

Welcome to Landmark Chambers' Social Care Webinar Series – Part 1

The recording may be accessed [here](#).

Your speakers today are...



Stephen Knafler QC (Chair)

Topic:
Coronavirus
and social
care



Yaaser Vanderman

Topic:
Service
provision
decisions



Leon Glenister

Topic:
Ordinary
residence
and local
authority
responsibility

Service Provision Decisions



Yaaser Vanderman

Topics

- Personal budgets
- Direct payments
 - Misspending
 - COVID-19

Personal budgets

- Statutory position – Care Act 2014:
 - Section 25(1)(e): Personal budget must be included in the care and support plan/ support plan
 - Section 26
 - “(1) A personal budget for an adult is a statement which specifies—
 - (a) the cost to the local authority of meeting those of the adult's needs which it is required or decides to meet as mentioned in section 24(1),
 - (b) the amount which, on the basis of the financial assessment, the adult must pay towards that cost, and
 - (c) if on that basis the local authority must itself pay towards that cost, the amount which it must pay.”

Personal budgets

- Purpose
 - enabling individuals to choose how needs will be met: e.g. by themselves, through LA or individual service fund
 - *Care and Support Statutory Guidance* (s78 of Care Act 2014)
 - Para 11.3: enables greater choice and control over how care and support needs met

Personal budgets

- Process:
 - *Care and Support Statutory Guidance*
 - Para 11.4. “It is vital that the process used to establish the personal budget is transparent so that people are clear how their budget was calculated, and the method used is robust so that people have confidence that the personal budget allocation is correct and therefore sufficient to meet their care and support needs. The allocation of a clear upfront indicative (or ‘ballpark’) allocation at the start of the planning process will help people to develop the plan and make appropriate choices over how their needs are met.”
 - Para 11.7: At all times, the wishes of the person must be considered and respected. For example, the personal budget should not assume that people are forced to accept specific care options, such as moving into care homes, against their will because this is perceived to be the cheapest option.

Personal budgets

- Content of personal budget
 - *Care and Support Statutory Guidance*
 - Para 11.10: The personal budget must always be an amount sufficient to meet the person's care and support needs, and must include the cost to the local authority of meeting the person's needs which the local authority is under a duty to meet, or has exercised its power to do so. This overall cost must then be broken down into the amount the person must pay, following the financial assessment, and the remainder of the budget that the authority will pay.
 - Para 11.22: Local authorities should not have arbitrary ceilings to personal budgets that result in people being forced to accept to move into care homes against their will.

Personal budgets

- Calculating personal budget:
 - *Care and Support Statutory Guidance*
 - Para 11.24: The amount that the local authority calculates as the personal budget must be sufficient to meet the person's needs which the local authority is required to meet under section 18 or 20(1), or decides to meet under section 19(1) or (2) or 20(6) and must also take into account the reasonable preferences to meet needs as detailed in the care and support plan, or support plan.
 - Para 11.25: In establishing the 'cost to the local authority', consideration should therefore be given to local market intelligence and costs of local quality provision to ensure that the personal budget reflects local market conditions and that appropriate care that meets needs can be obtained for the amount specified in the budget

Personal budgets - LGSCO complaints

- *Report into an investigation into Wiltshire Council (16 015 946) (12 April 2018)*
 - Policy of placing people into bands and paying in line with banding levels regardless of precise need. Resulted in reduction of support after family moved to Wiltshire
 - Ombudsman: “67...The Council cannot set maximum budget levels. The Act says eligible needs must be met, no matter what the cost... 69. The Council has provided me with its bandings. It says Mr P’s disability falls into a certain band and therefore his funding cannot exceed a certain level. 70. Again, this approach does not accord with the Care Act. The Council may use bandings as a guide but, as the Care and Support Statutory Guidance states, such systems are unlikely to work in complex cases like Mr P’s.”

Personal budgets - LGSCO complaints

- *Report into an investigation into Lancashire CC (17 006 095) (27 Jul 2018)*
 - Council charged B third-party top-up fee for care in residential care home. Council had not offered alternative at lower rate.
 - Top-up fee? The difference between the personal budget and the cost of a home
 - Ombudsman: “7. If no suitable accommodation is available at the amount identified in the personal budget, the council must arrange care in a more expensive setting and adjust the budget to ensure it meets the person’s needs. In such circumstances, the council must not ask anyone to pay a “top-up” fee.
 - ...

