## DDPO Legal Network, 18.05.17

# Responses to the questions asked at the meeting

The Care and Support Guidance, which is referenced a lot in this document, can be found here: <https://www.gov.uk/government/publications/care-act-statutory-guidance/care-and-support-statutory-guidance>

## How does the Care Act apply to the provision of after care services under section 117 of Mental Health Act?

Technically speaking, the Care Act amended section 117 of the Mental Health Act. However, section 117 of the Mental Health Act, i.e. aftercare, is not a Care Act service. The purpose of aftercare is to

* meet a need arising from or related to the person’s mental disorder;
* reduce the risk of a deterioration of the person’s mental condition (and, accordingly, reduce the risk of the person requiring admission to a hospital again for treatment for the disorder).

A person will often have other needs beyond this and The Care Act assessment and support planning framework will apply in relation to the needs that could not be met through aftercare. For example if a person has needs associated with their physical impairments, they would potentially be eligible for getting a service from either NHS Continuing Healthcare or social services. This means that a person could have joint assessments for different services under different statutory schemes[[1]](#footnote-1).

To find out more about section 117 aftercare services, see Chapter 33 of the MHA Code of Practice: <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435512/MHA_Code_of_Practice.PDF>

## Is the test for independent advocacy under the Care Act a mental capacity test?

No, the test in Mental Capacity Act looks at whether or not a person has capacity to make a particular decision, whereas a test in the Care Act looks at whether or not a person would have substantial difficulties in being involved in the process. Some people may have capacity to make certain decisions, but still have difficulties being involved in the process of assessment and care planning.

The test for independent advocacy is whether a person has substantial difficulty in **being involved** with these processes. If it is thought that they do, and that there is no appropriate individual to support and represent them for the purpose of facilitating their involvement, then the local authority must arrange for an independent advocate to support and represent the person.

## What to do when a direct payment is reduced without notice, and a person only finds out when seeing their bank statement

This situation is potentially unlawful. Local authorities (LAs) can reduce direct payments if they conclude that a person’s needs have changed and therefore they do not need as much support, or their needs could be met in a different and cheaper way. However, this kind of decision will only be lawful if the local authority follows the right process (a review followed by a revision of a care plan or a reassessment of needs followed by eligibility decision and a new care plan) and complies with its duty to promote the wellbeing of an individual.

**If the LA did not let a person know that they were considering changes to their care plan, if they did not ask for their views, the authority’s decision to go ahead with the changes could be unlawful.**

If, after a review which involves the individual concerned, the LA is satisfied that a care plan has to change, they can either revise it or carry out a new assessment. The LA can revise a care plan if they are looking at minor changes of how the needs could be met, but the guidance recommends that they follow the process of assessment and support planning while undertaking a revision[[2]](#footnote-2). If a person’s circumstances change in a way that affects their care and support plan, the LA must do a new needs assessment.

If the LA decides to make changes to a care and support plan it must take all reasonable steps to reach an agreement with the adult concerned about how it should meet those needs. In doing so, it should have regard to the wellbeing of the individual concerned.

***If you are supporting a Disabled person who experienced a sudden cut to their direct payment, you should write to the LA concerned and ask for:***

* *A record of a review and evidence of how they involved an individual concerned;*
* *A copy of their decision to revise a care plan and evidence of how they considered all aspects of wellbeing listed in Section 1.2 of the Care Act and how they involved an individual concerned;*
* *Evidence of how they took reasonable steps to reach an agreement with an individual concerned.*
* *If a change is significant, you could ask for a new assessment.*
* *And importantly, you should ask them to reinstate the individual’s direct payment until the right process has been followed.*

A cut to a direct payment is a change to a personal budget. The Care Act requires that the LA gives an explanation of how the needs could be met with the budget they are proposing[[3]](#footnote-3). Therefore you should ask the LA for this explanation.

A situation when a direct payment had been cut unexpectedly can have a devastating impact on a person concerned. Often Disabled people will be employing their PAs or enter in contractual relationships with agencies. If a person acquires liabilities because of the cut to their direct payment, especially when their LA did not follow the right process, it is reasonable to ask the authority to meet those costs.

