Care and Health Law

Defensible decision making
in relation to councils' service users

Strategy, Choice, Commissioning and Charging

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Menu for today's sessions

- Legal literacy **and the statutory frameworks that social workers need to work within,** and ***use*** to shape their practice eg: the Care Act, Human Rights Act, Mental Capacity Act etc;
- looking at how legal competence can ***support*** decision making and strengthen social work practice, balancing legal duties to service users and Councils' wider responsibilities…
- defending and accounting for practice, through responding to legal challenge

….We'll achieve all this through thinking about the culture one needs in adult social services within a council, to be Care Act compliant [but not actually insolvent!!] and considering …

- The most likely challenges that one could fall into creating
- What a person can do about them, and therefore what you have to cope with managing, or else avoid legal risk, as part of running the department.

Questions the staff have been asked

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 accepting responsibility for assessing those not even yet here, when they have a genuine intention to come?
- 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 <u>want</u> 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

- Has 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 ***eligible*** 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?

Safeguarding questions…

- What about advocacy and SAFEGUARDING enquiries? Who is making that decision and do they know how? Is it a MASH safeguarding triage team, or an Adult Safeguarding Co-ordinator or lead, or a person on the team doing enquiries
- Have you delegated safeguarding to others such as the hospital or the mental health trust?
- What about causing providers to do actual safeguarding enquiries? Are you doing that?
- Are you discussing the perceived abuse and neglect with alleged victims as a matter of routine?
- Are you remembering that alleged perpetrators have rights too, rights to a fair chance to disabuse you of your concerns, by being told about them in most cases?
- Are you applying the MCA principles of best interests consultation about capacity, and doing balance sheet consideration before deciding on what to do?
- Have you got a sensible approach to self neglect and hoarding cases that allows for refusal of assessment in some cases?
- Do your staff use an escalator approach in safeguarding and document it so as to leave an audit trail which evidences proportionate responses?

Strategy, commissioning, choice and charging questions

- Are you using the facility for delegating functions out, to ensure that as many roles as possible are being done by the most efficient means?
- Has the council changed its policy on how much capacity is needed to make a request for a DP, and organised a suitable person's agreement to sign - when it has to be THAT indirect sort of a payment that's going to be made to another person other than the service user?
- Have you changed the policy that says that 'exceptional' circumstances are required before someone can pay their related carer through a direct payment?
- Has your council actually funded someone with extra money, to pay their relative for the admin of a DP?
- 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?
- How is charging going – is the council sure that it is not charging ***anyone*** any more than it actually costs, to buy them their service?
- Are you charging full cost to those with over the threshold, or still subsidising full cost as a social care value?
- Are you charging for prevention, and are you charging carers? Have you decided formally not to for a good reason that you've made the most capital out of?
- How are you justifying volume based charge discounts to specific council users, so that not all council clients *pay* the same for the same sort of care and level of care?

More senior management questions

- Are you properly contracting for care homes and home care for all clients who lack capacity to sort it out for themselves and who have no-one else authorised or at least willing and able?
- Have you got a strategy for what you will do with self funders for whom you do not *HAVE* to contract, but could, say if they are close to the threshold, and make their money go further?
- Are you charging rich people a commissioning fee for letting them into your cheap contracted-for bulk rates for home care? You can - Wandsworth does.
- How are relations with providers, since the living wage came in? Whose problem have you said that that should be?
- Are you adding an increase in annual fees only for people coming in, so that the longer the person stays the bigger the top up is likely to be? The ombudsman says that that's maladministration (Bolton).
- Are you running top ups as a bridge between what you'd like to pay and what the homes want to charge, for most care homes, or less than 30%? Are you paying the extra when the placement is not a matter of choice, but necessity (even in respite? (Tameside, Cambridge).
- Have you persuaded health partners to agree a split package, for someone not quite qualifying for CHC? What about splitting s117 commissioning bills down the middle to save time?
- Are you managing Members' awareness of just how far your powers go, but also where they stop? So that they can better manage press attention when capacitated people take risks?

