

Carers Rights and the Care Act 2014

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Overview

The Care Act 2014 repeals most of the principal adult social care statutes² (as they apply in England³) – the laws that oblige social services' departments to assess and to provide services for disabled, elderly and ill adults as well as their carers.

A major problem with the 2014 Act is revealed in its long title – namely that it is an 'Act to make provision to reform the law relating to care and support for adults and the law relating to support for carers ...'. The problem being in the word 'adults': many of the 'community care' and 'carers' statutes also had provisions relating to children (ie young carers; disabled children and parent carers). As a result of a vigorous campaign by a number of disabled children's and carers' activists / organisations many of the problems concerning the rights of young carers, disabled children and parent carers have been addressed – but in large measure via the [Children and Families Act 2014](#). These changes are considered at the end of these notes under the heading '*Provisions relating to disabled children, young carers and parent carers*' (

Terminology

Adult needing care

The Act does not talk of disabled, elderly or of ill people: instead it uses the word 'adult' – but this is generally qualified as being an adult 'needing care'. The 2015 [Eligibility Regulations](#) however stipulate that this is an adult who has 'a physical or mental impairment or illness'.⁴ These terms are not defined, although the [revised Statutory Guidance](#) advises (para 6.102) that they include 'physical, mental, sensory, learning or cognitive disabilities or illnesses, substance misuse or brain injury'. It is therefore almost certain that 'adults needing care' will be given a very wide interpretation (as with the equivalent terms under the previous legislation⁵). Accordingly it covers not only those whose illness is caused by the misuse of

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² A list of the legislation it was proposed to be repealed, in whole or in part was provided as Annex E of Department of Health *The Care Act 2014 Consultation on draft regulations and guidance for implementation of Part 1 of the Act in 2015/16* June 2014 at www.gov.uk/government/uploads/system/uploads/attachment_data/file/317820/CareAct_cons_040614.pdf

³ Most of these Statutes will remain in force in Wales – until the [Social Services & Well-being \(Wales\) Act 2014](#) comes into force (expected to be in April 2016). The Act is accessible at www.legislation.gov.uk/anaw/2014/4/contents/enacted - and for a detailed briefing on this Act - see www.lukeclements.co.uk/whats-new/.

⁴ The Care and Support (Eligibility Criteria) Regulations 2015 SI 313 reg 2.

⁵ Section 29 National Assistance Act 1948 defined disabled people as people who were 'blind, deaf or dumb or who suffer from mental disorder of any description, and ... who are substantially and permanently handicapped by illness, injury, or congenital deformity' and section 17(11) Children Act 1989 contains a similar definition.

drugs or alcohol⁶ but also those with ‘any disorder or disability of the mind’.⁷ This latter category would comprise such conditions as depression, dementia, learning disability, personality disorder as well as hyperactive / attention deficit disorders, ‘high functioning’ autism and Asperger’s syndrome.

Carer

A carer is someone 18 or over⁸ who provides or intends to provide care for someone but is not contracted to provide the care or providing the care as formal ‘voluntary work’.

Underpinning ‘principles’ (section 1)

Section 1 of the Act places a duty on local authorities to promote ‘individual wellbeing’ – ie the wellbeing of adults in need and of carers.

The wellbeing obligation applies to every act of a local authority that relates to an adult in need or carer (when exercising ‘any function’ under Part 1 of the Act ie sections 1-80) – from a telephone conversation to the setting by the authority of its social care budget. It will be maladministration⁹ for a local authority to impose ‘restrictive interpretations of Care Act outcomes’ that fail to take proper account of an adult’s well-being.

The Act does not define ‘well-being’ merely stating in section 1(2) that it relates to a list of nine factors, that can be summarised in the following list:

(a) personal dignity; (b) physical / mental health / emotional well-being; (c) protection from abuse and neglect; (d) control over day-to-day life inc nature of care provided; (e) participation in work, education, training or recreation; (f) social and economic well-being; (g) domestic, family and personal relationships; (h) suitability of living accommodation; (i) the adult’s contribution to society.

When discharging any obligation under the Act, the local authority must (under section 1(3)) ‘have regard to’ eight further questions (which in many respects echo the principles in the MCA 2005 section 1 on which they have undoubtedly been based). These are summarised below—

- (a) the assumption that the ‘individual’ is best placed to judge well-being;
- (b) individual’s views, wishes and feelings;
- (c) take into account all the individual’s circumstances (and non-discriminatory in terms of stereotyping etc);
- (d) individual participating (with support if needs be) as fully as possible in decisions about them;
- (e) a balance between the individual’s well-being and that of any friends or relatives involved in their care;
- (f) the need to protect people from abuse and neglect;
- (g) any restrictions kept to the minimum necessary.

Although wellbeing is expressed as relating to such a widely range of considerations, there is a risk that it may prove to be of little practical application. There are however a few ‘principles’ that are likely to be much asserted.

1. The first is the section 1(3)(a) ‘assumption that the ‘individual’ is best placed to judge well-being’. This creates a default position (rather like the presumption of capacity in the MCA 2005) which a local authority will have to produce evidence if it wishes to

⁶ See Schedule 20 NHS Act 2006 and the relevant Directions specific to drug and alcohol misusers, continued in Department of Health Circular LAC (93) 10 para 3(3)(g).

⁷ ie, within the ambit of section 1 Mental Health Act 1983.

⁸ The Act has provisions for ‘young carers’ (ss63-64) – ie people who are under 18 – but these provisions use the term “young carers”.

⁹ Complaint 15 011 661 against London Borough of Hammersmith & Fulham 21 July 2016 para 25.

rebut. The [revised Statutory Guidance](#) indicates that this ‘principle’ should be given an expansive interpretation – for example at para 6.35, that inherent with this principle is the wider assumption that individuals must also be ‘best placed to understand the impact of their condition(s) on their outcomes and wellbeing’.

2. The second is the section 1(2)(e) identification of the importance of ‘participation in work, education, training or recreation’ which is of especial relevance for carers; and
3. The third concerns the right to ‘independent living’ (which although absent from the Act¹⁰) is expressed with force in the [revised Statutory Guidance](#), stating at para 1.19:

The wellbeing principle is intended to cover the key components of independent living, as expressed in the UN Convention on the Rights of People with Disabilities (in particular, Article 19 of the Convention). Supporting people to live as independently as possible, for as long as possible, is a guiding principle of the Care Act.

This affirmation is repeated at para 23.28 where it is asserted that:

The concept of ‘independent living’ is a core part of the wellbeing principle, and is detailed in the requirement to consider the person’s control over their day-to-day life, the suitability of their living accommodation and their contribution to society.

Services / care and support responses (section 8)

Under the pre-Care Act legal regime the object of a community care / carers assessment was to determine (among other things) whether there is a need for ‘services’. The community care statutes¹¹ provided exhaustive lists of services that could be provided and the Carers and Disabled Children Act 2000 provided a generalised statement as to what a carer’s ‘service’ might be. The Care Act repealed these statutes and (in keeping with its ‘outcomes’ rhetoric) avoids referring to the word ‘service’ when describing what may be provided to meet a person’s needs. Instead, section 8(1) contains an illustrative list of what may be ‘provided’ to an adult in need or carer – namely:

- 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, advocacy and other types of social work;
- d) goods and facilities;
- e) information and advice.

The absence of such things as ‘adaptations’ ‘travel’; and ‘holidays’ (which are specifically cited in the current law) was considered problematical by the Select Committee and in response to a question it asked the Department of Health, received confirmation that the Department considered that these services did fall within the ambit of the list.¹²

Assessment of adults in need¹³ (section 9)

The Act, the regulations and the guidance create important and welcome obligations on local authorities in relation to the advocacy and safeguarding needs of individuals that are

¹⁰ See T Collingbourne ‘The Care Act 2014: a missed opportunity?’ in Web JCLI (2014) 20(3) at <http://webjcli.org/article/view/365/464>

¹¹ Primarily s2 Chronically Sick and Disabled Persons Act 1970 and ss 21 & 29 National Assistance Act 1948.