## What is supported self-assessment[[4]](#footnote-4), how to get it and what are the benefits?

An assessment must always be appropriate and proportionate. It may come in different formats and can be carried out in various ways, including a supported self-assessment. A supported self-assessment is a process whereby a person completes an assessment of their needs themselves, after which the LA assures itself that this is a true description of their needs.[[5]](#footnote-5)

The LA can offer a self-assessment and they must do it if a person is willing, able and has capacity to do it. The questionnaire that a person is given should have similar questions to what the LA completes when their assessors carry out assessments. A person undertaking a self-assessment should be given all the relevant information about their needs, so if the LA has letters from other specialists working with the person, they should share those. If a person has capacity to carry out their self-assessment, but will have significant difficulties in doing so and there is no one else to support them, the LA should arrange an independent advocate.

A supported self-assessment gives a person the opportunity to record their needs and outcomes in their own words. It therefore gives much greater control of what is included in the assessment document.

## How to make sure people are assessed by professionals with a good understanding of their condition

The Care Act and the Guidance are clear that to provide a comprehensive assessment, the assessor must be appropriately trained.[[6]](#footnote-6) They must have the skills and knowledge and competence to carry out an assessment of needs that relate to a specific condition or circumstances requiring expert insight, for example when assessing an individual who has autism, learning disabilities, mental health needs or dementia[[7]](#footnote-7). Where an assessor does not have experience in a particular condition, they must consult someone with relevant experience.[[8]](#footnote-8)

There are also specific requirements in terms of skills, knowledge and training for assessors in relation to people with autism[[9]](#footnote-9) and Deafblind people.

If you believe an assessor does not fully understand the needs of a person you are supporting you could:

* Ask them for information about their qualifications, knowledge and experience of a particular condition to check if you can argue they don’t have the knowledge, skills and competence to carry out an assessment.
* Ask them to consult with an expert
* If a person you are supporting has autism or has both vision and hearing loss, look at specific guidance, both of which specify the level of training an assessor should have and see if you can make an argument that an assessor does not have this level of training, knowledge or experience.

## At what stages of the process does the care blind principle apply?

The assessment of needs and the determination of eligibility should be care blind.[[10]](#footnote-10) The local authority can take into account the fact that some needs are met by carers during the care planning stage, when considering how person’s needs could be met. If this is the case, a carer must be involved in the planning process and the LA has to make sure a carer is willing and able to meet those needs. They have to record the carer’s willingness to provide care.[[11]](#footnote-11) The LA is not under a duty to meet eligible needs met by a carer.[[12]](#footnote-12)

## If the LA can do anything to meet the needs, what are the restrictions, and how much are the individual’s wishes relevant?

The local authority is able to do anything to meet the individual’s needs, except providing what the NHS should provide or what a housing department should provide. However, it is important to remember that at the end of the day the local authority has a final say over how the needs will be met. However, in making their decision they have to involve the person concerned, start with an assumption that the person knows their needs best and take steps to reach an agreement and make sure the support promotes the individual’s wellbeing. The local authority cannot refuse to include an option which the individual prefers just because “they don’t do this” or “can’t fund this”. They can, however, insist on a cheaper option if they can show that it will meet the needs and it will promote the person’s wellbeing.

If the LA refuses an option a person you support wants, ask them for a written If LA refuses an

explanation. If they suggest an alternative, check if you can argue it will not meet needs or won’t promote the wellbeing of the individual. For example, you can look at the level of expertise or training a PA should have to argue that the option which is on the table won’t meet the needs.

## Which parts of the Davey judgement can be used to argue against cuts in packages?

Very importantly, the Davey decision clarified that once the LA agree to a care plan, they cannot come up with a different cheaper way to meet needs as an excuse to cut a package.

## What are the rights of carers to be involved and consulted during the assessment and the development of the care plan?

