1. This paper is in three parts:

1. Introduction to Part 1 of the Act: the financial climate and the key relevant principles.

2. Five stage decision making under the Act.

3. Challenges and opportunities when challenging cuts in care packages.

Introduction

The financial climate

2. As set out below, the Act has laudable aims (wellbeing – prevention – personalisation - support for carers) and has made some welcome improvements to community care law.

3. It has not however been accompanied by a corresponding change in the financial climate. The impact assessment that accompanied the Act did not for example envisage that the move to a preventative model would require any additional resources. The House of Commons Committee of Public Accounts stated (see July 2014 report on Adult Social Care, p7):

   “We are concerned that the Departments have not fully addressed the long-term sustainability of the adult social care system and that its policies to drive change (the Care Act and the Better Care Fund) are risky, are not supported with new money, and do not acknowledge the scale of the problem.”

4. Meantime adult social care funding fell from £14.7bn in 2012-13 to £14.1bn in 2015-16. The LGA has predicted massive shortfalls in local authority budgets (£2.6 billion\(^1\))

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\(^1\) [http://www.communitycare.co.uk/2016/10/20/adult-childrens-services-face-3-2bn-funding-gap/](http://www.communitycare.co.uk/2016/10/20/adult-childrens-services-face-3-2bn-funding-gap/)
which may mean the changes introduced by the Act are simply not implemented. The UN Committee on the Rights of Persons with disabilities has commented upon the adverse impact this is having on the right to independent living. It found there to be “reliable evidence that the threshold of grave or systematic violations of the rights of persons with disabilities” in the UK. There is also widespread concern about the developing crisis in adult social care and its consequences for the NHS.

5. Along with the closure of the Independent Living Fund these budgetary pressures have lead inexorably to cuts in individual care packages, often with very significant cuts of 25% or more.

Background to the Act and key relevant principles

6. The Care Act 2014 followed the work of the Law Commission, which in 2008 commenced a review of adult social care law. It reported in May 2011 (Law Com No 326, Adult Social Care). In parallel with the Law Commission’s work, was the Commission on Funding of Care and Support (chaired by Andrew Dilnot), established by the Coalition Government in 2010 and which reported in July 2011. The Act is substantially based on the work of these two Commissions.

7. Broadly speaking, the key objectives of the Act as they relate to adult social care law are four-fold:

   a. consolidation and simplification of the existing legal framework;

   b. reforming the cost of care to individuals;

   c. extending the provision of support services to carers; and,

   d. implementing policy aims of:

      1. early intervention,

      2. wellbeing, and

      3. personalisation/choice.

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8. The new structure of adult social care law comprises (a) the Act, (b) regulations, and (c) statutory guidance.

9. There is a single statutory guidance document, Care and Support Statutory Guidance ("the Guidance"). It is issued under the Care Act 2014, and section 78(1) of the Act states that:

“A local authority must act under the general guidance of the Secretary of State in the exercise of functions given to it by this Part or by regulations under this Part.”

10. Part 1 of the Care Act 2014, with which this claim is concerned, came into force on 1 April 2015. The Guidance was modified in March 2016 and again in December 2016.

The wellbeing principle

11. The Law Commission was concerned that at the heart of this new, unified adult social care statute, was a set of statutory principles which gave expression to the underlying purpose of the statute.

12. The Commission settled ultimately on the 'well-being principle'. The principle would: "establish clearly in law that the overarching purpose of adult social care is to promote or contribute to the well-being of the individual" and would provide "the basis for all decisions made and actions carried out under the statute."

13. Consistent with this, the Guidance states:

1.2 Local authorities must promote wellbeing when carrying out any of their care and support functions in respect of a person. ... it is a guiding principle that puts wellbeing at the heart of care and support.

14. Thus, section 1 of the Act states:

S1 Promoting individual well-being

(1) The general duty of a local authority, in exercising a function under this Part in the case of an individual, is to promote that individual's well-being.

(2) “Well-being”, in relation to an individual, means that individual's well-being so far as relating to any of the following—

(a) personal dignity (including treatment of the individual with respect);
(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.

(3) In exercising a function under this Part in the case of an individual, a local authority must have regard to the following matters in particular—

(a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;

(b) the individual's views, wishes, feelings and beliefs;

(c) the importance of preventing or delaying the development of needs for care and support or needs for support and the importance of reducing needs of either kind that already exist;

(d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being);

(e) the importance of the individual participating as fully as possible in decisions relating to the exercise of the function concerned and being provided with the information and support necessary to enable the individual to participate;
(f) the importance of achieving a balance between the individual's wellbeing and that of any friends or relatives who are involved in caring for the individual;

(g) the need to protect people from abuse and neglect;

(h) the need to ensure that any restriction on the individual's rights or freedom of action that is involved in the exercise of the function is kept to the minimum necessary for achieving the purpose for which the function is being exercised.

15. There are two points to note about this “general duty”. Firstly, having described it as a "general duty", it is clear it is owed, explicitly, to each and every individual in relation to whom the authority is discharging its care and support functions.

16. Secondly, wellbeing cannot be "promoted" simply by having regard to it. A duty to promote wellbeing demands or at least implies action. Indeed, the Guidance states at 1.7:

“Promoting wellbeing involves actively seeking improvements in the aspects of wellbeing ...”