Personal budgets - LGSCO complaints

42. The Ombudsman considers that for families to make an informed choice of care homes, councils must demonstrate that an alternative care home is available at a rate within the user's personal budget. If they do not do so, then we do not consider that they are entitled to charge top-up fees.

43. In this case, there is no evidence that there was a place available for Mr B at an alternative care home within Mr B's personal budget, or that Mr and Mrs B were made aware that there was such an option. Rather, as far as Mr and Mrs B were aware, Care Home 2 was the home with the lowest charge that was available to them."

Personal budgets - LGSCO complaints

- *Report into an investigation into Havering LB (18 018 467) (24 Sep 2019)*
 - Council awarded Y direct payments at Council rates. Y had to top-up allocated funding for live-in care because none of the agencies on Council list charged Council's rates.
 - Ombudsman: “63. In setting the amount of a direct payment (or the personal budget from which it is derived) the Council must ensure it is enough to buy services which will meet the person's assessed eligible needs. In Mrs Y's case the personal budget was insufficient to cover the cost of the care. The Council was aware none of the agencies on its provider list provided live-in care at the Council rates. The Council says it allocated Mrs Y “It's standard rate for live-in care”. This is fault and not in accordance with the Care Act or Statutory Guidance. The Council should have ensured Mrs Y's budget was sufficient to cover the cost of the service she received.”

Direct payments - Misspending

- Section 33 of the Care Act 2014:

(3) A direct payment is made on condition that it be used only to pay for arrangements under which the needs specified under section 25(2)(a) in the care and support plan or (as the case may be) the support plan are met.

...

(5) In a case where ...the condition mentioned in subsection (3) is breached, the local authority—

(a) may terminate the making of direct payments, and

(b) may require repayment of the whole or part of a direct payment (with section 69 accordingly applying to sums which the local authority requires to be repaid).

Direct payments - Misspending

- *Care and Support Statutory Guidance*
 - 12.67 Direct payments should only be terminated as a last resort or where there is a clear and serious contradiction of the Regulations.
 - LAs should take all reasonable steps to address any situations without termination of the payment.
 - 12.68 If terminating direct payment, LA must ensure no gap in provision of care support.
 - 12.81 There should be a period of notice

Direct Payments - LGSCO complaints

- *Report into an investigation into Nottinghamshire CC (19 000 339) (19 Nov 2019)*
 - Council undertook one annual review between 2012 and 2016 but then demanded repayment of £53,000 for failure to provide wage slips for care from husband (25 hours per week) and misuse of funds
 - Ombudsman:
 - No consideration given to fact that although wage slips not provided, not disputed that husband had provided that care; no opp given to B to discuss its findings/ give extra evidence;
 - Although understandable concerns on other misspending, not raised in 2013 review and no reviews in 2014 and 2015. B had no way of knowing Council considered spending unsuitable.

Direct Payments - LGSCO complaints

- *Report into an investigation into Lambeth LB (18 002 708) (5 Jul 2019)*
 - Various issues including Council stopping direct payments paid in 2016-2017 due to surplus, overspending and money not being used as set out in care and support plan. Related to organisational issues – number of carers at same time, regularity of calls, lack of training for carers.
 - Ombudsman:
 - LA failed to consider less extreme options, e.g. referral to direct payment support service
 - This was the case notwithstanding A advised on many occasions to arrange care in line with recommendations.

Direct Payments - LGSCO complaints

- *Report into an investigation into Buckinghamshire CC (17 016 036) (2 Apr 2019)*
 - P's direct payment stopped in April 2018 as a result of perceived misuse of funds despite no review taking place and no advance warning.
 - Over 6 months in 2017, P spent:
 - £3,862.27 (51.6%) on religious classes and sessions
 - £1,921.25 (25.7%) on football, motor sport, cricket, rugby and other tickets
 - £1,272.87 (17%) on fuel
 - £1,050 (14%) on reflexology.

