

Adult Social Care Legal Context – Briefing Paper **October 2022**

1 Current Legal Requirements for Adult Social Care

The Care Act 2014 is the underpinning legislation for Adult Social Care, providing the foundation for all activity and intervention and includes;

- The Wellbeing Principle
- Duties to assess and meet social care needs
- National Eligibility Criteria
- Advocacy
- Carers Rights
- Safeguarding Responsibility
- Charging for Social Care
- Which council is responsible
- Shaping the social care provider market
- Direct Payments

Overall, the Care Act aims to give people and their carer's more choice and control, more opportunity to live independent and fulfilled lives, and be kept at the heart of all involvement with Adult Social Care. This has led to the wide adoption of a Strengths Based Approach in Adult Social Care nationally and in Islington; taking a person-centred approach, focusing on what matters **to** people rather than what is the matter **with** people.

Some aspects of the Care Act in more detail;

National Eligibility Criteria

A person is eligible for assessment and support if

- their needs are caused by physical or mental impairment or illness,
- as a result of the needs they are unable to achieve two or more specified outcomes
- and as a consequence there is or is likely to be a significant impact on the person's well-being.

A carer meets the eligibility criteria if

- their needs are caused by providing necessary care for an adult
- and as a result their health is at risk or they are unable to achieve specified outcomes and as a consequence
- there is or is likely to be a significant impact on the carer's well-being.

Assessment

Adult Social Care is responsible for assessing anyone who 'may have needs for care and support'.

The aim of the assessment is to identify what needs the person may have and what outcomes they are looking to achieve to maintain or improve wellbeing.

The outcome of the assessment might range from

- offering guidance and information,
- connecting people with voluntary support,
- providing assistive technology and reablement,
- helping people into employment and arranging funded services

Prevention and early intervention

This is at the heart of Adult Social Care, and Local Authorities must consider the person's own strengths or if any other support might be available in the community to meet those needs. This is often provided through Occupational Therapy support, provision of equipment, assistive technology, voluntary sector support and reablement

Transitions

The Care Act aims to end the risk of young people and their families experiencing a 'cliff edge' in relation to their care when they transfer from Children's Services to Adult's Services. It is imperative that Children's Services, Adult Social Care, Education and Health Professionals work well together so that support can be seamless and continuous as they transition between children's and adult services. In Islington this is achieved through the Transitions and Progression To Adulthood Services where multidisciplinary teams across Children's and Adult Social Care work together to support young people and their families and carers.

Personal Budgets

A personal budget for an adult is the funding that is provided by the council to meet their needs. It is a statement which specifies the cost to the local authority of meeting the adult's eligible needs. The personal budget must be sufficient to meet the needs appropriately and the local authority can choose a more cost effective option if there is more than one way to meet needs appropriately, to ensure best use of public money. People are also financially assessed to make a financial contribution towards their care, and if criteria is met, health funding can also contribute towards the cost of care.

Support Planning

Following an assessment, a support plan is developed. This should be flexible and creative in how people's needs are met, not provide too much care thereby encouraging dependency, and always provide support that can prevent and delay needs arising or increasing.

Safeguarding

The Care Act 2014 places a duty on adult social care to safeguard people who appear to be at risk of harm and who are unable to protect themselves from potential harm. There is a duty for partner organisations to co-operate with safeguarding enquiries and Safeguarding Adult Boards are put onto a statutory footing. In carrying out safeguarding duties ASC has to apply the 6 principles of safeguarding; empowerment, prevention, proportionality, protection, partnership and accountability as well as use a making safeguarding personal approach. In Islington the Safeguarding Adults Team oversee this aspect of work, providing advice and guidance to staff and teams, and supports the strategic work of the Islington Safeguarding Adult's Board.

Market Shaping

Adult Social Care has a duty to shape, support and maintain appropriate and effective provision of services for meeting care and support needs in the local area. This must ensure there is a variety of providers to choose from, that services are of an appropriate quality, and that people have sufficient information on which to make their decisions. Care Act principles of wellbeing, outcomes, prevention and delay of need should inform commissioning, procurement, and management of market failure.

Other relevant legislation to ASC

Human Rights Act 1998

ASC legal duties are to:

Respect – this includes respecting people's right to autonomy, choice and control, not overly interfering in people's lives, and when people do need support ensuring that the least restrictive options are put in place

Protect - this can include protecting a person known to be at risk of serious harm and recognising that people have a right to feel safe in their homes, communities and lives

Fulfil - taking steps to strengthen access to and realisation of human rights such as a right to family life and liberty. It includes having systems in place to prevent or investigate human rights abuses e.g safeguarding issues

Mental Capacity Act, 2005

This relates to when and how an individual may be judged to be able or unable to make their own decisions and incorporates • The test for capacity • How to make a decision on behalf of someone who lacks capacity • Lasting Powers of Attorney and Advance Decisions • Independent Mental Capacity Advocates • Court of Protection • Now, Deprivation of Liberty Safeguards • From Oct 2020, Liberty Protection Safeguards

Mental Capacity Assessments are carried out when there is a particular significant and long term decision to be made such as accommodation, care and finances. If a person has been assessed as lacking capacity to make a decision, then a practitioner may make a best interests decision on their behalf. Thinking about the person's human rights and how they might be affected should be at the centre of any

decisions about best interests. This means the person's wishes and feelings must be considered at all times and they must be supported to participate in decisions as much as possible. There is also a requirement to consult relevant others such as family members and other professionals involved in the care and support of the person.