17. Whereas 1.1 states:

“The core purpose of adult care and support is to help people to achieve the outcomes that matter to them in their life.”

18. And the personalised nature is repeated in many places, including:

“1.10 Whenever a local authority carries out any care and support functions relating to an individual, it must act to promote wellbeing - and it should consider all of the aspects above in looking at how to meet a person's needs and support them to achieve their desired outcomes. However, in individual cases, it is likely that some aspects of wellbeing will be more relevant to the person than others. For example, for some people the ability to engage in work or education will be a more important outcome than for others, and in these cases "promoting their wellbeing” effectively may mean taking particular consideration of this aspect.

“Independent living”
1.18 Although not mentioned specifically in the way that “wellbeing” is defined, the concept of “independent living” is a core part of the wellbeing principle. Section 1 of the Care Act includes matters such as individual’s control of their day-to-day life, suitability of living accommodation, contribution to society – and crucially, requires local authorities to consider each person’s views, wishes, feelings and beliefs.

1.19The 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. The language used in the Act is intended to be clearer, and focus on the outcomes that truly matter to people, rather than using the relatively abstract term “independent living”.

Prevention

19. Section 2(1) is the most direct attempt in the Act to shift the focus towards preventing needs for care and support arising. A local authority “must provide or arrange” services and facilities which it considers will contribute towards preventing or delaying the development by adults or carers of needs for care and support, or reducing the needs for care and support of adults or carers.

20. The duty is bolstered by section 1(3)(c) by which, as set out above, an authority is required in each case to have regard to the importance of preventing or delaying the development of needs.

21. The Guidance states that local authorities should develop a "clear, local approach to prevention which sets out how they plan to fulfil this responsibility" (2.23), and put in place arrangements "to identify and target those individuals who may benefit from particular types of preventative support" (2.37).

22. Direction as to the implementation of section 2 is to be found in chapter 2 of the Guidance. Note:
   a. The responsibility for prevention applies to all adults, irrespective of whether they have eligible needs, or indeed whether they have needs at all.
b. Prevention is broken down into three general approaches: primary, secondary and tertiary prevention (2.5). Tertiary prevention comprises intervention aimed at minimising the effect of disability or deterioration for people with **established or complex health conditions**, supporting people to regain skills and manage or reduce needs where possible. Local authorities must provide or arrange services that maximise independence for those already with such needs: e.g. rehabilitation and reablement services (helping people to live in their own home). It may include supporting the lives of carers, helping them to cope and maintaining the sustainability of the care they provide.

**Five stage decisions making under the Act**

1. **Assessment**

23. Section 9 of the Care Act 2014 makes provision for the assessment of an adult’s needs for care and support. It states (materially):

S.9 Assessment of an adult's needs for care and support

(1) Where it appears to a local authority that an adult may have needs for care and support, the authority must assess—

   (a) whether the adult does have needs for care and support, and

   (b) if the adult does, what those needs are.

(2) An assessment under subsection (1) is referred to in this Part as a “needs assessment”.

(4) A needs assessment must include an assessment of—

   (a) the impact of the adult's needs for care and support on the matters specified in section 1(2),

   (b) the outcomes that the adult wishes to achieve in day-to-day life, and

   (c) whether, and if so to what extent, the provision of care and support could contribute to the achievement of those outcomes.

(5) A local authority, in carrying out a needs assessment, must involve—

   (a) the adult,
(b) any carer that the adult has, and

(c) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare.

(6) When carrying out a needs assessment, a local authority must also consider-

(a) whether and if so to what extent, matters other than the provision of care and support could contribute to the achievement of the outcomes that the adult wishes to achieve in day to day life, and;

(b) whether the adult would benefit from the provision of anything under section 2 or 4 or of anything which might be available in the community.

24. The Guidance states:

“6.9. The purpose of an assessment is to identify the person’s needs and how these impact on their wellbeing, and the outcomes that the person wishes to achieve in their day-to-day life. The assessment will support the determination of whether needs are eligible for care and support from the local authority, and understanding how the provision of care and support may assist the adult in achieving their desired outcomes. An assessment must be person-centred, involving the individual and any carer that the adult has, or any other person they might want involved. An adult with care needs could for example ask for their GP or a district nurse to be contacted to provide information relevant to their needs.

6.110 In making this judgment, local authorities should look to understand the adult’s needs in the context of what is important to him or her. Needs may affect different people differently, because what is important to the individual’s wellbeing may not be the same in all cases. Circumstances which create a significant impact on the wellbeing of one individual may not have the same effect on another.”

25. A few observations about the assessment duty:

a. ‘Care and support’ may carry a different meaning from ‘care and attention’ (“to need looking after”) and certainly does not have to be “accommodation related” as there is no direct link to the provision of accommodation (as was
the case with s.21 NAA 1948: see *R (SL) v. Westminster CC* [2013] UKSC 27).

b. The assessment must consider the impact of the needs on the wellbeing of the adult (s.9(4)). This should ensure it has a wide lens. It was in any event necessary under the old law to include a focus on matters beyond personal care, including recreational and social needs (*R (Norton) v. Haringey LBC* (1997-8) CCLR 168).

c. The assessment must be personalized – the adult’s needs must be identified but also their desired outcomes. The process should be discursive and contemplate whether care and support or anything else might contribute to the achievement of those outcomes.

d. The LA’s resources are (almost certainly) irrelevant at the assessment stage (see ‘opportunities’ below).

