



Carers' Forum – October 18th 2011

Carers and their Legal Rights

Luke Clements¹

Programme

10.00am	Welcome & Introductions
10.10am	Law Reform proposals
10.20am	Community care legal overview (disabled people's rights to care services including respite / short break care)
10.50am	Discussion
11.00am	Break
11.15am	Local authority carers' assessment obligations
12.00am	The Equality Act 2010 and Carers
12.20am	Personalisation and carers
12.40pm	Discussion
1.00pm	Close

¹ Solicitor, Professor, Cardiff Law School: books *Community Care and the Law* 5th edⁿ (LAG) 2011; *Carers and their Rights* 4th edⁿ 2010 (Carers UK).

Adult Care Law Reform

In May 2011 the Law Commission published its outline proposals for the reform of adult care law.² The report favours separate statutes for England and Wales (as currently exists in relation to the NHS).

The Commission's proposals include:

- a set of statutory principles (similar to those that exist under the Mental Capacity Act 2005);
- a single assessment duty (16-17 year olds included) & right to refuse an assessment.
- a single set of eligibility criteria in statutory guidance;
- a wide definition of community care services which will include 'social work';
- extending direct payments to cover residential care;
- clarifying the legal entitlements of carers (eg a right to an assessment regardless of 'request');
- placing an enhanced duty on local authorities to cooperate when people moving;
- placing duties on councils and the NHS to work together;
- defining nationally eligibility for NHS Continuing Healthcare;
- enacting legislation to protect adults from abuse.

With the exception of the new adult protection provisions, the proposals represent little more than a codification of the current legal regime – and in relation to the 'statutory principles' are disappointing. The principles emphasise the importance of respecting the 'individual's views, wishes and feelings' and their involvement in care planning – but only so far as the local authority considers this to be 'practicable and appropriate'.

By focussing on user involvement and choice, the principles fail to place obligations on the statutory authorities – for example, to ensure that support services maximise independence and do not subject individuals to indignity.

The Dilnot Report on the funding of long term care was published in July 2011 and recommended that social care continue to means tested, albeit that the costs in individual cases be limited. The Government has committed itself to publishing an Adult Social Care Bill in 2012, which is expected to incorporate parts of both the Law Commission and the Dilnot reports.

The 2010 Green Paper in England suggests that the new legislation will 'embed personalisation in the new legal framework' for example, via 'strengthened guidance, new statutory principles to underpin the law'³ and that careful consideration will be given to amending the law to 'allow some assessments to be undertaken by people themselves, including user led and community organisations, rather than councils'.⁴

² Law Commission (May 2011) *Adult Social Care*. Law Com No 326.

³ *A Vision for Adult Social Care* para 4.10.

⁴ *Ibid* at para 7.17.

Community Care Overview

National Assistance Act 1948

s21 - the duty to provide residential accommodation

The provisions apply to persons aged 18 or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them. The duty is owed to persons ordinarily resident in the LA area, whereas a power exists to accommodate others.

Chronically Sick & Disabled Persons Act 1970

s2 -the duty to provide non-accommodation services

Section 2 places a duty on the Local Authority to provided a range of services for those owed a duty under s29 NAA 1948; the services include the provision of

a) practical assistance in the home

The Ombudsman has held:

- it to be maladministration for a council to have criteria which stipulate that no domestic assistance can be provided – unless accompanied by a need for personal care⁵
- it is maladministration for a local authority to suggest that bathing is not an "essential activity - unless there was an identified medical need"⁶
- that the ability to properly manage bathing / washing with dignity is the entitlement of everybody⁷.

b) wireless. TV, library etc.

c) lectures, games outings and other recreational/educational facilities

d) assistance in travelling to community based care services

e) home adaptations

f) holidays

g) meals (at home or elsewhere)

h) a telephone

Children Act 1989

Section 17 Children Act 1989 enables social services departments to provide a comprehensive range of services (residential and non-residential) to 'promote and safeguard the interests of children in need.

⁵ Complaint No. 01/C/17519 against Salford CC 11.12.03

⁶ Complaint 02/A/11294 against Wycombe District Council 20th October 2004.

⁷ Complaint 02/C/8679, 8681 & 10389 against ⁷ Bolsover District Council 30th September 2003.

The Community Care Assessment Duty

The duty to assess

Section 47(1) NHS & Community Care Act 1990 obliges social services authorities to carry out a community care assessment where:

- the individual's circumstances have come to the knowledge of the authority;
- s/he appears to be someone for whom community care services can be provided;
- s/he might benefit from the provision of community care services.

A 3 step process

The assessment duty consists of three phases:

1. Gathering information concerning the disabled person's needs and requirements (this will include contacting significant information sources such as family, carers, GP's, housing etc.
2. Deciding which of these various requirements 'call for the provision of services by the social services department'.
3. Constructing a care plan to detail how these need's will be met by specified services.

Deciding on eligibility

The second stage requires the local authority to make a decision as to who will and who will not get services. In order to do this equitably authorities are required to construct 'eligibility criteria' which enable services to be targeted on those in most need. The guidance concerning these criteria in England was issued by the Department of Health as '*Prioritising need in the context of Putting People First: A whole system approach to eligibility for social care*'. Guidance on Eligibility Criteria for Adult Social Care, England 2010' which replaced the previous 'Fair Access to Care Services' (FACS) 2002 Policy Guidance.⁸

The decision making process requires the initial information (gathered in stage 1) to be graded into three broad themes, namely

- autonomy,
- health and safety,
- ability to manage daily routines, and
- involvement in family and wider community life

These identified risks to independence are then compared to the council's eligibility criteria.

Those risks that meet the eligibility criteria must result in some service provision response from the council.

⁸ In Wales the guidance is contained in the Assembly guidance 'Creating a Unified & Fair System for Assessing & Managing Care'.