¹² Joint Committee on the Draft Care and Support Bill, ‘Draft Care and Support Bill’ Stationery Office (2013) HL Paper 143 HC 822 para 168 - 170.

¹³ A number of guides have been published concerning the practicalities of assessing under the new legal regime – see for example, Think Local Act Personal [Delivering Care & Support Planning - supporting implementation of the Care Act 2014](#).

identified during the assessment and care planning processes: these are addressed under the 'Advocacy' and the 'Safeguarding' headings below.

As with the previous duty (under s47 NHS and Community Care Act 1990) the Care Act duty to assess adults in need is triggered by the 'appearance of need' and arises regardless of the 'level' of those needs or the person's financial resources. The assessment must have specific regard to the well-being criteria (ie section 1(2) above) and must involve the adult and any carer. In this context 2015 'whole family' guidance¹⁴ states that whatever assessment process is adopted:

the question of whether there is a carer should always be asked, the assessment must include any carer, and there must be an assessment of their needs for support where it appears they have such needs. There also needs to be a check on whether there are any children in the household and if they are undertaking any caring role.

It is difficult to see how this can be achieved without a face-to-face assessment (unless the adult agrees this is not necessary) however para 6.28 of the [revised Statutory Guidance](#) states that:

Where appropriate, an assessment may be carried out over the phone or online. In adopting such approaches, local authorities should consider whether the proposed means of carrying out the assessment poses any challenges or risks for certain groups, particularly when assuring itself that it has fulfilled its duties around safeguarding, independent advocacy, and assessing mental capacity.

The section 9(5) duty to 'involve' 'any carer that the adult has' requires some local authorities to rethink their approach – if based on the paradigm of there being 'primary carers'

The [revised Statutory Guidance](#) gives useful emphasis to the need for assessors to be 'appropriately trained', but also states that registered 'social workers and occupational therapists can provide important support and may be involved in complex assessments which indicate a wide range of needs, risks and strengths that may require a coordinated response from a variety of statutory and community services' (para 6.7). In so doing the implication is that for non-complex cases social workers may not be necessary. The general (and welcome) tenor of the [revised Statutory Guidance](#) is, however, that assessors must be 'appropriately trained'. Para 6.86, for example states that if an 'assessor does not have the necessary knowledge of a particular condition or circumstance, they must consult someone who has relevant expertise' and at para 6.84 it requires that:

assessors undergo regular, up-to-date training on an ongoing basis. The training must be appropriate to the assessment, both the format of assessment and the condition(s) and circumstances of the person being assessed. They must also have the skills and knowledge to carry out an assessment of needs that relate to a specific condition or circumstances requiring expert insight, for example when assessing an individual who has autism, learning disabilities, mental health needs or dementia.

The [revised Statutory Guidance](#) requires that assessments be 'person-centred, involving the individual and any carer that the adult has, or any other person they might want involved' (para 6.9) and that they must 'establish the total extent of needs' (para 6.10). Local authorities are also required to 'provide in advance, and in accessible format, the list of questions to be covered in the assessment' (para 6.38).

¹⁴ Department of Health (and others) *The Care Act and Whole-Family Approaches* (2015) at www.local.gov.uk/documents/10180/5756320/The+Care+Act+and+whole+family+approaches/080c323f-e653-4cea-832a-90947c9dc00c page 15.

Carer support ignored

The [Eligibility Regulations](#)¹⁵ make explicit that the decision about whether an adult has eligible needs, is made on the basis that it does not take into account any support that is being provided by third parties (ie carers): ‘instead, where a person receives support from a carer, this will be taken into account during the development of the care and support plan.’¹⁶ This important point is addressed in the [revised Statutory Guidance](#), which at chapter 6 (Assessment and eligibility) states:

6.15 During the assessment, local authorities must consider all of the adult’s care and support needs, regardless of any support being provided by a carer. Where the adult has a carer, information on the care that they are providing can be captured during assessment, but it must not influence the eligibility determination.

This approach is restated in the care and support planning section of the guidance (para 10.26) which requires that authorities ‘must identify, during the assessment process, those needs which are being met by a carer at that time, and determine whether those needs would be eligible’.

Carers Assessments (section 10)

The Act makes material changes to the pre-Care Act duty to assess carers’ needs. The new duty is triggered by the appearance of need and is no longer dependent upon the carer providing (or intending to provide) regular / substantial care or on the carer making a request. There is a ‘clear consensus’ among local authorities that the ‘costs related to carers – in terms of both assessments and associated services pose one of the greatest financial risks to the reforms going live in 2015/16’.¹⁷ While the Act may not lead to many more carers requesting an assessment any significant increase in cost may be attributable to carers having to be assessed ‘on the appearance of need’.

Although the principal carer assessment duty is only owed to adult carers caring for other adults – the Act contains specific provisions covering carers of disabled children and young carers who are in transition into adulthood (considered below – sections 58 – 66). These are complemented by measures in the Children and Families Act 2014 which provide for significant new duties in relation to parent carers and young carers as well as enhanced obligations on local authorities to ‘identify any children who are involved in providing care’ (para 6.68 of the guidance) – and these are considered separately below.

What is ‘care’

Pre-Care Act guidance recognised that at law ‘caring’ is a much wider concept than simply providing physical or practical care – stating, for example, that care may relate to being ‘anxious and stressed waiting for, or actively seeking to prevent, the next crisis’.¹⁸ It has also

¹⁵ The Care and Support (Eligibility Criteria) Regulations 2015, reg 2(3) which provides that ‘an adult is to be regarded as being unable to achieve an outcome if the adult ... is unable to achieve it without assistance’.

¹⁶ Department of Health *Draft national minimum eligibility threshold for adult care and support A discussion document* June 2013 para 1.23.

¹⁷ [ADASS & LGA Joint Response to the Care Act Regulations and Guidance Consultation](#) (August 2014) para 51.

¹⁸ See for example, Department of Health *Carers and Disabled Children Act 2000: Carers and people with parental responsibility for disabled children: Practice Guidance* (2000) para 67-8; Welsh Assembly Government *Guidance 2000 Act* (2001) para 4.11 and Welsh Government (2012) *Carers Strategies (Wales) Measure 2010* Guidance issued to Local Health Boards and Local Authorities, Annex 2.

suggested that it encompasses both the notion of ‘caring about someone’ as well as ‘caring for them’.¹⁹

The 2014 Act does not seek to define ‘care’, although the [revised Statutory Guidance](#) states that it ‘includes both the practical and emotional support’ (para 6.18). Since care is directed towards enhancing individual well-being, this brings with it a requirement to consider the section 1 checklist – including the ‘physical and mental health and emotional well-being’.

Carers assessments – basic principles

Section 10 of the Act requires that carers’ assessments must ascertain:

- whether the carer able / willing to provide and continue to provide the care;
- the impact on the carers ‘well-being’;
- the outcomes the carer wishes in day-to-day life;
- whether the carer works or wishes to (and / or) to participate in education, training or recreation.

Willing and able

The ‘carer blind’ element to the new regime (see note above ‘Carer support ignored’) is perhaps the most important new ‘explicit’ dimension to the [revised Statutory Guidance](#) and one that is mentioned repeatedly.

At law it is arguable that assessments have always had to take this approach, since there is no requirement at law that adults provide care for other adults (this aspect of the liable family rule was repealed in 1948²⁰). Section 10(5) requires that assessments must take into account the extent to which the carer is ‘willing, and is likely to continue to be willing’ to provide care. The [revised Statutory Guidance](#) at para 2.49 that ‘authorities ‘should not assume that others are willing or able to take up caring roles’ echoes earlier guidance – for example the original 1990 policy guidance to the Community Care reforms²¹ and guidance to the Carers (Recognition & Services) Act 1995.²²

ADASS has expressed its concern that one effect of this new transparency over the right of carers to decline to provide care, may be that they will withdraw their care in order to accelerate the point at which the cared for person reaches the cap on care costs.²³

Private versus combined assessments

As with the pre-Care Act guidance, emphasis is given to the importance of carers having the opportunity to have their assessments in private – ie away from the ‘adult in need’, where the carer so chooses.²⁴ At para 6.40 authorities are required to consider the ‘preferences of the individual with regards to the timing, location and medium of the assessment’ and at para 6.18 ‘where appropriate’ carers ‘views should be sought in a separate conversation independent from the adult’s needs assessment’. The Act, and guidance, provides for

¹⁹ Department of Health *Carers (Recognition & Services) Act 1995 Practice Guidance* LAC (96)7 at para 9.8; WOC 16/96 and WHC (96)21 in Wales (also at para 9.8).

