

Care Act Draft Regulations and Guidance Consultation Response

ADASS response in relation to prisoners

Prepared by Ian Anderson

Introduction

1. Whilst the Department of Health speak of the Care Act “clarifying” the responsibilities of local authorities to meet the social care needs of prisoners while in either a prison or approved premises, for almost all councils this will be experienced as a new responsibility and one that they have little or no previous experience of.
2. Having said this, ADASS welcomes the policy direction believing that it will improve the wellbeing of some of the most frail and vulnerable people in the prison system and enhance their prospects for a safe and successful return to the wider society on completion of their sentences.
3. ADASS wishes to ensure that in taking these developments forward the focus of need does not become just on those prisoners who are older or living with physical disabilities but also includes those who are living with mental health or learning disability or are experiencing the consequences of substance misuse.
4. Although not directly related to the Draft Guidance and Regulations, ADASS has concerns that there are still too many individuals being held in prisons who would be more appropriately placed in a health or social care facility. This includes both those people with severe mental health or learning disabilities and those with other long term health conditions both physical and mental. ADASS appreciates that a significant proportion of these people will still represent a risk to society if not managed in an appropriately secure environment but the prison experience may be either valueless to them or positively harmful to their wellbeing.

Overarching comment on the Draft Guidance document

5. While it is good to see a specific chapter in relation to prisons, approved premises and bail accommodation, it is disappointing to see little or no reference to prisoners in any of the other 22 chapters within the Draft Guidance despite the fact that in several of these areas there will be different provisions with regard to prisoners that need to be referenced. In finalising the Guidance it would be helpful if there were a fuller recognition of specific issues relating to prisoners in the relevant chapters.
6. It may be worthwhile considering a specific volume of Guidance that relates to prisons and approved premises that addresses all of the chapters of the current Draft Guidance but makes explicit what the requirements are upon local authorities and their partners and where these differ from those for the rest of the community e.g. charging, direct payments, choice of accommodation, safeguarding etc.
7. It also has to be recognised that in the 57 councils in England that currently have prisons many of these prisons are expected to generate relatively little demand for either assessments or the provision of care and support and yet those councils will be required to

put in place all of the systems, processes and information and advice provision that will be required for the rest of their community. There needs to be some consideration of the burden that this will place on those councils in particular and whether all councils with prisons should receive an “infrastructure support” allowance in addition to a funding allocation for the anticipated level of activity that they will be required to meet.

Promoting wellbeing

8. Paragraph 1.4 describes “wellbeing” and the Draft Guidance states that “Local authorities **must** promote wellbeing when carrying out any of their care and support functions in respect of a person” (para 1.2). It is probable that there will be situations where a local authority, in discharging this duty, will find itself challenging aspects of the regime within which a prisoner is held. There needs to be clear guidance for both local authorities and prisons about how such challenges are to be resolved e.g. if a local authority proposes changes to a prisoner’s living accommodation but the prison is either unwilling or unable to comply with this, what recourse will the prisoner have?
9. In counterbalance to the above, ADASS members have been encouraged by the early responses of colleagues in both the prison and prison health services to working together to improve the wellbeing of prisoners.

Preventing, reducing or delaying needs

10. The issues in this chapter follow on from those described in respect of promoting wellbeing. There is no dispute with the value of intervening early to support individuals before there is a crisis but there needs to be fuller consideration about what this means in a prison setting especially with regard to those individuals who “.... do not have any current needs for care and support” (para 2.3) and is particularly relevant in respect of primary and secondary preventions.
11. Paragraphs 2.17-2.24 describe how local authorities should develop a local approach to preventative support but makes no reference to prisoners. It would be helpful if there were explicit reference to how councils are expected to discharge this responsibility in respect of prisoners, for example should prisons based services be included within the authority’s commissioning strategy for prevention or should this be a separate document that maybe describes how the authority will discharge all of its responsibilities in respect of prisoners?
12. Paragraph 2.31 lists groups of people who may benefit from preventative support and it would be helpful if this list explicitly included people who have been recently admitted to prison.
13. Paragraph 2.32 states that “A local authority **must** establish and maintain a service for providing information and advice about preventative services, facilities or resources” Again it would be helpful if this explicitly made reference to the need to meet this requirement in respect of prisoners and the costs of doing so were included in financial allocations to councils.

