Care and Health Law

Defensible decision making
in relation to councils' service users

Advice, Information, Carers, Prevention and Advocacy

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Some questions for discussion first

First Contact, Advice and Information, Carers, Prevention and Advocacy:

- **Advocacy**: what is actually going on with First Contact: are they making the decisions as to who needs an **advocate** for the next stage? Are they recording their thinking on substantial difficulty, the appropriateness of any informal involver who seems to be willing, and the consent of the individual to being supported by their informal contact person?
- Are you and your A&I or first contact teams routinely able to explain how your cost allocation tool/RAS works? If not, why not?
- Are you telling people who are approaching that they **must** try prevention first, and pausing the assessment for a very long time, whilst several things are tried, in turn?
- Are you doing something called **supported self assessment** and if so, how are you doing the checking up – the '*assurance*' bit?
- Is there any purely computer based assessment system, just sort of running itself for eligibility and RAS decisions, for online requesters?
- What is the level of carer requests for assessment, and is it being met? Do the A&I services for carers, or ***those*** assessors, grasp that all a carer really has to do is to assert a cogent threat to their mental health to be found eligible?
- Do A&I staff know whether there are Support **Plans** for carers, even if you are ultimately giving the carer a direct payment? Would they know whether you are organising carers' *services* for those who do not want the money but who do need support?
- Have young people or young carers of adults been demanding **Transition** assessments at the age of 14? Have you been giving written reasons why you won't do them at that point?

More questions

Assessment

- Have there been any guidance to social workers/assessors if they find a person unable to achieve x, or xyz but believe that no consequential significant impact is being experienced as a result?
- Is eligibility being determined without regard to specific services: ie eligible for care planning, not eligible for any particular service?

Is this bit of the decision making counting the MET needs, as per the rules? (even though they will be discounted at the care planning stage?)

- Are **written decisions** about eligibility being given in every case, or even any single case?

Care Planning?

- How is review based care-planning going, for all the clients whose reviews have to be done before April 1st 2016?
- Are you telling ***<u>eligible</u>*** persons and/or their supporter or advocate that the person's needs can be met perfectly well, by going to something that's called a 'universal service'?
- Are you doing individuated care planning for older people or still maybe just saying 'needs 24 hr care'? What about shared care for younger people? Do they all have plans?
- Are people arguing about their budgets, and succeeding?
- Are you giving people reasons for why they can have £x but no more than £x after a Panel process?
- Is the DP rate the same as the councils contracted agency rate? Or more than the council can get the service for? Or less, even?
- Are you running ordinary residence properly, for out of area tenants? Do you have a space on that care plan for saying that their needs can only be met in specified accommodation?

The whole point of information and advice: 'People 'don't know what they *need* to know' in relation to their care and support."

"….A local authority must establish and maintain a service for providing people in its area with information and advice relating to care and support for adults and support for carers." [Care Act s4(1)]

Some definitions, before we get too far:

- The term '**information**' means the communication of **knowledge** and **facts** regarding care and support
- '**Advice**' means helping a person to identify choices and/or **providing an *opinion* or *recommendation***
- **Advocacy is not advice, in our view**. It means 'supporting a person to **understand** information, **express** their needs and wishes, secure their rights, **represent** their interests and **obtain** the care and support they need…' It is not a cheapie alternative to social services staff!

What should A&I cover, or be provided about?

- the care and support system **locally**
- how to **access** the care and support available locally
- the **choice of types of** care and support, and the **choice of care providers** available in the local authority's area
- **how to access** <u>independent</u> financial advice on matters relating to care and support
- how to raise concerns about the **safety or wellbeing of an adult** with care and support needs

Depending on local circumstances, the service *should also include, but not be limited to*, information and advice on:

- available housing and housing-related support options for those with care and support needs;
- effective treatment and support for health conditions, including Continuing Health Care arrangements;
- availability and quality of health services;
- availability of services that may help people remain independent for longer such as home improvement agencies, handyman or maintenance services;
- availability of befriending services and other services to prevent social isolation;
- availability of intermediate care entitlements such as aids and adaptations;
- eligibility and applying for disability benefits and other types of benefits;
- availability of employment support for disabled adults;
- children’s social care services and transition;
- availability of carers’ services and benefits;
- sources of independent information, advice and advocacy;
- the Court of Protection, power of attorney and becoming a Deputy;
- raise awareness of the need to plan for future care costs;
- practical help with planning to meet future or current care costs;
- accessible ways and support to help people understand the different types of abuse and its prevention. [Guidance 3.24]

When information should be provided – as a pointer to who should be doing it!

- at **first** point of contact with the local authority;
- as part of a needs or carer's **assessment**,
- during a period of **reablement**;
- around and following **financial assessment**;
- when **considering** a financial commitment such as a deferred payment agreement or top -up agreement;
- during or following an adult **safeguarding** enquiry;
- when considering **take up of a personal budget** and/or DP;
- during the care and support **planning** process;
- during the **review** of a person's care and support plan;
- when a person may be considering **a move to another** local authority area;
- at points in transition, for example when people needing care or carers under 18 become adults and the systems for support may change.

Who is likely to need I&A?

- people wanting to plan for their future care and support needs;
- people who may develop care and support needs, or whose current care and support needs may become greater.
- people who have not presented to LAs for assessment but are likely to be in need of care and support.
- people who become known to the LA (through referral, including self-referral) at first contact where an assessment of needs is being considered
- people who are assessed by LAs as currently being in need of care and support.
- people whose eligible needs for care and support the LA is currently meeting
- people whose care and support or support plans are being reviewed
- family members and carers of adults with care and support needs, (or those who are likely to develop care and support needs)
- adults who are subject to adult safeguarding concerns
- people who may benefit from financial information and advice on matters concerning care and support.
- care and support staff who have contact with and provide information and advice as part of their jobs.

A 'mode' and 'responsibility' warning from guidance

- A plan that relies disproportionately on provision of information and advice through the authority's website, or third party websites, is unlikely to meet the authority's duty under the Act to establish and maintain a service to provide information and advice on care and support.
- **This doesn't even say exclusively; it says *'disproportionately'* won't do…**

- If councils are simply flagging up the **existence** of independent services, they won't be risking **endorsing them or recommending them as fit;**
- BUT
- "Information and advice provided, whether directly by a local authority or by third parties **as part of the information and advice service that the local authority establishes and maintains**, should be of a good standard and, where appropriate, delivered by trained or suitably qualified individuals"

– seems to us to be saying that however you **get** it, you are then expected to monitor it and be sure it's good. We think that that means that at the very least, you need to be paying something for using others' information, if you want the means through terms or grant conditions, to require it to be up to date, etc.

