

Adult social care law reform

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The Care Bill is working its way through Parliament and on track to get Royal Assent at the turn of the year. The Bill will repeal virtually all the current adult ‘community care’ statutes and in the words of the Department of Health ‘modernise the law to put people’s wellbeing at the heart of the care and support system’. In Wales the Assembly is considering a not dissimilar Bill, the Social Services and Well-being (Wales) Bill. This article provides an overview of the English Bill in so far as it applies to adult social services and notes where the Welsh Bill takes a different (generally better) line. The most striking difference between the two Bills is that the English Bill is largely restricted to adults whereas the Welsh Bill also applies to children. The English approach will create significant difficulties for young carers (amongst others) but given the focus of this Journal, this issue is not addressed.

The National Assistance Act (NAA) 1948 – the last surviving of the great Beveridge statutes – is listed in the Repeals’ Schedule to the Bill. It was momentous legislation, as the Joint Committee in its scrutiny report on the draft Care and Support Bill [Joint Committee on the Draft Care and Support Bill, ‘Draft Care and Support Bill’ Stationery Office (2013) HL Paper 143 HC 822] notes. It was an Act that ‘swept away the Poor Law, abolished the Work House, the liable family rule, and the parish poor box in a system that dated back to 1531’. In addition to this repeal, the new legislation will sweep away (in so far as they apply to adults) the Chronically Sick and Disabled Persons Act 1970 as well as the legislation relating to direct payments, assessments, charging for social care and carers.

In 2011 the Law Commission published a report [Adult Social Care Law Com No 326, Stationery Office HC 941] proposing what was in essence a

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codification of adult social care law in England and Wales. Of its 76 recommendations, 66 were included in the draft Bill scrutinised by the Westminster Joint Committee. In broad measure the Committee welcomed the draft Bill – subject to 90 specific recommendations. About half of these have been addressed in the Care Bill.

With one major exception, it is possible that the average practitioner who dabbles in social care law will notice virtually no substantive change as a result of the legislation: most of the existing rights and processes are retained, including the duty to assess, the duty to provide support services, the right to direct payments and so on. The change that will cause ripples will be the ‘Dilnot’ reforms: for local authorities, these reforms might better be characterised as a tidal wave – they will cause havoc – but of that, more later.

The statutory architecture

A key recommendation in the Law Commission’s final report was that the new legislation should re-impose a ‘hierarchy of rules’. A significant problem with the current law is that it is overwhelmed by a mass of guidance: often difficult to track down and of uncertain status. The Law Commission recommended that the primary statute spell out the key legal obligations and limitations and that it be accompanied by a Code of Practice – rather like the Code that exists in relation to the Mental Capacity Act 2005. Practitioners and individuals would then only have to have regard to these two documents to ‘understand their obligations and entitlements’. A particular advantage of a Code is the requirement for Parliamentary oversight – unlike guidance which can be issued or cancelled at the whim of the Secretary of State. The English Government has rejected this advice, but not the Welsh. There will be no Code in England and much of what should be in the Bill is to be relegated to regulations or guidance (of one kind or another).

The Bill itself offends the Law Commission’s ‘hierarchy of rules’ in other respects, most notably it has the ‘feel’ of subordinate legislation – in that it often descends into a level of detail that one would seem longwinded even for a regulation. A good example of this is clause 11 which concerns what happens if a person refuses an assessment.

On the positive side, the eligibility criteria for deciding whether a person qualifies for social care support are to be spelled out in regulations – rather

than in the guidance where they currently reside. The Bill also provides for ‘red lines’ to be drawn in relation to such criteria – ie levels below which a local authority cannot fall. In June 2013 the Department of Health issued for consultation ‘Draft national minimum eligibility threshold for adult care and support’. Whilst the phrasing of the draft is different to the current criteria (often referred to as ‘FACS’) the intention is that the threshold will remain as at present – broadly that those whose needs are assessed as falling into the ‘critical’ and ‘substantial’ bands will continue to be eligible for support.