2. Eligibility criteria

26. Section 13 contains the eligibility criteria:

S.13 The eligibility criteria

(1) Where a local authority is satisfied on the basis of a needs or carer’s assessment that an adult has needs for care and support or that a carer has needs for support, it must determine whether any of the needs meet the eligibility criteria (see subsection (7)).

(2) Having made a determination under subsection (1), the local authority must give the adult concerned a written record of the determination and the reasons for it.

(3) Where at least some of an adult's needs for care and support meet the eligibility criteria, the local authority must—

(a) consider what could be done to meet those needs that do,

(b) ascertain whether the adult wants to have those needs met by the local authority in accordance with this Part, and
(c) establish whether the adult is ordinarily resident in the local authority's area.

(6) Regulations may make provision about the making of the determination under subsection (1).

(7) Needs meet the eligibility criteria if—

(a) they are of a description specified in regulations, or

(b) they form part of a combination of needs of a description so specified.

(8) The regulations may, in particular, describe needs by reference to—

(a) the effect that the needs have on the adult concerned;

(b) the adult's circumstances.

27. The relevant regulations are the Care and Support (Eligibility Criteria) Regulations 2015/313 and, in relation to adults with a need for care and support, regulation 2:

2. Needs which meet the eligibility criteria: adults who need care and support

(1) An adult's needs meet the eligibility criteria if—

(a) the adult's needs arise from or are related to a physical or mental impairment or illness;

(b) as a result of the adult's needs the adult is unable to achieve two or more of the outcomes specified in paragraph (2); and

(c) as a consequence there is, or is likely to be, a significant impact on the adult's well-being.

(2) The specified outcomes are—

(a) managing and maintaining nutrition;

(b) maintaining personal hygiene;

(c) managing toilet needs;
(d) being appropriately clothed;

(e) being able to make use of the adult's home safely;

(f) maintaining a habitable home environment;

(g) developing and maintaining family or other personal relationships;

(h) accessing and engaging in work, training, education or volunteering;

(i) making use of necessary facilities or services in the local community including public transport, and recreational facilities or services; and

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

28. The Regulations set out the meaning of being unable:

(3) Being unable to achieve an outcome if the adult—

(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.

29. The term significant is not defined in the Act. The Guidance instructs:

6.109. The term “significant" is not defined by the regulations, and must therefore be understood to have its everyday meaning. Local authorities will have to consider whether the adult’s needs and their consequent inability to achieve the relevant outcomes will have an important, consequential effect on their daily lives, their independence and their wellbeing.”

6.111. In making this judgment, local authorities should look to understand the adult’s needs in the context of what is important to him or her. Needs may affect different people differently, because what is important to the individual’s wellbeing may not be the same in all cases. Circumstances which create a
significant impact on the wellbeing of one individual may not have the same
effect on another."

30. Some observations about the eligibility criteria:

a. The criteria are focussed on the adult’s individual needs. It was common under the
FACS/Prioritising Need Guidance for local authorities to fall into the error of
essentially categorizing the person as a whole rather than her individual needs. That
said it is clear that a need will meet the eligibility criteria if it forms “part of a
combination of needs of a description” specified in the regulations (s.13(7)(b)).

b. Needs must “arise from” or be “related to a physical or mental impairment” - this
does not mean caused by, or even mainly caused by, a mental or physical
impairment and is broader than the test under s.29 of the NAA 1948 (“blind, deaf or
dumb or who suffer from mental disorder or any description and other persons...who
are substantially and permanently handicapped by illness, injury or congenital
deformity”) but does not include “age” or “any other circumstances”, which feature in
s.21 NAA 1948. Notably, the Guidance appears to suggest substance misuse will
meet this part of the test (6.104).

c. It is clear that the criteria are ‘carer blind’ – this is explained in the Guidance:

“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. After the eligibility
determination has been reached, if the needs are eligible or the local
authority otherwise intends to meet them, the care which a carer is
providing can be taken into account during the care and support
planning stage. The local authority is not required to meet any needs
which are being met by a carer who is willing and able to do so, but it
should record where that is the case. This ensures that the entirety of
the adult’s needs are identified and the local authority can respond
appropriately if the carer feels unable or unwilling to carry out some or
all of the caring they were previously providing.”

d. There is a risk that assessments become too focussed on the specified outcomes
whereas they should take a broader view (not least because there is a power to meet
ineligible needs which might be necessary where they nevertheless have a significant impact on the adult’s wellbeing).

e. The adult’s resources and in particular her need for accommodation must be ignored when determining whether there are eligible needs - the application of the criteria should focus on the adult’s capacity to achieve the stated outcomes whether or not they have the resources to meet their everyday needs (see R (GS) v. Camden LBC [2016] EWHC 1762).5

f. The term significant is not defined in the Act and the Guidance merely suggests that it should be given its “everyday meaning”, i.e. “an important, consequential effect on their daily lives, their independence and their wellbeing” (6.109). The courts are very unlikely to add any further gloss to the test (see Lord Wilson in re B (A Child) (Care Proceedings: Threshold Criteria) [2013] UKSC 33).

g. The difficult but common problem of fluctuating need is dealt with explicitly in regulation 2(4):

“(4) Where the level of an adult’s needs fluctuates, in determining whether the adult’s needs meet the eligibility criteria, the local authority must take into account the adult’s circumstances over such period as it considers necessary to establish accurately the adult’s level of need.”

