

DIFFICULT ASSESSMENTS OF NEED

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The statutory machinery for assessments:

- The Care Act 2014 (“the Act”) at -
 - Sections 9 – 13 (adults and carers);
 - Sections 58 – 59 (children’s needs after they turn 18);
 - Sections 60 – 62 (children’s carers);
 - Sections 63 – 64 (young carers);
- The Care and Support (Assessment) Regulations 2014 (“the Regulations);
and
- Chapters 6 and 7 of the *Care and Support Statutory Guidance* (“the Guidance”)

Judicial review of assessments

- Many claims may fail because of the alternative remedy provided by the statutory complaints process (*R (F) v Wirral BC* [2009] EWHC 1626 Admin) or because of the circumspect approach of the Administrative Court in this context (*R (Ireneschild) v Lambeth LBC* [2007] EWCA Civ 234, *R (Lloyd) v Barking & Dagenham LBC* [2001] EWCA Civ 533, *R (Davey) v Oxfordshire CC* [2017] EWHC 354 Admin).
- Others may succeed, for example where there has been unfairness or a clear failure to take into account relevant evidence (*R (JG) v Southwark LBC* [2020] EWHC 1989 Admin (that a behavioural support plan was being followed, and expert evidence as to insomnia and mobility difficulties)).
- The aim should be, however, to resolve a difficult situation as harmoniously as possible.

The basics (1)

The essentials of a lawful assessment are:

- an assessment of whether *‘the adult does have needs for care and support and...if the adult does, what those needs are’* (section 9(1) of the Act);
- an assessment of *‘the impact on the adult’s needs for care and support on the matters identified in section 1(2)’* (see section 9(4)(a) of the Act), which are:

1(2) “Well-being”, in relation to an individual, means that individual's well-being so far as relating to any of the following—

- (a) personal dignity (including treatment of the individual with respect);*
- (b) physical and mental health and emotional well-being;*

The basics (2)

(c) protection from abuse and neglect;

(d) control by the individual over day-to-day life (including over care and support, or support, provided to the individual and the way in which it is provided);

(e) participation in work, education, training or recreation;

(f) social and economic well-being;

(g) domestic, family and personal relationships;

(h) suitability of living accommodation;

(i) the individual's contribution to society;

an assessment of 'the outcomes the adult wishes to achieve in day-to-day life, andwhether, and if so to what extent, the provision of care and support

The basics (3)

- could contribute to the achievement of those outcomes*’ (section 9(4)(b) and (c) of the Act);
- a consideration of whether, and to what extent, *‘matters other than the provision of care and support could contribute to the achievement of the outcomes the adult wishes to achieve in day-to-day life’* and *‘whether the adult would benefit from the provision of anything under section 2 [preventative measures] or 4 [information and advice] or of anything that might be available in the community’* (section 9(5) of the Act);
 - a consideration of *‘the wishes and preferences of the individual to whom [the assessment] relates’*; of *‘the outcome the individual seeks from the assessment’*; and of *‘the severity and overall extent of the individual’s needs’* (including, over a period of time, when the needs fluctuate (Regulation 3(2)

The basics (4)

of the Regulations;

- a consideration of '*the impact of the needs of the individual to whom the assessment relates on*' any carer, or other persons the local authority considers relevant and, in particular, any impact on '*any child involved in providing care to any individual*' (Regulation 5 of the Regulations; and see paragraphs 6.65 to 6.72 of the Guidance on the '*Whole family approach*');
- finally, the provision of a written record of the assessment to the adult and, if the adult requests to any carer or any other person (section 12(3) of the Act).

Advance Information

- Regulation 3(4) and (5) of the Regulations;
- Paragraphs 6.22 and 6.38 of the Guidance.

Support

3 stages:

- seek to involve someone who can assist the adult to engage effectively:
section 67 of Act; but
- Otherwise the local authority may need to appoint an '*independent advocate*',
under section 67 of the Act;
- Or an assessment of capacity will need to be undertaken under the Mental
Capacity Act 2005 and an Independent Mental Capacity Advocate may need
to be appointed.

Self-Assessment

Most individuals are entitled to self-assess/assess jointly with the local authority:

- Regulation 2 of the Regulations.
- Paragraphs 6.44 to 6.53 of the Guidance.

Who should the assessor be?

Someone appropriately experienced and trained:

- Regulations 5 and 6 of The Care and Support (Assessment) Regulations 2014;
- Paragraphs 6.85 to 6.90 of the *Care and Support Statutory Guidance*

Help from outside

- Specialist help: Regulation 5 of the Regulations 2014 and paragraph 6.26 of the Guidance.
- Delegation: section 79 of the Act.
- NHS assessment under NHS CHC machinery?

Is the process appropriate and proportionate?

- Regulation 3(1) of the Regulations.
- Paragraphs 6.35 to 6.43 of the Guidance.
- Integrated assessments (paragraphs 6.74 to 6.70 of the Guidance)

Refusals of assessments

Sometimes, the local authority must still complete one, because of section 11 of the Act. Where:

- The adult lacks capacity to refuse the assessment and the authority is satisfied that carrying out an assessment would be in his best interests;
- The adult is experienced, or is at risk of abuse or neglect;
- The adult changes his mind, and requests an assessment;
- The local authority thinks that the adult's needs or circumstances have changed (in which case they must renew the offer of an assessment).

Possible reduced needs

Case-law and LGSCO decisions indicate that the following is required:

- A '*fair process*';
- A fair/accurate account of what the adult contends that his needs are;
- A fair/accurate account of what is the evidence supporting the adult's contention;
- A frank explanation of why the assessor does not agree, including a fair and un-exaggerated account of any evidence that exists supportive of the assessor's professional opinion;
- Explicit reference to the earlier assessment and an explanation of what has changed.

Some practical steps

- Changing the assessor;
- Adding a second assessor;
- Obtaining an external specialist report, potentially with the adult exercising some choice;
- Obtaining an independent social work report, potentially with the adult exercising some choice;
- Delegation;
- Early referral to a manager of an overview;
- Internal review or statutory complaints process;
- Mediation.

When a claim is threatened (1)

- is everything the claimant says factually correct? Is everything the client department says factually correct? Are factual assertions consistent with the documents?
- is the authority in a position to respond compliantly with its '*duty of candour*'?
- is counsel needed at an early stage? When might that be the case?
- is this a claim that the authority wants to defend? –
 - is the decision (clearly) lawful?
 - is there a reputational risk?
 - how important is the case, for the authority?
 - is negotiation or mediation possible?

When a claim is threatened (2)

- should the decision be re-made?
- how much will defending the claim cost?
- how much would conceding cost and are there consistency of treatment issues?
- who decides?
- is there a lateral solution or an alternative remedy?

Thank you for listening

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