²⁰ National Assistance Act 1948, section 1: see generally Luke Clements ‘[Does your carer take sugar?](#)’ Washington and Lee Journal of Civil Rights and Social Justice: (2013) pp397 – 434.

²¹ *Community Care in the Next Decade and Beyond* (HMSO 1990) para 3.28.

²² Department of Health *Carers (Recognition & Services) Act 1995 Practice Guidance* LAC (96)7 at para 9.8; WOC 16/96 and WHC (96)21 in Wales (also at para 9.8).

²³ LGA and ADASS *Joint consultation response Care Act: regulations and guidance* (August 2014) at para 31.

²⁴ See for example, Practice Guidance LAC (96)7 and WOC 16/96 and WHC (96)21 in Wales – para 9.1 and Carers and Disabled Children Act 2000: Carers and people with parental responsibility for disabled children: Practice Guidance para 59 and the Welsh Assembly publication ‘Guidance 2000 Act’ 3.11.

assessments to be ‘combined’ but this can only be with consent: section 12(5) stating ‘only if the adult to whom the needs or carer’s assessment relates agrees’ – a point emphasised at para 6.72 of the [revised Statutory Guidance](#) – namely that if ‘either of the individuals concerned does not agree to a combined assessment, then the assessments must be carried out separately’.

In relation to young carers there is a move (considered below) to use ‘whole family’ assessments. While this may work for some young carers – this will not always be the case and it is clear from the legislation, that combined assessments are an option that cannot be imposed by the authorities. The danger, of course, is that such an approach can result in a ‘rounding down’: compromising personal ambitions in the stir of family complexities. Carers’ difficulties in accessing their right to a separate assessment are well documented – parent carers and young carers particularly²⁵ – and the explicit statutory recognition of their right to a separate assessment is of importance.²⁶

The nature and setting of the assessment

The [revised Statutory Guidance](#) advises that to enable individuals to prepare for their assessment, they should be provided in advance (in an accessible format) with the list of questions to be covered in the assessment (para 6.38). At the same time the authority must consider if the individual may have ‘substantial difficulty’ in being involved in the assessment process and if so consider the need for independent advocacy (para 6.23: the advocacy requirements are considered below). At the conclusion of the assessment the local authority must ‘ensure that it is an accurate and complete reflection of the person’s needs’ (para 6.46) – which must presumably mean sharing a draft and getting it agreed (or details of what is not agreed) – since a copy of the assessment must then be given to the carer / adult in need (para 6.96).²⁷ The duty to endeavour to reach agreement at this stage is not however explicit – unlike the requirement in para 10.83, that authorities ‘must take all reasonable steps to reach agreement with the person for whom the plan is being prepared’.²⁸ Section 12(3)/12(4) requires that a copy of the assessment must be given to the adult in need / carer.

Individuals must be ‘at the heart’ of their assessments and in the case of an adult ‘in need’ the authority ‘must also involve any carer the person has (which may be more than one carer)’.²⁹

Carers’ assessments must seek to establish not only the carer’s needs for support, but also the sustainability of the caring role ... [ie] ... the carer’s potential future needs for support (6.18). They must specifically consider the carer’s ‘desire and ability to work and to partake in education, training or recreational activities, such as having time to themselves’ and the carers wishes in this respect should be considered over the short and longer term (section 10(6) and para 6.19 of the [revised Statutory Guidance](#)).

Assessments should be ‘proportionate’³⁰ (‘light touch’ or detailed depending on the extent of need) – but the guidance advises that even if done quickly, people should not be removed from the ‘process too early’ (para 6.25). However, as noted above, the guidance recognise

²⁵ See for example, Luke Clements *Carers and their Rights* 5th ed (Carers UK 2012) paras 10.4 – 10.6 and 11.3 – 11.4.

²⁶ The practice guidance to the Carers & Disabled Children Act 2000 advised that in order that the carer have an opportunity to opt for a confidential meeting, the assessor should endeavour to make arrangements for the assessment ‘over the phone, and away from the home or while the cared for person is out’ – see Department of Health *Carers and Disabled Children Act 2000: Carers and people with parental responsibility for disabled children* Practice Guidance para 59 and the Welsh Assembly publication ‘Guidance 2000 Act’ para 3.11.1.

²⁷ The Care and Support (Assessment) Regulations 2014 reg 3(1)

²⁸ An almost identical obligation to that in the Community Care Assessment Directions 2004 (Direction 2).

²⁹ Section 9(5) and para 6.30 of the revised Statutory Guidance.

³⁰ The Care and Support (Assessment) Regulations 2014 reg 3(1)

that assessments may ‘where appropriate’ be carried out over the phone or online although requiring that authorities consider whether in doing so this ‘poses any challenges or risks for certain groups, particularly when assuring itself that it has fulfilled its duties around safeguarding, independent advocacy, and assessing mental capacity’ (para 6.28) – and presumably satisfying its duty to ascertain if there are carers involved – so they can be contacted and offered an assessment. Every assessment must also ‘identify any children who are involved in providing care’ so that ‘where appropriate ... the child or young carer’ is referred for an assessment (para 6.68 – see young carers discussion below).

Carers’ assessments - timescale

The Care Act (as with the previous legislation) does not stipulate a period within which a carer’s assessment must be commenced or indeed completed. Para 6.29 of the guidance states that assessments:

should be carried out over an appropriate and reasonable timescale taking into account the urgency of needs and a consideration of any fluctuation in those needs. Local authorities should inform the individual of an indicative timescale over which their assessment will be conducted and keep the person informed throughout the assessment process.

Where a statute does not prescribe a time for the discharge of one of its requirements, the courts require that it be done ‘within reasonable period’ and of course what this is, will depend upon the facts of any particular case. However, in relation to community care assessment the Local Government Ombudsman has stated that s/he ‘normally considers that it is reasonable for this to take between four and six weeks from the date of the initial request’.³¹ Given that a carers assessment is almost invariably undertaken as part of this process (and that the outcome of this assessment is to be taken into account when deciding what community care services are provided) it must follow that as a general rule a carers assessment must also be undertaken well within the four and six weeks period.

Eligibility criteria (section 13)

Where an assessment identifies that an individual has needs for care / support then the authority must decide if these needs are sufficient to meet the eligibility criteria. The pre-Care Act legislation contained no reference to ‘eligibility criteria’: locating them instead in guidance (commonly referred to as FACS³²). The Care Act places eligibility criteria in a statutory footing (section 13) with the detail being spelled out in the [Eligibility Regulations](#)³³ – which contain separate criteria for adults in need and for carers. Whether this change of status – or indeed the significant changes to the criteria themselves – will result in material change in practice is difficult to predict. Research suggests that for both carers³⁴ and disabled / older people,³⁵ the content of national criteria is less influential than ‘social work attitudes’ and local interpretations of the national criteria.

³¹ Local Government Ombudsman (2011) Fact Sheet S4 ‘Complaints about councils that conduct community care assessments’ at <http://www.lgo.org.uk/publications/fact-sheets/complaints-about-community-care-assessments/> a view she reiterated in 2015 – see Report on [Complaint against Cornwall Council](#) (13 006 400) 26 February 2015 at para 7.

³² ‘Fair Access to Care Services’ although the 2002 Department of Health guidance that bore this name was replaced in 2010 by *Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care. Guidance on Eligibility Criteria for Adult Social Care, England 2010*.

³³ The Care and Support (Eligibility Criteria) Regulations 2015.

³⁴ Wendy Mitchell [How local authorities allocate resources to carers through carer personal budgets](#) (National Institute for Health Research 2014).

