

Care Act Regulation and Statutory Guidance: Response from Inclusive Change Partnership

Introduction

Inclusive Change is an alliance of organisations which bases its work upon the recognition that a 21st century care and support system is only viable if it starts with the individual; and specifically on an understanding of that individual's personhood in relation to others in family, community and culture. Each individual brings with them a history of living and learning which provides a basis for contribution; and each individual brings a need for choice and control over all aspects of life, including the support they receive from others. We therefore welcome a Care Act which has the wellbeing principle as its foundation and has many of the key principles of self-directed support as a driving force. Our view is that these principles and key self-directed support mechanisms are crucial to the achievement of the policy intentions of the Act. Any dilution of these is likely to have the effect of severely reducing the positive impact of the Act. We would urge the government to resist any such dilution in the final versions of the regulations and guidance.

While generally welcoming the regulations and guidance we do however have concerns, as our detailed comments below reflect. We believe that in a few regards the draft regulations and guidance are not sufficiently strong or detailed, particularly on the question of promoting practice which builds up from a foundation of individual strengths and systems which deliver independent living. It is imperative in particular that we attend to evidence of the success of those pro-active approaches - local area co-ordination, strengths based first conversations, shared lives schemes, support to micro-enterprise - which bring multiple benefits for individual wellbeing, community capacity and cost effectiveness. If public policy is to promote a transformed culture in care and support which sees citizens and communities as the authors of their own destiny, then we believe it is absolutely imperative that the key principles of the new Act are reinforced through regulation and guidance which is robust, coherent and inspirational. We urge the Department to review and revise its regulation and guidance documents in this light.

1. General responsibilities of local authorities

- 1.1. We welcome the positioning which the act gives to wellbeing at the heart of the care system. In particular we welcome the stated core purpose of adult care "to help people achieve the outcomes that matter to their life". We also welcome the comprehensive definition of wellbeing at para. 1.4 in the guidance documentation.
- 1.2. The wellbeing principle requires a very major cultural adjustment for local authorities and their partners. For example we have seen local proposals which exclude "purchase of well-being support" from use of personal budgets. We believe that in a time of financial austerity and

demographic challenge, guidance must be robust in its requirements and nuanced in its language to induce this adjustment.

- 1.3. We do not believe that the words “a shift from providing services to the concept of meeting needs” (para. 1.8) is adequate to this task. We would prefer to see the words “a shift from providing services to the concept of sustaining a good life”.
- 1.4. We are not of course proposing that needs should not be assessed or met (indeed, this would be unlawful under sections 8 and 9 of the Act). We do however, take the view that an acid test of the new Act, together with its supporting regulations and guidance is the extent to which the wellbeing principle is interpreted and mandated for local authorities and their partners; and the ways in which regulators and the public are supported to hold them to account on this basis.
- 1.5. Many of the comments below reflect our concern that whilst there are many positive and helpful sections in the draft documents, an overall basis in simply “meeting needs” alone and in itself, reinforces a deficit model which is contrary to the demands of the wellbeing principle; and this will mean in turn that managers and practitioners will not be required to make the very major shift in thinking that is called for by the Act.
- 1.6. We very much welcome the recognition that everyone’s needs “are different and personal to them” (para. 1.9); and the further recognition that independent living is a core aspect of the wellbeing principle (para 1.17). Our observation is that in too many places today independent living is in fact being compromised where councils require people to live in more institutional situations on cost grounds. We contend that these demanding stipulations can only be delivered in circumstances where the fundamental basis of the relationship between citizen and local authority is transformed, such that it is clear that the primary focus of the authority is to engage with an individual on the basis of their actual lived-situation, that is with someone who brings strengths, relationships, aspirations and a wish to contribute and connect. A simple focus on “meeting individual needs” will not deliver this.
- 1.7. We strongly support paras 2.14-16 on developing resilience and promoting individual strength, but we note that this section fails to contain any bold **should** or **will** statements. We believe that these paragraphs will be strengthened by the addition of such statements.
- 1.8. We welcome chapter 3 on Information and Advice and note that key points from this important chapter are reiterated throughout the guidance. This has been an area of weakness in many localities to date and we would want to reinforce the point that no aspect of strong, personalised and self-directed care and support arrangements will be possible without transformed arrangements for the provision of information and advice. This message will be strengthened by the inclusion of case studies, showcasing excellent information and advice arrangements.
- 1.9. We believe that this section of the guidance will benefit from a conclusion that explicitly promotes cultural change in local authorities and their partners and which lists areas of activity which might promote such change: transformational leadership, strategic vision, workforce planning and staff development, staff support arrangements, community engagement, thoroughgoing co-production, excellent public communications.

2. First contact and identifying needs

- 2.1. We are pleased to see many of the changes set out in this section of the guidance and in the Care and Support (Assessment) Regulations. We are particularly pleased to see the emphasis given to the requirements that citizens are fully informed about the process throughout; that

they are supported through the process; that they are always involved in the process; and are encouraged to take as much responsibility as they wish/are able to take through a process of supported self-assessment. The section will be improved by making some of the **should** statements here (those in paras 6.26, 6.27 and 6.28 in the guidance in particular) into **must** statements.