This is somewhat tautological. Thankfully the Guidance does a little better:

“6.58. As the condition(s) of the individual at the time of the assessment may not be entirely indicative of their needs more generally, local authorities must consider whether the individual’s current level of need is likely to fluctuate and what their on-going needs for care and support are likely to be. This is the case both for short-term fluctuations, which may be over the course of the day, and longer term changes in the level of the person’s needs. In establishing the on-going level of need local authorities must consider the person’s care and support history over a suitable period of time, both the frequency and degree of fluctuation.

5 There are sounds reasons for maintaining that the Judge’s conclusion may be wrong but the claimant won her case on different grounds.
6.113. Individuals with fluctuating needs may have needs which are not apparent at the time of the assessment, but may have arisen in the past and are likely to arise again in the future. Therefore local authorities must consider an individual’s need over an appropriate period of time to ensure that all of their needs have been accounted for when eligibility is being determined. Where fluctuating needs are apparent, this should also be factored into the care plan, detailing the steps local authorities will take to meet needs in circumstances where these fluctuate. For example, an adult with a mental illness, which has been managed in the past eight months but which could deteriorate, if circumstances in the adult’s life change. In such situations, local authorities must consider the nature of the adult’s needs have been over the past year to get a complete picture of the adult’s level of need.”

h. The criteria are intended to provide a single national threshold and as such no provision is made for consideration of local resources at this stage of the decision making process.

3. The duty and power to meet eligible needs

31. S.18 Duty to meet needs for care and support

S.18 (1) A local authority, having made a determination under section 13(1), must meet the adult's needs for care and support which meet the eligibility criteria if—

(a) the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence,

(b) the adult's accrued costs do not exceed the cap on care costs, and

(c) there is no charge under section 14 for meeting the needs or, in so far as there is, condition 1, 2 or 3 is met.

(2) Condition 1 is met if the local authority is satisfied on the basis of the financial assessment it carried out that the adult's financial resources are at or below the financial limit.
32. The local authority also has a power to meet ineligible needs or urgent needs without having yet assessed or made a determination pursuant to s.13(2) (s.19(2) & (3)).

What can be done to meet needs?

33. The Act does not contain an exhaustive list of what may be provided to meet needs: Section 8 states:

S.8 How to meet needs

(1) The following are examples of what may be provided to meet needs under sections 18 to 20

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

(2) The following are examples of the ways in which a local authority may meet needs under sections 18 to 20—

(a) by arranging for a person other than it to provide a service;
(b) by itself providing a service;
(c) by making direct payments.

(3) “Care home” has the meaning given by section 3 of the Care Standards Act 2000.

34. The “provision of services” (either by itself or by arrangement with another) is just one of the “examples” given in s.8(2) as to how a local authority may meet needs for care and support or support. This reflects a policy shift away from service delivery to the meeting of ‘outcomes’.

35. The Guidance states:

“10.10. ‘Meeting needs’ is an important concept under the Act and moves away from the previous terminology of ‘providing services’. This provides a greater variety of approach in how needs can be met, developed through care and support planning as described in this chapter. The concept of “meeting
needs” is intended to be broader than a duty to provide or arrange a particular service. Because a person’s needs are specific to them, there are many ways in which their needs can be met. The intention behind the legislation is to encourage this diversity, rather than point to a service or solution that may be neither what is best nor what the person wants. The purpose of the care and support planning process is to agree how a person’s needs should be met, and therefore how the local authority will discharge its duty, or its power, to do so.”

What cannot be done to meet needs

36. The line between care and support on the one hand and medical treatment on the other remains the same, with Coughlan [2001] QB 213 and Grogan [2006] EWHC 44 (Admin) being put of a statutory footing. This is achieved by s.22 of the Act:

S.22 Exception for provision of health services

(1) A local authority may not meet needs under sections 18 to 20 by providing or arranging for the provision of a service or facility that is required to be provided under the National Health Service Act 2006 unless—

(a) doing so would be merely incidental or ancillary to doing something else to meet needs under those sections, and

(b) the service or facility in question would be of a nature that the local authority could be expected to provide.

(2) Regulations may specify—

(a) types of services or facilities which, despite subsection (1), may be provided or the provision of which may be arranged by a local authority, or circumstances in which such services or facilities may be so provided or the provision of which may be so arranged;

(b) types of services or facilities which may not be provided or the provision of which may not be arranged by a local authority, or circumstances in which such services or facilities may not be so provided or the provision of which may not be so arranged;
(c) services or facilities, or a method for determining services or facilities, the provision of which is, or is not, to be treated as meeting the conditions in subsection (1)(a) and (b).

(3) A local authority may not meet needs under sections 18 to 20 by providing or arranging for the provision of nursing care by a registered nurse.