³⁵ See for example Jose-Luis Fernandez and Tom Snell *Survey of Fair Access to Care Services (FACS) Assessment Criteria among Local Authorities in England* PSSRU Discussion Paper 2825 (2012) and Jose-Luis

A key concept to be grasped with the new eligibility process concerns the interlocking nature of the various criteria. Even if it is determined that the adult does not satisfy the adult criteria, she or he may still be entitled to support because their carer is deemed eligible – and even if this does not trigger a duty to provide support – the ‘safeguarding obligations’ may require that support is provided. The following sections consider the eligibility criteria as they apply to ‘adults in need’ and to ‘carers’. The overarching safeguarding obligations (and the duty to provide care and support that may arise in consequence) are considered in the later ‘safeguarding’ section.

Adults in need eligibility criteria

Although the Care Act criteria have some similarities to the FACS guidance, an obvious difference is the absence of ‘bands’ (the ‘critical’, ‘substantial’, ‘moderate’ and ‘low’ bands in FACS). Under the Care Act eligibility scheme, adults in need are either eligible or they are not – and to be eligible three requirements must be satisfied:

- (1) their needs must be the result of a physical or mental impairment or illness;
- (2) as a result they must be unable to achieve **two or more** specified outcomes; and
- (3) as a consequence, there is (or there is likely to be) a **significant** impact on their well-being.

Unable to achieve

Regulation 2(3) defines ‘unable’ in expansive terms: a person is to be deemed ‘unable’ if he or she:

- (a) is unable to achieve it without assistance;
- (b) is able to achieve it without assistance but doing so causes the adult significant pain, distress or anxiety;
- (c) is able to achieve it without assistance but doing so endangers or is likely to endanger the health or safety of the adult, or of others; or
- (d) is able to achieve it without assistance but takes significantly longer than would normally be expected.

The broad definition of inability to achieve – has also led some commentators to suggest that even in this final formulation, the eligibility remain more generous than under the FACS guidance.³⁶

Specific outcomes

Regulation 2 details ‘outcomes’ as being:

- (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;³⁷ and

Fernandez, Tom Snell and Gerald Wistow *Changes in the patterns of social care provision in England: 2005/6 to 2012/13* PSSRU Discussion Paper 2867 (2013).

³⁶ See for example, Steve Broach Care Act 2014 – first thoughts on eligibility – a ‘moderate’ success? at <http://rightsinreality.wordpress.com/2014/10/27/care-act-2014-first-thoughts-on-eligibility-a-moderate-success/>

- (j) carrying out any caring responsibilities the adult has for a child.³⁸

Para 6.104 of the [revised Statutory Guidance](#) provides examples of how local authorities should consider each of the above outcomes – while emphasising that the guidance does not constitute an exhaustive list of examples.

A 2016 ombudsman report found maladministration in relation to two of these criteria, namely;

- maladministration³⁹ for a local authority to fail to recognise the importance to an adult's personal dignity of wearing clean, presentable and appropriate clothes (a complaint concerning a visually impaired adult who needed support to sort her clothes so that she did not wear stained or inappropriate clothing)
- maladministration⁴⁰ for a local authority to fail to recognise that 'fresh food is essential to meet nutritional needs' and that 'consumption of fresh food once it has started to perish carries a significant health risk' (a complaint concerning a visually impaired adult who needed help to check the contents of her fridge, read cooking instructions and on occasions to be escorted to a local shopping centre).

The 'two or more' requirement means that the adult will be eligible if unable to achieve two outcome areas overall. Some needs will be so substantial that they will result in the adult being unable to achieve several of the specified outcomes whereas some will only have this impact on a single outcome. All that is required is that the individual is – as a result of their various 'needs' – unable to achieve two or more outcomes and that as a consequence there is a significant impact on their well-being. In such cases (subject to the other qualifying requirements in section 18 being satisfied) the authority is under a duty to produce a Care and Support Plan. This must then be constructed (as a minimum) to ensure that the individual is enabled to achieve the two or more outcomes that resulted in their eligibility determination.

Carers eligibility criteria

The eligibility criteria for carers (put broadly) measure whether as a consequence of providing care, the carer is unable to undertake certain key roles / tasks (ie household activities / other caring responsibilities / employment / education / recreation) or that their health is at significant risk. These criteria are thought by many to be more generous than those currently in place.

Regulation 3 of the [Eligibility Regulations](#)⁴¹ provides that:

A carer's needs meet the eligibility criteria if

- a) The needs arise as a consequence of providing **necessary** care for an adult
- b) The effect of the carer's needs is that any of the circumstances specified below apply to the carer

³⁷ SCIE has produced a *Strengths-based approaches* resource (accessible at www.scie.org.uk/care-act-2014/assessment-and-eligibility/strengths-based-approach/) which is designed to find ways of meeting a person's needs through the use of informal community / social networks and it considers particularly relevant to 'needs related to connecting with people, staying (physically) active, socialising, learning new skills and/or offering skills or knowledge to others in the community' (although the one practical example it gives is of a person who has care needs and female neighbour agrees to provide this for her without charge www.scie.org.uk/care-act-2014/assessment-and-eligibility/strengths-based-approach/what-do-practitioners-need-to-consider.asp)

³⁸ *Bristol CC v. S* – a case concerning the duties to a parent carer (whose children were accommodated and then subject to care proceedings) the court observed 'There appears to be a profound lack of knowledge of the responsibilities that arise under the Care Act 2014' – His Honour Judge Wildblood, Q.C. 20th May 2015 BS15C00174 para 10.

³⁹ Complaint 15 011 661 against London Borough of Hammersmith & Fulham 21 July 2016 para 24.

⁴⁰ Complaint 15 011 661 against London Borough of Hammersmith & Fulham 21 July 2016 para 24.

⁴¹ The Care and Support (Eligibility Criteria) Regulations 2015.

- c) As a consequence there is, or is likely to be, a **significant** impact on the carer's well-being.

Carer impacts / outcomes

The circumstances specified in (b) above are as follows—

- (a) the carer's physical or mental health is, or is at risk of, deteriorating;
- (b) the carer is unable to achieve any of the following outcomes—
- i. carrying out any caring responsibilities the carer has for a child;
 - ii. providing care to other persons for whom the carer provides care;
 - iii. maintaining a habitable home environment in the carers home (whether or not this is also the home of the adult needing care);
 - iv. managing and maintaining nutrition;
 - v. developing and maintaining family or other personal relationships;
 - vi. engaging in work, training, education or volunteering;
 - vii. making use of necessary facilities or services in the local community, including recreational facilities or services; and
 - viii. engaging in recreational activities.

Unable to achieve (carer)

Regulation 3(3) defines 'unable' in similar terms to that for adults in need (see above) except the final ground (reg 2(3)(d)) of being deemed unable if it 'takes significantly longer than would normally be expected' is omitted. The precise significance of this has yet to be determined but it has been suggested that this would mean that carers would not be eligible simply because it took them significantly longer than normal to do their house cleaning because of their caring responsibilities.⁴² In such a case, however, carers could simply state that without such support they would be unable to continue caring.

Carer eligible vs 'adult in need' ineligible

The guidance makes clear that 'carers' eligibility does not depend on whether the 'adult for whom they care has eligible needs' (para 6.116). Accordingly the fact that an adult is not eligible for support is irrelevant in so far as the carers' assessment is concerned. This obligation stems from section 20 of the Act, which states:

- (7) A local authority may meet some or all of a carer's needs for support in a way which involves the provision of care and support to the adult needing care, even if the authority would not be required to meet the adult's needs for care and support under section 18.
- (8) Where a local authority is required by this section to meet some or all of a carer's needs for support but it does not prove feasible for it to do so by providing care and support to the adult needing care, it must, so far as it is feasible to do so, identify some other way in which to do so.

The [revised Statutory Guidance](#) addresses some of the implications of this requirement, explaining that where the carer is eligible for support but the adult being cared is not – and accordingly 'does not have their own personal budget or care plan' (para 11.42) – the carer could (for example) request a direct payment, and use that to commission their own replacement care from an agency (para 11.44). It then states (para 11.45):

If such a type of replacement care is charged for... then it would be the adult needing care that would pay, not the carer, because they are the direct recipient of the service.