All Eligibility criteria in England⁹ must (as a minimum) contain the following list – which is set out in the 2010 Prioritising need Department of Health policy guidance:

Critical¹⁰ – when
life is, or will be, threatened; &/or
significant health problems have developed or will develop; &/or
there is, or will be, little or no choice & control over vital aspects of the immediate environment; &/or
serious abuse or neglect has occurred or will occur; &/or
there is, or will be, an inability to carry out vital personal care or domestic routines; &/or
vital ¹¹ involvement in work, education or learning cannot or will not be sustained; &/or
vital social support systems & relationships cannot or will not be sustained; &/or
vital family & other social roles & responsibilities cannot or will not be undertaken.
Substantial - when
there is, or will be, only partial choice & control over the immediate environment; &/or
abuse or neglect has occurred or will occur; &/or
there is, or will be, an inability to carry out the majority of personal care or domestic routines; &/or
involvement in many aspects of work, education or learning cannot or will not be sustained; &/or
the majority of social support systems & relationships cannot or will not be sustained; &/or
the majority of family & other social roles & responsibilities cannot or will not be undertaken.
Moderate - when
there is, or will be, an inability to carry out several personal care or domestic routines; &/or
involvement in several aspects of work, education or learning cannot or will not be sustained; &/or
several social support systems & relationships cannot or will not be sustained; &/or
several family & other social roles & responsibilities cannot or will not be undertaken.
Low – when
there is, or will be, an inability to carry out one or two personal care or domestic routines; &/or
involvement in one or two aspects of work, education or learning cannot or will not be sustained; &/or
one or two social support systems & relationships cannot or will not be sustained; &/or
one or two family & other social roles & responsibilities cannot or will not be undertaken.

⁹ For Wales, see footnote 5 above.

¹⁰ Critical means that life is threatened or individuals are at great risk of serious illness or harm (Q3.6 of the FACS practice guidance).

¹¹ Vital means that without help, individuals are at great risk of either losing their independence, possibly necessitating admission to institutional care or making very little, damaging or inappropriate contributions to family and wider community life with serious consequences for the individual and others ... [however] 'what may be "vital" to one individual may not be "vital" to another' (Q3.6 of the FACS practice guidance).].

Carers' Rights in the Assessment Process

The carer's assessment process – in a nutshell

When a disabled person is being assessed (either under the Community Care legislation or the Children Act) [but see para 9.2 below] and their carer requests an assessment, the process should proceed as follows.

1. The information about the 'presenting needs' of the disabled person should be gathered in the normal way - ie all those needs that s/he (and those close to him/her) identify as existing as well as those that the assessor also identifies.
2. Before the assessor decides which of the disabled person's various needs 'call for the provision' of social care services by the local authority, the carer should have their assessment.
3. The carer's assessment analyses the sustainability of the caring role - primarily whether the carers is willing and able to carry on caring and/or providing the same level of care. The risks to sustainability can include health risks to the carer, their wishes to remain in work or return to work or undertake training, education or leisure activities and so on.
4. Once the assessor has completed the carers assessment, s/he will then be in a position to decide what services should be provided to the disabled person and (if needs be) what services might be provided to the carer (ie services under the Carers and Disabled Children's Act 2000 or the Children's Act 1989).
5. The assessor should then draw up a care plan explaining how the disabled person's needs will be met (ie by identifying the services the local authority will provide) and how the carers needs will be met (either by providing additional services to the disabled person - eg a sitting service) or (less commonly) by providing actual services to the carer.

Assessment: Carers (Recognition and Services) Act 1995

Policy guidance on the Act (under Local Authority Social Services Act 1970 s7(1)) has been issued as circular LAC (96)7¹² as well as practice guidance (which is referred to in this section as the Practice Guidance).

Carers, in order to be eligible for an assessment under the 1995 Act, must cross four hurdles:

1. The person for whom they care must be 'being' assessed;
2. They must be providing (or intending to provide) a substantial amount of care on a regular basis;
3. They must not be under a contract to provide the care or doing so as a volunteer from a voluntary organisation; and
4. They must make a request for the carer's assessment.

1. In conjunction with an assessment of the service user

Under the 1995 Act, carers do not have a right to a 'free-standing' assessment (unless of course they are entitled to a community care assessment in their own right, by virtue of being an elderly, ill or disabled person). However this difficulty has been removed by section 1 Carers & Disabled Children Act 2000 which provides for 'free-standing' Carers assessments (see below).

¹² WOC 16/96 and WHC (96)21 in Wales.

2. Providing / intending a substantial amount of care on a regular basis

The guidance issued under the 1995 Act provided very little help in defining what was meant by 'regular and substantial care'. However the 2000 Act uses the same phrase and the practice guidance to this Act (discussed below) is particularly helpful. At para 67-8¹³ for instance it states:

- 67 It is not only the time spent each week caring that has an impact on carers. For some, such as those caring for adults with learning disabilities, the caring role can have the additional impact of being a life long commitment. For others, such as those caring for adults with severe mental health problems, caring can be a sporadic or cyclical responsibility. The carer may not be physically or practically caring at all at certain times, but still be anxious and stressed waiting for, or actively seeking to prevent, the next crisis. In addition, caring responsibilities may conflict with other family responsibilities, such as parenting or holding down a job. Any assessment of the carer's need for support has to look at the impact of the whole caring situation.
- 68 The term 'substantial and regular' is not defined in this guidance. In any given situation, the test that a practitioner should apply will relate to the impact of the caring role on the individual carer. In particular the practitioner will need to address the following questions.
- Is the caring role sustainable?
 - How great is the risk of the caring role becoming unsustainable?

The English practice guidance to the 2000 Act suggests that in determining what is 'sustainable' the following four factors should be considered¹⁴, namely:

Autonomy: ie the extent to which the carer has choice over the tasks they will perform and over the time to which they give to their caring role.

Health and Safety: ie the risks to the carers own health of maintaining the caring role at its current level.

Managing daily routines: ie the extent to which carers are able to look after their own domestic needs and other daily routines

Involvement: ie the extent to which carers have freedom to maintain relationships, employment, interests and other commitments.

The practice guidance then requires the local authority to categorise these factors of risk into 4 bands of risk, 'critical, substantial, moderate and low'. A critical risk includes (para 70) — the development of major health problems; an extensive loss of autonomy; an inability to look after one's own domestic needs and other daily routines; a risk to employment or other responsibilities; a risk to significant social support systems or relationships.

'Intending to provide'

A carer may be entitled to a carer's assessment even if s/he is presently providing no care – provided the authority is satisfied that s/he is intending to provide a substantial amount of care on a regular basis for the user (for example, when the relevant person is discharged from hospital - see LAC (96)7).

¹³ Paragraph 4.11-12 of the Welsh Practice Guidance.

¹⁴ This following two paragraphs do not appear in the Welsh Guidance. The Welsh guidance on Carer's Assessments (see below) does however expand upon the concept to a limited degree at para.2.4.4. The English version of FAC adopts very similar wording to that which appears in the following two paragraphs.

3. Employed and voluntary organisation carers

The Act excludes from consideration (at s1(3)) persons who provide the care by virtue of a contract of employment or as a volunteer for a voluntary organisation.