The duty in the Care Act will not be met through the use of digital channels alone, and information and advice channels are likely to include all of the following modes:

- face-to-face contact;
- use of peer-to-peer contacts;
- community settings;
- advice and advocacy services;
- telephone;
- mass communications, and targeted use of leaflets, posters etc. (e.g. in GP surgeries);
- use of ‘free’ media such as newspaper, local radio stations, social media;
- local authority’s own and other appropriate internet websites, including support for the self-assessment of needs;
- third party internet content and applications;
- email.

Non-social care and support services to which you could well be making ***<u>referrals…</u>***

ie pointing a person, or filling out a form that guarantees them past the other agency's front door

- Welfare Benefits and council tax rebates
- Client money management service
- Debt advice
- Consumer / trading standards
- The Health Service, for a split package or CHC
- Public Health offerings
- The homeless person's officers
- The housing register staff
- Education and special education
- Concessionary transport
- Employment support
- Volunteer service co-ordination

Driveway and porch – customer services and first contact with SOCIAL services

The relationship between customer services and first contact

- What is the relationship between the **driveway** and the **porch**, if the porch is where one ends up being sent in order to knock on the front door, behind which there is an assessment process awaiting?

- Will it only ever be the **porch** staff who switch on actual <u>targeted</u> as opposed to genuinely *universal* services - targeted services like reablement and counselling?

- If so, should the ***<u>driveway</u>*** staff ever be doing any signposting **AWAY** FROM THE PORCH, or is that too risky – what do they feasibly know of Mental Capacity, for instance, or safeguarding signs?

- Should the driveway staff be triaging TO the porch and only signposting people to things that are not part of the care and support journey at all? Ie concessionary transport, benefits, etc. ?

- That would be **our** vision, in terms of the logic of the duty to assess….**so that the porch is sheltered from <u>demand</u>, but is for activating re-ablement, equipment, counselling, other preventive services, CHC check-list and urgent needs decisions… and for triaging to the right team or being the assessors for anyone who doesn't fit in a client group team – because people who make it to the porch clearly should not be denied an assessment…**

Where *are the outside edges* to the care and support function?

- Social care is not there for **every** need
- It is a **residual** service, statutorily precluded where there is some other agency with a duty - a safety net, traditionally…and legally.
- It is trumped by other agencies' obligations
- For instance: health, housing and Home Office support for failed asylum seekers; children's services.
- But **not where there is merely overlap**: only where those other agencies are **required**, ie under a **duty**, either by law or because the minister has told them they **must** (as with 'primary health need cases', for CHC)….and that makes the edges of the service extremely ambiguous…so if in doubt, do not refer the person elsewhere completely: start a file on them and call it **pending**.
- **Health and Housing** are the most obvious examples of an overlap – and this has implications for Information and Advice services which we will come to.

Section 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.

Section 21 - Exception for persons subject to immigration control

(1) A local authority may **not** meet the needs for care and support of an adult to whom section 115 of the Immigration and Asylum Act 1999 ("the 1999 Act") (exclusion from benefits) applies and whose needs for care and support have arisen solely—

(a) because the adult is **destitute**, ***<u>or</u>***

(b) because of the **physical** effects, or **anticipated physical** effects, of being destitute.

The guidance does not say that housing is part of the care and support function, but issues *related* to housing will be, of course

- Consideration of housing issues in relation to a local authority's responsibility **is an integral part of the health and care system and a local authority's responsibility for care and support.**
- This could be in relation to a local authority's duty on prevention (see chapter 2) or through the duty to assess an adult or carer's needs for care_and support (see chapter 6), or in providing advice and information (see chapter 3). **[suitability of living accommodation** is an aspect of **well-being**, after all]

- Supporting people through the provision of good quality information and advice can help people make early choices about their housing options and related services in advance of a potential crisis. …People can be helped to stay **independent longer** through adaptations and modifications to their homes or extra care or support being offered in their home.

This is the crucial paragraph in the guidance:

Local authorities have broad powers to **provide** different types of accommodation in **order to meet people's needs** for care and support. The Care Act is clear that suitable accommodation **can be one way of meeting care and supports needs**.

However, the Act is also clear on the limits of responsibilities and relationship between care and support and housing legislation, to ensure that there is no overlap or confusion. Section 23 of the Care Act clarifies the existing boundary in law between care and support and relevant housing legislation, such as the Housing Act 1996.

Where a local authority is required to meet accommodation related needs under housing legislation as set out in the Housing Act 1996 **or under any other legislation specified in regulations** (and in the case of two tier authorities it would include "another local authority") then the local authority must meet those needs **under that housing legislation**. Where housing forms part of the solution to meeting a person's needs for care and support, or preventing needs for care and support, then a local authority **may** include this **in the care or support plan** even though the housing element itself is provided under housing legislation.

Any care or support needed to supplement housing is covered by this Act.

Prevention and reduction at some point before “ assessment ‘proper’ ”

- The vision of the Act is for as much of this as possible, so that people do what they can for themselves first, before turning to the State for actual services or money.
- Prevention monies from Public Health have been put into the Local Offer of all things good, in some places.
- It doesn’t matter if it happens at Driveway or Porch stage, so long as we don’t do some very silly things: eg
- **Signpost to services with no vacancies**
- Signpost to **unaffordable** services, especially where we have **cut the grant**
- Signpost to **inappropriate** services – inappropriate either because the person’s needs are not what they’re there for, or the service is not suitable to the person who needs to access it.
- People will have prejudices and entrenched views, yes, but sometimes they will also be **completely right** about why it would not work…

Some prevention responses will address need, so that it goes away, and does not trigger eligibility, let alone a duty to fund

"Where the local authority judges that the person may benefit from such types of support, it should take steps to support the person to access those services.

The local authority may 'pause' the assessment process to **allow time for the benefits of such activities to be realised**, **so that the final assessment of need (and determination of eligibility) is based on the remaining needs** which have not been **met** through such interventions.

For example, if the local authority believes that a person may benefit from a short-term reablement service which is available locally, it may put that in place and complete the assessment following the provision of that service."

Reablement would address the need in a long term way here, not merely keep the lid on it. 'Met' here, does not mean managed, but met in the sense of having been *resolved*. It's saying that the deficit concept of the eligibility regulations would have been lessened: the needs relating to inability as defined in the regs, could have been lessened by the prevention benefit.

Exercise

- Discuss where it makes the most sense for a person to be able to find out information about the following types of thing. You could discuss what would happen now, and what might need to change.

