are complying with the duty to promote a marketplace in care services?
- What impact are budget cuts having on LAs’ ability to implement the Care Act?

2 examples of possible areas for challenge/litigation

- **Marketplace** – how many councils are actually promoting and supporting a marketplace? What is the impact/legality of mass or block contracts for social services provision in the local area? How much of a choice should there be for services such as daycentres, supported living, specialist care providers (e.g. head injury or autism specialists)?
- **Eligibility criteria** – some evidence to suggest that some councils are applying it very rigidly and are refusing to commission services that are not explicitly written into the eligibility criteria.

ANY QUESTIONS?

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