⁴² See Belinda Schwehr Your questions answered about assessing carers under the Care Act Community Care 9th June 2016

Duty /power to provide care & support for adults /carers (section 18 - 20)

The duty on local authorities to meet the eligible needs of disabled, elderly and ill people is retained and widened by the Care Act. The pre-2014 legislation contained no duty to meet carers' eligible needs (just a power)⁴³ nor (in general) did it create a duty to meet the needs of 'self-funders' (ie people whose savings are above the capital limit – currently £23,750). Both these limitations are removed by the 2014 Act (albeit in only for self funders who are not in care homes). Where an individual's needs (ie a carer or an 'adult in need') meet the eligibility criteria then there is a duty to ensure their care and support needs are addressed. The only stipulation being that they are ordinarily resident in the local authority's area (as at present) and that if their assets are above the financial limit, that they 'ask the authority' to meet their needs (and are not in / or seeking care home accommodation).

Section 20 creates a duty to meet the assessed needs of carers and is, the Government states, 'the first ever legal entitlement to public support, putting them on the same footing as the people for whom they care.'⁴⁴ The duty rests with the local authority responsible for the adult in need and extends to self-funders (ie carers with assets above the new maximum limits) who request help.

Care & support plans (section 25-26)

The assessment process involves identifying 'needs' and then determining which of these (if any) are 'eligible needs'. This stage is then followed by the development of a care and support plan that explains how the eligible needs will be met. These stages are two sides of an equation: on one side there are the eligible needs that have to be met and on the other are the details of how this will be done. In order that the individual can determine whether their assessed needs are fully addressed in the care plan, the [revised Statutory Guidance](#) requires that they 'must be given a record of their needs or carer's assessment' (para 6.96)⁴⁵ and also their final care plan (para 10.87).

Care and support planning – principles

Section 25 details what must be in every care and support plan⁴⁶ (ie for a carer or an adult 'in need') and this duty is analysed in the [revised Statutory Guidance](#) (para 10.36). The requirements include:

- the needs identified by the assessment;
- whether, and to what extent, the needs meet the eligibility criteria;
- the needs that the authority is going to meet, and how it intends to do so;
- for a person needing care, for which of the desired outcomes care and support could be relevant;
- for a carer, the outcomes the carer wishes to achieve, and their wishes around

⁴³ This change should not be over-stated since, as the Commission for Social Care Inspection (CSCI) observed in 2008 'there is a duty to address carers' eligible needs but discretion about whether to meet these through carers services or community care services – however, some practitioners appear to think [incorrectly] the discretion is about whether to help carers' - CSCI *Cutting the cake fairly: CSCI review of eligibility criteria for social care* (CSCI 2008) para 3.22.

⁴⁴ Department of Health *The Care Bill explained: Including a response to consultation and pre-legislative scrutiny on the Draft Care and Support Bill Cm 8627* (The Stationery Office 2013) para 73.

⁴⁵ Even if it is decided that none of their needs are eligible needs, the authority must nevertheless provide them with 'information and advice in an accessible form, about what can be done to prevent, delay, or reduce development of their needs' (para 2.52).

⁴⁶ Unless excluded by the Care and Support (Personal Budget Exclusion of Costs) Regulations 2014 – which concerns the exclusion of costs associated with the provision of intermediate care (including reablement support) services.

- providing care, work, education and recreation where support could be relevant;
- the personal budget ...;
- information and advice on what can be done to reduce the needs in question, and to prevent or delay the development of needs in the future;
- where needs are being met via a direct payment ... , the needs to be met via the direct payment and the amount and frequency of the payments.

The effect of section 25 is that the pre-Care Act requirements for care and support plans continue – but they are now statutory creatures rather than requirements of Department of Health guidance. Existing case law concerning care plans remains relevant – particularly so, given that it places great emphasis on the importance of local authorities following guidance.⁴⁷ In *R v Islington LBC ex p Rixon* (1997)⁴⁸ it was held that central importance of a care plan was described as:

the means by which the local authority assembles the relevant information and applies it to the statutory ends, and hence affords good evidence to any inquirer of the due discharge of its statutory duties.

Carer input into adults ‘in need’ care plan

In relation to support provided by a carer – the [revised Statutory Guidance](#) repeats its reoccurring theme, that assessments are ‘carer blind’. Para 10.26 stating:

LAs are not under a duty to meet any needs that are being met by a carer. any eligible needs met by a carer are not required to be met by the LA, for so long as the carer continues to do so. The LA should record in the care and support plan which needs are being met by a carer, and should consider putting in place plans to respond to any breakdown in the caring relationship.

In preparing a care / support plan section 25(3) requires that local authorities must involve (among others) the adult for whom it is being prepared; ‘any carer that the adult has’, and ‘any person who appears to the authority to be interested in the adult’s welfare’. In relation to carers, the requirement is to involve the carer for whom it is being prepared, ‘the adult needing care, if the carer asks the authority to do so’ and any other person whom the carer asks (section 25(4)).

In the same vein, para 10.40 states that where a person with eligible needs is having these met by a carer at the time the plan is developed, the ‘carer must be involved in the planning process’ and the authority ‘should record the carer’s willingness to provide care and the extent of this in the plan ... so that the authority is able to respond to any changes in circumstances ... more effectively. Para 10.40 also provides that:

where the carer also has eligible needs, the local authority should consider combining the plans of the adult requiring care and the carer, if all parties agree, and establish if the carer requires an independent advocate.

Carers services: ‘replacement care’ / respite / short breaks care

As noted above, the result of a carer’s assessment will often be that the care and support plan for the adult ‘in need’ or a third party is adapted / changed to enable the carer to achieve the outcomes they consider to be of importance.

The Act and [revised Statutory Guidance](#) re-emphasise the legal position – that ‘respite / short break care’ is (where it consists of a service delivered to the adult ‘in need’ - for

⁴⁷ *R v Islington LBC ex p Rixon* (1997–98) 1 CCLR 119 at 128, QBD.

⁴⁸ (1997–98) 1 CCLR 119 at 128, QBD.

example as a sitting service or placement in a residential setting etc) a care and support arrangement for the adult in need and not for the carer. A 2000 Department of Health note explained this well:⁴⁹

People who care may be assessed as needing a break from their caring role. This need will be clearly recorded on their own assessment documentation.

The person they care for will then be assessed for the additional support that they will need to allow their usual carer to take a break. This need will be recorded on their assessment documentation. The additional service remains a community care service delivered to the cared for person, not a carer service under this Act.

In some situations this process (addressing carer's eligible needs in the care and support plans of others) can raise issues that may be less common. One such example is given in the [revised Statutory Guidance](#) (para 11.38) and it concerns Divya, who is caring for her dying father and for her young children. Her father has a care package in addition, but Divya's carer's assessment identifies her as eligible for support due to her additional child care responsibilities.⁵⁰ The support plan that is developed for her consists of a carers' direct payment 'which she uses for her children to attend summer play schemes so that she get some free time to meet with friends and socialise when the family member providers care to her father'.

The [revised Statutory Guidance](#) refers to support that involves the local authorities meeting a carer's needs by providing a service directly to the adult needing care as 'replacement care which:

may be needed to enable a carer to look after their own health and wellbeing alongside caring responsibilities, and to take a break from caring it should be considered a service provided to the cared-for person, and thus must be charged to them, not the carer. (para 11.39)

Of importance is the statement (para 11.45) that if the local authority have a policy of charging for a particular type of replacement care 'then it would be the adult needing care that would pay, not the carer, because they are the direct recipient of the service'. This will also be the case where the a carer is assessed as eligible for support but the adult being cared for does not have eligible needs – and accordingly 'does not have their own personal budget or care plan' (para 11.42). In such cases the carer could (for example) request a direct payment, and use that to commission their own replacement care from an agency (para 11.44).

Carers support services generally

The wide range of arrangements that local authorities were able to provide to support carers under the pre-Care Act are continued under the new regime. As noted above the range of support under section 8 is wide. The [revised Statutory Guidance](#) (para 11.41) provides illustrative examples of the types of support that are envisaged for carers:

relaxation classes, training on stress management, gym or leisure centre membership, adult learning, development of new work skills or refreshing existing skills (so they might be able to stay in paid employment alongside caring or take up return to paid work), pursuit of hobbies such as the purchase of a garden shed, or purchase of laptop so they can stay in touch with family and friends.