- A person with a disability is in privately owned housing and is enquiring about whether there is any financial help to get an adaptation done to assist getting around the house.

- A person has been referred to social services because their neighbours are worried about him: there are 40 dogs on the property looking emaciated and it looks insanitary from what the neighbour can see through the windows.

- A person has got a stamp on their passport saying No Recourse to Public Funds, and they want to apply for social services due to deteriorating health. The person is a lawful immigrant with a valid visa and the appearance of need for care and support.

- A person has got a complicated lung disease, and has been having social care in another county – they've just moved here, but have also recently inherited a large sum of money, so they are interested in continuing NHS health care

- A very educated and clearly well off person wants to know what the capital limit is for supposedly being able to buy one's own care home care – her mother is very frail and not very well off, but is lacking in mental capacity.

- A person comes in and says that they are at their wits end, because they've been trying to get their daughter who has moderate learning disabilities, re-assessed for over 6 months, and have met with refusal by the social services – can the council help.

- A person comes in saying that they've been helping someone for the last two years as a good neighbour but can't do it any longer, what should be done about it?

- A person wants to know about help to stop drinking: they seem to be suffering from tremors, are confused and unstable on their feet, but not through being drunk as such at that very moment.
- Someone wants to know whether the council offers cut price handyman services for the elderly, and if so is there a means test?

- A person rings up and says that they want to come to live in the area because it was where they grew up as a child, but they have a large care package on account of their needs and have heard that things might be less generously funded in your area, so are unsure as to whether they should come.

- People are looking online to see what your authority's usual rate for care is, because the homes in the area have been saying that the contract rate is £550 and the authority will only pay £450, meaning that no homes seem to be taking on council clients without charging a big top up.

- Someone wants to know whether their redundancy payment will be counted in the charging system in force locally. They've been injured in an accident and the employer has called it redundancy, but it isn't really; it's notice pay for dismissal for incapability.

- Someone wants to know whether they'd be better off with equity release from a commercial provider, or signing a deferred payment scheme with the council.

Have you got this material covered for *carers* in ‘the driveway’ or ‘the porch’?

- Can you identify a carer? Many carers don’t identify themselves as such and may need help to do so
- Carers may be seeking information and advice about support for the person they care for but may have their own information needs too
- Information and advice on breaks from caring;
- the health and wellbeing of carers themselves;
- caring and advice on wider family relationships;
- carers’ financial and legal issues;
- caring and employment;
- caring and education; and,
- a carer’s need for advocacy.

What do carers need to be told by I & A, despite the obvious policy imperative to satisfy them with preventive services?

- They need to know that they don't **have** to be assessed, if they don't want to be – it may be a real pain for them, and why bother when prevention and hub services for carers have been so well thought through? 'Try it and see' services…
- **They need to know, though, that they have a *right* to be assessed**, on the basis of appearance of any need for support and that there may be a *point* to being assessed, instead of just being encouraged to find ways of coping.
- The point of being assessed is that they are entitled to have eligible needs met, by a service, or a budget which can be taken as a direct payment.
- That is, a service to meet their needs, BECAUSE they are doing what they are doing, not necessarily just to meet the needs of the individual whom they are caring for, so as to let them do less.

What is the purpose of the prevention duty and guidance?

- There is a duty on all councils to ensure that prevention services are available in the area – so as to help people *to help themselves*.
- There's also a requirement to consider prevention and reduction BEFORE assessment and DURING assessment.
- This sounds good, in terms of new services that might now be wanted - but the result is that councils will be encouraged to refer people off to prevention services without knowing very much about whether they are **suitable**, whether they have **closed**, since the grant was cut, or whether they even have a **vacancy**.
- **Saying no to prevention services does not exclude a person from assessment,** but it does enable a council to say that the impact can't be all that bad if the person won't even help themselves to minimise it.
- Some prevention services such as counselling, equipment or 6 weeks of reablement may have the effect of rubbing out the need altogether; others would merely be able to manage the need, but it would still count as existing for the purposes of eligibility when the assessment is actually completed.

Where are we starting *from*, for carers?

- Informal Carers have always been ***relevant*** to a service user's assessment, because without the carer being both **willing and able** to do any of what's being done, **adequately**, there'd be a risk of harm, and at the very least, some likely **unmet eligible need, on the part of the service user.**
- **Legislation** – in support of carers - had developed bit by bit, when new gaps became apparent. All of it turned on a person '**counting**' as a carer – but it was focused on ***assessment***, without any of it following through into the notion of a right as a ***carer*** to have **one's needs *met***.
- The legislation **hasn't specified the type of services** a carer could be provided ***with*** either – that's been left up in the air, and very flexible.
- Carers' assessments have been **lawfully able to be contracted out**, and a lot of voluntary sector organisations have filled that gap. **Hubs and Carers' Centres** have developed which help people who count as carers, and even people who don't formally count as carers, with a range of services – but none of those services have ever had to be individuated to particular carers, or to the extremity of the impact being experienced as a result of caring.

From the old to the new system….

- Going back for a minute to the cared FOR person: carers have long been handed the direct payments of their loved ones, to manage, even when their loved ones **were incapacitated**, as if that **was legal! It never was.**
- **Since 2009 it's been possible to give a carer the money to manage as long as they were regarded as a Suitable Person, involving a thought process, and some checks and a judgement by the council.**
- That's a direct payment FOR the cared for person, and based on that person's needs; but the Suitable Person is given it in their own name and is treated as the holder of the money, for legal purposes.
- Carers were often given what were called Carers' GRANTS, but these were discretionary payments to make them feel better and say thanks for doing so much.
- Carers' **own** formal **direct *payments***, existed but most councils did not do them. Such levels of cash or voucher books to take to care homes, tended to be for buying replacement care for the person cared for, so that the carer could have a *break*. But this was always odd, since the need for the care cover, was the cared FOR person's need, if their carer CHOSE to take a break.
- *So-called* services for *carers* often included free training for PA staff, on the footing that the carer has in effect been running their loved one's Direct Payment, with or without lawful authority, and owing duties to the staff in relation to their safety (ie lifting etc).

What does the Act *do* to the system for carers?

