

COMMUNITY CARE

NEWSLETTER | Edition 5 - February 2015

Care Act 2014 Meeting needs for care

This is the second newsletter focussing on the Care Act covering:

- The manner in which needs are to be assessed
- The application of the new statutory eligibility criteria to those needs and the new duty on local authorities to meet eligible needs
- Highlights some significant differences with current practice.

No separate duty to provide care home accommodation

It is a well kept secret of the current social care legislation that the test of eligibility for council support for a person to be provided with care home accommodation is often significantly lower than for that requiring care at home.

In accordance with Section 21 National Assistance Act 1948 the Department of Health has required councils to provide:

“residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them.”

Following a series of legal cases, the test of whether the statutory duty of a council to provide care and accommodation is engaged is simply that the person needs looking after and it is not reasonably practicable and efficacious to look after them without the provision of accommodation. Notwithstanding that the Prioritising Need guidance to councils published by the Department of Health, which can permit councils to meet only critical needs, claims to apply to all social care needs, it was held in the case of *R(Almeida) v Royal Borough Kensington & Chelsea* [2012] EWHC 1082 (Admin) at paragraph 68 that it did not apply to residential care.

Under the Care Act, all of this will change. The Act brings the provision of residential and at home care within the same legal framework. Henceforth, care home accommodation will be just one amongst many different possible ways of meeting eligible needs. The new Care and Support Statutory Guidance states at paragraph 1.10: “The concept of meeting needs also recognises that modern care and support can be provided in any number of ways, with new models emerging all the time, rather than the previous legislation which focuses primarily on traditional models of residential and domiciliary care.”

So section 8 of the Act states that the following are examples of what may be provided to meet needs:

- a. accommodation in a care home or in premises of some other type;
- b. care and support at home or in the community;
- c. counselling and other types of social work;
- d. goods and facilities;
- e. information, advice and advocacy.

There will be no separate statutory duty to provide residential care and as we shall see, eligibility now appears more restrictive than was previously the case.





Assessments

The needs assessment will remain the critical event in determining whether a local authority will fund residential care.

Section 9 provides that where it appears to a local authority that an adult may have needs for care and support, the authority must assess whether the adult does have needs for care and support, and what if any those needs are.

As now, the duty to carry out a needs assessment applies regardless of the authority's view of the level of the adult's needs for care and support, or the level of the adult's financial resources. This duty is likely to continue to run up against councils' attempts to manage public demand on their assessment service.

An assessment must identify the outcomes that the adult wishes to achieve in day-to-day life, and whether, and if so to what extent, the provision of care and support could contribute to their achievement (section 9(4)).

Under the Act, an assessment must include an assessment of the impact of the adult's needs for care and support on the determinants of well being set out in section 1 of the Act, referred to in the last edition of this newsletter.

More lateral and creative thinking

In this way, the council must identify what are currently referred to as "presenting needs" even if the individual has no needs that are currently eligible for care and support. This is an important aspect of the Act which attempts to identify needs on a more holistic basis than the traditional service gatekeeping approach.

Assessors must now think beyond the question of what care and support services the person may require. Councils are now under a duty (section 2) to prevent or delay the development of needs for care and support and must develop a range of services that will do so.

This will also apply in care homes. So referring to "tertiary prevention", paragraph 2.9 of the Statutory Guidance states that:

"These are interventions aimed at minimising the effect of disability or deterioration for people with established health conditions, complex care and support needs or caring responsibilities, including supporting people to regain skills and reduce need where possible. Local authorities must provide or arrange services, resources or facilities that maximise independence for those already with such needs..."

As dementia is one of the most significant causes of need and a Department of Health priority, it will be interesting to see what creativity can be released in this area. Care home managers may have their own proposals on avoiding mental health deterioration which no doubt councils will be interested to hear.



Involving others

The local authority must involve in the assessment, the adult, any carer and any other person the adult asks the authority to involve. If the adult lacks capacity to identify people to be involved, the council must involve any person who appears to them to be interested in the adult's welfare (section 9(5)). This goes significantly further than the previous Community Care (Assessment) Directions 2004, which set out a requirement to involve carers only.

Training of needs assessors and the requirement to bring in other expertise



There is no requirement that assessments must be done by a qualified social worker. But under regulation 5(1) Care and Support (Assessment) Regulations 2014 a council assessor must have the "skills, knowledge and competence" to carry out the assessment and also must be "appropriately trained." It follows that assessors must pass 4 tests of suitability and the practical effect should be that newly trained assessors must shadow experienced staff until they have developed sufficient competence.

Also under regulation 5 a local authority carrying out an assessment must consult a person who has expertise in relation to the condition or other circumstances of the adult in any case where it considers that the needs of the individual concerned require it to do so.

This is really a clause to guard against assessors cutting corners by making judgements they are not properly qualified to make. Care home staff may well be the people with expertise in many

issues affecting the resident. The regulations provide that this consultation may take place before, or during, the carrying out of the assessment.