- 2.2. Whilst we welcome the statements linking prevention with assessment and eligibility (paras. 6.31 and 6.32) these paragraphs will benefit from being revised to make it clear that the first recourse for someone whose “needs could be reduced” is the person’s family, network and community; and not “specific preventive services or information.”
- 2.3. We very much welcome para. 6.33, *Considering the person’s strengths and capabilities* and the case study; however we believe this should be strengthened and made more prominent: “in considering what else might help” is a very weak statement indeed.
- 2.4. We support appropriate and proportionate assessments and the guidance at paras. 6.34 to 6.42 is helpful and sensible.
- 2.5. Whilst welcoming the emphasis given to self-assessment (paras. 6.51 to 6.59 and regulation para. 2) we believe additional guidance might be added specifying that a citizen’s self-assessment and the consequent determination of eligibility will normally stand, unless the authority has good reason to believe it to be flawed, in which case they will have exceptional powers to provide their own assessment and determination.
- 2.6. We believe that the sections of the guidance on integrated assessments and combined assessments are helpful and should enable citizens to achieve more seamless support through a simpler process; however it is of critical importance that parallel guidance is provided for local authorities’ statutory partners.
- 2.7. The paragraphs from 6.86 and from 6.92 on, concern adults’ eligibility and carers’ eligibility. These exist, by definition in a state of complex interdependence: addressing the needs of one party will almost invariably impact greatly on the needs of the other. The new system and the guidance that supports it must reflect this. It is important in particular that resource allocation systems are responsive to the interdependent relationships and that we neither discount the caring relationship nor presume a “wish to care”. We recommend an additional paragraph of guidance stating that this is how local authorities should now respond.
- 2.8. We reiterate our lack of support for the undue emphasis on *needs* throughout this section: we acknowledge that one function of the first contact conversation is to register needs so that these can be properly assessed, so that short-term measures can be taken to keep the person safe and so that eligibility can be determined. We firmly believe however that there are other important aspects of the first contact conversation, most notably support for the person to sustain or regain a good life, as they themselves define it through use of their own strengths and their own networks: this is what is most different and most challenging about the new approach to the first contact conversation and this should be flagged as its defining characteristic.

3. Person centred care and support planning

- 3.1. We very much welcome much of the guidance provided in chapter 10 on care and support planning as reflecting the learning about the power and reach of person-centred thinking and planning. We reiterate here the point we have made at an earlier stage of the consultation on the Care Act: that the term “care and support plan” is confusing for many citizens and professionals who have now adopted the term “support plan” for plans for adults as distinct

- from the pre-existing “care plan”. Reversion to the term “care plan” for the new type of plan at some points in the guidance is particularly unhelpful.
- 3.2. We are very pleased to see that the guidance insists that the person “**must** be actively involved and influential throughout the planning process” and that the ability to meet needs by taking a direct payment **must** be clearly explained to the person in a way that works best for them”. (para 10.2). We are broadly pleased to see the expanded role of independent advocates in the process specified at 10.4 but would wish the guidance to make it clear that this expansion must not be at the expense of the inclusion of family and friends.
 - 3.3. We strongly believe that the process **must** (not “should”) be person-centred and person-led. Our experience is that there is extremely variable practice across local authority areas in relation to arrangements for the preparation of plans and that this is a critical area for which authorities should be held to account. Some good practice case studies might also be helpful in this respect.
 - 3.4. We believe that para. 3.22 which promotes the inclusion of “universal services and/or unpaid support” in plans is weak and needs strengthening. Our view is that such services and support are the first recourse for many citizens and that the best plans are based upon this premise.
 - 3.5. Similarly, we believe that para. 3.22 which refers to the desirability of including an anticipated review date in plans should be stronger; there is no reason not to have an anticipated review date in every plan and the addition of this as a requirement will address some existing poor practice.
 - 3.6. We are extremely pleased to see the expectation at para. 3.29 that people should be free to choose innovative forms of care and support from a diverse range of sources including non-service options; however we believe that this should go further and a form of words devised which makes it clear that the core purpose of planning is to develop and hone such arrangements, with traditional service options as the exception.
 - 3.7. We support para. 10.45 which makes it clear that if lack of capacity is established, the person should still be involved in making decisions as far as possible. We believe that planning **must** (not “should”) always be done *with* the person and not for them and that it is the responsibility of local authorities to facilitate this.
 - 3.8. We are pleased to see a range of approaches to planning support (at para. 10.62) and clarity about local authority responsibilities in this regard; however we believe that it is an absolute necessity (a **must** not a “should”) that the best interests of the person must be reflected in all cases. We are clear that this is a core local authority responsibility.
 - 3.9. We strongly support para. 10.65 which limits the use of approval panels for plans. Our experience suggests that in most instances such panels are not inclusive or transparent and that the vast majority of “sign-off” decisions can readily be taken closer to the person.
 - 3.10. We have one important reservation about the content of chapter 10. It is important to be clear about who “owns” the plan: it appears from the guidance (particularly the list at 10.18) that this is a local authority plan, which the citizen may be able to prepare on their behalf. Our strong preference is a process where citizens own and prepare their own plans, with help if necessary. The plans are prepared in each person’s own preferred style, using a format they choose and in the knowledge of what it is the local authority requires for sign-off; the authority then extracts the information it needs, working with the person to fill any gaps. In this way the plans are unambiguously person-centred and owned and the authority has a linked but distinct process to meet its statutory duties and responsibilities.
 - 3.11. We are also broadly pleased with chapter 11 on personal budgets and were very pleased to see the Act make personal budgets “the norm for people with support needs” (para. 11.1). Para.

