# THE CARE ACT 2014: OVERVIEW

## Background

1. The Care Act adopts and implements many of the recommendations of the Law Commission on Adult Social Care[1] (published 11 May 2011). It is the largest single piece of community care legislation since the great Beveridge reforms of 1948, sweeping away and re-codifying more than 50 years worth of law and policy.

2. Notwithstanding all of this, the Care Act does not fundamentally alter the substantive law, save for a few notable exceptions, which are discussed in more detail below. Under the old law a local authority was required, boiled down to essentials, to carry out an assessment of those appearing to it to be in need of care and support; determine the provision that is necessary to meet those needs; and then make that provision. That basic structure is retained in the Care Act.

3. Rather, the Act's principal aim is to bring together many of the existing provisions in the current law, which were until recently diffused across a complicated patchwork of statutes, regulations, and statutory guidance. Even within this limited brief, the Government has not taken up one of the Law Commission's key recommendations, which was for there to be a single act, accompanied by a full Code of Practice. The Care Act in fact leaves much of the detail to be worked out in regulations and/or guidance. It is likely that practitioners will still have to look at a variety of sources in order to apprehend the full scope of community care law.

## Key provisions and the structure of the Act

4. Sections 1-7 create a set of guiding principles for the provision of adult social care, by imposing a series of general duties on local authorities:

    - **Section 1** creates a general duty on local authorities exercising community care functions to promote the well-being of the individual;

[1] Available at http://lawcommission.justice.gov.uk/publications/1460.htm

- **Section 2** imposes a duty on local authorities to provide, or arrange for the provision of, services which will prevent, delay and reduce the need for support of adults and carers in its area;

- **Section 3** requires local authorities to exercise their community care functions with a view to integrating the provision of care and support with the provision of health, and health-related, services;

- **Section 4** obliges local authorities to produce certain information and advice in relation to adult social care;

- **Section 5** requires local authorities to promote a market in services;

- **Sections 6 and 7** impose a duty on local authorities, NHS bodies, the police, probation officers and other prescribed public bodies to co-operate with each other in the exercise of their functions.

5. This collection of sections reflect the current practice of draftsmen of opening social-care type legislation with guiding principles: see, for example, the opening sections of the Children Act 1989 or the Mental Capacity Act 2005. No doubt lawyers (on both sides of a given argument) will seize upon this set of sections in support of their arguments; whether they will have any bearing on the outcome of individual cases is less certain.

6. **Section 8** sets out an illustrative list of the types of services that could meet eligible assessed needs: accommodation in a care home or premises of some other type; care and support at home or in the community; counselling and other types of social work; goods and facilities; and information, advice, and advocacy. It is far more general than the equivalent list in s.2 of the Chronically Sick and Disabled Persons Act 1970.

7. **Sections 9 to 12** are the provisions relating to assessment, replacing s.47 NHSCCA 1990. The trigger for assessments (now called "needs assessments") is "Where it appears ... that an adult may have needs". Despite slight differences in wording, this

is substantially the same as the existing s.47 NHSCCA 1990. Thus, as was previously the case, there is no need for anyone to have requested an assessment. **Section 9(3)** provides that the duty to assess applies regardless of the authority's view of (a) the level of the adult's needs for care and support, or (b) the level of the adult's financial resources. This effectively puts on a statutory footing the current position pursuant to the common law and statutory guidance. The combination of these points, and their codification into statute, means that there will continue to be a very low threshold for assessments.

8. The Act is highly prescriptive as to the content of assessments. Whereas previously there was minimal input from primary legislation as to the content of assessments, the Care Act now sets out in **section 9(4)** a detailed list of the matters to be covered. Currently, assessments are usually divided into similar sections, and so in practice there should be relatively little change in practice here. **Section 12** empowers the Secretary of State to make regulations, which provide much greater detail as to the assessment process.

9. **Section 10** provides a detailed framework for carer's assessments, which brings them much closer to assessments for people who are themselves in need of care and support. The new duty arises where it appears that a carer may need support "currently or in the future". This expands the scope of the duty: it is no longer necessary that carers already provide or intend to provide a substantial amount of care on a regular basis. The Government estimates that there will be up to 250,000 extra carers assessments each year (ie above the current 400,000 a year).

10. **Section 11** deals specifically with the position where a person refuses an assessment or carer's assessment. In such cases the local authority will not be required to assess, subject to two exceptions: (1) where the person lacks capacity and an assessment is in their best interests; and (2) where the person is experiencing, or is at risk of, abuse or neglect. This brings useful clarity in an area that has caused considerable uncertainty in the past.

