



UNVEILING THE TRUTH ABOUT SOCIAL CARE IN ENGLAND

PART TWO

**How Government policy is
leading councils to flout the law
and deceive their communities
so they can continue to put
resource before need**

Campaign For Real Care
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OVERVIEW

Whether or not its architects realised it, the Care Act of 2014 contains provisions to transform social care. It created a three stage process for how councils should respond to people in need of care and support:

1. They must identify all needs for them to have the best level of wellbeing possible for them without regard to the current availability of services.
2. Those needs then divide into two groups – those that are a *legal duty* to meet and those councils have the *power* to meet.
3. They must meet all needs in the first group, regardless of cost, and then can meet as many in the second group as their resources allow.

Such a three stage process would mean councils would be able to deliver a further, critical requirement of the Act. The information about the needs that *cannot* be met will mean councils will know the level of service required in their community for all to have the best wellbeing their situation allows. ***Councils will know the budget they require.***

The Act therefore requires social care to work on the same founding principle as the NHS – that ***need precedes resource***. Just as waiting times provide the barometer of any gap between needs and resources in the NHS, so unmet need would provide the equivalent for social care.

But Part One of *Unveiling the Truth* comprises a dossier that shows how one council, Barnet, is flouting the Act. It is preserving traditional practices to ensure spend is within budget by applying the reverse principle - ***resource precedes need***. The professional role is to reduce 'need' to whatever budget Barnet's political leaders happen to set.

But Barnet is no rogue council. Part Two of *Unveiling the Truth* sets out how Barnet is delivering a national template as do all councils. Government, through two conflicting sets of messages and a *nod and a wink* as to which of the two councils should action, is leading councils to deceive their communities into believing the Care Act is being delivered whilst preserving decades-old practices that mean the Act never can be delivered. These practices are successful in keeping spending to budget whilst at the same time, crucially, serve the political expedient of denying the existence of any need for which there is no resource.

WHAT THE CARE ACT 2014 SAYS

Arguably the single most important issue that determines how social care is experienced is the way the needs of the individual are identified and resources matched to meet them. The Care Act is clear on how this should be carried out:

- All needs requiring a council's care and support and that have an impact on any of the Act's nine areas of wellbeing should be identified. This must be carried out having no regard to the current availability of resources.¹
- Any needs that a council believes satisfy criteria set by the Secretary of State to be a legal duty to meet must be met, regardless of the cost of doing so.² Reflecting traditional use of language, the Act called this group of needs 'eligible'.
- The council must then make a decision about meeting any remaining needs under their power to do so.³

1 [Section 9\(4\) Care Act 2014](#)

2 [Section 18, Care Act 2014](#)

3 [Section 19, Care Act 2014](#)



Subject to the Secretary of State making the *legal duty* to meet need a *minimum guarantee*, or safety net, the process would have two major benefits with regard to how the system both uses and plans resources:

1. Use of the *power to meet need* above the *minimum guarantee* would allow councils the flexibility to target resources to have the greatest impact on the lives of individuals;

'The two categories of need engages an important structural point about the Care Act. The power to meet need ...brings flexibility and discretion' (Aburas v Southwark, High Court, 2019)

2. It would allow transparency about the level of need that can be met within current budgets and the level that cannot. This means another requirement of the Act becomes deliverable. In setting budgets, the Act requires them to⁴;

'...have regard to the need to ensure that sufficient services are available for meeting the needs for care and support of adults in its area and the needs for support of carers in its area'

It is a progressive agenda that would justify the billing given the Act by the Minister for Health at the time as

'the biggest shake up in social care for 60 years!'

It would put social care on the same footing as the NHS in the way needs and resources are reconciled. *Unmet need* in social care would perform the same function as *waiting times* in the NHS. It would be the barometer of how resources are shaping up to need and thus create political pressure. Social care would adopt the founding principle of the NHS that ***need precedes resource***.

4 [Section 5, Care Act 2014](#)



THE SECRETARY OF STATE'S RESPONSE TO THE ACT

The key decision the Act places on the Secretary of State is to establish the criteria that determines the threshold for when a need is a legal duty to meet. That decision is delivered through Statutory Guidance and Regulations to the Act.

But the Secretary of State gave councils two sets of fundamentally conflicting messages in relation to when a need is a legal duty to meet. One set is *explicit* and the other *implicit*. **Councils have to heed both.**

The explicit messages confirm the above description of the Act.

*'The national eligibility criteria set a minimum threshold for adult care and support needs and carer support needs which local authorities must meet. Authorities can also decide to meet needs that are not deemed to be eligible.'*⁵

and

*'...a plan must be provided where a local authority is required to meet needs... or decides to meet needs'*⁶

However, there are also *implicit* messages that completely contradict these explicit messages. They give clear indications to councils that the legal duty to meet need is not a minimum at all. It is the **total offer** to be made.

5 [Para 6.100 Statutory Guidance to the Act](#)

6 [Paragraph 10.9 Statutory Guidance to the Act](#)



If councils have to make decisions about which of assessed needs it can meet above a *minimum threshold*, it is self-evident that there will be occasions when it cannot. Unmet need will inevitably arise. **Yet the Guidance is silent on the issue of any assessed need remaining unmet.**

The *implied* message is that unmet need will never arise. Amongst the *explicit* messages, this is, indeed, the Secretary of State's view. However, the reason unmet need will never arise is because councils will set budgets that always are exactly the size required to meet every need for wellbeing that requires council resources.