- The whole time, the crucial driver has been **sustaining** carers, because they save councils money. Whatever they choose not to do, councils might have to do instead, or buy in, if it was to cover eligible assessed and now unmet need.
- Under the new Act, the discussion with carers needs to go up a gear - to the effect that of course they don't **HAVE** to care, but that withdrawing, if they feel they have to, inevitably affects the cost/benefit analysis for supporting the needy person in their preferred setting, as it all comes out of public money.
- **This is a legal *truth*, and not in any sense meant to be a threat!**
- The new Act makes the notion of evaluating the amount of practical care a carer is '***doing'*** obsolete, at least for the purposes of their status or their **eligibility – but it is not necessarily irrelevant to how much support the carer might *get*, however, in terms of a support plan or a budget to spend**.
- The reason **virtually anyone *could now*** count as a carer is that the big idea is 'the more the better', because that's more social capital to draw in, so long as carers still feel *appreciated* and not exploited…
- The value of what the carer is saving the council may be far more than it would cost to meet the carer's specific personal needs and help with the impact: the Act allows councils to pay for **that sort** of solution, rather than always meeting the cost of delivering alternative care to the person cared for, on the footing that most carers WANT to care, and contribute massive added value.

From the old to the new…

- Whether or not the centrally funded information campaign ever informed carers of their new rights, one thing is true: the vast majority of people taking an interest in their relatives' needs won't necessarily be wanting a formal ***assessment***: they will be wanting **advice and information, benefits support, discounts off of universal services, free entry as carers into certain settings, access to handyperson services, advice about equipment, and all sorts of support** – and even those who need 'respite' won't be thinking about not caring at all, or giving it up altogether.
- Anyone who is really doing a **lot** of care – the old 'regular and substantial' notion of care – might **also** be satisfied with an assessment system that did not put them through a paper based assessment – because they've got enough on their plates. So the best strategy is preventive services for carers and the people whom they care for, accessible through a centre or specifically through advice and information.
- *There is no regular and substantial* test now for counting as a carer. Even providing practical and emotional support will suffice to 'count' as a carer.
- Well informed carers will appreciate that they are *entitled* to an assessment, which could lead to something very different to what they got in the past. It may lead to the judgement **that they are not just a carer, but an *eligible* carer, and thus have solid and enforceable legal rights….**
- If councils have to assess them and find at least some of them eligible, they will have a duty to meet their need in a rational evidence based way, regardless of the cost – unless or until the council bites the bullet and says 'You clearly can't do this on your own, but it's not cost effective for us to support you to carry on caring'.
- That will not be fun. So the moral must be to **love our carers,** and consult with them and find out what it is that they really, really want, without the formality of assessment wherever possible. **Carer focused *conversations***, at the very least, whilst councils are assessing the service USER, I think…

Who is the service FOR?

- If it is **respite** that a person needs, ie a different carer or a paid carer for a short while, then that service is, in most cases, a service that councils should assess the service user for, on the footing that any day when the carer doesn't **want** to do what they've been doing, is a day when the total inabilities of the person that have been assessed to trigger eligibility, will need to be picked up, by the council.
- **A carer is not legally obliged to care.** Yet their input saves the State large sums of money and provides the means to enable councils to ***choose*** to support people in their own homes, in many, many cases – to choose comfortably, because it is both what most people want, AND cheaper, whilst the carer is doing a lot of it.
- It makes no sense to cap 'respite', even if it were legal to do so under the new Act, **for eligible carers**, **unless or until the cost of it - taken together with the cost of meeting the service user's needs -** significantly outweighs the cost of an alternative, not inappropriate package in another setting, that avoids the **need for supporting the carer or the need for ongoing informal support beyond what the carer is willing to cope with**.
- Then it becomes possible for councils to assert that there is **no such thing as a human *right* to care, if you need financial support from the State to do it**. What there IS, is a set of carers' rights to services or money, whilst they or the State, if the client lacks capacity, choose to manage the person cared for, in their own home.

What is the national eligibility threshold for carers?

Para 6.121 In considering whether a carer has eligible needs, local authorities must consider whether:

- the needs arise as a consequence of providing **necessary** care for an adult; [this does **NOT** MEAN providing for *eligible* needs – according to the guidance]
- the **effect** of the carer's needs is that **any of the circumstances specified** in the Eligibility Regulations **apply** to the carer; and
- as a consequence of that fact there is, or there **is likely** to be, a **significant impact** on the carer's **wellbeing**.

reg3 (2) The circumstances specified in this paragraph are as follows—

a) the carer's **physical or mental health is, or is at risk of, deteriorating**; [we think ***OR, not AND here, but neither of those words is actually used***]

b) the carer is unable to achieve any **[any *one*]** of the following outcomes—

- carrying out any caring responsibilities the carer has for a child;
- providing **care to other persons** for whom the carer provides care;
- **maintaining a habitable home environment** in the carer's home (whether or not this is also the home of the adult needing care);
- managing and maintaining nutrition;
- developing and maintaining family or other personal relationships;
- engaging in work, training, education or volunteering;
- making use of necessary facilities or services in the local community, **including recreational facilities or services;** and
- engaging in **recreational** activities.

Interpreting the carers' eligibility criteria

The guidance says to look a reasonable way into the future with carers, as the assessment is directed towards sustainability.

As with the service users' threshold, the Guidance lends colour to the plain words, and staff must have regard to what is said to be **the right approach to the outcomes:**

Para 6.128 The following section of the guidance provides examples of how local authorities should consider the outcomes set out in the Eligibility Regulations when they determine whether a carer meets the eligibility criteria. To be eligible, a carer must be unable to achieve any of the following outcomes:

(i) carrying out any caring responsibilities the carer has for a child

Local authorities should consider any parenting or other caring responsibilities the carer has for a child in addition to their caring role for the adult. For example, the carer might be a grandparent with caring responsibilities for their **grandchildren** while the grandchildren's parents are at work.

(ii) providing care to other persons for whom the carer provides care

Local authorities should consider any additional caring responsibilities the carer may have for other adults. For example, a carer may also have caring responsibilities **for a parent** in addition to caring for the adult with care and support needs. [or their partner's parent, for instance]

Interpreting the carers' eligibility criteria

Para 6.128 cont.

(iii) maintaining a habitable home environment

Local authorities should consider whether the condition of the carer's home is safe and an appropriate environment to live in and *whether it presents a significant risk to the carer's wellbeing*. A habitable home should be safe and have essential amenities such as water, electricity and gas.

(iv) managing and maintaining nutrition

Local authorities should consider whether the carer has the time to do essential shopping and to prepare meals for themselves *and their family*.

(v) developing and maintaining family or other significant personal relationships

Local authorities should consider whether the carer is in a position where their caring role prevents them from **maintaining key relationships with family and friends** or from developing new relationships **where the carer does not already have *other* personal relationships**.

The last ones…

Para 6.128 cont.

(vi) engaging in work, training, education or volunteering

Local authorities should consider whether the carer **can continue in their job, and contribute to society**, apply themselves in education, volunteer to support civil society or have the **opportunity** to get a job, if they are not **in** employment.