11. **Section 13** provides that there will be national eligibility criteria set by regulations. This will finally put the position established by *R v Gloucs C, ex p Barry* on a

statutory footing, and will establish national standards for local authority care support. It will also, presumably, end the current situation where some local authorities have limited themselves to only critical needs, or seek to establish new bands of "super-critical" needs to further limit social care provision. The new regulations, setting out the national eligibility criteria, appear to be intended to reflect the current practice of most authorities, ie to set the eligibility threshold at the level of critical and substantial needs.

12. Will local authorities need to consult and conduct equalities impact analyses before changing over to the new eligibility criteria? We suggest the following answers to this issue:

    a. If the local authority is proposing to decrease its provision, then it needs to comply with the PSED and to consult;
    b. If the local authority is increasing coverage as a result of the new national standards (for example because it previously provided for critical only, and not it provides for a greater range of needs), then it will need to consult. The fact that the local authority is *increasing* the scope of coverage does not remove the need to consult and comply with the public sector equality duty. People may wish to say, for example, that the local authority to go even further than it is proposing to go;
    c. By contrast, if there is no change in substance then the advent of the new criteria without more does not call for consultation. The change of the banding descriptions is a national change, and central government will have conducted its own consultation on that change.

13. **Sections 14 to 17** contain the main exception to the rule that the Care Act maintains the status quo. Their innovation is that they create a new charging regime which adopts the proposals of the 2011 "*Report of the Commission on Funding of Care and Support"* (the "*Dilnot proposals"*). The old position on charging for services was set out in guidance, with a statutory longstop provision that charges be no more than was "*reasonably practicable*" for the individual to pay, in order to insure against crippling care costs. Even so, approximately 25,000 people per year were forced to sell their homes in order to fund their social care costs.

14. The Dilnot reforms introduce a lifetime cap of £72,000 on self-funded costs, after which the local authority is required to assume responsibility in all cases. This has the worthy aim of insuring the public against catastrophic care costs. In order to calculate when the cap is reached, local authorities will keep an account of all care costs incurred by the self-funder. The self-funder need simply have their needs assessed by the local authority, and then either allow the local authority to commission their care (the cost of which they will then reimburse), or implement for themselves a care and support plan developed by the local authority (the cost of which they will pay directly). Once the cap is reached, the local authority will become responsible for the payments.

15. The reforms can be viewed in two ways. On the one hand, they have a worthy aim and have been unanimously welcomed by those in the third sector, albeit with the concern being expressed by some that the cap is too high.

16. On the other hand, they will create an enormous bureaucracy with a disproportionately small benefit. They effectively offer a free insurance policy to a few relatively wealthy self-funders. As such, more self-funders are likely to request assessments, with the government predicting there will be an additional 230,000 assessments when the cap comes into force in 2016-17. There is much room for disagreement in the accounting method: for example, a local authority might specify a rate of £12 per hour for a support worker, whilst the self-funder might claim the real cost is £15 and that his account should therefore accumulate that much quicker. Further, every time the person's needs change they will seek a reassessment so as to ensure that their clock is ticking at the appropriate rate. The administrative burden of managing the accounts is likely to be very significant, whilst only a small minority of relatively wealthy individuals are ever likely to reach the £72,000 cap.

17. A further potential problem area created by the Dilnot reforms is that self-funders will have the option of asking the local authority to commission their care. The sheer bargaining power of local authorities means that they are generally able to pay lower rates for placements in care homes than do privately paying residents; indeed it appears that the business model of many care homes is that privately

paying residents cross-subsidise the authority residents. The Dilnot reforms may mean either that self-funders are able to obtain the lower local authority rate, or that rates are driven up for everybody. Either way they are likely to distort an already fragile care homes market. The reforms also raise the interesting question of whether a self-funder placed in a care home by a local authority at the self-funder's own request is protected by human rights legislation, which applies only to the actions of public bodies acting as such.

18. **Sections 18 and 19** are the important provisions which create the powers and duties for local authorities to meet eligible, assessed needs, mirroring very closely the position under the current statutory framework. **Section 20,** for the first time, imposes a duty on (as well as creating a power for) a local authority to meet the eligible, assessed needs of carers.

19. **Section 21** excludes from the Act those who are subject to immigration control, whose needs have arisen solely because they are destitute or because of the effects of destitution. This preserves the position under the old legislative framework.

20. **Section 22** seeks to preserve the existing dividing line between a local authority's community care responsibilities and the NHS's continuing healthcare responsibilities, as examined in detail by the Court of Appeal in the leading case of *R v North and East Devon Health Authority ex parte Coughlan* [2000] 2 WLR 622.