⁴⁹ Department of Health *Questions and Answers* – a note that accompanied the enactment of the 2000 Act; (the Answer to Question 7 'Are short term breaks (respite care) a service for carers or cared for people?')

⁵⁰ By virtue of The Care and Support (Eligibility Criteria) Regulations 2014 Reg (3)(2)(b)(i)

The relevance of local authority financial difficulties

Para 10.27 of the [revised Statutory Guidance](#) makes clear that pre-Care Act case law concerning the relevance of an authority's financial position remains – namely that although authorities can 'take into reasonable consideration' of their finances, they 'must comply' with their legal obligations.⁵¹ A local authority's finances are relevant when it decides how to meet the eligible needs of an individual 'but not whether those needs are met'. The [revised Statutory Guidance](#) goes on to stress that authorities 'should not set arbitrary upper limits on the costs [they are] willing to pay to meet needs through certain routes' – although they may:

take decisions on a case-by-case basis which weigh up the total costs of different potential options for meeting needs, and include the cost as a relevant factor in deciding between suitable alternative options for meeting needs. This does not mean choosing the cheapest option; but the one which delivers the outcomes desired for the best value. (para 10.27)

Sign off and copies of care plans

The 'sign off of a plan should only occur once the authority has taken 'all reasonable steps to reach agreement with the person for whom the plan is being prepared' and 'any third party involved in the preparation of the plan' and this 'agreement should be recorded and a copy placed within the plan' (para 10.83). If the plan is not agreed then the authority should 'state the reasons for this and the steps which must be taken to ensure that the plan is signed-off' (para 10.86).

The Act also requires that a copy of the care and support plan be given to the adult in need / carer (and anyone else they request) (section 25(9) and (10)) and the [revised Statutory Guidance](#) at para 10.87 makes clear that the copy must be 'in a format that is accessible to the person for whom the plan is intended' and copies should also be given to any independent advocate involved. Many care and support plans are computer generated and incomprehensible to all but the initiated. The requirement that the copies be 'in a format that is accessible' must require that this practice ends and plain English, jargon free plans are provided to those who require them.

Review of care & support plans

Section 27(1) of the 2014 Act places a general duty on local authorities to keep under review care and support plans (as well as when a reasonable request is made by the adult in need or a carer) and section 27(4) requires a reassessment if they believe that that circumstances have changed materially. The [revised Statutory Guidance](#) creates an expectation that the care and support plans will reviewed 'no later than every 12 months, although a light-touch review should be considered 6-8 weeks after the plan and personal budget have been signed off' (para 10.42 – and see also para 13.32).

The [revised Statutory Guidance](#) requires that reviews (like assessments) must person-centred, accessible and proportionate: must involve the 'person needing care and also the carer where feasible' (para 13.2) and their purpose is 'identify if the person's needs' or any 'other circumstances' have changed (para 13.4). Very welcome is the note in the [revised Statutory Guidance](#) that the 'review must not be used as a mechanism to arbitrarily reduce the level of a person's personal budget' (para 13.4). Reviews should not be 'overly-complex or bureaucratic' and should cover the specified matters – which 'should be communicated to the person before the review process begins' (para 13.12). These include: whether the person's needs / circumstances have changed; what parts of the plan are working / not working / need changing; have the outcomes identified in the plan been achieved and are

⁵¹ *le* the position identified by the House of Lords in *R v Gloucestershire County Council ex p Barry* 1 CCLR 40; [1997] 2 All ER 1; and reiterated by the Supreme Court in *R (KM) v. Cambridgeshire County Council* (2012) [2012] UKSC 23.

there any new outcomes they want to meet; is the person's personal budget adequate and is there a need to change the way it is managed / paid; are there material changes in the person's support networks which might impact negatively or positively on the plan; have any changes occurred which could give rise to a risk of abuse or neglect; and is the person, carer, independent advocate satisfied with the plan?

Personal budgets

Section 26 states that the amount of an adult's personal budget is 'the cost to the local authority of meeting those of the adult's needs which it is required or decides to meet'.

The expectation is that (for non-self funders) the personal budget will change as the care and support planning process progresses. At the start of the planning process it will be an 'indicative amount' shared with the person, and anybody else involved, with 'final amount of the personal budget confirmed through this process' (para 11.7). This means there is no need for an authority to use a Resource Allocation System (RAS) to generate a figure at the commencement of the process – an authority might have (for example) a simple set of 'bands'. Research suggests that most RAS generate incorrect figures which and have serious defects – not least their complexity and the rigidity with which some local authorities then apply them.⁵² In support of this approach the [revised Statutory Guidance](#) advises that 'complex RAS models of allocation may not work for all client groups' (para 11.23) and that 'regardless of the process used, the most important principles in setting the personal budget are transparency, timeliness and sufficiency' (para 11.24).

A [2015 Ombudsman report concerning Cornwall Council](#)⁵³ has confirmed the legal position – namely that the hourly rates on which personal budgets / direct payments are assessed must not be arbitrary and that the calculations must be shared with adults in need / carers. Where the individual lacks the necessary mental capacity to manage a personal budget (and to employ personal assistants) then the budget must be costed on the basis that an agency would have to be used.

Direct Payments (sections 31-33)

The Care Act provides for an almost identical 'direct payments' regime to that under the previous regime and the detail is again to be found in the [regulations](#)⁵⁴ and the [revised Statutory Guidance](#). There are two material changes.

1. The first concerns a 'softening' of the presumption against making payments to spouses / partners / relatives living in the same house as the adult. Such payments can be made 'if the local authority considers it is necessary to do so'⁵⁵ – and the payment can cover either the cost of meeting the adult's need or the cost of providing 'administrative and management support or services' for the person to whom the direct payments are made.

In relation to this latter category, the [revised Statutory Guidance](#) (para 12.36) explains that:

This is allows people to pay a close family member living in the same household to provide management and/or administrative support to the direct payment holder in cases where the local authority determines this to be necessary. This is intended to reflect the

⁵² See for example Lucy Series and Luke Clements, 'Putting the Cart before the Horse: Resource Allocation Systems and Community Care' *The Journal of Social Welfare Law* [2013] (2) 207-226.

⁵³ Report on [Complaint against Cornwall Council](#) (13 006 400) 26 February 2015

⁵⁴ The Care and Support (Direct Payments) Regulations 2014.

⁵⁵ The Care and Support (Direct Payments) Regulations 2014 reg 3(2).

fact that in some cases, especially where there are multiple complex needs, the direct payment amount may be substantial.

2. The second change (which has now been postponed until 2020⁵⁶) is that direct payments will be available for residential care placements. . The local authorities who were piloting this programme will however be able to continue making such payments if they so choose.⁵⁷

A 2016 ombudsman's report⁵⁸ concerned an adult in need who requested that she have a direct payment (rather than the services being commissioned by the local authority). Instead of responding swiftly to this request, the authority stated that it would have to first undertake a review: action that the ombudsman considered to be maladministration.

Young Carers, Disabled Children, and Parent Carers

Although the primary purpose of Part 1 of the Care Act 2014 was to reform adult social care law, the Act also contains provisions relating to disabled children and carers 'in transition' into adulthood (ie young carers and the parents of disabled children who are in the transition process). These provisions are designed to mesh with reciprocal provisions in the [Children and Families Act 2014](#), and also came into force in April 2015.

The amendments to [Children and Families Act 2014](#) were made at a late stage (and as a result of a vigorous campaign by a number of disabled children's and carers' activists / organisations). In early 2015 it emerged that the rights of one group were 'missed' and this is considered below (under the 'grandparent carers').

Transition into adulthood responsibilities

The Care Act contains the detail of the legal obligations of authorities for supporting carers and disabled children whose care and support needs will transfer to the adult social services. The Act has a formulaic approach to the duty – essentially that if it appears to an authority that (1) it is 'likely' that [a disabled child and/or the child's carer / a young carer] will have care & support needs after transition; and (2) it will be of 'significant benefit' to be assessed – then the authority must assess or give reasons if it refuses to assess.