4. The carer must request the assessment

The English and Welsh policy guidance under the 1995 and the English policy guidance under the 2000 Act require social workers ‘to inform any carer who appears to be eligible under [each] Act of their right to request an assessment’ [LAC (96)7 at para 20¹⁵]. The English policy guidance under the 2000 Act additionally requires (para 9) that the ‘to ensure that the carer has been made are of this right the assessor should give the carer a copy of the Department of Health’s leaflet “*How to get help in looking after someone – A carers guide to a carers assessment*”.

The assessment

The object of a carer’s assessment is to identify his or her ‘**ability to provide and to continue to provide care**’ (s1(1) and (2) CR&SA 1995). Whilst it is generally considered that, under the 1995 Act, carers cannot be given specific services in their own right, the outcome of a carer’s assessment may nevertheless be an increase in the community care services provided for the user.

The Practice Guidance to the 2000 Act (para 70) requires social services departments to grade the ‘extent of risk to the sustainability of the caring role’ into one of four categories – namely ‘critical, substantial, moderate and low’.

Although the grading system is modelled on that which regulates disabled people’s assessments the consequences of a categorisation are different. If a disabled person’s is assessed as having a ‘critical’ need, then this means that the local authority is under a duty to make services available to meet that need. However a categorisation of critical in relation to the caring relationship does not mean that the local authority is under a duty to make services available to the carer – since there is no duty under the 2000 Act to provide services (merely a ‘power’).

However, as a matter of public law, the categorising of a risk to the sustainability of a caring role as ‘critical’ brings with it an obligation by the authority to take steps to ensure that support is made available to ensure that this state of affairs did not continue (or come to pass). Although in such a situation the local authority is not obliged to provide the carer with services it is obliged to act. It has the choice therefore of providing the necessary support either to the carer by way of a service under the 2000 Act or by way of additional support to the disabled person by provision of a community care service. The bottom line however, is that the identification of a critical risk in a Carers Act assessment triggers a local authority obligation to make an appropriate response to address this risk.

CRITICAL

Critical risk to sustainability of the caring role arises when:

- their life may be threatened
- major health problems have developed or will develop;

¹⁵ WOC 16/96 and WHC (96)21 in Wales.

- there is, or will be, an extensive loss of autonomy for the carer in decisions about the nature of tasks they will perform and how much time they will give to their caring role;
- there is, or will be, an inability to look after their own domestic needs and other daily routines while sustaining their caring role;
- involvement in employment or other responsibilities is, or will be, at risk;
- many significant social support systems and relationships are, or will be, at risk.

SUBSTANTIAL

Substantial risk to sustainability of the caring role arises when:

- significant health problems have developed or will develop;
- there is, or will be, some significant loss of autonomy for the carer in decisions about the nature of tasks they will perform and how much time they will give to their caring role;
- there is, or will be, an inability to look after some of their own domestic needs and other daily routines while sustaining their caring role;
- involvement in some significant aspects of employment or other responsibilities is, or will be, at risk;
- some significant social support systems and relationships are, or will be, at risk

MODERATE

Moderate risk to sustainability of the caring role arises when:

- there is, or will be, some loss of autonomy for the carer in decisions about the nature of tasks they will perform and how much time they will give to their caring role;
- there is, or will be, some inability to look after their own domestic needs and other daily routines while sustaining their caring role;
- several social support systems and relationships are, or will be, at risk.

LOW

Low risk to sustainability of the caring role arises when:

- there is, or will be, some inability to carry out one or two domestic tasks while sustaining their caring role;
- one or two social support systems and relationships are, or will be, at risk.

Guidance under the 1995 Act

LAC (96)7, particularly the Practice Guidance,¹⁶ makes a number of important observations, including:

Private discussion

9.1 The assessment is not a test for the carer. It should not be prescriptive but recognise the carer's knowledge and expertise. The assessment should listen to what they are saying and offer an opportunity for private¹⁷ discussion in which carers can candidly express their views . . .

Not assume a willingness

9.8 In assessing the carer's ability to care or continue to care, care managers should not assume a willingness by the carer to continue caring, or continue to provide the same level of support. They will wish to bear in mind the distinction between caring about someone and caring for them. Many carers continue to care deeply about a person even though their ability to care for them may change.

Carers whose care is not regular and/or substantial

Carers who 'provide a substantial amount of care on a regular basis' have a statutory right to be involved in the assessment process. Department of Health guidance states that the views and interests of carers who do not come within this category (ie who do not provide substantial or regular care) should nevertheless be taken into account when an assessment is undertaken¹⁸.

Not infrequently, a local authority will not be able to decide upon the extent of a carer's responsibilities – without undertaking an assessment – and it is clear that where there is uncertainty an assessment should be undertaken. The Local Ombudsman has been highly critical of a local authority that refused to undertake a carer's assessment in such a case, commenting¹⁹.

It should also have been obvious to the Council that a carer's assessment was necessary in order to see (a) how much support [the carer] could reasonably be expected to provide for his brother without placing his own health at unacceptable risk; and (b) what practical help could be provided to provide [the brother] with respite from his caring responsibilities.

Parent carers

People with parental responsibility for a disabled child are entitled to an assessment under C(RS)A 1995 s1(2)²⁰ and CDCA 2000 s6. It is self-evident that most parent carers provide a 'substantial amount of care on a regular basis'. Neither the 1995 nor the 2000 Acts includes a

¹⁶ WOC 16/96 and WHC (96)21 in Wales. For adult carers at paras 9-11 and for young carers at para 16.

¹⁷ Authorities will need to ensure that the carer is aware that his or her comments may be placed on the user's file and accordingly advised of the right to withhold consent to them being copied to the user.

¹⁸ The DoH-commissioned report *Empowerment, Assessment, Care Management and the Skilled Worker* (HMSO 1993) uses the term 'significant others' as a separate category from 'carer'; although neither term is defined, the report accepts the importance of involving 'members of the user's networks to negotiate and sustain arrangements which integrate resources from the statutory and independent sectors with the help given through family and/or neighbourhood networks'.

¹⁹ Complaint no. 02/C/08690 against Sheffield City Council 9th August 2004.

²⁰ Section 1(2) was inserted to deal with the question of parent carers; s1(1) is only activated where an assessment under s47(1) NHS&CCA 1990 is carried out and such assessments are generally limited to persons over 18; this is not however always the case, eg, if the assessment concerns a child entitled to services under Sch 8 para3 NHS Act 1977 (which is a community care service under s46 of the 1990 Act).

stipulation (found in social security law) that the care provided to a disabled child must (for instance) be 'substantially in excess of the normal requirements of persons of his age'²¹.