Things to look out for in local practice

With **statutory duties and discretions**, the most **likely risks of being challenged in judicial review proceedings**, for acting *unlawfully* will arise from a council's

- **Not doing these duties at all, or taking unfeasibly long about it**
  - Eg: not providing advocacy where it is acknowledged to be necessary and an entitlement;
  - Not offering direct payments for a particular client group not excluded from the opportunity;
  - Stretching the assessment phase out, by offering prevention again and again, and never saying when they will get to an eligibility decision;
- **Not doing them sensibly, or in accordance with the guidance, without a good reason!**
  - Eg: running a waiting list for a scarce resource based on alphabetical order instead of need;
  - Not giving reasons for why an offered package or budget is considered to be enough…;
- **Not doing them legally, within the words used in the Act or Regs – or ignoring the statutory purpose**
  - Failing to allow a person to require the involvement of a nominated person in a decision where this is required, or regarding their relative as their informal supporter without getting the person's consent or making a BI decision.
  - Imposing a condition on a direct payment recipient that negates the whole point of the offer – choice/control
- **Fettering discretion or not doing decision making fairly, so far as procedural fairness rules are concerned...**
  - Failing to consider giving a person direct payments to spend on a close relative in the same household;
  - Not allowing a person to make representations in respect of their position on ability to achieve or what is wrong with the suggestion that a service available for free locally could appropriately meet a person's needs.

The unavoidable truth: your organisational culture matters for defensible decision making

- How seriously is supervision taken? Whistleblowing? Attention to workload?
- If staff question the legality of something they've been asked to do, is this regarded as helpful, or as an irritation?
- Do senior managers go to legal update training? Legal awareness is going to be an inherent part of being skilled for management – it's a strategic *tool* and not a pain or a hindrance to meeting performance targets.
- Do members expect to be able to demand a change of policy or an exception to be made at the drop of a hat? That sort of culture feeds a perception of 'he who shouts loudest…', and saps morale.
- A well ***governanced*** council keeps its staff happier, and more engaged.... So they will do more, overall, for the money.

The Monitoring Officer's independent governance function

– clients, providers and advocates are going to learn about this much more effective way of complaining, in a council near yours, very soon!

- 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.

First contact foolishness

- Not reconfiguring First Contact services, so as to have at least some senior qualified staff up there – with antennae, for sensitive decision-making confidence, and legally aware supervision…
- Setting up implicit thresholds to getting *past* this point, to assessment 'proper' - like one's IQ, severe or enduring mental illness, having a diagnosis, etc
- Getting the mode, level, skill factor or timing wrong for a proper assessment *beyond* your 'front door'.
- Not at least offering people 'a supported self assessment' if they have capacity to take part in one, and not allowing them to say who they want *involved*, and involving *them* in the process as per the statutory rules.
- Turning people away at this point, without identifying whether you are

  A) purporting to be actually denying them an ***assessment*** and if so, why,

  B) saying that they have just actually had one from you (without their realising it) and that they're not eligible - or

  C) just saying 'Try this first, and let us know whether it works....' without following up
- Saying no on the basis of an ignorant view of ordinary residence rules
- Saying no on the basis that they've not moved here yet...

Advocacy accidents

- Not having enough, so as to delay assessment or other stages. Er, it's a **duty**.
- Failing to spot someone would experience **substantial difficulty,** at the right point
- Forgetting to get the **consent** of the person to the informal support from their informal involving person
- Finding *willing* involvers to be **inappropriate** for obviously challengeable reasons
- Finding ***un***willing involvers to be appropriate, regardless, and thus failing to appoint
- Forgetting that alongside advocacy, a person has a right to require a council to involve a person of their own choosing, and that people are best interests consultees of people lacking capacity, in whose wellbeing they are interested, unless or until a council decides that to be inappropriate or impracticable...
- Overlooking the exceptions to the exception: ie where, notwithstanding the existence of a willing and appropriate informal involver, councils *must* appoint an independent advocate in any event!! (conscientious material disagreements)
- Appointing people who don't have the skills or knowledge or the qualification within a year...
- Appointing insufficiently independent people – hard because the regs fail to make it clear as to whether it is a contracted advocacy *organisation* that must be independent, and not *otherwise working* for the council - or the advocate, him or herself, in person....