Direct Payments - LGSCO complaints

- Ombudsman (paras 95 and 106):
 - Should have been formal review of the direct payment while it was active.
 - Should have been explored with P and discussions about what could and could not be spent.
 - Should have been warnings.

- “86. From my perspective the plan for how Mr P was to use his Direct Payment was quite vague. This is not necessarily a criticism. As detailed above, the guidance asks councils to do two somewhat contradictory things: to make a plan for how the money is to be used; but also, to ensure the person is given freedom and flexibility to use the money as effectively as possible. Nevertheless, it is evident that the lack of clarity in the plan caused uncertainty for all concerned, including Mr P, those attempting to keep a track of the Direct Payment’s use and those who later investigated matters. As noted above, the Council’s internal audit investigation also highlighted this lack of clarity.”

Direct Payments - Coronavirus

- Problems: Inability to access classes/ events, staff shortages, PPE
- Govt guidance: *Using direct payments during the coronavirus outbreak (2020)*
 - Direct payments to continue as before
 - Contingency plans
 - LAs should allow “*most flexible possible use*” of direct payments to manage COVID-19 issues when “*reasonable decisions*” made to use direct payments differently. “*Ideally, you will have agreed this with your usual contact person at your LA or CCG, but we understand that this will not be possible every time. This is OK.*”
 - In emergency or time-critical circumstances, could allow variation in plan without immediate sign-off from LA.

Ordinary residence and local authority responsibility



Leon Glenister

Introductory points

- Care Act 2014, section 18(1) places a duty on LA to meet an adult's needs for care and support if “the adult is ordinarily resident in the authority's area or is present in its area but of no settled residence”.
- Two types of ordinary residence: (1) actual ordinary residence resulting from a person's physical presence in LA area, and (2) deemed ordinary residence, which will be explored in due course.

Ordinary residence for persons with capacity

- R (Cornwall Council) v SoS for Health [2015] UKSC 46. The facts:
 - P lived in area of Wiltshire CC and cared for by parents until WCC placed him with long term foster carers in South Gloucestershire CC under Children Act 1989.
 - P remained in SGCC with foster parents until after 18, when placed in area of Somerset CC under the National Assistance Act 1948.
 - In the interim the parents had moved to Cornwall CC.

Ordinary residence for persons with capacity

- In Cornwall, the Court approved of the following formulation (which arose from R v Barnet LBC ex p Shah [1983] 2 AC 309), see para 41:

“ordinarily resident’ refers to a man’s abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.’

- “settled” need not be indefinite, so staying for education or business is sufficient.

Ordinary residence for persons with capacity

- What appears to be critical is where the person voluntarily eats and sleeps as a matter of fact, so that a person may be ordinarily resident in interim accommodation provided under the homelessness acts, or even in a barn at a farm where he or she is working temporarily (see e.g. Mohamed v Hammersmith and Fulham LBC [2001] UKHL 57)
- In principle, a person may be ordinarily resident in more than one area, but under CA 2014 a person can only be ordinarily resident in one area so where a person has two or more places of ordinary residence it will be necessary to determine where he or she has the strongest link (R (Sunderland CC) v SF [2012] EWCA Civ 1232).

Ordinary residence for persons with capacity

- Cornwall:
 - SoS had determined ordinarily resident in Cornwall, using parents as “base” who subsequently moved to Cornwall.
 - CA determined ordinarily resident in South Gloucestershire, which is where he was ordinarily resident with foster carers.
 - SC determined ordinarily resident in Wiltshire CC. Test is where he lived voluntarily and he had been placed into South Gloucestershire.

Ordinary residence for persons lacking capacity

- Adults who lack capacity to choose where to live cannot be treated as having become ordinarily resident anywhere on the basis of the ordinary test for ordinary residence because, as a result of lacking the capacity to choose where to live, it cannot be said that such adults have ‘voluntarily adopted’ a place of residence.
- The test was set out in Cornwall (paras 45-47), that a person lacking the capacity to choose where to live will be treated as ordinarily resident in the place where they have lived on a settled basis, as part of the regular order of their life for the time being.