Guiding principles

It is the current fashion that social care statutes should commence with a set of guiding principles – for example sections 1 of the Children Act 1989 and the Mental Capacity Act 2005. A number of commentators have argued that social care could benefit from this treatment and proposed principles such as the duty to promote ‘independent living’, good quality support, choice and so on.

The NAA 1948, s21 contains the first example in the world of an independent living duty. Under the Poor Law, the Work House was the default position for a person so destitute as to resort to Parish support. The 1948 Act turned this on its head, with section 21 stating (as it still does) that no one can be placed in a care home unless alternative arrangements are ‘not otherwise available’. That is a principle worth its salt – but is not found in Bill.

Another principle that attracted strong support (including from the Joint Committee) was a duty to promote ‘dignity’. This too does not appear in the Bill – because it is deemed too ‘imprecise’ – notwithstanding that it appears in UN Convention Rights of Persons with Disabilities, the EU Charter of Fundamental Freedoms, the German Constitution and gets a full chapter in the Government’s White Paper on social care reform. Having dismissed dignity as imprecise, the Bill plumps for ‘well-being’. Local authorities must, when exercising any function in relation to adult social care, have regard to the need to promote ‘well-being’ – which is defined in the most expansive of terms. The Bill is not short of rhetorical ‘wouldn’t it be nice’ provisions of this kind. There are exhortations on local authorities and NHS bodies to work together and to integrate; there is a duty to provide information and a duty to promote the efficient and effective operation of the social care market with a

view to improving diversity and quality in provision of services. The Joint Committee was fairly blunt in relation to most of these aspirational bits of the Bill – and its report is well worth reading. This article, however concentrates on those aspects which are likely to have a material impact and to be of relevance to practitioners.

Key provisions

Clause 8 is significant. At present a number of statutory provisions provide lists of services that authorities must provide, if a person is assessed as being in need of one. Most obviously the list in the Chronically Sick and Disabled Persons Act 1970, s2 contains: practical assistance in the home; wireless; library; TV; telephone; holidays; adaptations; meals; and so on. This approach is discarded and in future the assessment will focus on the ‘outcomes’ a person wishes and then a wide range of support responses can be funded to help achieve these outcomes. Inevitably we will come to talk of ‘section 8 services’ for which the Bill gives illustrative examples: accommodation in a care home or in premises of some other type; care and support at home or in the community; counselling and other types of social work; goods and facilities; and information, advice and advocacy.

On a theoretical level this is welcome, as it avoids the straightjacket of a fixed menu of ‘service’ responses to need. However there are some concerns. One is that such services can be provided for dependent persons as well as carers, and so the clear distinction between carers’ needs and the needs of the person they care for, will be blurred. There are sound reasons why this should not be so, not least that clause 14 permits charges to be levied on section 8 services. This will open the way for local authorities to charge for ‘social work, information, advice and advocacy’ as well as for carers services: something that does not happen at present.

A radical provision in the English Bill (absent from the Welsh) concerns the requirement that every care and support plan must include a personal budget (clause 25). An earlier Elder Law Journal article [L Clements (2011) *Social care law developments A sideways look at personalisation & tightening eligibility criteria* ELJ v.1 pp 47-52] has considered ‘personal budgets’ and the extent to which they differ from direct payments. Put simply (overly simply – so read the above article) a direct payment involves money leaving the local authority

and going into the dependent person's (or carer's) bank account. A personal budget is just the amount that the local authority considers to be sufficient to purchase the person's eligible needs. The local authority may still commission the services, but it will also inform the person what they cost: a bit like the NHS telling you what your heart operation cost.