Information and advice

14. Following on from the comments above, it would be helpful if the Guidance explicitly stated that the duties described in paragraphs 3.3-3.4 and also, as above, the financial cost of providing and maintaining such a service needs to be recognised.
15. The information and advice service provided to prisoners needs to reflect the particular circumstances of being in prison and, given the limited access of prisoners to the internet and the fact that many of them have poor literacy skills, will need to be drafted and made available in a way that is unique to that population. It would be of benefit if this was explicitly referred to within the Guidance.

Assessment and eligibility

16. The comments in relation to providing advice and information so that people can make informed choices and actively engage in promoting their wellbeing also apply to assisting people to be aware of their rights under the Care Act for an assessment and for them to be actively and effectively involved in the processes.
17. Paragraphs 6.62- 6.65 explicitly refer to integrated and combined assessments but make no reference to where prison management regimes should fit in. This is addressed to an extent within the chapter on prisons but does not read across into chapter 6 and should.
18. In considering eligibility for care and support there may be occasions where a prisoner's needs are exacerbated by the environment or regime of the prison in which they are held. In these circumstances it would be inappropriate for a local authority to have to pay to provide services where the need could be either reduced or removed if the necessary changes were made to the prison environment or regime. While recognising that there continues to be a need to maintain security and safety within a prison and that experience to date suggests that prison management will generally want to assist in supporting vulnerable prisoners, there would benefit in making clear statements in the Guidance about the relationship between social care needs and the responsibilities of the prison services.

Independent advocacy

19. The proportion of people assessed who meet the criteria for receiving support from an independent advocate is likely to be higher in the prison population than the wider community. Peer support schemes staffed by serving prisoners to assist individuals to participate in the Care Act assessment and planning processes may have a valuable contribution to make but councils will have to consider whether someone offering support as part of such a scheme can meet the criteria described in paragraph 7.35 and it is unlikely that they will. It would therefore be helpful if the Guidance provided a more explicit statement about when an independent advocate should be provided as opposed to a peer supporter.
20. If the local authority provides an independent advocate then this individual is also going to have to understand how the prison regime operates and the constraints that operate upon individual choice. This is also not explicitly referenced in the Guidance and should be.

21. The provision of specific independent advocacy to prisons will also bring further challenges in terms of the individual advocate being cleared to operate within the prison and it may be that there is value in commissioning a national/regional prisoner independent advocacy service of people trained and cleared to operate within prisons and experienced in doing so.
22. The Guidance lists, in paragraph 7.37, people who cannot operate as an advocate. It refers to people “providing care or treatment to the individual in a professional or paid capacity” but also needs to include those responsible for delivering custodial services i.e. prison officers and support staff.
23. Finally, if a prisoner is deemed to be eligible for independent advocacy under the Care Act [(or even Mental Capacity Act), what does this mean in terms of other aspects of their life in prison such as being involved in offending treatment programmes or giving informed consent to health treatments? There must surely be consistency in approach across all aspects of the individual’s life and if there is to be such then the argument for a national prisoner independent advocacy service becomes a stronger one.

Charging and financial assessment

24. Prisoners will be eligible for charging but with restricted access to paid employment, benefits and their capital assets, savings and pensions will need specific consideration. Chapter 8 makes no reference to this and should do so for this is an issue that will come more to the fore as older people are sent to prison for historic offences as evidenced by a number of older, high profile wealthy celebrities that have recently received substantial prison sentences.

Care and support planning and direct payments

25. Both of these chapters fail to make explicit the specific limitations that operate in respect of prisoners and this needs to be addressed for consistency.

Adult Safeguarding

26. The ability to include prisons in the work of Adult Safeguarding Boards is welcomed but the draft Guidance in relation to prisoners and safeguarding is seriously under developed.
27. Paragraph 14.1 of the Draft Guidance states that a local authority must “**make enquiries**, or ensure others do so, if it believes an adult is at risk of, abuse or neglect.” The Guidance then says nothing about how this duty is to be discharged in relation to serving prisoners. Indeed paragraphs 14.36-14.41 which expand on how enquiries are to be carried out would lead the reader to believe that local authority and police responsibilities apply to prisoners and are to be delivered in prisons the same as in the rest of the community.
28. Similarly paragraph 14.23 states that “Adults at risk of abuse and neglect are entitled to the protection of the law in the same way of all” and 14.24 states “Statutory adult safeguarding duties apply equally to those adults with care and support needs regardless of whether those needs are being met, whether the adult lacks mental capacity or not, and regardless of setting.” This also implies that local authority and police responsibilities apply equally to prisoners as to any other citizen but how these are to be delivered in a prison setting is not

addressed and with prisons being essentially closed communities the ability of the local authority and police to discharge them will be severely constrained. Much clearer Guidance is required and ADASS would be pleased to engage with the Department of Health, Ministry of Justice and NOMS in discussing this further.