Carers have a right to be involved in the assessment[[13]](#footnote-13) and in preparing a care and support plan.[[14]](#footnote-14) Carers have a right for an assessment of their needs when they provide or intend to provide care and appear to have needs for support themselves. The assessment should establish the needs and the sustainability of a caring role. When appropriate, carers’ views should be sought in a separate conversation without the cared-for adult present.[[15]](#footnote-15) If a Disabled person lacks capacity, carers should be consulted when the LA determines what will be in the best interests of the person concerned.

## Is our authority acting legitimately by blanket removal of carers’ support, and allegedly including this in the cared-for individual’s support plan without a consultation?

If support for a carer involves support for a cared-for individual, local authorities can include it in a Disabled person’s support plan. However, changes to a support plan can only be made after a review followed by a revision of the plan, and LAs are legally required to involve both the carer and Disabled individual in this process.

## At what stage of the process can local authorities take their resources into account?

LAs can take resources into account when deciding how to meet needs. It most certainly cannot take resources into account when assessing needs and deciding on eligibility.

## What to do when the authority changes its charging policy? Why is there such disparity, with some councils wanting to charge a lot, when others are abolishing it altogether?

The Care Act 2014 enables local authorities to decide whether or not to charge a person for the support they get. This is why there is a disparity in how much different authorities charge. However, the Care Act and the Care and Support (Charging and Assessment of Resources) Regulations 2014[[16]](#footnote-16) set out the rules councils have to follow if they decide to charge.

Many local authorities are tightening their charging policies, so that they could charge as much as possible. If your local authority is considering this option, or has changed its policy recently and you would like to challenge it, here is what you should do:

* Check if the policy meets the minimum requirements set out in the Charging and Assessment of Resources regulations. And after that, check if the authority followed the right process.
* Check if they have consulted on this policy and that the consultation gave enough information and gave a genuine choice between different policy options. Look at what stage they consulted at, and whether it seems they have consulted with an open mind or just to tick a box.
* Check if they have done an equality impact assessment and whether the decision-maker had enough information to understand the impact this will have on Disabled people. If you want to challenge a new policy, you should move quickly as the time limit for challenging decisions through a judicial review process is 3 months since the decision has been made.

## How can we challenge racism and disablism from local authorities?

The Equality Act 2010 protects us from Disability or race discrimination and harassment and local authorities have duties under the Equality Act. You can read about different types of discrimination here: <https://www.equalityhumanrights.com/en/advice-and-guidance/disability-discrimination>

Local authorities are public bodies and therefore they have duties under the Equality Act. When you experience discrimination and want to challenge it you can either complain or seek legal advice.

## How many people have access to independent advocacy?

There has been some research into how advocacy has been commissioned by different LAs and it indicated that number of referrals is lower than expected: <http://www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/HSMC/publications/2016/CA-advocacy-commissioning-research-report.pdf>

The best way to find out how many referrals have been made in your areas is to do a Freedom of information request.

1. Care and Support Guidance para 6.78 [↑](#footnote-ref-1)
2. Care and Support guidance, 13.27 [↑](#footnote-ref-2)
3. Care and Support Guidance, 11.24 [↑](#footnote-ref-3)
4. Care and Support Guidance, 6.44-6.53 [↑](#footnote-ref-4)
5. Care and Support Guidance, 6.3 [↑](#footnote-ref-5)
6. Para 6.7 [↑](#footnote-ref-6)
7. Para 6.86 [↑](#footnote-ref-7)
8. 6.90 [↑](#footnote-ref-8)
9. <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/422338/autism-guidance.pdf> and <https://www.gov.uk/government/publications/deafblind-people-guidance-for-local-authorities> [↑](#footnote-ref-9)
10. Care and support guidance, 6.15 [↑](#footnote-ref-10)
11. Care and Support Guidance, 10.40 [↑](#footnote-ref-11)
12. Care and Support Guidance, 10.26 [↑](#footnote-ref-12)
13. The Care Act, Section 9.5.b [↑](#footnote-ref-13)
14. The Care Act, section 25, 3, b [↑](#footnote-ref-14)
15. Care and support guidance 6.18 [↑](#footnote-ref-15)
16. <http://www.legislation.gov.uk/uksi/2014/2672/pdfs/uksi_20142672_en.pdf> [↑](#footnote-ref-16)