(4) But a local authority may, despite the prohibitions in subsections (1) and (3), arrange for the provision of accommodation together with the provision of nursing care by a registered nurse if—

(a) the authority has obtained consent for it to arrange for the provision of the nursing care from whichever clinical commissioning group regulations require, or
(b) the case is urgent and the arrangements for accommodation are only temporary.

(5) In a case to which subsection (4)(b) applies, as soon as is feasible after the temporary arrangements are made, the local authority must seek to obtain the consent mentioned in subsection(4)(a).

(6) Regulations may require a local authority—

(a) to be involved in the specified manner in processes for assessing a person's needs for health care and for deciding how those needs should be met;

(b) to make arrangements for determining disputes between the authority and a clinical commissioning group or the National Health Service Commissioning Board about whether or not a service or facility is required to be provided under the National Health Service Act 2006.

(7) Nothing in this section affects what a local authority may do under the National Health Service Act 2006, including entering into arrangements under regulations under section 75 of that Act (arrangements with NHS bodies).

(8) A reference to the provision of nursing care by a registered nurse is a reference to the provision by a registered nurse of a service involving—

(a) the provision of care, or
(b) the planning, supervision or delegation of the provision of care, other than a service which, having regard to its nature and the circumstances in which it is provided, does not need to be provided by a registered nurse.

(9) Where, in a case within subsection (4), the National Health Service Commissioning Board has responsibility for arranging for the provision of the nursing care, the reference in paragraph (a) of that subsection to a clinical commissioning group is to be read as a reference to the Board.

(10) For the purposes of its application in relation to the duty in section 2(1) (preventing needs for care and support), this section is to be read as if references to meeting needs under sections 18 to 20 were references to performing the duty under section 2(1)."

37. Similarly, the Care Act 2014 does not disrupt the relationship between social care and housing, which is retained by s.23 of the Act:

S.23 Exception for provision of housing etc.

(1) A local authority may not meet needs under sections 18 to 20 by doing anything which it or another local authority is required to do under—

(a) the Housing Act 1996, or

(b) any other enactment specified in regulations.

(2) “Another local authority” includes a district council for an area in England for which there is also a county council.

(3) For the purposes of its application in relation to the duty in section 2(1) (preventing needs for care and support), this section is to be read as if, in subsection (1), for “meet needs under sections 18 to 20” there were substituted “perform the duty under section 2(1)“

38. The Guidance explains:

“10.23. Sections 21 to 23 of the Act set out the limitations on the circumstances in which local authorities may meet care and support needs. In particular, they make clear that local authorities must not meet needs by providing or arranging any health service or facility which is required to be provided by the NHS, or doing anything under the Housing Act 1996. The aim
of these provisions is to avoid duplication in the provision of services and facilities, and provide clarity about the limits of care and support, and the circumstances in which care and support should be provided as opposed to health services or housing services (or vice versa)."

4. Care Planning and personal budgets

39. Section 24 of the Care Act 2014 sets out the steps the local authority must take following the needs assessment. It states (materially):

S.24 The steps for the local authority to take

(1) Where a local authority is required to meet needs under section 18 or 20(1), or decides to do so under section 19(1) or (2) or 20(6), it must—

(a) prepare a care and support plan or a support plan for the adult concerned,

(b) tell the adult which (if any) of the needs that it is going to meet may be met by direct payments, and

(c) help the adult with deciding how to have the needs met.

40. The contents of a care and support plan are prescribed by s.25:

S.25 Care and support plan

(1) A care and support plan ... is a document prepared by a local authority which—

(a) specifies the needs identified by the needs assessment

(b) specifies whether, and if so to what extent, the needs meet the eligibility criteria,

(c) specifies the needs that the local authority is going to meet and how it is going to meet them,

(d) specifies to which of the matters referred to in section 9(4) the provision of care and support could be relevant or

(e) includes the personal budget for the adult concerned (see section 26), and

(f) includes advice and information about—

(i) what can be done to meet or reduce the needs in question;
(ii) what can be done to prevent or delay the development of needs for care and support or of needs for support in the future.

(2) Where some or all of the needs are going to be met by making direct payments, the plan must also specify—(a) the needs that are to be so met, and (b) the amount and frequency of the direct payment.

(3) In preparing a care and support plan, the local authority must involve—

(a) the adult for whom it is being prepared,

(b) any carer that the adult has, and

(c) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult's welfare.

... (5) In performing the duty under subsection (3)(a) the local authority must take all reasonable steps to reach agreement with the adult for whom the plan is being prepared about how the authority should meet the needs in question.

(6) In seeking to ensure that the plan is proportionate to the needs to be met, the local authority must have regard in particular—

(a) in the case of a care and support plan, to the matters referred to in section 9(4);

41. The Guidance states:

1.12 During care and support planning, when agreeing how needs are to be met, promoting the person’s wellbeing may mean making decisions about particular types or locations of care (for instance, to be closer to family).

10.20. The local authority must take into consideration the individual’s preferences. The authority should consider the person’s goals in approaching the authority for support, and the level or nature of support desired.

10.27. In determining how to meet needs, the local authority may also take into reasonable consideration its own finances and budgetary position, and must comply with its related public law duties. This includes the importance of
ensuring that the funding available to the local authority is sufficient to meet the needs of the entire local population. The local authority may reasonably consider how to balance that requirement with the duty to meet the eligible needs of an individual in determining how an individual’s needs should be met (but not whether those needs are met). However, the local authority should not set arbitrary upper limits on the costs it is willing to pay to meet needs through certain routes – doing so would not deliver an approach that is person-centred or compatible with public law principles.