(vii) making use of necessary facilities or services in the local community

Local authorities should consider whether the carer has an opportunity to make use of the local community's services and facilities and for example consider whether the carer has time to use recreational facilities such as gyms or swimming pools.

(viii) engaging in recreational activities

Local authorities should consider whether the carer has leisure time, which might for example be **some free time** to read or engage in a hobby.

S13 - The formal *legal* nature of the eligibility decision for carers

(1) Where a local authority is satisfied on the basis of a needs or carer's assessment 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.**

….

(4) Where at least some **of a carer's needs** for support meet the eligibility criteria, the local authority must-

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

(b) establish whether the **adult needing care** is ordinarily resident in the local authority's area.

Carer Resource Allocation

- It seems to us that the Act intended there to be budgets and direct payments for Carers. The guidance intended that this should be the practice too. However resource allocation systems are not in wide use – most authorities give a flat rated or otherwise discretionary 'grant' to people on the basis of the carer test; and that must change; it simply must, because the legal framework is changing rapidly.

- It seems to us that the question of how much the council is saving is not the logical determinant of the impact on the carer. The cost of respite care may be more or less than the cost of the impact on the carer.

- We can't see any logical way of being rational about how much a carer needs, when the imperative from the council's perspective is to keep the carer, caring for free. That will be worth it for as long as it saving a council something; and the aggravation of having to intervene so as to stop someone indulging in care that is costing the state more to 'police' than it would otherwise cost them, putting in an appropriate service in another setting, must also be worth *something*. The value of the work saved, is to some extent relevant, we think, to the size of the impact on an ordinary person, but not determinative once one appreciates the strategic purpose to which the need to allocate a level of funding or service, simply has to be put.

What *not* to do by way of a response:

- Don’t set carer allocations by reference to treats, such as spas etc.
- Don’t set carer allocations by reference ONLY to the cost of replacement care: the point is not to let the carer OFF of caring, but to mitigate the impact so that they can bear to go on.
- Consider bands by reference to these questions: is the carer a carer, or an eligible carer, or a carer who is so close to downing tools or perpetrating abuse that we simply must manage the situation but it is not one where we want to stop the relationship…
- Get your commissioners to research the cost of the kinds of response that would make sense, given the domains that are relevant to a carer’s deficits.

Formal funded Advocacy Rights under the Care Act

- **There are new rights to independent advocacy** for people with cognitive difficulties**, for representation and support with assessment, care planning and revisions to plans.** There are new advocacy rights within the **safeguarding sphere, too**, to keep the vulnerable adult at the centre of the process.

- Councils **must fund** these rights, when triggered, so it should mean that all vulnerable adults, without anyone to help them with involvement, will now have someone who's **clued-up** to support them in discussions about their council's views about their needs and budgets.

- **The duty is not one where shortage of financial resources is a legal excuse for not discharging the duty! It's what the council's 'reserves' are for, in legal terms, because it's a duty.**

- **All over the country, the concern is that councils are ignoring the duty; and maybe, in particular, the rule** that a person with substantial difficulties does not *have* to have their own *relative* ***be*** their *informal* advocate. Their **consent is needed**, but that must be informed consent; and if you don't understand what an advocate could even *do* for you, given that they're supposed to be skilled and knowledgeable, then just 'going along' with the idea that your relative may as well be doing the talking for you, is not really able to be seen as **consent**.

How councils must decide about ‘substantial difficulty’ for advocacy rights (set out in the Care Act (Advocacy) Regulations)

r3. In deciding **whether** an individual would experience substantial difficulty of the kind mentioned in section 67(4) of the Act (difficulty in understanding information etc.), a local authority must ***have regard*** to—

(a) any health condition the individual has; [so a *diagnosis* is not essential, but it ought to help, here!]

(b) any learning difficulty the individual has; [ditto]

(c) any disability the individual has; [ditto]

(d) the degree of **complexity** of the individual’s **circumstances**, whether in relation to the individual’s needs for care and support or otherwise;

(e) where the assessment or planning function is the carrying out of an assessment, whether the individual has previously *refused* an assessment - and -

(f) whether the individual is experiencing, or at risk of, abuse or neglect.

So, what you’d say to *get* one, or make a referral, is this: Given this person’s [condition, learning difficulty, disability] and given the complexity of this person’s situation, or given the risk of abuse and neglect that the facts have told us about]…. [And given the complexity of the [assessment/care planning/revision process] **how could any right-thinking, properly advised and legally council NOT see this person as bound to have substantial difficulty without an advocate?**

My prediction is that many councils are going to be FOI’d by advocacy organisations – soon - about how they are recording decision-making at the first contact stage, so that they can consider whether they are actually able to defend themselves for not having made arrangements for advocates.

Is this *everyone* then, if they've at least got a cognitive difficulty?

No, there's an exemption from this right to an advocate:

(5) The duty under subsection (2) does **not** apply if the local authority is **satisfied** that there **is** a person—

(a) who would be **an appropriate person** to represent and support the individual for the purpose of facilitating the individual's involvement, **and**

(b) who is not engaged in providing **care or treatment** for the individual in a professional capacity or for remuneration.

(6) For the purposes of subsection (5), a person **is not to be** regarded as an appropriate person unless—

(a) where the individual has capacity, or is competent to consent to being represented and supported by that person, the individual does so **consent**, or

(b) where the individual lacks capacity or is not competent so to consent**, the local authority is satisfied** that being represented and supported by that person would be in the individual's **best interests.**

Informal involvers vs independent advocates

The statutory Guidance doesn't properly reflect the regulations on the need for consent, here, but it does convey the mandatory nature of the obligation – see here Para 6.34

"Where there is a family member or friend who is willing and able to facilitate the person's involvement effectively, **and who is acceptable to the individual,** **and judged appropriate by the local authority**, they may be asked to support the individual in the assessment process.

Where there is no one thought to be appropriate for this role – either because there is no family member or friend **willing and available**, or if the individual does not want them to be a part of the assessment – the local authority **must appoint an independent advocate**."

[I hope you can see why I feel that the Guidance understates the extent to which a person's views about their friend or relative doing it for them, should be explored. If a person is just jollied along, they've been 'done out' of a right that ***might*** make all the difference to the outcome of the assessment…]

Shy, 'unwilling' family members are a *good* thing, in terms of spreading this right to advocacy

- **You don't get an advocate if you have someone appropriate, who's *willing* to represent you and support your involvement, by themselves.**
- **But just as is the case with being unwilling to be a *carer*, a family member cannot be *made* to be the informal 'involver'.**
- If they are not *willing* (eg because they are *too busy, or* because they believe themselves to be inappropriately skilled or aware, for instance), **a council would still have to put an advocate *in*. So there's a strategic advantage in a relative's saying 'Ooh no, not me, for *that* role, thank you very much.'**
- There are other aspects to the test of 'appropriate', **but 'unwilling' definitely means not appropriate, and that's *GOOD, if one wants an advocate*!**
- **Formal advocates should know about routes for challenge or negotiation of budgets and other such decisions,** and be able to explain that sort of thing to vulnerable adults.