The Government argues that if people know what their service is costing, then they are likely to become more involved in choosing providers and support arrangements that better meet their needs. Since very many people who receive local authority services have significant cognitive impairments, it begs the question as to why local authority are to be put to the substantial administrative obligation of telling each and every one of them, what their support arrangements are costing. Why, one asks, would a person with advanced dementia living alone and without close family, want to be told this cost? The Joint Committee's main concern with personal budgets was the absence in the draft Bill of a requirement that the amount of such a budget must be 'equivalent to the reasonable cost of securing the provision of the service concerned' (which is the current requirement in the legislation relating to direct payments). The Care Bill also lacks this safeguard.

One of the much vaunted aspects of the Bill is that it gives carers the same rights to have their support needs met, as it gives to disabled people. The Bill removes the requirement that adult carers have to provide (or intend to provide) 'regular' and 'substantial' care to qualify for an assessment (clause 10) and places the local authority under a 'duty' to meet a carer's assessed needs (clause 20) – whereas under the current law, this is only a 'power'. Theoretically this could treble the number of carers' assessments that local authorities have to undertake – and the Dilnot provisions are likely to give a real impetus to carers to seek such assessments. A doubling of assessments of elderly and disabled people is also foreseeable, as a result of the Bill ramping up local authority duties to 'self-funders'.

Self funders

Clause 18(2) replicates the current law, that requires local authorities to provide care and support to meet the 'eligible needs' of people whose financial means are below the maximum limits (the capital limit is currently £23,250 in England and £23,750 in Wales). Clause 18(3) however, heralds

major change. It requires local authorities to meet the 'eligible needs' of people whose financial means are above the maximum limits (generally referred to as 'self-funders') if they ask the local authority to meet their needs. Clause 20 mirrors this position in relation to carers with eligible needs.

Why, one asks, would self-funders with significant resources want to go through the lengthy local authority assessment and care planning procedures – when they are going to have to pay the full cost of the resulting care? Why would they not continue to do what they do today: which is to reach for their cheque books and make direct contracts with the service providers? There are two powerful reasons why self-funders are likely to change their habits and to seek local authority involvement in their care arrangements. The first is 'Dilnot' (discussed below) and the second concerns those who are in need of a care home placement. Self funders in care homes in general pay significantly more for their placement than people funded by a local authority: indeed the evidence suggests that self-funders subsidise local authority placements and without this cross subsidy, many care homes would fail. If a self funder is able to require the local authority to negotiate their contract then 'what will be the contract price?' If care homes are required to charge the local authority rate, then it is likely many will go bankrupt, whereas if local authorities have to increase their usual price to the self-funding rate - then many may suffer a similar fate. Either way this provision is likely to distort a very fragile market.

Ordinary residence and 'portability'

The Bill provides the Government with elbow room to update the 'ordinary residence' rules. In large measure it will create a common rule that applies regardless of the statute that governs the care and support provided. This means that the 'deeming' rules under the NAA 1948 will apply to all services provided under the Care Act as well as to those provided under MHA 1983, s117 – and it appears likely that regulations will extend these provisions to accommodation other than registered care homes. This last element will be addressed in regulations – but it may cover (for example) supported living accommodation arranged by one authority but situated in the area of another.

There has been considerable pressure on the Government to provide for 'portability' of care packages – so that when a person receiving support moves from one local authority to another, they do not suffer a material loss

of support. The Bill goes a small way to addressing these concerns, and adopts a number of the proposals contained in Baroness Campbell of Surbiton's Private Members Bill: the Social Care Portability Bill. It places a duty on the new authority to maintain the care package of the person who has moved, until it has undertaken a reassessment, but it fails to grasp reality and make arrangements for what will happen if (as is so often the case) the new authority fails to do this.