10.31. The plan must detail the needs to be met and how the needs will be met, and will link back to the outcomes that the adult wishes to achieve in day-to-day life as identified in the assessment process and to the wellbeing principle in the Act. This should reflect the individual’s wishes, their needs and aspirations, and what is important to and for them, where this is reasonable. This process is central to the provision of person-centred care and support that provides people with choice and control over how to meet their needs. The local authority should encourage creativity in planning how to meet needs, and refrain from judging unusual decisions as long as these are determined to meet needs in a reasonable way.

10.49 The person, and their carers, will have the best understanding of how the needs identified fit into the person’s life as a whole and connect to their overall wellbeing (see chapter 1). They are well placed to consider and identify which care and support options would best fit into their lifestyle and help them to achieve the day to day outcomes they identified during the assessment process.

42. Section 26 deals with what should be contained within a personal budget

“26 (1) A personal budget for an adult is a statement which specifies—

(a) the cost to the local authority of meeting those of the adult’s needs which it is required or decides to meet as mentioned in section 24(1),

(b) the amount which, on the basis of the financial assessment, the adult must pay towards that cost, and

(c) if on that basis the local authority must itself pay towards that cost, the amount which it must pay.”
43. The Guidance advises:

11.4 It is vital that the process used to establish the personal budget is transparent so that people are clear how their budget was calculated, and the method used is robust so that people have confidence that the personal budget allocation is correct and therefore sufficient to meet their care and support needs. The allocation of a clear upfront indicative (or ‘ball-park’) allocation at the start of the planning process will help people to develop the plan and make appropriate choices over how their needs are met.

11.7 Everyone whose needs are met by the local authority, whether those needs are eligible, or if the authority has chosen to meet other needs, must receive a personal budget as part of the care and support plan, or support plan. The personal budget is an important tool that gives the person clear information regarding the money that has been allocated to meet the needs identified in the assessment and recorded in the plan. An indicative amount should be shared with the person, and anybody else involved, at the start of care and support planning, with the final amount of the personal budget confirmed through this process. The detail of how the personal budget will be used is set out in the care and support plan, or support plan.

At all times, the wishes of the person must be considered and respected. For example, the personal budget should not assume that people are forced to accept specific care options, such as moving into care homes, against their will because this is perceived to be the cheapest option.

11.10. The personal budget must always be an amount sufficient to meet the person’s care and support needs, and must include the cost to the local authority of meeting the person’s needs which the local authority is under a duty to meet, or has exercised its power to do so.

44. Calculating the personal budget is dealt with in 11.22 onwards:

11.22. It is important to have a consistent method for calculating personal budgets that provides an early indication of the appropriate amount to meet the identified needs to be used at the beginning of the planning process. Local authorities should ensure that the method used for calculating the
personal budget produces equitable outcomes to ensure fairness in care and support packages regardless of the environment in which care and support takes place, for example, in a care home or someone's own home. Local authorities should not have arbitrary ceilings to personal budgets that result in people being forced to accept to move into care homes against their will.

11.23 There are many variations of systems used to arrive at personal budget amounts, ranging from complex algorithmic-based resource allocation systems (RAS), to more ‘ready-reckoner’ approaches. Complex RAS models of allocation may not work for all client groups, especially where people have multiple complex needs, or where needs are comparatively costly to meet, such as deaf-blind people. It is important that these factors are taken into account, and that a ‘one size fits all’ approach to resource allocation is not taken. If a RAS model is being used, local authorities should consider alternative approaches where the process may be more suitable to particular client groups to ensure that the personal budget is an appropriate amount to meet needs.

11.24 Regardless of the process used, the most important principles in setting the personal budget are transparency, timeliness and sufficiency. This will ensure that the person, their independent advocate if they have one, is fully aware of how their budget was calculated, that they know the amount at a stage which enables them to effectively engage in care and support planning, and that they can have confidence that the amount includes all relevant costs that will be sufficient to meet their identified needs in the way set out in the plan. The local authority should also explain that the initial indicative allowance can be increased or decreased depending on the decisions made during the development of the plan. This should prevent disputes from arising, but it must also be possible for the person, carer or independent advocate (on the person’s behalf) to challenge the local authority on the sufficiency of the final amount. These principles apply to both the indicative upfront budget and the final signed off personal budget that forms part of the care and support plan.

11.25 The Act states the personal budget must be an amount that is the cost to the local authority of meeting the person’s needs. In establishing the ‘cost to the local authority’, consideration should therefore be given to local market intelligence and costs of local quality provision to ensure that the personal
budget reflects local market conditions and that appropriate care that meets needs can be obtained for the amount specified in the budget. To further aid the transparency principle, these cost assumptions should be shared with the person so they are aware of how their personal budget was established. Consideration should also be given as to whether the personal budget is sufficient where needs will be met via direct payments, especially around any other costs that may be required to meet needs or ensure people are complying with legal requirements associated with becoming an employer (see chapter 12). There may be concern that the ‘cost to the local authority’ results in the direct payment being a lesser amount than is required to purchase care and support from the local market due to local authority bulk purchasing and block contract arrangements. However, by basing the personal budget on the cost of quality local provision, this concern should be allayed.