Ordinary residence for persons lacking capacity

- The Care and Support Statutory Guidance provides the following pointers:

“This involves considering all the facts, such as the place of the person’s physical presence, their purpose for living there, the person’s connection with the area, their duration of residence there and the person’s views, wishes and feelings (insofar as these are ascertainable and relevant) to establish whether the purpose of the residence has a sufficient degree”

Deemed ordinary residence

- CA 2014 s39, read with the Care and Support (Ordinary Residence) (Specified Accommodation) Regulations 2014 sets out the 'deeming provisions' whereby a person accommodated in LA B will be deemed to be ordinarily resident in LA A.
- Deeming provision 1: where adult has need for care and support that can only be met in (a) a care home, (b) shared lives accommodation or (c) in supported living accommodation and is placed by LA A in area of LA B, that adult remains ordinarily resident in LA A.

Deemed ordinary residence

- Deeming provision 2: adult who is being provided with accommodation as after care service under section 117 of the Mental Capacity Act 1983 is ordinarily resident in the area of the LA with responsibility for providing them with after care services (which is the LA for the area where individual was ordinarily resident prior to detention).
- Deeming provision 3: adult provided with 'NHS accommodation' must be treated as ordinarily resident in the area where ordinarily resident before the accommodation prior to accommodation being provided.

Deemed ordinary residence

- Deeming provision 4 (CA 2014 s74): prisoners detained in prison, adults residing in approved premises, or adults residing in premises because of a requirement as a condition of bail, are treated as ordinarily resident in area of the prison, approved premises or bail premises.
- However, on release, ordinary residence is fact sensitive (see paras 17.48-17.51 of the Care and Support Statutory Guidance).
- Deeming provision 5 (non statutory): see Cornwall, the effect of which is that if LA A place person in LA B area under the Children Act 1989, then person remains ordinarily resident in LA A.

Dispute resolution procedure

- Where LAs disagree on a person's ordinary residence, the statutory procedure is to refer the matter to the Secretary of State: CA 2014 s40. Detail of the scheme is in Care and Support (Disputes between Local Authorities) Regulations 2014. SoS's decision may be judicially reviewed.
- Alternatively, Landmark Chambers have a dispute resolution service where a barrister acts as an "expert" to determine a dispute, in the 'Who Pays?' scheme: <https://www.landmarkchambers.co.uk/resources/who-pays/who-pays-home/>
- NB. there is also procedure for LA to reclaim cost from another LA where it has funded care for someone and it transpires person is ordinarily resident elsewhere: CA 2014 s41.

Residence for education duties for 18-25 year olds

- SEN functions in relation to young persons are the responsibility of an LA “if he or she is in the authority’s area”: Children and Families Act 2014 s24.
- Not many cases on this, but probably something more than simply physical presence as under Children Act 1989, because only one LA can be responsible, unlike CA 1989. I suggest the test involves presence, but additionally involves a degree of stability and connection.
- Financial responsibility for EHC Plan is governed by the Education (Areas to which Pupils and Students Belong) Regulations 1996, known as ‘the Belonging Regulations’. General principle is based on ordinary residence.

Coronavirus and social care



Stephen Knafler QC

An outline of the new framework (1)

- Section 15 and Schedule 12 to the [Coronavirus Act 2020](#) (“the Act”), in force in England on the 31 March 2020, on the 1st April, in Wales.
- The statutory guidance, [Care Act easements: guidance for local authorities](#) (“the Guidance”).
- The non-statutory guidance, [Responding to COVID-19: the ethical framework for adult social care](#) (“the Ethical Framework”).
- A great deal of non-statutory guidance which is revised fairly regularly.

An outline of the new framework (2)

- The Act amends the Care Act 2014 by reducing the duties therein. These are referred to as “the easements”.
- Local authorities are no longer required to discharge their duties to assess the needs of adults or carers, make eligibility determinations, undertake financial assessments or prepare care and support plans.
- Local authorities continue to have the power, but are no longer under a duty, to meet needs except in the case of persons ordinarily resident or present and not settled elsewhere, so far as necessary to avoid a breach of Convention rights and subject to charging provisos.