Chapter 16 of the [revised Statutory Guidance](#) to the Care Act provides considerable detail on the way authorities should approach their duties in relation to disabled children; the parents of disabled children and young carers.

Disabled children in transition (sections 58 – 59 Care Act 2014)

The Care Act 2014 provisions relating to disabled children (as well as those concerning carers 'in transition' to adulthood) are overly complicated – as the Act contains considerable detail on the issue of consent / capacity to consent and what must be included in the assessment. Put simply however the general formula (above) applies - namely: a local authority must undertake a needs assessment of a disabled child if it considers that the child

⁵⁶ In late January 2016 the Government announced that it had decided to postpone the 'national rollout of direct payments in residential care' until 2020 - see www.local.gov.uk/web/guest/care-support-reform/-/journal_content/56/10180/7643648/ARTICLE.

⁵⁷ These are listed in Schedule 2 to the Regulations – and see also Department of Health Policy Research Unit in Policy Innovation Research *Direct Payments in Residential Care Trailblazer Programme Evaluation Preliminary report* 2014 at www.piru.ac.uk/assets/files/DP%20Trailblazer%20Preliminary%20report.pdf.

⁵⁸ Complaint 15 011 661 against London Borough of Hammersmith & Fulham 21 July 2016 para 22.

is likely to have needs for care and support after becoming 18 and that the assessment would be of '*significant benefit*' to the child. Such an assessment is referred to as a 'child's needs assessment'. If a local authority decides not to undertake such an assessment it must give reasons for its refusal. Para 1.25 of the [revised Statutory Guidance](#) to the Care Act is however helpful in advising that 'control' not only encompasses the idea of moving from one area to another – but also 'from children's services to the adult system without fear of suddenly losing care and support'.

The right to a Care Act 2014 transition assessment is triggered when the local authority consider that it would be of significant benefit for the young carer / disabled child or the parent carer of a disabled child and that the young person or carer is 'likely to have needs' – neither of which terms are defined in the legislation.

Likely need

Para 16.9 of the [revised Statutory Guidance](#) advises that a young person or carer is 'likely to have needs' if they have 'any likely appearance of any need for care and support as an adult':

not just those needs that will be deemed eligible under the adult statute. It is highly likely that young people and carers who are in receipt of children's services would be 'likely to have needs' in this context, and local authorities should therefore carry out a transition assessment for those who are receiving children's services as they approach adulthood, so that they have information about what to expect when they become an adult.

Significant benefit

The [revised Statutory Guidance](#) (para 16.6) advises that it will generally be of 'significant benefit' to assess 'at the point when their needs for care and support as an adult can be predicted reasonably confidently, but will also depend on a range of other factors'. In relation to young people with special educational needs (SEN) who have an Education, Health and Care (EHC) plan the [revised Statutory Guidance](#) is unequivocal in stating that the transition assessment process should begin from year 9⁵⁹ (para 16.11), adding that even 'for those without EHC plans, early conversations with local authorities about preparation for adulthood are beneficial' (para 16.12).

Para 16.7 gives further guidance as to the point at which the young persons' needs for care and support (as an adult) can be predicted reasonably confidently, stating:

Transition assessments should take place at the right time for the young person or carer and at a point when the local authority can be reasonably confident about what the young person's or carer's needs for care or support will look like after the young person in question turns 18. There is no set age when young people reach this point; every young person and their family are different, and as such, transition assessments should take place when it is most appropriate for them.

Para 16.10 states that the considering of 'significant benefit' is 'not related to the level of a young person or carer's needs, but rather to the timing of the transition assessment'. It then provides an illustrative list of factors that should be considered when trying to establish the right time to assess - namely:

- The stage they have reached at school and any upcoming exams;
- Whether the young person or carer wishes to enter further/higher education or training;
- Whether the young person or carer wishes to get a job when they become a young adult;

⁵⁹ Department of Health [SEN Code of Practice Preparing for Adulthood](#) (2014) para 88.11.

- Whether the young person is planning to move out of their parental home into their own accommodation;
- Whether the young person will have care leaver status when they become 18;
- Whether the carer of a young person wishes to remain in or return to employment when the young person leaves full time education;
- The time it may take to carry out an assessment;
- The time it may take to plan and put in place the adult care and support;
- Any relevant family circumstances;
- Any planned medical treatment.

An informative case study is provided in the [revised Statutory Guidance](#) (para 16.15) concerning the timing of a transition assessment. It concerns a 15 year old disabled child who attends an education funded residential school and who also receives a funding package from social services – both at the school and on the weekends / holidays with her parents. The parents request a transition assessment on her 16th birthday. After a discussion with the family the local authority realises that when the young person leaves school at 19 ‘it will not be appropriate for her to live with her parents and she will require substantial supported living support and a college placement’. The local authority then appreciates that this will necessitate ‘a lengthy transition in order to get used to new staff, a new environment and a new educational setting’ not least because the ‘college has also indicated that that they will need up to a year to plan for her start’. On this basis the local authority concludes that it would be of ‘significant benefit’ for the transition assessment to take place .

Parent carers in transition (sections 60 -62 Care Act 2014)

In very similar terms (to the rights of a disabled child to a transition assessment), sections 60 – 62 of the Act places obligations on local authorities to assess the disabled child’s adult carers (referred to as a ‘child’s carer’) during this transition process. In simple terms⁶⁰ the Act provides that a local authority must undertake a needs assessment of the carer of a disabled child if it considers that the carer is likely to have needs for support after the child becomes 18 and that the assessment would be of significant benefit to the carer. Such an assessment is referred to as a ‘child’s carer’s assessment’. If a local authority decides not to undertake such an assessment it must give reasons for its refusal. See discussion above as to how ‘significant benefit’ and ‘likely to have needs’ should be construed.

A child’s carer is defined as ‘an adult an adult (including one who is a parent of the child) who provides or intends to provide care for the child’ (section 61(7)) but is not paid to provide the care or a formal volunteer (section 61(8)).

Young carers in transition (sections 63 – 64 Care Act 2014)

Prior to the enactment of the Care Act 2014 and the Children and Families Act 2014, ‘young carer’ was not a term that appeared in any legislation. For a local authority to have an obligation to a young carer (ie someone aged under 18 who provided care on an unpaid basis for another person), she or he has to be labelled a ‘child in need’ – for the purposes of Children Act 1989, section 17. This has now changed, as both Acts address the needs of ‘young carers’ directly.

⁶⁰ The Act, again, contains overly complicated provisions on the issue of consent / capacity to consent and what must be included in the assessment .

The Care Act 2014, sections 63 – 64 concern young carers ‘in transition’. The Act (in simple terms⁶¹) requires a local authority to undertake a needs assessment of a young carer if it considers that she/ he is likely to have needs for support after becoming 18 and that the assessment would be of significant benefit to him / her. Such an assessment is referred to as a ‘young carer’s assessment’. If a local authority decides not to undertake such an assessment it must give reasons for its refusal. . See discussion above as to how ‘significant benefit’ and ‘likely to have needs’ should be construed.

A young carer is defined as ‘a person under 18 who provides or intends to provide care for an adult (section 63(6)) but is not paid to provide the care or a formal volunteer (section 63(7)).

Disabled children; parent carers and young carers support arrangements

Parent carers in general

The Children & Families Act 2014, section 97 amends the Children Act 1989⁶² to oblige local authorities to assess parent carers⁶³ on the ‘appearance of need’ – ie if it appears to a local authority that a parent carer may have needs for support (or is requested by the parent) then it must assess whether that parent has needs for support and, if so, what those needs are.

A ‘parent carer is defined as an adult ‘who provides or intends to provide care for a disabled child for whom the person has parental responsibility’.⁶⁴ As will be seen below (the ‘grandparent problem’) this is a definition that is now seen to be too restrictive.