29. Paragraphs 14.100-14.110 that address the establishment and functioning of Adult Safeguarding Boards are similarly under developed in relation to the involvement of prisons.
30. Paragraph 14.109 which lists discretionary members of an Adult Safeguarding Board, noticeably omits prisons and yet with all prisoners in prisons and approved premises being deemed to be ordinarily resident in the local authority area and by definition to be living in a closed community with others who have committed criminal acts there is surely a case for prisons being mandatory members of the Adult Safeguarding Board.
31. If prisons are to become full members of an Adult Safeguarding Board then the 3 functions of Boards as described in paragraph 14.100 also apply to them and this would include conducting a Safeguarding Adults Review. Such a review could be a consequence of either an event or an inspection finding within a prison such as the failure of a prison to provide adequate washing facilities for disabled prisoners. This would bring prisons much more into the remit of local accountability which could be a valuable addition to the existing roles played by HMIP and other assurance processes. Our concern however is that while these approaches would be welcomed by ADASS we consider that they have not been adequately thought through in drafting the Guidance and therefore are not sufficiently clearly described. As with other aspects of the Guidance in respect of prisoners described above, ADASS would be pleased to engage in further discussion with the relevant parties in helping shape the final Guidance.
32. Finally under this heading there is the issue of protecting property of adults being cared for away from home. ADASS understands that this section is not meant to apply to prisoners but this is not explicitly stated and there may be confusion as to the definition of the words “cared for” in respect of prisoners if this is not clarified.

Integration, cooperation and partnerships

33. If prisoners are deemed to be ordinarily resident within the local authority that the prison is located and the local authority has responsibility for meeting their entitlements under the Care Act then it would seem appropriate for prisons to be subject to the provisions of Chapter 15 of the guidance and we welcome that being explicitly stated in paragraph 15.21. This is however the only reference to prisons in 17 pages of Guidance. There is no reference to prisons or prisoners in the sub-sections on strategic planning, JSNA’s or integrating service provision and combining and aligning processes all of which are relevant to prisons and prisoners.

Transition to adult care and support

34. The chapter on prisons explicitly refers to young people transitioning from young offender institutions into adult prisons and clarifies responsibilities for those who have been “looked after children.” This guidance is helpful and it is disappointing that there is no cross

referencing between this and the chapter on transitions. It would be helpful if this were addressed in the final version of the Guidance.

Ordinary residence and continuity of care

35. As with the chapter on transitions these chapters fail to reference prisoners either while they are serving their sentence or at the point that they are released from custody and while it is addressed within the prisons chapter previous comments apply about the value of explicit cross-referencing between chapters.

Prisons, approved premises and bail accommodation

36. An explicit chapter in the Guidance is welcomed and is helpful despite the lack of explicit cross referencing to and from other chapters.

37. The issue of information sharing will be an important one that can only be addressed locally. It would however be helpful to be provided with a model agreement that the Ministry of Justice and NOMS would consider appropriate to meet their needs. This may also include provision for particular high profile prisoners where enhanced data security is required as with certain patients in high security psychiatric hospitals currently.

38. Given that prisoners are often moved between establishments at short notice it is reassuring to see in paragraph 17.19 that a responsibility is placed upon prisons and prison health providers to advise local authorities of someone entering their establishment who may have social care needs.

39. It is also reassuring to see in paragraph 17.23 that the right of prisoners to self-refer is also explicitly stated although the duty to facilitate them being able to self-refer could possibly be more strongly stated.

40. Paragraph 17.27 describing the requirement for local authorities to “provide information and advice to both individuals and establishments on what can be done to prevent or delay the development of care and support needs” needs to be reflected more explicitly in the other relevant chapters of the Guidance. The status of such advice to an establishment also needs to be clarified as it may be that a prisoner would seek to exercise a legal challenge if the local authority advised an establishment to pursue certain measures but for reasons that were not related to maintaining safety or security e.g. lack of funding, manpower or due to overcrowding, the establishment chose not to implement that advice.