An outline of the new framework (3)

- The Guidance advises local authorities to exercise their powers, e.g. to assess and meet needs, as if the Care Act 2014 remained in force, and for as long as reasonably possible.
- When that ceases to be reasonably possible, the Guidance advises that care and support needs should continue to be assessed and as far as possible met in a timeous, proportionate, evidence-based and person-centred manner, in accordance with the Ethical Framework.

What remains unchanged

- Safeguarding functions (and see Annex D of the Guidance).
- Duties to promote well-being, preventing duties and advice and information duties.
- Complaints procedures.
- The PSED and the reasonable adjustments duty under the Equality Act 2010.
- DOLS – see *Coronavirus (Covid-19): looking after people who lack mental capacity* and associated guidance.

The first two lines of defence

- The Guidance advises local authorities to exercise their new functions as if the Care Act 2014 remained fully in force, and for as long as possible and it advises that this can be done by operating the first two lines of defence: (i) business as usual; and then (ii) by taking short-term measures and using flexibilities that always have been in the Care Act 2014. For example:
 - Para 6.3 of the Care and Support Statutory Guidance (proportionate assessments of different kinds);
 - Para 10.11 of the CSSG (flexibility as to how needs may be met)(may warrant changes to types of provision, delays or short-term cancellations – Annex B of the Guidance).

The third and fourth lines of defence (1)

- If it becomes necessary to go further, the Guidance envisages local authorities applying the easements in two stages:
 - (i) ceasing formal assessments, eligibility decisions, assessment reviews and care and support plans, with some shifting of resources;
 - (ii) wholesale prioritisation of needs.
- First, the “tipping point” needs to be reached.
- Second, the right process needs to be undertaken.

The third and fourth lines of defence (2)

- The “tipping point” is reached

“when the workforce is significantly depleted, or demand on social care increased, to an extent that it is no longer reasonably practicable for it to comply with its Care Act duties (as they stand prior to amendment by the Coronavirus Act) and where to continue to do so is likely to result in urgent or acute needs not being met, potentially risking life. Any change result from such a decision should be proportionate to the circumstances in a particular Local Authority” (Guidance, page 5).

The third and fourth lines of defence (3)

- A decision to operate the easements should (i) be taken by the Director of Adult Social Services in conjunction with the Principal Social Worker; (ii) having involved and briefed the lead member; (iii) having discussed the matter with the local CCG leadership; and (iii) carefully recorded. Decisions to reduce/prioritise needs should be reviewed every 2 weeks and reversed asap (Guidance, page 5 and 8-9). NB comply with the PSED.
- A decision to operate the easements should be (i) communicated to the HWB (Health and Well-being Board); (ii) communicated to *all* providers, service users and carers (taking into account any communication difficulties/needs); and (iii) reported to the DHSC (when a decision is made to start prioritising services, explaining why the decision has been made and providing brief details) (Guidance, page 5 and 8-9).

The third and fourth lines of defence (4)

- The easements should be applied as narrowly as possible.
- The third line of defence is applying the easements so as to undertake streamlined assessments and reviews of need and care planning, re-allocating resources, meeting needs differently, and reducing levels of personal care (Guidance, pages 8-9).
- The fourth line of defence is moving into full scale prioritisation. Such decisions need to be made separately, to be reviewed every two weeks, to be communicated to the DHSC with reasons and to be revoked asap, and to be recorded with reasons (Guidance, page 9).

Assessments, Reviews, Care Planning (1)

- Assessments, reviews and care planning should still mirror the approach and ethos under the Care Act 2014.
- Local authorities must still respond as soon as possible to requests for care and support, consider needs and wishes and make an assessment of what care needs to be provided (page 3).
- Assessment (and care planning) must still be proportionate and person-centred (pages 3, 4-5, 6).
- Assessments must demonstrate that decisions (i) are evidenced; (ii) based on professional judgment; (iii) apply the Ethical Framework (see below); and (iv) consider Convention rights (page 10).

Assessments, Reviews, Care Planning (2)

- Assessments must take into account risks both current and future (page 7).
- Assessments need not be conducted face-to-face and a range of different methods may be adopted (page 10).
- People need to be informed that their needs may be assessed or re-assessed in the future and a different decision made (page 10).
- Local authorities must ensure there is a clear and transparent pathway for Convention issues to be raised (page 11).
- Escalation and complaints procedures remain unaffected (page 11).
- All assessments and reviews not completed must be followed up and completed in full once the easements are terminated (page 4).