Two situations when one has a *right* to an advocate EVEN IF one's friend or relative *is* appropriate and willing:

Regulation 4 **[cases where the person is being considered for CHC – positively checklisted people, for instance]** …where

(2) …(a) the exercise **of the assessment or planning function** in relation to the individual is likely to result in an NHS body making arrangements for the provision to that individual of accommodation in—

(i) a hospital for a period of 28 days or more; **or**

(ii) a care home for a period of 8 weeks or more; **and**

(b) the local authority is satisfied that it would be in the best interests of the individual to make arrangements in relation to that individual under section 67(2) of the Act.

[how could it *not* be in the person's best interests, to have an advocate, you may well ask?]

My view is that this regulation creates a right to funded advocacy for CHC Decision Support Tool processes, which is different from the right to an IMCA for CHC care planning]

4(3) …[also, very importantly for **very *assertive* willing relatives!**] ...where

(a) there is **disagreement on a material issue** between the local authority and the person referred to in section 67(5) [ie the informal advocate] … in the case of the individual; **and**

b) the local authority and that person **agree** that making arrangements under section 67(2) of the Act **in relation to the individual would be in the best interests of that individual.**

[how could both sides *NOT agree* that that would be a good thing to do, in all honesty?]

It’s a powerful role: absolute rights to records for advocates

Reg 5(6)

In particular, an independent advocate **may examine and take copies of any relevant records relating to the individual** in circumstances where—

(a) the individual **has** capacity, or is competent, to **consent** to the records being made available to the independent advocate and **does** so consent; or

(b) the individual ***does not have capacity***, or is not competent, to consent to the records being made available to the independent advocate but the **independent *advocate*** considers it is in the best interests of the individual.

[that’s giving **the final decision on best interests to the *advocate***; not the data keeper!]

s67(9) “Relevant record” means—

(a) a **health record** (within the meaning given in section 68 of the Data Protection Act 1998 (as read with section 69 of that Act)),

(b) a record of, or held by, a local authority and compiled in connection with **a function under this Part or a social services function** (within the meaning given in section 1A of the Local Authority Social Services Act 1970),

(c) **a record held by a person registered** under Part 2 of the Care Standards Act 2000 or Chapter 2 of Part 1 of the Health and Social Care Act 2008, or

(d) a record of such other description as may be specified in the regulations.

The first case under the Act – about advocacy (and other things too!)

- **The case (*SG*) (involving Haringey Council) means**
- **it is unlawful to assess *without* one, when the duty could only *conceivably* be regarded as triggered by any reasonable council…**
- **and that assessments made without one, when the duty *has* been triggered, are all prone to be declared invalid!**
- Of significance to ALL councils is the factor of **resourcing** an advocate, at a time when most will be stretched to capacity on the DoLS backlog.
- The council's barrister suggested that "demand exceeded supply", hopefully like, but the judge applied pure public law principles and held that **that was no excuse** in relation to a mandatory duty that had been acknowledged to have arisen.

- The woman in question had severe memory difficulties, could not count, could not tell the time and had severe difficulty in learning her way to new places and using public transport. She had post-traumatic stress disorder and resulting anxiety and depression. She struggled with all manner of basic tasks, including self care, preparing and eating food, management of simple tasks and taking medication. The judge said this:
- “[Haringey Council] appears to accept the claimant was entitled to, but did not have, an independent advocate when she was assessed under the Care Act, but contends nonetheless that this did not “lead to a flawed assessment process” because ***referral for such an advocate was made at the time of the assessment***, and since then an independent advocate *has been appointed* in the form of Mind.
- [Haringey’s barrister] …says the claimant’s services have not been prejudiced as a result concerning the outcome of the assessment, but I agree with [SG’s barrister] that **we simply do not know that**. I do accept the defendant’s submission that there *may* be cases in which it is unlikely the presence of an independent advocate would make any difference to the outcome. This is not one of them, because **this appears to me *the paradigm case*** where such an advocate was required, as in the absence of one, the claimant was in no position to influence matters.”

My *favourite* questions about advocacy rights

- **Is it the same system, as operated for the advocacy that you used to organise for me?** **No, it is not the same system.** That was **informal** advocacy, not underpinned by any duty. Only councils can make the referral for the new kind; but people and providers should be saying '**You need to refer this person for advocacy – it's their *right*….'**
- **Can there be a waiting list? There always used to be.** This is **duty-based** advocacy, and the fact that many councils have insufficient money for organising enough of it, is not legally relevant. It is a *duty*, and without an advocate, the processes it is meant to make easier for people, simply won't be legally validly completed. **Councils are meant to spend their reserves on such duties so that their duty-based functions are delivered, in a timely way. I would say that making a person wait any longer than the period for re-ablement (6 weeks) would be judged to be indefensible!**
- **Can I say No to having an advocate, if you think I need one?** No, consent is not mentioned in that context….and in reality, the input of the advocate should make the process easier for the council, as well. Advocates offer cheaper support than qualified social workers, in lots of subtle ways! Co-operation can't be forced, but advocacy must be arranged to be available, is as flexible as the Act is.
- **Do they have to have some legal knowledge?** **Yes**, according to the Guidance, and to even be competent at the job - but not a qualification – and no obvious standard *exists*.
- **'Can the advocate really be independent, if the council is paying them?** It seems weird but the person is appointed to a statutory role, not to 'a job' with the council. The council cannot seek to **control** the advocate, but given the way England works, these days, the fee rate could well achieve the same effect…..over time...or so a cynic might well fear, at least. Only advocates' organisations will know whether this is a real risk, when the contract comes up for renewal.
- **What should they do if they think that a council is acting unlawfully?** **Use the Monitoring Officer route –** it's free, mandatory and independent as well. Ensure that the advocate's report is copied to that person.