11.2 is especially important: the fact that people know how much their personal budget is likely to be before planning begins empowers them to make good plans and this drives the process from that point on.

- 3.12. We support the principles and the process outlined in paras 11.1-13 and are particularly pleased to see the sufficiency principle articulated at para 11.9: our concern here is that many local authorities have **not** adhered to this principle to date and we are interested to learn how in a period of further austerity they will now be held to account.
- 3.13. We welcome the fact that the first period of intermediate care is to be free, but have reservations about the total exclusion of intermediate care and reablement from personal budgets (para. 11.15.) - an unintended consequence of this may be to limit the full benefit of personal budgets. There will be some occasions where service led crisis care is necessary however there is a strong risk that having received a service led crisis response at point of contact that choice and control is frustrated by the addition of a personal budget too late, often this can mean merely costing an established package of support. Our experience suggests there will be many occasions where the person is better served through an indicative personal budget and urgent support to plan at first contact; in this way creativity and innovative planning are promoted at all points in the care and support process.
- 3.14. We are broadly pleased with chapter 12 in that it promotes direct payments as the preferred approach for the delivery of personal budgets; sets out a clear role for the local authority in promoting and providing or commissioning the necessary support; but is equally clear that there must never be any element of compulsion or undue pressure involved in the direct payments process (para. 12.10 “Local authorities **must not** force people to have a direct payment”.)
- 3.15. The continued promotion of direct payments is particularly important in the light of recent intelligence about the plateauing of numbers of direct payments nationally and some dramatic variations in performance across councils: we will be interested to learn how councils will be held to account when some outliers are in effect denying access?
- 3.16. The issue of the use of direct payments by people who lack capacity and the important link to the Mental Capacity legislation is dealt with appropriately and helpfully in paras. 12.17-23. In our experience this is an area of very variable practice and we are particularly pleased to see that local authorities should “take all reasonable steps to provide the support to people who may require it” (para. 12.20). We think this should in fact be made a requirement (**must not** “should”). We will be interested to observe how practice changes going forward.
- 3.17. We support the change in the regulations (reflected in the guidance at para. 12.35) which now empowers the local authority to pay a family member living in the same household for administering/managing the direct payment. We believe that the issue of payment of such a family member for care should be kept under close review: this is on occasion an issue of some contention for families and we are not convinced that the present (“exceptional circumstances”) arrangements always work well.
- 3.18. We are pleased to see an expectation of a flexible and sensible approach when a direct payment user is admitted to hospital (para. 12.50). We are aware that this has sometimes been an issue of difficulty in the past and we hope now to observe generally improved practice.
- 3.19. We strongly support a strengthened review process generally (see below) and the enhanced expectation to review direct payment arrangements where the citizen is employing people (para. 12.61) is welcomed. It should however be made clear that the focus of this process is the provision of reassurance and if necessary advice and support for the person to ensure that

they are fulfilling their legal obligations, rather than primarily a process of checking up on them.

- 3.20. Whilst supporting the broad approach set out in the chapter on direct payments, we feel that it could be improved by clearer links with the chapters on information and advice and on commissioning; these are crucial activities in direct payments where user led organisations and centres for independent living have important roles to play in the success or failure of local schemes. Our view is that this should be made more explicit in chapter 12.
- 3.21. In terms of chapter 13 on *Review of care and support plans*, we see this as a critical issue, which has been neglected in many localities as resources have reduced. We have many examples of support packages which have failed as a result of a poor or non-existent review process and we see the Act and the new regulation and guidance as an opportunity to address this issue. Our overarching view then is supportive of the chapter, with the rider that wherever possible it should be strengthened.
- 3.22. We very strongly support para. 13.4, which states that the “review **must** not be used as a mechanism to arbitrarily reduce the level of the person’s personal budget.” The In Control helpline receives a considerable volume of calls which suggest that this is currently common practice in some localities: this undermines all aspects of the system, not least the review process itself. We believe that local authorities who continue to operate in this fashion should be named and shamed.
- 3.23. We also think that *proportionality* in the review system is critical if local authorities are to manage limited resources for this activity and if personal budget holders are not to have undue burdens placed on them. It is important to frame reviews as an opportunity for growth and learning. Paras. 13.10 and 13.11 on this issue are important therefore. A case study here might assist some local authorities.

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