Thus the Guidance says councils must ensure that the funding available,

'...is sufficient to meet the needs of the entire local population?'

In other words, councils must set budgets in anticipation of meeting all needs identified through the assessment process. Resourced by such budgets, councils will have no need of the discretion to meet need under the power the Act gives them. It means the legal duty to meet need is no *minimum threshold*. It is the *total offer*.

Therefore, in addition to making no mention of unmet need, **the Guidance makes no mention of using the Act's power to meet need for long term support.**

The message that the power to meet need is superfluous, is confirmed by the *Eligibility Regulations*. The 'eligibility criteria' have every appearance of being generous. The key judgement is whether a need is having a '*significant impact on wellbeing*'. The Guidance says what is 'significant' must be judged by '*what is important to the individual*'.

This is as generous as could be wished for. It would leave nothing to be desired. Why would anyone expect taxpayers to fund meeting a need that is *unimportant*, or one whose impact on their wellbeing is *insignificant*? The Act's power to meet need truly would be redundant.

7 [Paragraph 10.27 of the Statutory Guidance](#)



Problems with the Secretary of State's response to the Care Act

The spanner in the works in this strategy is rather obvious - ***it is completely undeliverable.*** Councils cannot set budgets in the way the Guidance requires:

- Councils depend to a significant degree on government grants, over which they have no control
- They are subject to government controls in the amount of taxes they can raise locally
- The relative affluence of the communities served determines how much councils can raise from local taxes
- Social care has to compete with other local services for resources. There can be no expectation those other services will stand aside so social care can have first claim to all the resource it requires.

The Secretary of State's view of the budget setting process at local level is an illusion. It sees the budget setting as pristine and planned, whereas in reality it is abrasive and messy.

Without the ability to set budgets to meet all needs, the Government's entire strategy for delivering the Care Act's vision of a system built to deliver wellbeing collapses.

HOW HAVE SOCIAL CARE'S LEADERS RESPONDED?

Social care's leaders have had three broad options:

1. Call out the government's strategy for being undeliverable and demand change.
2. At the individual council level, they could recognise the undeliverability of the Government's guidance and create their own threshold for the legal duty as an authentic *minimum guarantee* or *safety net*. They could do so on the basis that public bodies, while having no choice about applying *primary legislation* such as the Act, are not obliged to deliver *secondary legislation* such as Statutory Guidance if they have cogent reasons not to do so. Undeliverability is about as cogent as it can be.
3. Make a pretence to their communities of delivering the *explicit messages* but, on a '*nod nod, wink wink*' basis, understand the implicit messages from Government mean it wants them to carry on as they always have in the way they match spend to budget. The message from Government to councils is – '*Whatever alchemy you have used in the past and still use, carry on. It works!*'

Part One of this report - the *Barnet Dossier* – shows it has opted for the third.



It shows Barnet behaving in the following way:

- It tells its community it will deliver the national requirement to meet all needs that meet the national eligibility criteria, with ***a blanket policy of never using the power to meet need.***
- It sets the budget for social care ***without any information as to the level of budget required to meet all needs that meet the national eligibility criteria.***
- It requires its professionals to spend within the budget they have set. Although it may result in some minor overspends and underspends, they are well within tolerable limits. ***Using the language of the national criteria to describe case by case decisions serves to maintain the impression that the national criteria are being applied.***
- To show the eligibility decision is made without regard to resources, the Council says it's the social worker who makes the eligibility decision. However, the social worker's submission of their 'decision' to a senior manager with budgetary responsibility for 'approval' is all the manager requires to control the decision making process but ***without appearing to have done so.*** The 'decision', and the assessment behind it, is prepared by the social worker for the express purpose of securing the manager's approval. This satisfies the social worker's *moral purpose* which is to secure support for their service user.

It has actually been known since 2008 that that the '*street level bureaucracy*'⁸ determines eligibility, not the official eligibility criteria. Made up of senior managers, finance staff and front line practitioners it knows the level of demand the local budget can sustain. ***Any need for which there is no resources is labelled a mere 'wish' or 'want', meaning there is no public responsibility to meet it.***

Political leaders are incurious as to how this positive narrative conflicts with the popular narrative about social care as a 'broken' service that leaves swathes of need either not met or inappropriately met. Part One of *Unveiling the Truth* shows that, in opposition at least, political leaders are perfectly capable of opening their eyes to the realities of the system and of grasping the enormity of the implications. But it also shows how quickly they can shut tight their eyes again once in power in the face of pressure from professional leaders determined to protect the status quo. The professional body serves to allow political leaders to keep their head in the sand.

Barnet is no rogue council. The Director knows of no other council that meets needs it doesn't have a legal duty to meet. All have chosen the '*nod nod, wink wink*' approach to the undeliverability of the Government's Guidance.

8 [*Cutting the Cake Fairly, Commission for Social Care Inspections, 2008*](#)

THE CONSEQUENCES

The success of Government's strategy in thwarting the vision of the Care Act has consequences that go far beyond mere legal or technical failures. The human and economic consequences are devastating:

- In *human terms*, the profession centric decision making process that takes place behind closed doors continues to be one that service users and their families experience as bureaucratic, obscure and disempowering.
- Part Three of *Unveiling the Truth* sets out the evidence of the deeply dysfunctional economic consequences. It shows inequity of gross proportions alongside misuse of resources on an industrial scale. It is a system that does not know how best to spend the money it has.