In general however, a separate assessment under one or both of these Acts should be unnecessary – since a holistic assessment under the CA 1989 should fully address their needs²². There may, however, be instances where a parent carer might insist upon a separate carer's assessment. This might, for example occur where a local authority was proving reluctant to provide services which would enable a parent carer to return to work or maintain employment. If s/he sought an assessment, under the 2000 Act, reliance could be placed upon the guidance which stresses the benefits of supporting parents in such situations.

The Welsh Ombudsman has held it to be maladministration for a local authority not to undertake such a separate assessment or to suggest this is merely a 'good will gesture' – when clearly it is a statutory responsibility.

The Childcare Act 2006 seeks to address this question by requiring English and Welsh Councils (sections 6 and 22) to secure, 'so far as is reasonably practicable' sufficient childcare to meet the requirements of parents in their area who require childcare in order to work or to undertake training or education to prepare for work. In relation to disabled children, the obligation extends to childcare facilities up to the 1st September after their 18th Birthday. In determining whether the provision of childcare is sufficient, councils must have regard to (amongst other things) the needs of parents for childcare eligible for the childcare element of the Working Tax Credit, and for childcare that is suitable for disabled children.

The Children and Young Persons Act 2008, section 25 amends the Children Act 1989²³ and creates a duty on local authorities to 'assist individuals who provide care for such children to continue to do so, or to do so more effectively, by giving them breaks from caring.': regulations (to be made by the department of health / Assembly in Wales). will provide the detail of the obligation.

Young carers

The Carers (Recognition and Services) Act 1995 applies to all carers irrespective of their age. Carers who are under the age of 18 are generally referred to as 'young carers'. They are eligible, in addition to the benefits detailed above, to services in their own right.

There is no legislation which specifically refers to young carers. Recent guidance concerning young carers has, however, been issued by the Social Services Inspectorate.²⁴ The guidance adopts a definition of a 'young carer' as 'a child or young person who is carrying out significant caring tasks and assuming a level of responsibility for another person, which would usually be taken by an adult'. Such duties as are owed to young carers by a social services authority are primarily contained in the Children Act 1989 and in the guidance issued by the Department of Health.²⁵

Child in need ~ definition

Under Children Act 1989 s17(10) a child is 'in need' if:

²¹ s72(6) Social Security Contributions and Benefits Act 1992

²² para 10 A Practitioner's Guide to Carers Assessments under the Carers and Disabled Children Act 2000.

²³ By inserting a new paragraph into Schedule 2 para 6 (c).

²⁴ Guidance letter 28.4.95; CI (95)12

²⁵ Two volumes of guidance have been issued under the Children Act 1989 of relevance to young carers – Volume 2: *Family Support* and Volume 6: *Children with Disabilities* (both HMSO 1991).

- a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority ...; or
- b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
- c) he is disabled.

Section 17(1) Children Act 1989 places a general duty on social services authorities to safeguard and promote the welfare of children within their area who are 'in need', and empowers authorities to provide almost unlimited services towards this goal. In relation to young carers, since they are not usually 'disabled children', it is necessary to establish that the child comes within category (a) or (b).

The policy guidance under the 1995 Act (at para 14) referred to, and adopted specific guidance SSI²⁶ which stated that:

*many young people carry out a level of caring responsibilities which prevents them from enjoying normal social opportunities and from achieving full school attendance. Many young carers with significant caring responsibilities should therefore be seen as children in need.*²⁷

The key issue therefore is whether the young carer's caring responsibilities are 'significant'. In this respect the Practice Guidance points out (at para 15.2) that young carers should not be expected to carry out 'inappropriate' levels of caring (that is, inappropriate to their age, sex, culture etc).

The Children Act 1989 assessment procedures and service provision arrangements for young carers are the same as for any other child in need. Section 17(1)(b) emphasises that a principal purpose for the provision of services to children in need is to promote the upbringing of such children by their families.

A local authority can of course provide services for a sibling carer even if that child is not considered to be a 'child in need'. Section 17(3) specifically provides that social services may provide services to (*inter alia*) such a child 'if it is provided with a view to safeguarding and promoting the welfare' of the disabled child.

The English policy guidance²⁸ (for the new Carers 2000 Act) states that

para 20 ~ 'in most circumstances the local council should ensure that the person cared for is receiving sufficient services so that a young person aged 16 or 17 is not undertaking a regular and substantial load of caring responsibilities'

Carers & Disabled Children Act 2000

Section 1 – Right of carers to an assessment

²⁶ Guidance letter CI (95)12 Annex A para 1.1.

²⁷ See also para 2.4 of Volume 2 Guidance which emphasises that 'the definition of "need" in the Act is deliberately wide to reinforce the emphasis on preventive support and services to families'.

²⁸ Para 2.5.1 of the Welsh guidance.

This section gives carers aged 16 or over who provide or intend to provide a substantial amount of care on a regular basis for another person aged 18 or over, the right to an assessment even where the person cared for has refused an assessment by the local authority social services department or has refused the delivery of community care services following assessment.

Boundary problems

The practice guidance (para 24-7)²⁹ gives guidance on boundary problems; where the carer lives some distance away from the user. It advises that in general it will be the disabled person's home authority (not the carer's) which will be responsible for the assessment and the provision of any services under the 2000 Act.

Not a bureaucratic exercise

The guidance further stresses that '*assessment is not a process for its own sake*' (Practice guidance para 47) and should '*not be a bureaucratic process based on ticking boxes*'. Although '*self-assessment forms can help [social services] prepare for assessment ... best practice suggests that they cannot replace face-to-face assessment*' (Practice guidance para 61). Assessments should '*focus on outcomes the carer would want to see help them in their caring roles and maintain their health and well-being*' (para 29 Practitioners Guide to Carers' Assessments under the Carers and Disabled Children Act 2000).³⁰

Private meetings

In order that the carer have an opportunity to opt for a confidential meeting with the assessor, s/he is advised to make arrangements for the assessment '*over the phone, and away from the home or while the cared for person is out*' (Practice guidance para 59). Carers should also be told of their right to have a friend or advocate present (Practice guidance para 60)³¹.

Section 2 – Services for Carers

This section enables local authorities to provide services to carers following a carer's assessment. Services to carers are not defined in the Act. The local authority **may** provide any services they see fit to provide and which in their view help the carer care for the person cared for. These services may take the form of physical help, for example assistance around the house, or other forms of support such as training or counselling or equipment for the carer.