11.27 In all circumstances, consideration should be given to the expected outcomes of each potential delivery route. ... Decisions should therefore be based on outcomes and value for money, rather than purely financially motivated.

5. **Reviews of care and support plans**

45. Section 27 deals with review of care and support plan.

S.27(1) A local authority must—

(a) keep under review generally care and support plans, and support plans, that it has prepared, and

(b) on a reasonable request by or on behalf of the adult to whom a care and support plan relates or the carer to whom a support plan relates, review the plan.

(2) A local authority may revise a care and support plan; and in deciding whether or how to do so, it—

(a) must have regard in particular to the matters referred to in section 9(4) (and specified in the plan under section 25(1)(d)), and

(b) must involve—
(i) the adult to whom the plan relates,

(ii) any carer that the adult has, and

(iii) any person whom the adult asks the authority to involve or, where the adult lacks capacity to ask the authority to do that, any person who appears to the authority to be interested in the adult’s welfare.

(4) Where a local authority is satisfied that circumstances have changed in a way that affects a care and support plan or a support plan, the authority must—

(a) to the extent it thinks appropriate, carry out a needs or carer’s assessment, carry out a financial assessment and make a determination under section 13(1), and

(b) revise the care and support plan or support plan accordingly.

(5) Where, in a case within subsection (4), the local authority is proposing to change how it meets the needs in question, it must, in performing the duty under subsection (2)(b)(i) or (3)(b)(i), take all reasonable steps to reach agreement with the adult concerned about how it should meet those needs.

46. The Guidance states:

13.27 When revising the plan the local authority must involve the person, their carer and any other persons the adult may want involved, and their advocate where the person qualifies for one. The local authority must take all reasonable steps to agree the revision. The revision should wherever possible follow the process used in the assessment and care planning stages. Indeed, the local authority must if satisfied that the circumstances have changed in a way that affects a care and support or support plan, carry out a needs or carer’s assessment and financial assessment, and then revise the plan and personal budget accordingly. The assessment process following a review should not start from the beginning of the process but pick up from what is already known about the person and should be proportionate.

Challenges and opportunities when tackling cuts in care packages

47. For a number of reasons it can be difficult to successfully challenge cuts to care packages, the main ones of which are probably the following:
a. Judicial review is not an appeal: the LA is the arbiter of fact and the ultimate
decision maker. Therefore, where the facts range from the “obvious to the
debatable to the just conceivable, it is the duty of the court to leave the
decision of that fact to the” LA to decide (R (Puhlhofer) v. Hillingdon LBC

b. The courts have stressed that social work assessments must not be
scrutinized in an unrealistic or overly technical manner and judicial review
should not be used to ‘micro-manage’ the exercise of social workers functions
(see R (Ireneschild) v. Lambeth LBC [2007] EWCA Civ 234 and Munby J in R
(B) v. Lambeth LBC [2006] EWHC 639).

c. The concept of ‘need’ is vague and conceptually difficult: a “relative concept,
which trained and experienced social workers are much better equipped to
assess than are lawyers and courts” (Hale LJ in R (Wahid) v. Tower Hamlets

d. How to define needs was never really settled under the old law: see Lord Kerr
in MacDonald v. Kensington & Chelsea [2011] UKSC 33 [38-40]. Whilst it is
probably correct to state that the LA resources were not relevant to the
determination of whether there were needs (see the discussion in R (KM) v.
Cambridgeshire CC [2012] UKSC 23), it was plainly permissible for LAs to
describe needs in the most cost effective manner: e.g. a need for
incontinence pads and absorbent sheets as opposed to needing support with
accessing the toilet at night. This was achieved by defining needs as being a
“broader view of what needs means and includes not only the narrow
connotation of needs but also how those needs may be met.” (Lord Kerr in
MacDonald at [40])

e. Decisions which were explicitly based on consideration of competing
resources are treated as being non-justiciable (see for example Lord Bingham

f. Whilst personal budgets have always had to be adequate for the purpose of
meeting needs, it has been suggested that their inherent imprecision has
obscured a downwards pressure on the costs of care, undermining the personalisation agenda.6

g. The Human Rights Act and the public sector equality duties have been of limited relevance, despite the obvious importance of adult social care to people’s everyday lives and the difficulties many face in reaching their full potential (see for example MacDonald: R (Hughes) v. Liverpool CC [2005] EWHC 428: R (AM) v. Birmingham CC [2009] EWHC 688).

h. The courts have on several occasions decided that any injustice that flows from flawed decisions should first be ventilated by way of a complaint, even sometimes where the LA is alleged to have misdirected itself in law (on the basis that it may change its mind during the currency of the complaint) (R (Cowl) v. Plymouth CC [2001] EWCA Civ 1935).