Prioritisation (1)

- Surprisingly, given its central importance, the Guidance offers very little advice about prioritisation, stating that “The Department does not propose to advise local areas on how to prioritise as methods of prioritisation will be unique to each area. The Department also recognises that there will already be well established methods of prioritising in most areas” (page 14).
- One suggestion that the Guidance does make is that “Local Authorities may want to ‘RAG-rate’ their packages and have them split between High, Moderate and Low (or similar terminology). It is likely that many will have a mixed care package. They should note these but work on the most essential element of care for mapping purposes” (page 13).

Prioritisation (2)

- Does anyone else remember *Fair access to care services: prioritising eligibility for care and support*.
<https://www.scie.org.uk/publications/guides/guide33/files/guide33.pdf> .
- Could it be a useful starting point, to inform the identification of different levels of need, bearing in mind that the first level must be “Convention rights”?

Prioritisation (3)

- **Critical** – when:
 - life is, or will be, threatened; and/or
 - significant health problems have developed or will develop; and/or
 - there is, or will be, little or no choice and control over vital aspects of the immediate environment; and/or
 - serious abuse or neglect has occurred or will occur; and/or
 - there is, or will be, an inability to carry out vital personal care or domestic routines; and/or
 - vital involvement in work, education or learning cannot or will not be sustained; and/or
 - vital social support systems and relationships cannot or will not be sustained; and/or
 - vital family and other social roles and responsibilities cannot or will not be undertaken.

Prioritisation (4)

- **Substantial** – when:
 - there is, or will be, only partial choice and control over the immediate environment; and/or
 - abuse or neglect has occurred or will occur; and/or
 - there is, or will be, an inability to carry out the majority of personal care or domestic routines; and/or
 - involvement in many aspects of work, education or learning cannot or will not be sustained; and/or
 - the majority of social support systems and relationships cannot or will not be sustained; and/or
 - the majority of family and other social roles and responsibilities cannot or will not be undertaken

Convention rights

- *R (Bernard) v Enfield LBC* [2002] EWHC 2282 Admin, (2002) 5 CCLR 340.
- *R (Anufrijeva) v Southwark LBC* [2003] EWCA Civ 1406, [2004] QB 1124.
- *R (Limbuella) v SSHD* [2005] UKHL 66, (2006) 9 CCLR 30.
- *Pentiacova v Moldova* (2005) 40 EHRR SE23.

Dealing with the market

- It is now probably too late for providers to apply for a JR of LA decisions as to the levels of standard fees for 2020/2021 but that cannot be taken for granted and it would be good practice to check that current standard fees have been properly assessed e.g. taking into account inflation, the increased NLW and relevant statutory & non-statutory guidance.
- The first tranche of government funding for increased payments has ended. How any future funding is to be distributed will depend primarily on the terms of the funding

Dealing with the market

- The LGA has published a number of very helpful notes, at <https://www.local.gov.uk/our-support/our-improvement-offer/care-and-health-improvement/commissioning-and-market-shaping/covid-19>.
- *LA should have monitored the impact of C19 on provider costs from April 2020 (Temporary Funding for Adult Social Care providers during the Covid-19 Crisis) and that can still be done. Temporary Funding suggests taking into account “the costs pressures caused by Covid-19 arising from, inter alia, higher dependency levels, higher staff sickness, absence rates, higher administration costs perhaps due to greater volatility of support packages, PPE costs and any other relevant factors”.*

Dealing with the market

- All LA will need to consider the state of the market as a whole, because of section 5 of the Care Act 2014 and Chapter 4 of the *Care and Support Statutory Guidance*. They will need to at least consider whether it may be necessary to provide support for homes with whom they do not contract.
- The judiciary is not going to impose unrealistic demands in the current environment, but it would be prudent as far as possible to start to review the JSNA (Joint Strategic Needs Assessment), the Market Position Statement and any other relevant local strategies: at least by starting a conversation/process locally if that has yet begun.

Thank you for listening

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