Prevention Pitfalls

- Signposting, without finding out if there are actually vacancies or services out there still!
- Assuming that people can buy their own: no good if the services are not **affordable** to ordinary people – perverse disincentive to take personal responsibility.
- Not listening conscientiously as to why a person won't **avail** themselves of preventive services, but then taking that into account as relevant to significant impact considerations at the eligibility stage. If councils want to be brave and take it as relevant to significant impact, they'd need to make sure that there was ***no*** *very good reason*, or only a completely **indefensible** one, like racism, for the person's having turned down access to preventive or universally available services which were available at the time.
- Getting in a mess about what can be charged for if merely preventive, and what **can't** be. There is a separate charging power in the Act and Regs for prevention services, so in principle, councils CAN charge – but not if it's reablement or intermediate care (a programme…) and nb they can't charge for equipment **they** provide in **any** circumstances.

Assessment aggravations and eligibility embarrassments

- Not covering all of the domains that an assessment should cover. The client is not the real decision maker, even when they're saying that they've not got a problem…or that they have no needs…. You have to be a *professional*.
- Overlooking the definition of inability – it is a **stretched** one. So even if staff start out with the person's assets and strengths, it doesn't mean that they don't count as unable to do something – for instance, if they are getting assistance, so don't see the difficulty as a big problem….
- Overlooking the need to be carer blinkered in relation to ability or impact – ie forgetting that staff must assess the person's ability without regard to the existence of current help.
- Appearing not to be taking any account of desired outcomes or the person's own view of the impact arising from the difficulty
- Insisting that significant impact needs to be counted over criteria of the council's **own making** which by their wording, make some of the 10 eligibility domains less likely to matter….
- Paperwork with no spaces for the client/involver/carer/any relevant person's advocate to assert a different view

Care Planning and Budget bungles and RAS wrangles

- Ignoring s25 on what a care plan must have in it.
- Ignoring Choice of Accommodation legal requirements or misinterpreting them – re a 'keep people in borough' policy for instance.
- Not monitoring whether they are working, and thus spotting safeguarding issues in a timely manner.
- Signing off care plans with too little response or money to meet needs
- Funding up to the cost to the *authority*, and never any more than that, effectively not meeting need via direct payments if it would cost more, that way.
- Not commissioning for reasonable objective sufficiency and holding customers to that inadequate discharge of responsibility by saying 'we have no more money'.
- No reasons given for why a given offer of anything is believed to be enough to be appropriate.
- Ignoring the MCA and DoLS at the care planning stage and getting into more *Somerset* or *Cheshire West* or *Milton Keynes* moments
- Ignoring any other relevant and applicable legal principle, including human rights.

Direct Payment disasters

- Giving them to people who lack capacity to request a direct payment, direct to *them*
- Getting the role of the client's *nominee* mixed up with the role of the authorised person to whom the council can give the direct payment separately and accountably,
- Refusing people a direct payment when they have enough capacity to request one, without a good reason Eg the council doesn't *like* their nominee
- Thinking that the council could buy the service for less because ***it's*** been crushing the market with its dominant purchasing position, and translating that into a NO.
- Not having a clear policy on when or if the council will ever fund the administration of the direct payment separately, and/or by close relatives in the same household
- Not ever imposing **conditions**, so not managing public money properly
- Allowing monitoring outcomes to go **unaddressed**, despite concerns
- Not ever recouping unspent money from one particular group - **discriminatory**
- Recouping it too savagely without regard to all relevant circumstances
- Imposing conditions that are **unreasonable**: like having a payment card as the only option when it's not even in a bank account in the person's name
- Paying net, when there is a really good reason to pay gross