Respite care

Q7 *Are short term breaks (respite care) a service for carers or cared for people?*

People who care may be assessed as needing a break from their caring role. This need will be clearly recorded on their own assessment documentation.

The person they care for will then be assessed for the additional support that they will need to allow their usual carer to take a break. This need will be recorded on their assessment documentation. The additional service remains a community care service delivered to the cared for person, not a carer service under this Act.

²⁹ Para 4.3 of the Welsh guidance.

³⁰ These references are also contained in section 3.6 of the Welsh Guidance.

³¹ These references are also contained in section 3.11 of the Welsh Guidance.

Carers services

Para 80 practice guidance³² states (amongst other things):

Much of the support that carers need may already be provided through the delivery of community care services. Focusing -on the outcomes the carer and user want will help to ensure best value solutions. Anecdotally, carers sometimes say that they have approached councils to be told that they can have help with personal care (which they do not want) but not cleaning (which they do). , In this context, local authorities that have decided not to provide or commission certain services as community care services -such as shopping only, cleaning only, or other low-level services -should review their positions'. Such services, if targeted purposively, can be of genuine assistance in sustaining the caring relationship, and be cost effective.

In similar vein, the Ombudsman has held it to be maladministration for a council to have criteria which stipulate that no domestic assistance can be provided – unless accompanied by a need for personal care³³

Eligibility criteria for services

The Practice guidance (para 38)³⁴ stresses the importance of local authorities ‘focussing on outcomes’ when they construct their eligibility criteria for services. Criteria based solely upon ‘risk’ could award services regardless of whether they were likely to be make a real difference. By focussing on outcomes, criteria should ensure ‘best value solutions’ (Practice guidance para 80) and enable more suitable services to be delivered ‘*ie laundry, gardening, taxi fares etc*’ (para 38)

Other examples of services could include:

- Help with housework;
- Relaxation therapy / counselling;
- Mobile phones
- Trips/holidays/special events;
- Driving lessons
- Travel assistance
- Training

Direct payments

Section 5 of the 2000 Act, enabled carers to have their services by means of a direct payment: this right now stems from s57 Health and Social Care Act 2001. Frequently, however, Carers manage the direct payments made to the disabled person for whom they care. The relevant regulations, however, prohibited disabled adults from receiving direct payments if they lacked the mental capacity to ‘consent’ to the making of the payment and/or the ability to manage the payment (even with assistance). The law in this context has been amended.

Section 146 Health & Social Care Act 2008 enables local authorities to make direct payments where the disabled person lacks capacity. The detailed rules will be set out in regulations

³² The Welsh guidance contains no equivalent statement.

³³ Complaint No. 01/C/17519 against Salford CC 11.12.03

³⁴ In Wales this appears only in the ‘Practitioners Guide to Carers’ Assessments, 3.2.

which, in England, have been published in draft.³⁵ These indicated that payments will be capable of being made in various situations, including:

1. if the person does not have a Court of Protection appointed 'deputy' or Lasting Power of Attorney (LPA), the authority will have discretion to decide whether a third party is suitable to be a recipient of direct payments.
2. However if the person does have a deputy or LPA then the arrangement will depend upon whether the LPA or deputy has authority to make 'decisions about securing the provision of a community care service' (known as a 'surrogate': if they have this power they can demand that a direct payment be made to them; but failing this the local authority will only be able to make a direct payment if it and the LPA/deputy agree to such an arrangement.

Further changes to the direct payments arrangements are proposed in the Health Act 2009 which at s11 permits PCTs to make direct payments to patients along similar lines to those paid by social services. In January 2009 the Department of Health published its proposals *Personal health budgets: first steps* which suggested that the new powers would be piloted for 3 years.

The Carers (Equal Opportunities) Act 2004

The Carers (Equal Opportunities) Act 2004 came into force in England and Wales on 1st April 2005. The Act originated as a private members bill introduced Hywel Francis M.P – although his original Bill was much amended.

Guidance

Important guidance concerning the application of the Act has been issued, namely:

1. *Policy guidance* (which is combined guidance under the 2001 and 2004 Acts) – issued by the Department of Health
2. *Practice guide: Implementing the Carers (Equal Opportunities) Act 2004*. This has been prepared on behalf of the Department of Health but issued by the Social Care Institute for Excellence (SCIE)

Section 1 ~ duty to inform carers:

Section 1 places an duty on social services authorities to inform carers of the rights to be assessed under the Carers (Recognition and Services) Act 1995 and the Carers and Disabled Children Act 2000.

Key points

- Carers consistently rate information as one of their top priorities and information is amongst the primary recommendations of carers in nearly every research report carried out by both Carers UK and other carers' organisations.
- A statutory duty of this nature already exists in Scotland³⁶.
- A 2003 SSI report on care services for physically and sensory disabled people found that these carers "were not consistently offered a separate assessment of their needs" and that, when it was offered, "the assessment did not always lead to support services being provided and few carers' needs were reviewed regularly". The report argued that

³⁵ Community Care, Services for Carers and Children's Services (Direct Payments) (England) Regulations 2009 at www.dh.gov.uk/en/Consultations/Liveconsultations/DH_087108

³⁶ s11(2) Community Care (Scotland) Act 2002.

“in all the councils inspected, more needed to be done to ensure that carers’ needs were properly identified and met”³⁷.

- Every year, over 2 million adults become carers.³⁸
- Only half of carers were told about their rights when the person they were caring for was assessed (Missed Opportunities research, 2003).
- Carers say that the first step in accessing support is knowing about your rights and where to turn.
- Evidence from implementation in Scotland where they already have these provisions is that they have not increased costs or expenditure, but have been warmly welcomed by carers.

The 2004 Act makes it mandatory that social workers advise carers of their rights under the carers Acts. Since these rights include the right to have their work, education, training leisure aspirations considered, the assessor will need to know what facilities exist and as to how they can be accessed – including the support that may be available from the local authority and other sectors. The Combined Policy Guidance under the 2000 and 2004 Acts states (at para 28):

[the assessment should] include a discussion with the carer about possible alternative care services to help enable them to take up opportunities to participate in these activities, as well as signposting carers to information and support services, for example Job Centre Plus or local voluntary organisations who may be able to offer help and support.

The obligation to provide information to carers is reinforced by guidance on the Community Care Assessment Directions 2004³⁹ that:

Local authorities should continue to ensure that up to date and appropriate information on the range of support, entitlements and assistance available for carers is accessible in a variety of formats. This information should be offered to all carers, irrespective of whether the carer receives an assessment.