Regulation 6 provides that any assessment of a person who is deafblind must be carried out by a person who has specific training and expertise relating to such individuals. Note that again, training alone is not enough, expertise is also required.

The regulations provide that an individual is "deafblind" if he or she has "combined sight and hearing impairment which causes difficulties with communication, access to information and mobility." The threshold word "difficulties" is unqualified by any other word such as "significant" or "substantial" and is therefore likely to cover a wider group of residents than might otherwise be described as deafblind.

Eligibility

Eligibility for care under the current regime is determined in accordance with the Prioritising Need guidance. This requires that the local authority label particular assessed needs as low, moderate, substantial or critical. The council then determines as a matter of policy, which levels of need it will meet. Over 80% of councils currently set policies funding only substantial and critical needs.

Section 13 of the Care Act provides that where a local authority is satisfied on the basis of an assessment that an adult has needs for care and support or that a carer has needs for support, it must determine

whether any of the needs meet the eligibility criteria.

Under the Care Act, councils lose discretion over setting the minimum care offer. Instead this minimum standard is set out in the Care and Support (Eligibility Criteria) Regulations 2014.

The stated intention of the Department of Health was to set a minimum standard which correlated to the "substantial" level of need, presumably so as not to make any impact on council budget setting. Local authorities expressed concern at the draft eligibility criteria. The final regulations are now significantly more restrictive than the original draft.



These now provide that an adult's needs meet the eligibility criteria if (our emphasis):

- a. the adult's needs arise from or are related to a **physical or mental impairment or illness**;
 - b. as a result of the adult's needs the adult is unable to achieve **two or more** of the outcomes specified in paragraph (2); and
 - c. as a consequence there is, or is likely to be, a **significant impact** on the adult's well-being.
2. The specified outcomes are:
- a. managing and maintaining nutrition;
 - b. maintaining personal hygiene;
 - c. managing toilet needs;
 - d. being appropriately clothed;
 - e. being able to make use of the adult's home safely;
 - f. maintaining a habitable home environment;
 - g. developing and maintaining family or other personal relationships;
 - h. accessing and engaging in work, training, education or volunteering;
 - i. making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and
 - j. carrying out any caring responsibilities the adult has for a children

The regulations provide a definition of "unable" which is inclusive.

The requirement for needs to be related to a "physical or mental impairment or illness" is more restrictive than the current duty under section 21 National Assistance Act (see above). In particular, by removing the reference to persons requiring care and attention by reason of "age", the new threshold appears to exclude the frail elderly.

The new threshold clearly derives from the current threshold test for people with disabilities under section 29 National Assistance Act. But it has long been recognised that not all elderly people with care needs are necessarily disabled. In truth an elderly person may simply need "care and attention" because they are very old. If there is no-one to provide that in the community then they currently qualify for council support in a care home. No longer. They must prove disability. But to what standard? Is decline associated with old age, of itself a physical impairment? The author can foresee a judicial review case on the question of whether

"physical impairment" in an elderly person is to be assessed compared to other people of the same age or that of an averagely fit adult. Similarly will an elderly adult who is somewhat confused but with no formal diagnosis of dementia qualify as having a mental impairment or illness?

The requirement for the adult to be unable to achieve two or more outcomes which impact on their well-being seems to the author to be irrational and likely solely an attempt to restrict demand. To take our slightly confused lady without a dementia diagnosis, what if her only issue is being able to live safely in her home, because she forgets the pots on the stove and lets in strangers. No matter how significant this risk is under the criterion in (c), she may not meet the disability threshold criteria in (a) and certainly not the multiples of failed outcomes required by (b) and would not be supported either in her home or, if she wanted it, in residential accommodation. In the author's view it is questionable whether this restrictive secondary legislation is compatible with the overriding duty to support well being in section 1 of the Act.

The duty to meet eligible needs

Section 18 of the Act provides that if the needs assessment has identified that the adult has eligible needs, the authority must meet those needs if the adult is ordinarily resident in their area.

They must also meet the adult's needs if the person has no settled residence but is present in their area.

Under the current legislation, it is generally thought, though never decisively settled, that if an adult can arrange their own residential care and pay for it, it is "otherwise available" and therefore the council has no duty to them.

Under the Care Act this will no longer be the case. The council must arrange the adult's accommodation (or other care service) for them if

they request it, even if their resources exceed the means testing limits.

If the adult's resources make them a self funder but the adult lacks capacity to arrange their care and support, the council must arrange it if "there is no person authorised to do so under the Mental Capacity Act 2005 or otherwise in a position to do so on the adult's behalf" - (S18(4)(b)). This is a departure from the current guidance which has the additional requirement that such a person must be "willing and able" to do so. It creates a lacuna where a representative is unwilling to sign a care contract which may be for good financial reasons and the care home could find themselves in a position where both the representative and the council state that the contract is the other's responsibility.



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