Carer crises

- Refusing to treat someone as a carer because they are not doing 'enough', in the council's opinion…
- Telling them that they ***must*** care, or being economical with the truth that councils **need** them to care but have to back fill if they don't want to
- Applying the wrong criteria to them – the regulations have two sets – different ones
- Thinking that they can still just be signposted to carers' services – without making it clear that they can insist on an eligibility decision as well
- Giving them money even if they are rocky enough just to want a service – they'd have to consent to a Direct Payment before that's a proper response.
- Trying to give carers a sum of money that has no rational evidence basis, and which would only be appropriate if there was a **discretion** to meet needs as now, instead of a **duty** to meet eligible assessed unmet needs of carers.
- Ignoring carers of people in care homes – practical and emotional support is enough.
- Ignoring carers of people with CHC status
- Mixing up the carer charge with the service user or recipient charge.

Ordinary residence ordeals

- Not distinguishing between s117 people and everyone else – it is a bit different
- Not deciding what you think specialist accommodation IS or means: goodness knows what we are supposed to do about this: premises '**intended** for adults with care and support needs' 'where personal care is **available if required**…'??
- Not understanding that continued o/r turns on the client's needing **personal care, not just care and support, and it being written up in the Care Plan that the accommodation aspect is the ONLY way to meet need!!**
- Not being consistent across client groups as to whether social care clients who move into personally contracted for accommodation are covered and continue as o/r – it seems to us that Shared Lives clients *do* move as licensees or tenants, in most cases, and will qualify under *that* rule, not the Shared Lives rule.
- Not understanding the role of incapacity or solutions to it, for those wanting to move as tenants (deputyship = a private arrangement)
- Putting it in the care plan before the cost of the care has been worked out, in specialist care and support provision arrangements and thus falling into dispute in specialist cases
- Not deciding whose job it is to decide, in-house or leaving a client in a provider's setting without an interim contract, because of a dispute….
- Not abiding by the new dispute resolution rules and time frames
- Mixing up **choice** rules and o/r rules, just because they appear to be structured in the same way. One applies to placements, and the other applies to placements and tenancies….

Choice and top-up terrors

- Thinking that public procurement obligations 'trump' choice rights
- Thinking that the choice right simply passes to the relatives, if the person is incapacitated
- Just offering a list of registered or contracted providers: it's the council's job to point to the ones that are considered *suitable* by the authority, which is the decision maker!
- Thinking that the council can take a figure out of thin air and say that anything above that is a top-up – even if the figure is arbitrarily low
- Not vetting the offeror of the top-up for their own financial standing: it's the council's risk – and leaving the client insecure for want of payment!
- Not contracting for the whole amount when the council is acting as the buyer – **the rules still require it**
- Offering **one** home in the area that takes the asserted rate for the package even if it's horrible - and even if it isn't, has no vacancies at the time....
- Not using the usual rate in another authority where that's the person's choice – and *there*, of course, the concept of **usual rate** still applies, because the person won't *have* a personal budget for the meeting of needs in another borough.
- Letting the providers double charge, by not taking steps against private top ups for things already covered by the council's contract...