The practice guidance to the 2004 Act advises that a carers information strategy should (amongst other things):

- Ensure practitioners and carers have access to up-to-date information on local resources for supporting carers in education, training, employment and leisure.
 - Ensure carers are offered appropriate support for the cared for person so that they can have the piece of mind to pursue their own interests
 - Assess whether carers need funding for fees and transport when accessing education and training
 - Offer assessments at flexible times to accommodate those in employment
- and
- Produce an A-Z of Carers Services so that assessors have good sources of up to date information to enable them to support carers to access opportunities in training, education, leisure and employment
 - Ensure assessors are aware of local and national sources of funding for carers services
 - Ensure that other public bodies are also equipped with signposting information

³⁷ Department of Health (Social Services Inspectorate), *Independence Matters*, December 2003, para 5.25, p33, see: www.doh.gov.uk/ssi/independence_matters_main.pdf

³⁸ *Caring Relationships Over Time*, Michael Hirst, SPRU, University of York, 2001

³⁹ LAC (2004) 25 August 2004 at para 2.6

Section 2 ~ employment, education, training & leisure

Section 2 requires that in any assessment undertaken under the Carers (Recognition and Services) Act 1995 or the Carers and Disabled Children Act 2000 that consideration be given as to whether the carer:

- (i) works or wishes to work;
- (ii) is undertaking, or wishes to undertake, education, training or any leisure activity.

The practice guidance to the 2000 Act (at para 35 – 37)⁴⁰ had already stressed the need to for ‘carers of adults’ to be supported so that they can stay in work or be helped to return to work. It also notes that ‘people with parental responsibility for disabled children will also benefit from joining or re-joining the workforce ... many parents of disabled children would like to return to work and, if they were able to do so, would benefit socially and emotionally, as well as financially.’ It had also flagged up the importance of local authorities investigating how they treated their own staff who are carers - and how the experiences of these staff members can be harnessed to improve employment practices.

Nearly one in five carers have had to leave a job or unable to take one because of their caring responsibilities⁴¹. A House of Commons Research Paper on the Bill⁴² refers to the 2001 Department of Health Report *Carers and Employment*⁴³ which reviewed the approaches of 5 local authorities to flexible working options for carers. The Research Paper notes that: the report found that carers’ assessments “did not as a matter of course” address the employment aspirations of the carer, as forms and checklists did not always cover this issue, and that the assessments generally seemed to focus on the menu of services available more than outcomes for service-users and carers. Further, the report found that carers’ employment aspirations and their practical needs were not routinely addressed at discharge from hospital; instead, the assumption was often made that there was no choice but that the carer should give up work. However, the report said that where carers made it clear that they did wish to keep their job, individual care managers did make considerable efforts to support this.

Statistics provided in a Carers UK briefing include:

- 80% of carers are of working age.⁴⁴ Every year 2.3 million carers stop caring, appropriate information will give carers better opportunities for education, training and employment when they end their caring role.
- According to research by Carers UK, 6 out of 10 carers providing substantial amounts of care, had given up paid work to care.⁴⁵
- In the same research, 7 out of 10 carers found themselves financially worse off since becoming a carer.
- Research by Caring Costs found that nearly 80% of carers wished to return to work if they could.⁴⁶
- Caring Costs⁴⁷ found that carers lost an average of £9,000 pa by taking on significant caring responsibilities and having to reduce working hours.

⁴⁰ Regrettably this section does not appear in the Welsh guidance.

⁴¹ Equal Opportunities Commission Survey 2004 at www.eoc.org.uk

⁴² Carers (Equal Opportunities) Bill: Research Paper 04/13 by Tim Jarrett & Adam Mellows-Facer 3/2/04 accessible at www.parliament.uk/commons/lib/research/rp2004/rp04-013.pdf

⁴³ Carers and Employment: Report on Visits to Five Councils with Social Services Responsibilities, para 2.1, accessible at www.carers.gov.uk/visito5councils.pdf

⁴⁴ Office of National Statistics, *Census 2001*

⁴⁵ Carers National Association (now Carers UK) (2000) *Caring on the Breadline: The financial implications of caring*

⁴⁶ *The True Cost of Caring*, Caring Costs, published by Carers National Association, 1996.

⁴⁷ Caring Costs, 1996, *op cit*.

A 2007 Carers UK report⁴⁸ based on a survey of nearly 3,000 carers found that 72% were worse off since they started caring, 54% had had to give up work to care, 53% said that financial worries were affecting their health and 33% were in debt.

During the passage of the Bill the Health Minister made the following comments on the impact of this provision:

“We want carers who wish to work to have the right to work. For those carers who wish to take part in education, we want that to be built in to the care plans that are put together for the person for whom they are caring. We want them to have the opportunity to engage in leisure activities, to the extent that I feel that it would be appropriate that if a carer wanted to take part in a physical fitness or aerobics class in the evening, the care plan should be adapted to ensure that the person could be cared for while the carer went out to engage in such activity. The fundamental life expectations that all members of the Committee would expect for ourselves and for our families are often denied to carers because of their responsibilities and duties.”

The Welsh Ombudsman has held it be maladministration for a local authority to state ‘that direct payments would not be paid for childcare and that childcare was the responsibility of the parents, whether or not children have a disability’⁴⁹ (para 78). Relying heavily on the obligations created by the Carers (Equal Opportunities) Act 2004 he was highly critical of a local authority that failed to provide direct payments to a parent who wished to use them to purchase respite care so that he could pursue his University’s studies – in the ombudsman’s opinion there was an obligation on the local authority to ensure that the parent was not ‘disadvantaged in pursuit of education/training any more than other parents’.

In this context, the practice guidance to the 2004 Act notes⁵⁰ that ‘many carers are on low incomes and carers may need support with costs for transport or college fees’ this does not however mean that the social services budget should necessarily be used to fund such a subsidy – as the combined policy guidance notes (at para 24)⁵¹:

Not all the costs of offering wider, more flexible packages of support for carers fall within social services departments’ budgets. Other services, including education, housing, leisure facilities, libraries, and transport, can all provide a valuable contribution to the wider well-being of carers.

Flexible working rights

Parents with children under 6, or disabled children under 18, who have worked for their employer for at least 26 weeks have the right to apply for flexible working arrangements⁵². Employers have a statutory duty to consider such requests seriously, and will only be able to refuse when there is a clear business reason or where the employee has made an application for flexible working in the past 12 months. In order to exercise this right the employee needs to make the initial written application to the employer. An employee can request a change to the hours they work, a change to the times they work, or to work from home. Since any changes will be permanent it is important to consider the future implications carefully. This may include any

⁴⁸ Carers UK (2007) Real change not short change.