21. **Section 23** preserves the distinction between a local authority's community care and housing functions by preventing a local authority from meeting community care needs by doing anything which it is required to do under housing legislation.

22. **Sections 24 to 28** contain the provisions relating to support planning, to be set out in documents which will now be called "care and support plans". **Section 25** describes what such plans should contain, and this includes a personal budget. **Section 26** prescribes what such budgets must contain. Under a personal budget, the local authority is required to set out the total sum of money a person is assessed as needing, and the cost of services required to meet those needs. The local authority can still commission the services, but the rationale is that service-users will demand

less if they know how much the services cost. Personal budgets have been in existence for a number of years, but the requirement to produce them in *every* case is novel. However, there are likely to be many cases in which there is no point of informing the service-user what the cost of services are: where they lack capacity, for example. The extension of this requirement to all cases is thus likely to significantly increase the administrative burden on local authorities, to little effect.

23. **Section 30** requires that where an authority decides to meet needs by arranging for the provision of accommodation, it must comply with an adult's preferences as to where he or she is accommodated, provided conditions (to be set out in as yet unpublished Regulations) are met.

24. **Sections 31 to 33** provide that where a person, or (in the case of a mentally incapacitated adult) their guardian, requests that a personal budget is paid by way of direct payment, the local authority must comply with that request provided certain conditions are met.

25. **Sections 34 to 36** allow local authorities to enter into "deferred payment agreements" pursuant to which, in essence, the local authority pays for an adult's care but is then reimbursed from out of the proceeds of that person's estate upon their death.

26. **Sections 37 to 38** make provision intended to smooth out the process of moving from one authority to another for those in receipt of adult social care. For example, the receiving authority is required to commence the assessment process before the adult moves and, if it has not completed the process by the time of the move, it must meet the needs set out in the existing assessment until such time as it has completed an assessment of its own.

27. **Sections 39 and 40** establish the rules on ordinary residence and for the resolution of disputes about ordinary residence. These essentially remain the same as in the existing legislation.

28. **Sections 42 to 47** create a range of safeguarding duties which amount to a basic safeguarding code. Local authorities will have duties to make inquiries where there are safeguarding concerns, and to set up safeguarding adult boards for the carrying out of safeguarding adult reviews in defined circumstances. Disappointingly, however, local authorities are given no new powers (for example, a right of entry to investigate a safeguarding concern) with which to carry out their duties. Instead, the rarely used power under s.47 of the 1948 Act to remove people in need of care has been repealed without being replaced. At least one commentator has suggested that the position may not comply with the UK's positive obligations to safeguard individuals under human rights legislation.[2]

29. **Sections 48** imposes a new duty on local authorities to meet the need of any adult or carer which were being met by a provider whose business has failed, for so long as it considers necessary, whether or not it was previously meeting those needs.

30. **Sections 53 to 57** create a new regime under which the Care Quality Commission will oversee the financial health of social care providers.

31. **Sections 59 to 67** supplement the leaving care duties currently found in Part III of the Children Act 1989. They make provision for the assessment and the meeting of the needs of children and of child carers as they make the difficult between children's and adult's services at the age of 18.

32. **Sections 68 to 69** impose an obligation on the local authority to appoint an independent advocate in certain circumstances where the Act requires the LA to involve an individual in the exercise of its functions; or where it is carrying out a safeguarding enquiry or review.

33. **Section 75** deals with an ambiguity in s.117 of the Mental Health Act 1983 that has caused much dispute between local authorities as to who is responsible for funding a person's aftercare services when they are discharged from detention under the

[2] Luke Clements '*Adult Social care law reform'* (2013) Elder Law Issue 3, Volume 3

Mental Health Act, essentially by bringing the provision into line with the rules on ordinary residence.

34. **Section 77** requires a local authority to act under the general guidance of the Secretary of the State in the exercise of its functions under the Act. No draft guidance has yet been published.

**Roundup of possible areas of conflict**

35. We have identified above a number of potential areas of conflict arising out of the passage into law of the Care Act. To recap, these are:

    (1) Disputes over the rate at which service-users accounts accumulate towards the £72,000 cap;
    (2) Commercial disputes relating to the rates local authorities will pay when they commission placements in residential homes for self-funders;
    (3) Inter-agency disputes between local authorities and clinical commissioning groups over the dividing line between community care and continuing health care;
    (4) High-level questions arising out of the compatibility of the safeguarding provisions of the Care Act with human rights legislation;
    (5) Similarly, questions over whether self-funding residents placed in care homes by local authorities will enjoy the protections of the Human Rights Act 1998.