Mental Health Act, 1983 (amended 2007)

The Mental Health Act provides the legal premise for compulsory detention in hospital for assessment, treatment, Community interventions e.g. Community Treatment Orders (CTOs), and Guardianship. It provides for the protection of patient's rights through the Nearest Relative, Advocacy, access to Mental Health Tribunals, and incorporates a provision for free after-care as well as options for the treatment of mentally disordered offenders.

It is extremely important to emphasise that where it is possible to treat a patient safely and lawfully without detaining them under the Act, the patient should not be detained. Wherever possible a patient's independence should be encouraged and supported with a focus on promoting recovery.

Duty of Care

This requires Adult Social Care to take actions within its lawful power to prevent harm from occurring, where harm is reasonably foreseeable. It is never possible to eliminate risks but it is imperative to take all reasonable steps and actions to mitigate risk and harm, thereby not being negligent.

2) Legislative Reform for ASC

Significant change and reform to aspects of law relevant to Adult Social Care is underway.

1. Health and Care Act

This introduces new measures to promote and enable collaboration in health and care, building on earlier recommendations made by NHS England and NHS Improvement in 2019. It also contains new powers for the Secretary of State to intervene in the health and care system, changes to public health, social care, and the oversight of quality and safety by the introduction of a new assurance/inspection programme.

A key aim of this legislation is to encourage integration; both within the NHS, but also for social care providers, integration between the NHS and other services and providers, creating potential to improve communication and co-operation between NHS and social care providers to improve outcomes for people and their carers.

In summary:

- This legislation aims to make it simpler for health and care organisations to work together to deliver more joined-up care to the increasing number of people who rely on support from multiple different services.
- The proposals include new powers for the Secretary of State to intervene in local service reconfigurations.
- Introduction of an assurance/inspection regime to be carried out by the Care Quality Commission
- The Secretary of State to have the power to make payments directly to social care providers (including profit-making organisations)
- Data collected from social care providers to be shared across local authorities, with a requirement to share anonymised information to the benefit of the health and care system
- The Secretary of State to have additional obligations, including a statutory duty to publish a report in each Parliament on workforce planning responsibilities across the social care sector; highlighting an intention to address chronic staff shortages and resolve workforce challenges.
- To move toward a “discharge to assess” model for hospital discharge. This would allow for assessment for NHS Continuing Healthcare (CHC), NHS Funded Nursing Care (FNC) assessments, and Care Act assessments to take place once a patient has been discharged from hospital.
- Removal of the “delayed discharge regime.” This set time limits for the provision of support arrangements for hospital patients, with fines being paid by the local authority should they cause a patient’s discharge to be delayed.

2. Impact of Covid

The government’s ***Build Back Better: Our Plan for Health and Social Care*** recognised that Social care is an integral part of our society and economy and resulted in a decision to raise taxes and a UK wide 1.25% Health and Social Care Levy ringfences for health and social care and based on an increased National Insurance contribution, although this has subsequently been paused.

This emphasises the priority to ensure that adults who need extra care are well looked after and that the social care system could be working better both for people using it and for those caring for others. There is a commitment to reforming the adult social care system in England in order to meet the increasingly complex needs of an ageing population, as well as those of younger adults who need support.

Key to the plan is the need for:

- better integration between health and social care, so that care becomes less fragmented, and people are cared for in the right place for their needs
- a more joined up approach to the delivery of care that brings together national and local systems
- a continued focus on preventative care, so that fewer people require hospital care and those preparing for major treatment get support at the right time

3. People at the Heart of Care White Paper

This white Paper implements some of the ambitions set out in the ***Build Back Better: Our Plan for Health and Social Care paper*** and sets out a vision for the future of adult social care, proposing a 10-year programme of change towards a more personalised, digitised sector.

The white paper revolves around three objectives:

1. that people have the choice, control and support to live independent lives;
2. that people have access to quality and tailored care and support; and
3. that people find adult social care fair and accessible.

There was renewed commitment to increase state funding to the social care sector. For the first time, the government is proposing to set a lifetime cap on the cost of care while increasing pay for workers. These proposals are backed by the health and social care levy announced in September 2021, which pledged £5.4bn for adult social care in the next three years.

There was an initial commitment to spend £1 billion over the next three years on reforming the social care system, including funding supported housing, new technology, and career progression for those working in the sector.

Note: Given the current economic crisis, there is speculation that these pledges may be paused.