Commissioning Capers

- Top-ups: the ombudsman has spoken, even if Tameside hasn't listened! **Counting the cost of care, 2015**
- Fees reviews: David Collins or Alison Castrey will be after you if you don't actually respond to the real cost of care.
- Leaving off all mention of DoLS, necessary restraint and conditions when commissioning
- Misleading the provider through e-commissioning as to what you're really asking them to take on
- Contracting in an outcomes ONLY based way, so that the client hasn't got a clue what they're entitled to for the price
- No contract monitoring, relying on CQC instead!
- Using safeguarding as a stick to beat providers with – a provider concerns forum is all very well, but not if it's being used by the fees negotiators in a muscular way when it comes to price!
- Imposing discounts, ignoring dispute resolution clauses
- Leaving clients in the bed or with a dom care provider, without any contract being in place: this will lead to a restitution claim, where the JUDGE tells you what is a reasonable price, not the Members, or the Laing&Buisson tool!!
- Tendering at a fixed price, and sticking to it, even if it does not produce what you KNOW to be your anticipated throughput for that type of service for a year
- Re-tendering for dom care without making provision for a change being indefensible, in terms of the reliance or extremity of the need in the particular context of the client/provider relationship: you need to make some exceptions.

Charging calamities

- Not being clear about transport and Mobility Component: you cannot take someone's benefit into account for eligibility for a transport service that you actually provide by way of the Care Act; but someone's eligibility for concessionary transport from another bit of the council could be a reason for not making a specifically social services arrangement for transport. If you do provide a social services based transport service, then when it comes to charging you cannot count their Mobility Component, but you can take a person BELOW the MIG, by reference to non-care services. If you are not providing the transport, then the money a person spends on their concessionary transport is DRE, if you are taking their other benefits into account.
- Charging a person MORE than it actually costs you to buy their services. So if you are charging a flat rate for residential care that you commission, to make it fair on all council clients, you are giving some of them an advantage and others a disadvantage.
- Charging a person based on their partner's assets
- Forcing a person to treat the value of their share in their home as half, when the other owner is not a willing seller. It's a loophole, you need to find a valuer who's very credible, or just live with it!!

Reviews risk-running

- Not getting everyone onto a properly arrived at Care Act care plan in one year – **ie by April 2016 – and never putting them through the new criteria! NOT FAIR!!**
- Ignoring the regs and guidance as to the longest anyone should go without review – the 'expectation' is **annually**.
- Mixing up *service* **and/or FEES reviews**, with review of whether the **package/budget** is working to deliver the meeting of needs and outcomes – and sending out cost brokers to do the latter!!
- Ignoring providers' evidence in *their* reviews, and not organising your own or **formally adopting theirs as yours – you gotta HAVE one on record…**
- Rejecting requests for revisions of the plan when it would be unreasonable to do so, on **a change of circumstances or just because someone keeps on asking!!**
- Revising a plan so as to impose a change the manner of provision or the provider, whilst contending that there is no suggestion that the person's actual needs are thought to have changed, without doing **a proportionate re-assessment. It will 'affect the *plan*'…**

Safeguarding sloppiness...

- Treating the DoLS backlog as if the Safeguards have already been **abolished**, and not even prioritising the cases where there is a dispute about capacity, strong objections to the situation or relatives about to go nuclear, regarding the lack of access to their loved ones that you have imposed
- Valuing integration with Health so much, that *their* budget driven difficulties in commissioning, blind your Supervisory Body to the idea that 10 months is not a short time to be inappropriately cared for, whilst being deprived of your liberty (the recent *Surrey* case)
- Ignoring the wishes and feelings of the client who actively **prefers** the life they have, even though they know their loved one's behaviour towards them is not nice
- Marginalising a suspected neglecter or abuser, without having it out with them: they are an MCA best interests consultee **unless you decide otherwise**, but you have to be up front about it.
- Assuming that you don't ever have to ***do*** a s135 or a Public Health Act removal, because 'hoarding is a life-style choice'…
- Ignoring **property protection** duties for those in care homes or hospital if they can't manage to take care of their goods or pets
- Not ever **asking** the SAB to use the special information sharing power in support of front line safeguarding enquiries
- **Delegating** safeguarding formal decision making in breach of the Act, ie to Mental Health Trusts, as opposed to causing them to make enquiries subject to supervision from safeguarding HQ…..

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Thank you for reading this !

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