For those who want to hear more, go to the webinar I did for free for Community Care

https://cc.readytalk.com/cc/playback/Playback.do?id=68teen

- **Who gets it?** Anyone who would, without one, experience substantial difficulty in being involved in the processes where involvement is the council's **duty**.
  - Involvement and what it means as a minimum isn't defined; substantial difficulty is defined by reference to the approach in the MCA, but stopping short of incapacity. *Ridiculous* decisions or blanket policies about either of these things though, is subject to legal challenge.
- **In what circumstances?** For assessment, care planning, **revision** of care plans, and safeguarding. For transition assessments for young people and their parents, and for process related to young people/carers: go look at s67(3) if in doubt (not the guidance).
- **What's its essence, ie what's it *for*?** Representation and support for the purposes of facilitating the involvement of the person in the statutory process.
  - The role doesn't extend to a requirement that the advocate becomes a litigation friend!
- **Who makes the decisions about entitlement to it, and who should do the job?** The council, in every single case where the potential for the right is raised. **Not** the advocacy organisation, the welfare LPA/Deputy or the person with the subst difficulties!
- **Who *can* be an appropriate person,** thereby avoiding the need for an advocate? Anyone whom the person consents to taking on the role of maximising their involvement, as long as it's not someone providing care or treatment to them, for payment, or in a professional, including a formal volunteer's, capacity.

- **'Do I *have* to do this 'involving' business, if I don't feel up to it?'** No, an unwilling supporter **can't** be treated as obviating the need for a proper funded independent advocate.
- **How can *I possibly be expected* to do it, if *you* don't even know much about the Care Act in the council?** **Good point! Best get reading the guidance. But bear in mind that** ANY reason for being unwilling is enough to justify treating the duty as triggered.
- **Does one still have a right to an advocate, if the person in question so clearly lacks capacity that they *can't* be involved, even with the help of an advocate?** IN strict legal theory terms, no, because the provision of an advocate is not going to facilitate the person's involvement. But that's not what the guidance says. So it's effectively broadening the role from representation and support, to one of best interests consultation of an objective stranger.
- **Who can be an independent funded advocate?** The council must appoint people who are independent in the sense required by the regulations, and appropriate as per the regs and the guidance. The **person fulfilling the advocate role** cannot be providing care or treatment to the individual, and cannot be *otherwise working for* the council, whatever that means - see reg 2(3) a and b of the No 2 Advocacy Regs.
- **Why does the new guidance speak about Chinese Walls?** Probably because the very few organisations with the capacity to provide this advocacy are also organisations who might have been commissioned formally to discharge councils' assessment functions – like a carer's organisation, for instance. The rules if applied would mean that they couldn't do the job and a wall is the fudge being offered to make it work.
- **What are the consequences of there not being an adequate supply?** It's a breach of statutory duty not to appoint an advocate where the duty has been triggered, and since delay would delay assessment, and assessment would delay an eligibility decision, it could have severe consequences for the client, family and local authority. The *Haringey* case (2015) said resources difficulties were not an excuse.

- **Can that nice person on First Contact be my advocate? No**, it can't be anyone *working* for the LA…it's got to be *independent* of the LA….
- **'I have a right to represent her, I'm the next of kin!'** The positive **consent** of the person to being helped by their relative or friend, is needed. Being a person's next of kin, isn't enough for this role. If the person actually **lacks capacity**, it's the Council who decides, on best interests grounds…whether to treat the keen relative as 'appropriate'.
- **Can a relative be refused the role of being the appropriate informal supporter?** Yes, for all sorts of reasons, all of which have to be genuine and conscientiously explored and rational. It's like the Mental Capacity Act where people interested in a person's welfare have a virtual **right to be consulted**, unless the decision maker regards it as not practicable or appropriate.
- **Why am I regarded as inappropriate, as my loved one's supporter?** You might have a mind that's been apparently made up in advance; the real sin seems to be having made up one's mind before being engaged with by the council. They might just not *want* you to be involved, given undisputed past history; you might be regarded as unable to control yourself, you are so angry; – or some other conflict of interest might be a concern. Being seen as the alleged 'problem' is a common occurrence; but remember, there virtually *has* to be an advocate appointed in that situation. So it's not a bad thing, or something to take personally.
- **'What if there IS (polite) history between the council and us? I want to help and I am able to, but you know we fundamentally disagree about X's best interests'.** In that case the council must appoint an independent advocate…and it would be really hard to disagree that it would be in the person's best interests. This is an exception to the notion that a willing and able informal supporter is enough – and it enables some distance and objectivity for both sides. So, best to embrace it!

- **Can I choose my own advocate?** **No**, it is the authority's role to choose, but you might always **nominate** someone – the council may or may not be contracting with individuals! Most are NOT, though, using existing IMCA providers, instead, or 'hubs' – as they were told to do by the Guidance.
- **What if *I* am already paying for my own advocate, privately? Can I ask the LA to let them continue as the Care Act advocate?** No, nomination rights only, as above; the rules don't say that a Care Act advocate has to be independent of the *client*, only of the authority. The council might say no, though; it is ultimately down to the council.
  - You could have the person involved, just as your **supporter** – and you could *require the council to let them* be involved in assessment etc (s9 says so). But *you* would have to pay them, not the council.
- **'If we can't do the informal supporting of our relative, ourselves, can we at least choose his/her advocate?'** **No**, the best you could hope for would be nomination as above, and this is not so very likely, if you're regarded as inappropriate to be the informal involver, by your loved one or by the council, in the first place!
- **What if the council is already paying for an *informal* advocate for me? Can that person continue?** The guidance says **yes**, sometimes. Then again, the regulations would appear to say **no**, because they'd already be 'otherwise working' for the authority….if you think about it. But that informal advocacy might often have been merely grant funded, not contracted for – which MIGHT make it ok.
- **Can my council-funded Care Provider be my advocate?** No
- What about a **privately paid provider** of care or treatment? No

More questions about advocacy…

- What about the provider from which I want you to commission **my future services?** The rules don't forbid it, but common sense says absolutely not! You can *nominate* a provider who's doing, or hopefully **going** to be doing - something that counts as mere *support*, to be a formal advocate but the council could still say No, if the company is **otherwise working** for the council already.
- A ***support*** *provider* could instead be given a role as an informal supporter of the individual, however, but the conflict of interest might be overwhelmingly strong, on **revision** to a care plan, for instance, so it's still not very likely.
- **Can an *employee* from a council funded provider who's not *my* provider, be my advocate?** ***Maybe***, the regulations aren't clear…! Anyone otherwise working for the council is not in the running – but is an individual employee of a council contracted provider actually someone who is 'otherwise working for' the council? Who knows!? There's a long discussion of this at the very end.
- **Can a provider of care to 'x', be x's *carer's* advocate?** No. The regulations forbid it.
- **Can I sit in on my loved one's meeting with the advocate? No**, the regulations envisage a private meeting. And that's something that the advocate can insist on, even if the person has capacity!
- **Does an advocate need a criminal record check? Yes** – Enhanced. the regulations say that this *must* be part of the process of satisfaction as to the fitness of the aspiring advocate, before appointment.
- **Do advocates have to be specially *qualified* as 'advocates'?**
  - No, they merely have to have had 'appropriate training' and experience.
  - 'Appropriate training' was a bit of a moveable feast in 2015, and Care Act advocates didn't have to have the *new* Advocacy qualification if they were already *working* as advocates.
  - Even now, advocates don't have to start towards the new level 3 qualification, until they have been doing Care Act advocacy for a whole year! And there is no particular test of Care Act awareness that I know of, for advocates, as yet. Although I am working on it!!

