

COMMUNITY CARE

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Care Act 2014

This is the first of a series of newsletters updating readers on the changes brought about by the Care Act 2014. This first article looks at the origins of the Act and the general duties that councils will act under from April 2015.

The need for the Care Act 2014

It has long been recognised that the law relating to adult social care is complex and widely misunderstood. In part its difficulty arises because it has developed piecemeal since the passing of the National Assistance Act 1948.

The National Assistance Act was itself a radical reform. It abolished the "poor law" which itself had become increasingly obsolete due to the passage of legislation intended to improve support for vulnerable adults. Over the last 55 years, society's expectations of the standard of care have changed further. Key innovations were the Chronically Sick and Disabled Persons Act 1970 which provided to disabled people for the first time an enforceable right to social care provision. Subsequent Acts emphasised the importance of care in the community rather than in institutions, made improved specific provision for those suffering from mental illness and the frail elderly and provided for support to be given to carers. The care system has also been channelled by a plethora of secondary legislation, guidance, and court case law.

In May 2011 the Law Commission published its report "Adult Social Care." Recognising the deficits of the present system, the stated overall aim of the project was to provide a "clearer, modern and more cohesive framework for adult social care."

The government mostly accepted the Law Commission recommendations and The Care Act is the result. For the most part, the Act consolidates, clarifies and integrates existing law and good practice. There are also some significant innovations.

These developments in care law recognise the point expressed in the preamble to the UN Convention on the Rights of Persons with Disabilities (CRPD) "that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others."



The Well Being Duty

The Care Act begins by placing a new duty upon local authorities when exercising their functions under the Act to promote the individual's well being relating to:

- 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

These considerations are presently expressed in guidance only. The duty enacts a modern view of people in need of care and support in line with current human rights standards under the Human Rights Act and the CRPD with a strong emphasis on promoting participation in family and social roles and against discrimination on arbitrary grounds. Thus the general principles of the CRPD as they relate to adults are:

- a. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons
- b. Non-discrimination
- c. Full and effective participation and inclusion in society
- d. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- e. Equality of opportunity
- f. Accessibility

g. Equality between men and women

Reflecting this, when exercising their care functions under the Act councils are now required to have regard to the importance of:

- beginning with the assumption that the individual is best-placed to judge their own well-being
- the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate

The old fashioned and much criticised approach whereby the care professional knows best is no longer legally sustainable.

Recognising that mental health issues and dementia are key areas requiring support, the well being duty now incorporates very similar provisions to the Mental Capacity Act 2005 such that when making care decisions the council must have regard to:

- the individual's views, wishes, feelings and beliefs
- the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised
- the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being)

The Care Act thus represents a statutory codification of a wider change in attitudes towards persons with disabilities that has developed over a long period. It is clear from this approach that councils will not be meeting their statutory duty in commissioning residential services which do not do enough to engage residents generally and in particular those suffering from dementia. The well being principles and those established by the MCA 2005 are the modern requirements for engaging with people lacking capacity and will have to be properly incorporated into everyday practice not just as a matter of good practice but also of commercial survival.



Preventing needs for care and support and integration with health

The Act sets out a duty upon the council to provide or arrange for the provision of services, facilities or resources, or take other steps, which it considers will contribute towards reducing, preventing or delaying the development by adults or carers in its area of needs for care and support.

There is a further duty for the council to provide care and support with a view to ensuring the integration of care and support provision with health and health-related provision where this would promote well-being, contribute to the prevention or delay of the development of needs for care and support or improve the quality of care and support.

In the residential care sector, services that provide good respite, intermediate and rehabilitation care may benefit from this new statutory emphasis.

It is worth bearing in mind that the 2009 Department of Health guidance on intermediate care "Halfway Home" states that:

"All older people at risk of entering care homes, either residential or nursing, should be given the opportunity to benefit from rehabilitation and recuperation and for their needs to be assessed in a setting other than an acute hospital ward. They should not be transferred directly to long-term residential care from an acute hospital ward unless there are exceptional circumstances."

Residential services that help the council to meet both its preventative duty and comply with this stipulation should receive an enthusiastic welcome from commissioners.

Providing information and advice

Section 4 provides that councils must establish an information and advice service relating to care and support for adults and carers. It is not a requirement that the council itself runs this service.

The service must provide information and advice on:

- how the system operates in the authority's area and how to access care and support
- the choice of types of care and support, and the choice of providers, available
- how to access independent financial advice on matters relevant to the meeting of needs for care and support
- how to raise concerns about the safety or well-being of an adult who has needs for care and support.

The draft guidance on this duty states that the council must ensure that the information and advice services cover more than just basic information about care and support. The service should also address the prevention of care and support needs, finances, health, housing, employment, what to do in cases of abuse or neglect of an adult and other areas where required.

This is a service to the general public as well as to those in need of care and support and is expected to play an important role in delivering the preventative duty under section 2.

The guidance makes it clear that the service must be made available both to residents with care needs who are self funding as well as those financially supported by the council.

The requirement that this service must be able to direct to appropriate

independent financial advice seems most likely to be relevant to self funders. An expectation of care funding reform was that a greater market for care fees funding products would develop. There is little current evidence that the finance industry sees an opportunity.

Having regard to the Equality Act 2010, the service must recognise and make reasonable adjustments for the different information delivery methods its vulnerable client group will require

The draft guidance states that:

"The duty in the Care Act will not be met through the use of digital channels alone, and information and advice channels are likely to include all of the following:

- face-to-face contact
- use of peer-to-peer contacts
- telephone
- mass communications, and targeted use of leaflets, posters etc. (e.g. in GP surgeries)
- use of 'free' media such as newspaper, local radio stations, social media
- local authority's own and other appropriate internet websites, including support for the self-assessment of needs
- third party internet content and applications
- e-mail"

It seems unlikely that such a service could be effective without the close involvement of providers in both planning and delivery.



Conclusion

The force of the Care Act general duties is to take what was previously a fragmented approach to good practice found in various sources with varying legal status, and to give them statutory force in one coherent Act.

They are on the one hand familiar but in Wrigleys view it would be an error not to recognise that they also represent a culture change which

will in time affect both customer expectations and commissioning practice.

It is inevitable that the current funding environment will affect the way that these duties are developed in the short to medium term. Council success in delivering upon these duties will depend substantially on successful engagement with providers.

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