The assessment must include ‘an assessment of whether it is appropriate for the parent carer to provide, or continue to provide, care for the disabled child, in the light of the parent carer’s needs for support, other needs and wishes’⁶⁵ and must also have regard to:⁶⁶

- the well-being of the parent carer (‘well-being’ has the same meaning as the Care Act 2014 section 16⁶⁷), and
- the need to safeguard / promote the welfare of the disabled child and any other child for whom the parent carer has parental responsibility.

The requirement to consider ‘well-being’ brings with it the duty of the authority to consider (among other things) the parent carers’ (a) personal dignity; (b) physical and mental health and emotional well-being; (c) protection from abuse and neglect; (d) 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); (e) participation in work, education, training or recreation; (f) social and economic well-being; (g) domestic, family and personal relationships; (h) suitability of living accommodation; (i) the individual’s contribution to society.

This obligation replicates but considerably broadens the pre-Care Act duty under the Carers (Equal Opportunities) Act 2004. The duty in the 2004 Act, section 2 was to consider whether the carer: (i) works or wishes to work; or (ii) is undertaking, or wishes to undertake, education, training or any leisure activity. This restatement of the pre-Care Act law means that previous case law and ombudsman’s reports remain relevant. A key ombudsman’s

⁶¹ The Act contains overly complicated provisions on the issue of consent / capacity to consent and what must be included in the assessment – see footnote above.

⁶² By adding s section 17ZD and section 17ZE.

⁶³ referred to in the Care Act 2014 as ‘child’s carers’ – sections 60 – 62 above.

⁶⁴ Children Act 1989, section 17ZD(2).

⁶⁵ Children Act 1989, section 17ZD(9).

⁶⁶ Children Act 1989, section 17ZD(10).

⁶⁷ Children Act 1989, section 17ZD(11).

report⁶⁸ in this context concerned a parent who sought direct payments to enable him to purchase respite care so that he could pursue his University's studies. In the Ombudsman's opinion there was an obligation on the local authority to ensure that the parent was not 'disadvantaged in pursuit of education/training any more than other parents'.

Carers' employment rights also benefit from the protection provided by the Equality Act 2010.

Having undertaken such an assessment the local authority must then decide whether the parent has needs for support; whether the disabled child has needs for support; and if so whether those needs could be satisfied (wholly or partly) by services under Children Act 1989, section 17. The parent must be given a written copy of the assessment (s17ZD(13)).

There is in addition a strategic duty on local authorities to take reasonable steps to identify the extent to which there are parent carers within their area who have needs for support.

Young carers in general (section 96 Children & Families Act 2014)

The Children & Families Act 2014, section 96 amends the Children Act 1989 to address the needs of young carers. This creates detailed obligations (fleshed out in regulations) including a duty to assess a 'on the appearance of need' (ie without a 'request' having to be made (section 17ZA (1)) and a strategic duty on the local authorities to take reasonable steps to identify the extent to which there are young carers within their area who have needs for support (section 17ZA (12)). The provisions came into force in April 2015 to coincide with Care Act implementation. It is expected that where eligible needs are identified in relation to young carers, local authorities will have to either provide support under section 17 CA 1989 to the young carer or demonstrate that the 'cared for person's' assessment has provided adequate care and support to prevent inappropriate care being required from the young carer.

The [Young Carers' \(Needs Assessments\) \(England\) Regulations 2015](#) SI 527 'enable a "whole family approach" to providing assessment and support.' The Consultation document accompanying the draft Regulations stated that the Department of Health will 'shortly' be publishing best practice guidance on 'Whole Family Approaches' to assessment – and it explained that a "whole family approach" is:

an assessment that takes into account and evaluates how the needs of the person being cared for impact on the needs of the child who is identified as a possible young carer, or on any other child or on other members of the household. This approach also allows the local authority to combine a young carer's needs assessment with any other assessment in relation to the young carer, the person cared for or another member of the young carer's family.

Regulation 2 requires that local authorities undertake 'young carer's needs assessments' in a manner 'which is appropriate and proportionate to the needs and circumstances of the young carer' and that in doing so they must have particular regard to—

- (a) the young carer's age, understanding and family circumstances;
- (b) the wishes, feelings and preferences of the young carer;
- (c) any differences of opinion between the young carer, the young carer's parents and the person cared for, with respect to the care which the young carer provides (or intends to provide); and
- (d) the outcomes the young carer seeks from the assessment.

⁶⁸ Public Service Ombudsman (Wales) Complaint No. B2004/0707/S/370 against Swansea City Council 22 February 2007 see in particular paras 78, 133 & 137.

As with assessments under the Care Act, authorities are required to provide relevant parties⁶⁹ with information 'about the manner and form of the assessment' to enable their effective participation.

Regulation 3 requires that those undertaking the assessment must have sufficient knowledge and skill (having regard amongst other things to the young carer's age, sex and understanding), and be appropriately trained. Where necessary the authority is required to consult third parties with 'expertise and knowledge in relation to the young carer' and consider any other relevant assessments that have been carried out.

Regulation 4 details what must be determined by the assessment – including

- (a) the amount, nature and type of care which the young carer provides / intends to provide;
- (b) the extent to which this care is (or will be) relied upon by the family, including the wider family, to maintain the well-being of the person cared for;
- (c) whether the care which the young carer provides (or intends to provide) impacts on the young carer's well-being, education and development;
- (d) whether any of the tasks which the young carer is performing (or intends to perform) when providing care are excessive or inappropriate for the young carer to perform having regard to all the circumstances, and in particular the carer's age, sex, wishes and feelings;
- (e) whether any of the young carer's needs for support could be prevented by providing services to—
 - (i) the person cared for, or
 - (ii) another member of the young carer's family;
- (f) what the young carer's needs for support would be likely to be if the carer were relieved of part or all of the tasks the young carer performs (or intends to perform) when providing care;
- (g) whether any other assessment of the needs for support of the young carer or the person cared for has been carried out;
- (h) whether the young carer is a child in need;
- (i) any actions to be taken as a result of the assessment; and
- (j) the arrangements for a future review.

Continuity of support for disabled children / young carers in transition (section 66)

The Care Act 2014, section 66 creates a complex set of provisions,⁷⁰ the effect of which is (in essence) that the assessments of disabled children / young carers that take place before the young people become 18, will either continue to apply when they become 18 until reviewed⁷¹ or if the local authority do not treat the assessments as a continuing obligation – then they must reassess.

Disabled young people / young carers not receiving children's services

The [revised Statutory Guidance](#) to the Care Act highlights the importance of local authorities being proactive in relation to transition assessments: particularly in relation to disabled young people and young carers who are not already receiving children's services. An approach suggested by the guidance is for authorities should consider how to 'establish mechanisms in partnership with local educational institutions, health services and other agencies' (para 16.20) and gives as examples of those who might be targeted, including (para 16.18):

⁶⁹ Regulation 2(4) specifies that these are (a) the young carer; (b) the person cared for; (c) the young carer's parents; and (d) any other person whom the young carer or a parent of the young carer requests should participate in the assessment.

⁷⁰ These are delivered by inserting in the CA 1989 new sections (s17ZB and s17ZC) and also by amending the Chronically Sick and Disabled Persons Act 1970 by adding a new s2A.

⁷¹ ie be treated as a 'needs assessment under s60 Care Act 2014'.

- young people (for example with autism) whose needs have been largely met by their educational institution, but who once they leave, will require their needs to be met in some other way;
- young people and young carers receiving Children and Adolescent Mental Health Services (CAMHS) may also require care and support as adults even if they did not receive children's services from the local authority.

Transition planning should consider, not only the sustaining of the care and support needs of disabled young people and carers – but also 'how carers', young carers' and other family members' needs might change' – the example in the [revised Statutory Guidance](#) being (para 16.21):

... some carers of disabled children are able to remain in employment with minimal support while the child has been in school. However, once the young person leaves education, it may be the case that the carer's needs for support increase, and additional support and planning is required from the local authority to allow the carer to stay in employment.

In this context, the guidance (para 16.22) requires social services to be aware of the SEN code of practice relating to the transition arrangements for disabled young people and the importance of them gaining access to full-time programmes. It notes however that such an option may not be suitable or available for all young people and advises that in addition the authority should consider 'other provision and support ... such as volunteering, community participation or training'.