41. Paragraph 17.29 makes a clear statement that prisoners cannot acquire the status of “carer” within the definition of the Act. This does not mean however that a prisoner cannot and should not provide support for a fellow prisoner either on a voluntary or paid basis and if it is on a voluntary basis and not part of an organised scheme of peer support operated within the prison it may be difficult to explain why such support is not eligible for consideration as being that of a carer within the definition of the Act. This paragraph promises separate guidance on the issue to prison and approved premises staff and ADASS would be pleased to assist in drafting this although such guidance (presumably not statutory guidance?) must not just be for prison staff but accessible to prisoners and local authority staff too for it will be to local authorities that any challenge will be directed.

42. Paragraph 17.30 does not adequately address the issue of charging and assessing financial resources and as stated in paragraph 24 above, there needs to be fuller guidance on this issue.
43. Paragraph 17.34 states that “Local authorities **should** aim to ensure that consent is given so that individual care plans are shared with other providers of custodial and resettlement services...” While this is a laudable ambition and one that it is hoped and expected that most prisoners will agree, it will not be possible for local authorities to deliver care and support services to prisoners without sharing information with prison staff. It would be helpful therefore if the Guidance could provide a clear statement of a minimum set of information that the local authority must share with the prison staff whether or not the individual prisoner agrees to it.
44. Paragraph 17.35 attempts to describe the respective responsibilities for meeting the needs of prisoners requiring equipment or adaptations to their living accommodation. In its current iteration the language is too vague and permissive and ADASS hopes for a clearer statement in the final Guidance that defines not just the mutual responsibilities of prisons and local authorities but also references those of health services. ADASS would support the position indicated within the draft Guidance that prisons take responsibility for fixtures and fittings and that local authorities provide standalone pieces of equipment. This would ensure that Disabled Facilities Grants which in two tier council systems are provided by district councils (although from 2015 funded out of top tier councils’ Better Care Fund capital allocations) are not brought under additional financial pressures. The responsibilities of health services should mirror those within the community.
45. ADASS welcomes the clarification on the determination of ordinary residence for people leaving custody as described in paragraphs 17.47-17.50. This is clear and helpful.
46. As in the chapter on Adult Safeguarding, the references in the prisons’ chapter of the Draft Guidance (paras 17.60-17.61) need further development.
47. As stated previously, prisons should be required to be part of Safeguarding Adult Boards and this should not be discretionary.
48. Secondly, there needs to be a much clearer statement within the Guidance on the local authority’s position regarding situations that need enquiries to be made.
49. Finally, and given the above, there needs to be a clear statement of prisons’ relationships with and accountability to local Health and Wellbeing Boards and the accountability of prison health care commissioners and providers to local authority Health Scrutiny Committees. If prisoners are residents of a local authority area then the same processes and accountabilities should operate as with other residents.
50. ADASS welcomes the clarity of the sections on transitions from children’s to adults care and support and on care leavers and would wish to see this clarity reflected in the chapter specifically addressing transitions.

51. Paragraph 17.68 suggests that prison staff could be trained to act as advocates. ADASS contends that such an approach is not consistent with the approach described in the chapter on independent advocacy and should be explicitly ruled out due to potential conflicts of interest.

Financial Impact Assessment

50. ADASS welcomes the attempts made by the Department of Health supported by NOMS to quantify the financial burden to councils of these new/clarified responsibilities for local authorities but is concerned on a number of fronts.

51. Firstly, the quantification of social care need is based on limited analysis of prisoners' disabilities and long term health conditions and does not explicitly demonstrate the levels of need that this then generates. At no time in developing the financial impact assessment have social care professionals experienced in assessing social care need and arranging for the delivery of services to meet it been involved in direct assessment of prisoners.

52. Secondly, the number of assessments likely to be generated does not explicitly consider the behaviour of individual prisoners who may seek eligibility for social care support as a way of mitigating the deprivations of prison life.

53. Thirdly, the needs of younger adults with mental health, learning disabilities or substance misuse issues may be severely understated due to both a current significant level of unmet need and by what need that is identified being met through prison health service contracts. The inter-relationship between health and social care services within prisons is untested and not clearly defined in these areas and there is a real risk that unrealistic expectations each of the other may be generated as a means of protecting stretched resources.

54. Finally, the provision of dedicated information and advice materials and services to prisons is going to be a significant financial challenge to councils. Similar inputs will be required to produce these in terms of costs and time as for the rest of the community but the likely dedicated funding provided to councils to meet their costs for assessments, reviews and provision of care and support may be insufficient in many councils with smaller prisoner populations to meet the costs of the provision of information and advice.

Ian Anderson

ADASS Associate