Digitisation is at the heart of the plans so that by March 2024 at least 80% of social care providers will have a digitised care record in place that can connect to a shared care record. The intention is to have a partnership between the Department for Culture, Media and Sport and the telecommunications industry to ensure home care providers have the infrastructure they need to work digitally.

A universal knowledge and skills framework for the care sector will be developed alongside a career structure for the social care workforce.

The proposals also include more support for unpaid carers, and funding for local authorities to be more innovative in the care they offer and widen the options available.

The white paper also confirmed that £3.6bn will be allocated to reform the social care charging system, as first announced in November 2021. Nobody in England will have to pay more than £86,000 for their personal care costs, alongside more generous means-tested support for anyone with less than £100,000 in chargeable assets.

Self-funders will be able to access the same rates for care costs in care homes that local authorities pay, bringing an end to self-funders having to pay more for the same care, while ensuring local authorities move towards paying a fair cost of care to providers.

Note: Given the current economic crisis, there is speculation that these pledges may be paused.

The white paper also confirmed that the secretary of state for health and social care will be given new legal powers to intervene in local authorities in order to improve services where there are significant failures to deliver their duties under the Social Care Act 2014.

4. Integration White Paper

This sets out proposals that aim to provide better, more joined-up health and care services at 'place' level, it provides some clarity in areas such as better data sharing and a focus on enabling workforce integration which would help to improve care for individuals.

The paper focuses on integration arrangements at place level and aims to accelerate better integration across primary care, community health, adult social care, acute, mental health, public health and housing services which relate to health and social care. Children's social care is not included within the scope of the paper, and it is left to individual places to consider the integration between and within children and adult health and care services.

Overall, it is not prescriptive and permits a good degree of local flexibility. It covers:

- **Governance.** All places will be required to adopt a governance model by spring 2023. This must include a clear, shared plan against which delivery can be tracked and which should be underpinned by pooled and aligned resources.
- **Leadership.** The paper states that there should be a single person accountable for the delivery of the shared plan and outcomes in each place or local area. This may be, for example, an individual with a dual role across health and care or an individual who leads a place-based governance arrangement. The single person will be agreed by the relevant local authority or authorities and integrated care board. These arrangements should, as a starting point, make use of existing structures and processes including health and wellbeing boards and the Better Care Fund.

- **Budget pooling.** NHS and local government organisations will be supported and encouraged to do more to align and pool budgets. There is an expectation that financial arrangements and pooled budgets will become more widespread and grow to support more integrated models of service delivery, eventually covering much of funding for health and social care services at place level.
- **Oversight.** The government will set out a framework with a small and focused set of national priorities and an approach from which places can develop additional local priorities. This will come into force in April 2023. Local leaders will be responsible for working with partners to develop their priorities. Local partners and integrated care systems (ICSs) will be responsible for identifying and addressing issues and barriers to delivery.
- **Digital.** Every ICS will need to ensure that all constituent organisations have a base level of digital capabilities and are connected to a shared care record by 2024, enabling individuals, their approved caregivers and their care team to view and contribute to the record.
- **Workforce.** ICSs will be required to support joint health and care workforce planning at place level, working with both national and local organisations. The paper outlines the intention to introduce integrated skills passports. This will: enable health and care staff to transfer their skills and knowledge between the NHS, public health and social care; increase nurse training opportunities in social care settings; and focus on roles which can support care co-ordination across boundaries, for example link workers.

Funding will be provided to deliver [Care Certificates](#), alongside significant work to create a delivery standard recognised across the social care sector.

5. Mental Health Act Reform

This has been consulted on for some time and was formally announced in the Queen’s Speech in May 2022. It is 10 years since the Mental Health Act was previously amended and there is a need for further reform due to a continued rise in detentions; a disproportionate impact on Black and Black British Groups; evidence that Community Treatment Orders do not reduce hospital admissions, and important developments in recognising the rights of people who have disabilities who also have mental health needs. It is widely hoped that the following will feature as central to reform

- Principles of Choice and Autonomy; Least Restriction; Therapeutic Benefit and The Person as an Individual
- Automatic access to advocacy
- Addressing Racial Disparities
- Strengthening family and carer involvement

- More scope for tribunals to respond to people's concerns about their care
- An end to the use of police cells when initially detained and an end to the use of police vehicles in taking people to hospital
- Improving how people with Learning Disabilities and Autism are treated under the Mental Health Act

6. Deprivation of Liberty Safeguards

Deprivation of Liberty Safeguards was introduced in 2009 to provide legal authority to care for people who lack capacity to consent to their accommodation and care arrangements, and who were under high levels of care and supervision. The Mental Capacity (Amendment) Act 2019 has been passed and will replace DOLS with Liberty Protection Safeguards (LPS). The intention is that LPS will be a simpler legal framework and process applying to all settings, ensuring that the person is at the centre of all decision-making, include 16 and 17 year old's, increase legal compliance and cost effectiveness. It is expected that this process will be absorbed into the work of all social care practitioners rather than be a more specialist piece of work carried out by Best Interest Assessors.