⁴⁹ Public Service Ombudsman (Wales) Complaint No. B2004/0707/S/370 against Swansea City Council 22 February 2007 see in particular paras 78, 133 & 137.

⁵⁰ SCIE practice guide to the Carers (Equal Opportunities) Act 2004 accessible at www.carers.gov.uk/whatsnew.htm

⁵¹ Combined Policy Guidance under the 2000 and 2004 Acts (Department of Health 2005) accessible at www.dh.gov.uk/assetRoot/04/11/78/66/04117866.pdf

⁵² s47 Employment Act 2002 (which amended Employment Rights Act 1996 primarily by way of the insertion of a new Part 8A to that Act) and see generally the DTI guidance *Flexible Working: The right to request and the duty to consider* DTI (2003) accessible at www.dti.gov.uk/er/individual/flexwork-pl520.pdf.

drop in salary, and the impact that any reduction in hours may have on state benefits such as Working Tax Credit.

Work and Families Act 2006

The Work and Families Act 2006 came into force in April 2007. Section 12 of the Act extends the benefits of flexible working rights to cover other carers. The detail of this right is set out in The procedure for requesting flexible working rights is now governed by detailed regulations⁵³

These require that the employee submits a carefully considered application. The Department for Employment and Learning has produced a leaflet which provides a detailed explanation of the process, its timescales and the application form⁵⁴. Additional guidance leaflets have been published by Acas⁵⁵. The employer is then required to follow a set procedure to ensure the request is considered seriously: a refusal is only permitted where there is a recognised business ground for doing so.

The regulations⁵⁶ define a 'carer' for the purposes of the 2006 Act as an employee who is or expects to be caring who:

- (i) is married to, or the partner (including a civil partner) of the employee; or
- (ii) is a relative of the employee; or
- (iii) falls into neither category (i) nor (ii), but lives at the same address as the employee.

Relative is defined⁵⁷ as including means a mother, father, adopter, guardian, special guardian⁵⁸, parent-in-law, step-parent, son, step-son, son-in-law, daughter, step-daughter, daughter-in-law, brother, step-brother, brother-in-law, sister, step-sister, sister-in-law, uncle, aunt or grandparent, and includes adoptive relationships and relationships of the full blood or half blood or, in the case of an adopted person, such of those relationships as would exist but for the adoption.

The government decided not to require in addition a level of care that has to be provided by such a carer, in order for them to have the permissive right (to request flexible working rights). In its view 'defining a level of care would be extremely complex'; would be 'unlikely to make matters any clearer' and might deter some people from applying for flexible working if they felt that the definition did not cover their exact circumstances⁵⁹.

Unlawful discrimination

It has been argued⁶⁰ that an unjustified refusal to allow a woman flexible working rights may amount to unlawful sex discrimination since such a practice would disadvantage women more than men, because more women than men take primary responsibility for childcare and are disadvantaged by having to work longer hours and (in relation to women caring for adults) more women of working age are carers of adults than men.

⁵³ The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 S.I. 3236 as amended by the Terms and Conditions of Employment The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2006 S.I. 3314 and the Terms and Conditions of Employment The Flexible Working (Eligibility, Complaints and Remedies) (Amendment) Regulations 2007 S.I. 1184.

⁵⁴ *ER 36 Flexible working: a guide for employers and employees* accessible at www.delni.gov.uk/er36righttorequestflexibleworking.pdf

⁵⁵ Acas has produced two guidance notes: (1) *Advice leaflet - The right to apply for flexible working, A short guide for employers, working parents and carers* accessible at www.acas.org.uk/index.aspx?articleid=803 and (2) a more detailed guidance note *Flexible working and work-life balance* accessible at www.acas.org.uk/media/pdf/i/t/B20_1.pdf

⁵⁶ The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 S.I. 3236 regulation 3B.

⁵⁷ The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002 S.I. 3236 regulation 2 (as amended).

⁵⁸ A person appointed as a special guardian under section 14A of the Children Act 1989

⁵⁹ *Draft Flexible Working: Regulations Summary of Responses and Government Response to the 2006 Consultation* DTI.

⁶⁰ see Palmer, C. (2007) *New rights at work for parents and carers from April 2007* Legal Action April 2007 33-35 at 35.

EU Equal Treatment Framework Directive 2000/78/EC

The Equal Treatment Directive is part of UK law and since 2006 makes unlawful direct or indirect discrimination on grounds of (amongst other things) disability⁶¹. In many respects the provision reinforces the existing requirements of the Disability Discrimination Act 1995. However in one respect, it may go further. It is arguable that the Directive makes it unlawful to discriminate against a person on the ground of disability – even if the person is not disabled – provided the reason for the differential treatment is a disability related reason.

Coleman v Law (2008)⁶² concerned a claim by Sharon Coleman that she had been discriminated against by her employers (who she left) on the ground of the disability of her son, for whom she is the primary carer. In July 2008 the European Court of Justice accepted her argument that this contravened the Directive since it amounts to discrimination on grounds of disability. In the Court's opinion the Directive's purpose is to combat all forms of discrimination and accordingly it applies 'not to a particular category of person but by reference to the nature of the discrimination'. In its opinion, once an applicant has established 'facts from which it may be presumed that there has been direct discrimination' this then shifts the burden of proof to the employer, who must prove that there has been no breach of the principle of equal treatment.

In reaching its decision the Court considered the Opinion of its Advocate General.⁶³ He had stressed that discrimination could take many forms and that there were 'more subtle and less obvious ways' than merely targeting the disabled person – for example by targeting 'third persons who are closely associated with them'. In his opinion a 'robust conception of equality entails that these subtler forms of discrimination should also be caught by anti-discrimination legislation, as they, too, affect the persons belonging to suspect classifications'. The Advocate General considered that discrimination 'by association' in such cases undermined the ability of disabled people to exercise their autonomy, since:

[disabled people] are: often more vulnerable than the average person, so they have come to rely on individuals with whom they are closely associated for help in their effort to lead a life according to the fundamental choices they have made. When the discriminator deprives an individual of valuable options in areas which are of fundamental importance to our lives because that individual is associated with a person having a suspect characteristic then it also deprives that person of valuable options and prevents him from exercising his autonomy. Put differently, the person who belongs to the suspect classification is excluded from a range of possibilities that would otherwise have been open to him

Equality Act 2010

The Act repeals the pre-existing equality / non-discrimination provisions (eg the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Disability Discrimination Act 1995). In addition to its role as a codifying statute, the Act introduces a number of new provisions, and subtly amends some existing provisions. Those considered below comprise:

Associative discrimination

The Act recognises the concept of 'associative' discrimination in relation to disabled people – and widens the impact of the *Coleman* decision (Section 13) to make unlawful such discrimination, not only in relation to a person's employment, but also in relation to goods, services, housing and other fields.