Questions about the appropriate ‘other’ person….

- A friend who’s being paid by an adult, through the adult’s direct payment, to help and support them in the community, **could be a legitimate source of support during an assessment,** so as to avoid the need for an independent advocate, yes? What about volunteers who don’t know the person, but to whom the person makes no objection?
- As long as the friend is being paid for **support**, and **not for care or for treatment**, they can be an informal involvement supporter, obviating the need for a formal funded advocate.
- A person’s friend or relative who is being paid for **actual care**, is not able to be seen as an appropriate person, but they (indeed ANY current provider of care or treatment) *should* still be consulted as a best interests consultee, if the client is incapacitated, because of s7 MCA and the Croydon case, or their involvement could be **insisted upon** by a capacitated client, under s9 Care Act.
- A proper volunteer could be an informal supporter, too, even if their organisation was grant funded or commissioned by the council, because there is no requirement that a mere informal involver be ***completely independent*** of the council. They just mustn’t be doing care or treatment professionally.
- But the person’s consent to being informally supported by ANYONE, has to be obtained first - if they have capacity to understand that they are entitled to *have* an advocate but that they won’t get one if they consent to this other person helping them….

- Can a local authority (whether or not in the name of person centred-ness) say "Yes, you *should* have an advocate – and we **will give** you one, but they've got a waiting list. **So it will hold up your assessment, if you don't mind waiting – or we could go ahead without, and get your assessment done now – which would you *prefer*?"**
- There is no maximum time limit for an assessment, either to start or to be finished, but the law is that it must be done within a reasonable time given the person's circumstances, ie in a timely way, and an unconscionable delay in an obviously pressing situation would be challengeable. It's a duty, so lack of resources, is not an excuse. **A *capacitated* person can always be given the chance to give up their right but only on the basis of the full facts about the situation**. It's not **lawful** to do an assessment without an advocate if there should be one. If a person is told that, it's not quite the same question, is it? Asking an *INCAPACITATED* person is just plain WRONG.
- The 'right' answer for a person who's asked this question, to give, in legal terms, is this:
  - "I know that it's actually you who's now got to decide whether to provide funding or services to me on the basis of the **urgency** of the situation, given that you're saying that you can't **do** your statutory duty and provide me with a lawful assessment in a timely manner.
  - If you don't feel it's appropriate to exercise your discretion to do that, then you need to find the means to commission an advocate – it's not proper to say I have to wait, when it's your statutory duty to commission enough. The contract has to be needs led! The *Haringey* judgment said so!
  - I can go to the Ombudsman with this, but I know someone from whom you can commission the service - someone who meets all the criteria, and who is not otherwise working for you."
- **Go on, practise saying it! I do have a nationwide team of hand-holders at the ready!!**

The Monitoring Officer's independent governance function

for when things are not going so well, and there's a whiff of 'can this really be right?' about it all!

- Anyone who is dissatisfied with a social services decision made by the local authority can make a **complaint** about that decision. The local authority must make its own arrangements for dealing with complaints in accordance with the **2009** regulations.
- The local authority's arrangements must ensure that those who make complaints receive, as far as reasonably practicable, assistance to enable them to understand the complaints procedure or advice on where to obtain such assistance.
- The complaint process takes ages, and the complaints person cannot tell the council to change its policies or practices, only how the staff failed to live up to those, if the complaint was justified. You can't go to the ombudsman until you've at least tried to complain.
- The complaint system can't be made to give you an injunction to continue a disputed budget or plan, pending resolution of the complaint.
- There is no appeal, only internal review, up through 2 or 3 more layers of ground down staff… and then only if you know to ask for that to happen. It's not statutory, but it is referred to in the Guidance, if disputes arise or agreement is not reached.
- However, there is also the **council's monitoring officer** as an addressee of a special kind of complaint and this route is never mentioned anywhere in local government advice and information services or central government information, which is a bit of a shame, since it's free, and saves a lot of aggravation for everyone (everyone except the poor Monitoring Officer, that is).

What does the Monitoring Officer have to do?

s5(2) of the Local Government and Housing Act 1989 ….says this: it shall be the duty of a relevant authority's Monitoring Officer, if it at any time *appears* to him, that **any proposal, decision or omission by the authority, …has** given rise to, or *is **likely** to* or would give rise to—

(a) a contravention … of any enactment (that means a *statute*, like the Care Act, or *Regulations* like the Assessment Regulations) or rule of law (that's a principle in the wider COMMON law applicable to public bodies)

… **to prepare a report to the authority with respect to that proposal, decision or omission…. and to arrange for a copy of it to be sent to each member of the authority.**

All such actions and proposals are automatically suspended during the time when the report is being considered by the members.

This is a personal, **non-delegable** duty, for the named MO/their Deputy, although s/he can take advice from specialist lawyers if the matter is not clear to them, using their own expertise. The MO is protected from dismissal other than through special steps, thus guaranteeing independence.

It is a high level form of governance and management of legal risk, designed to minimise the need for legal proceedings. The council is obliged to furnish the MO with the resources to do the job, so if s/he needs a barrister's opinion, they have to pay for that. **Independent advocates' reports should be sent to this person as well as to the council, in my view.**

The elected members – when they get such a report - must consider an MO's report within 21 days. That would be the Cabinet Lead for Adult Social Care, and the response would reassure the Monitoring Officer that the relevant issue had been sorted out.

Care and Health Law

Thank you for reading this !

We believe that Legally Literate Leadership in adult social care is an idea whose time has finally come.

Information about the *irresistibly affordable webinar based* training now available from Care and Health Law over 12 x 2hr sessions (24 hrs) (5 seats and recordings for whole staff), in 2016-17 can be found on the Training and Webinars page at www.careandhealthlaw.com

I am selling these to individuals for £10.00 a go, so that legal literacy will become part of the necessary knowledge base of everyone in adult social care.

Or email us: belinda@careandhealthlaw.com or debbie@careandhealthlaw.com