48. However, there are also opportunities to make headway. In particular there are countervailing considerations to some of the challenges set out above and innovations and advantages included within the Act:

a. At least where you are dealing with significant cuts to larger budgets, the courts should now apply high intensity review of the decision, particularly when dealing with the allocation of a budget in lieu of direct services (R (KM) v. Cambridgeshire CC [2012] UKSC 23 at [36]).

b. Whilst the concept of needs remains unsettled, the 2014 Act is careful to separate the identification of needs and the options available for meeting them. Therefore Lord Kerr’s analysis in MacDonald should not apply under the Care Act: instead need should be broadly descriptive of the problem (e.g. an inability to move independently), rather than a want or requirement for a particular form of “care and support” (e.g. assistance with travel in the community), and certainly not any element of how the need will be met (e.g. a need for a taxi) in the manner explained by Lord Kerr. There is some support for this in the examples given in the guidance at 6.114.

c. A need will not be met if the care and support offered does not improve the adult’s wellbeing. As the very least the selected option will have to be proportionate, having regard to the impact on the adult’s wellbeing and the

obligation to prevent needs worsening or new ones developing (s.25(6) and s.1(2)). Care planning should be long-term (*R (Tucker) v. Sutton LBC* (1997) 1 CCLR 251).

d. Whilst the eligibility criteria import an objective test, the importance of the subjective views of the adult concerned are given a statutory footing: section 1(3) requires the LA to have regard to *inter alia*:

(a) the importance of beginning with the assumption that the individual is best-placed to judge the individual's well-being;

(b) the individual's views, wishes, feelings and beliefs;

(d) the need to ensure that decisions about the individual are made having regard to all the individual's circumstances (and are not based only on the individual's age or appearance or any condition of the individual's or aspect of the individual's behaviour which might lead others to make unjustified assumptions about the individual's well-being);

e. Decision making under the Act ought to be transparent, including in the setting of the budget (see chapter 11 of the Guidance). Particularly clear and strong reasons will be required to support a decision to cut a budget.

f. Decisions must be made with regard to up to date evidence, including medical evidence of needs (*R (Killigrew) Birmingham CC* (2000) 3 CCLR 109). Whilst the court will be circumspect about admitting expert evidence intended to show that the social services authority has reached an unlawful decision, reports and evidence from treating physicians should be considered as part of the assessment where relevant.

g. Despite this bold attempt to establish uniform national eligibility criteria, subjective and managerial influences will undoubtedly continue to play a major role in decisions made about who is entitled to care and support. Nonetheless it is always worth asking the contrary question – can the level of impact on the adult's wellbeing rationally be described as insignificant?

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7 See Munby J in *R (B) v. Lambeth* above.
h. Whilst there is no duty to meet needs that are being met by carers this only applies if they are in fact being met (s.18(7)) and the carer is willing and able to continue to do so (s.10(1)(a)(b)). Under the previous law met needs were often ignored.

i. It is clear that the personal budget must be adequate to meet the needs in the manner set out in the care plan (Guidance 11.24). The decision about how needs will be met must accord with the reasonable preferences of the adult and cannot be changed without a review and probably a reassessment under s.27. For this reason it should not be open to the LA to say in the face of an allegation that the budget is inadequate that the needs should therefore be met by a way not specified in the care plan (see R (Davey) v. Oxfordshire CC forthcoming).

j. In making decisions about how needs will be met and setting the corresponding budget the LA can have regard to its resources and the general needs of its population but this must never be determinative: arbitrary decisions or rigid policies will be unlawful (see paragraph above, KM above and DM (2013) 16 CCLR 39 and R (Alloway) v. Bromley CC [2004] EWHC 2108). The use of RAS and/or Panels is still lawful but must accord with the principles of the Act.

k. Whilst the civil and political rights in the HRA have offered little to recipients of care who have had their budgets cut, the courts are beginning, tentatively, to recognise some features of other UN human rights treaties and socio-economic rights, including the UN Convention on the Rights of People with Disabilities – see R (Bumpi) v. Birmingham CC [2012] EWCA Civ 629, Mathieson v. SSDWP [2015] UKSC 47 and forthcoming R (Davey) v. Oxfordshire CC in which the EHRC intervened in order to make submissions about the right to independent living (Article 19 UNCRPD).

l. Alternative remedies have to be effective in order to make JR inappropriate (see Tucker above). Ultimately there is a duty to meet needs that the courts will enforce if the claimant establishes that her needs are not being met or the care plan is being frustrated by an inadequate budget (R (Tammadge) v. Wigan MBC (1997-8) 1 CCLR 581).
m. Where the LA contends that a particular services is not available it may be worth inquiring about what steps they have undertaken to promote a diverse and high quality range of care and support services for people in their area, pursuant to the new market oversight provisions contained in the Act (s.5). Where it is contended a resource is not available to meet a need the LA must make a “sincere and determined” effort to find it (*R. v Lambeth CC ex parts A1 & A2* (1997) 1 CCLR 336).

n. Whilst the LA “should take steps to support the individual to access the support to which they are entitled under other legislation”, (10.24) the buck stops with the LA: the duty to meet eligible needs is not discharged just because a person has another entitlement to a different service which could meet those needs, but which they are not availing themselves of” (10.25).

o. There is a welcome new duty to provide reasons for eligibility decisions (s.13(2)). This means the scope for an impermissible focus on resources or other errors should be easier to identify and challenge.

49. There is still considerable uncertainty around how far the Care Act and the courts will provide the legal ballast necessary to prevent the undeniable problems in the adult care system resulting in crisis or even catastrophe. There are however reasons to believe that the Act has at least provided more opportunities in this regard than it has fresh problems.

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