⁶¹ Accessible at http://ec.europa.eu/employment_social/news/2001/jul/directive78ec_en.pdf

⁶² *Coleman v Attridge* ECJ C-303/06 Judgment 17 July 2008 accessible at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=EN&Submit=rechercher&numaff=C-303/06>

⁶³ Opinion of Advocate General Poiares Maduro delivered on 31 January 2008 Case C-303/06 S in *Coleman v Attridge Law and Steve Law* accessible at above web address – and para's 12 – 14 in particular.

Associative discrimination arises where a policy or practice aimed at someone associated with a protected characteristic (ie due to disability or sex or race etc) disadvantages the person with the protected characteristic. In relation to carers, it is probably best understood where a disadvantage can be expressed in the following simple statement – ‘but for my relationship with the disabled person, this would not have happened’.

Indirect discrimination

The Act contains an explicit provision relating to indirect discrimination and disabled people (Section 19) – which is not found in the Disability Discrimination Act 1995.

Indirect discrimination occurs where an apparently neutral provision, criterion or practice puts, or would put, people with a protected characteristic (ie due to disability or sex or race etc) at a particular disadvantage compared with other people, unless that provision, criterion or practice can be objectively justified as being a proportionate means of achieving a legitimate aim. *G v St Gregory's Catholic Science College (2011)*⁶⁴, for example, concerned the school's refusal to allow a pupil to attend because his hair was in cornrows. The boy's family practice (of not cutting his hair and wearing it in cornrows) accorded with a recognised African-Caribbean tradition. The school's policy placed the group and the boy in question at a particular disadvantage, and on the evidence could not be justified.

Disability discrimination can arise, when a difference of treatment exists between different categories of disabled person and this in turn may impact on the carer. In such a case it could be understood by the response to the following statement: ‘but for the specific characteristics of the disabled person, I would have been treated in a different way’. An example could be if the services provided to physically disabled older people are materially inferior to those for (say) learning disabled younger people. If this lack of support put a carer at a disadvantage such that the disabled person's care or wellbeing was jeopardized, then a claim of indirect discrimination could arise.

Discrimination arising from disability

This provision is intended to alter the impact of House of Lords decision *Lewisham LBC v Malcolm (2008)*⁶⁵ where it was held that the ‘less favourable treatment’ comparator was person who did not display the same characteristics as the disabled person. An example often used is the way a child with autism would be treated if he misbehaved in a dinner queue and then hit a teacher who admonished him and was then excluded. Section 15 Equality Act 2010. Section 15 makes it discriminatory if the discriminator:

- treats the person unfavourably ‘because of something arising ‘in consequence of’ his or her disability; and
- cannot show that the treatment is ‘a proportionate means of achieving a legitimate aim

A recent factual example is provided by an NHS Ombudsman report concerning a dentist who automatically excluded patient with Aspergers Syndrome who swore despite being a patient for 13 years without trouble.⁶⁶

Disability and the duty to make reasonable adjustments

Disability is, by section 4, a ‘protected characteristic’. Section 6 defines a disability as a physical or mental impairment which has a ‘substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities’.

⁶⁴ [2011] EWHC 1452 (Admin). Although in this case the school had failed to undertake an equality impact assessment (see below) concerning the policy, this was not considered by the court to be conclusive – although material – as to whether the policy could be justified.

⁶⁵ [2008] 1 AC 1399

⁶⁶ NHS Ombudsman (2011) *Listening & Learning: a Review of Complaint Handling by the NHS in England 2009/10* at <http://nhsreport.ombudsman.org.uk/>

Section 20 lists three situations in which there is a requirement on the responsible party to make reasonable adjustments (known as the first, second and third requirements).

- The first requirement is a requirement, where a provision, criterion or practice puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.
- The third requirement is a requirement, where a disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid.

Harassment:

The Act (section 26) makes it unlawful for a person to harass a person with a protected characteristic [PC] if:

- s/he 'engages in unwanted conduct related to the PC and
- the conduct has the purpose or effect of (i) violating [the person's] dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for [the person].

'Intent' is therefore required on the part of the person whose conduct is in question.⁶⁷

Pre-employment health checks

The Equality Act 2010, s60 prohibits employers asking potential employees about their health prior to the making of a conditional offer of employment.⁶⁸

The prohibition is aimed at ensuring job offers are made on individual merit and not marred by unreasonable stereotyping of applicants. Once a conditional offer has been made, then the employer can ask the applicant to provide details of any job-related health issues. This means that if the job offer is then withdrawn, the employee will know why – enabling them to challenge the rejection if they believe it was unreasonable.

Public sector equality duty

The Disability Discrimination Act 1995 (s49A), the Sex Discrimination Act 1975 (s76A) and the Race Relations Act 1976 (s71) imposed duties on public authorities (such as local authorities, the NHS, and Government Departments) to take action aimed at eliminating discrimination, advancing equality of opportunity and fostering good relations. This is often referred to as the 'public sector equality duty' and it has been the subject of extensive litigation.⁶⁹

The Equality Act 2010 s149 consolidated these duties and requires public bodies when making decisions or formulating / reviewing policies etc. to have regard to the importance of eliminating discrimination, advancing equality of opportunity and to fostering good relations between persons 'who share a relevant protected characteristic and persons who do not share it'. The

⁶⁷ See *Grant v HM Land Registry & Equalities And Human Rights Commission* [2011] EWCA Civ 769

⁶⁸ There are very limited exceptions to this prohibition, of which enquiring whether the applicant will need reasonable adjustments to be made for their interview, is one)

⁶⁹ For an overview of the public sector duty, see for example Broach, S. Clements, L. and Read, J. (2010) *Disabled Children: a legal handbook* (Legal Action Group) para 9.73 – 9.90

public authorities covered by this duty are detailed in Schedule 19 to the 2010 Act – and are, essentially, the larger ‘classic’ public bodies.

The courts have been strict in their interpretation of this duty – for example in *R (Chavda) v Harrow LBC* (2007)⁷⁰ and *R (W) v. Birmingham CC* (2011).⁷¹

⁷⁰ [2007] EWHC 3064 (Admin) para 40.

⁷¹ [2011] EWHC 1147 (Admin) para 182-183.