Public functions

Local authority adult social care responsibilities rub shoulders with a number of other public law functions and it is important that the new legislation does not unwittingly disturb these boundaries – particularly the 'NHS Continuing Healthcare' boundary. The Government has gone some way to address the serious concerns of the Joint Committee on this question, but the drafting of the Care Bill remains problematic. The NAA 1948, s21(8) prohibits local authorities from providing nursing care for which the NHS has a power or duty to provide, and this provision was analysed in great detail by the Court of Appeal in *R v. North and East Devon health authority ex p Coughlan* [2000] 2 WLR 622. Given that this is a highly contentious area, and there is considerable evidence that the NHS is still failing to comply with the *Coughlan* judgment, it is essential that the Bill replicate exactly the wording of the 1948 Act. Unfortunately this is not the case: clause 22 of the Bill only prohibits local authorities from providing nursing care which the NHS is under a duty to provide. Whilst this may be a minor point, it is bound to result in NHS bodies claiming that the *Coughlan* judgment is no longer valid – since it was based on a differently worded statute. We will then have to wait many years for another Court judgment (of uncertain outcome) on this question. If the Government is genuine in its wish to maintain the status quo, it is essential it amends this clause.

Safeguarding

The Bill is also disappointing in relation 'adult safeguarding'. At present local authorities have all the responsibilities, but no powers – save only the rarely used power under NAA 1948 s47 to remove (amongst others) gravely ill or infirm people living in unsanitary conditions. The Bill repeals this provision

and puts nothing in its place. The Welsh Bill is better, providing local authorities with the power to seek ‘adult protection and support’ orders (essentially a power of entry to ascertain whether a person is at risk). The Adult Support and Protection (Scotland) Act 2007 provides for even greater powers. It has been in force for almost 5 years and appears to be working well. In England local authorities will have no new powers. It is questionable whether this state of affairs is human rights compliant. On a number of occasions the Strasbourg court has referred to the positive obligations of states to protect those who are vulnerable to abuse and that this duty includes member states ensuring that they have domestic laws that are fit for this purpose.

Another human rights aspect to the Bill remains uncertain. At present, local authority funded residents in care homes have the protection of the Human Rights Act 1998 (by virtue of the Health and Social Care Act 2008, s145). It is unclear as to whether the Government intends this protection to be carried forward to cover people placed in care homes under the Care Bill. Even if this is the intention, there is also the question as to whether self-funding residents (whose accommodation is arranged by the local authority) should be protected – and indeed those placed in supported living’ arrangements, since the Care Bill blurs the boundaries between this type of accommodation and ‘registered’ care homes.

Charging and Dilnot

Charging, is a good example of where the Law Commission’s proposed ‘statutory architecture’ has been rejected. At present there is a requirement in the primary legislation that charges for home or community based social care must be no more than it is ‘reasonably practicable’ for an individual to pay. This provision acts as a long stop, when local authorities have followed the relevant guidance on charging and the resultant charge is nevertheless impracticable for the person to pay. The Joint Committee considered that this was an important principle that should appear on the face of the Bill – but it does not. Whatever protection there is to be concerning excessive charges, it will be in the regulations.

It is in the charging section of the English Bill (clauses 14-17) that the proposals of the 2011 ‘Report of the Commission on Funding of Care and

Support' (the 'Dilnot' proposals) appear (Wales has yet to decide what to do about 'Dilnot'). The focus of the Dilnot Commission was not on the current chronic underfunding of social care, but on the impact that the charging arrangements have on 'self-funders'. Each year, it appears, about 25,000 people have to sell their homes to pay for their social care costs and for a few, these costs can exceed (in total) £100,000. The Dilnot Commission proposed that the lifetime contribution an individual should make to their care costs should be capped at a maximum of £35,000 (and indeed that the earlier in a person's life that the need for social care arose, the smaller the cap should be). The Commission considered that the cap could be a higher figure but that anything above £50,000 would not meet its 'criteria of fairness or sustainability'.

The Commission's report ignored almost entirely the bureaucracy that its scheme would generate – stating only that there 'will be some additional administration as a result'.

The Care Bill will implement the Dilnot proposals, albeit that the detail will be in subordinate legislation. A July 2013 Department of Health Consultation paper 'Caring for our future: implementing funding reform' sets out the Government's intentions (see www.gov.uk/government/consultations/caring-for-our-future-implementing-funding-reform).

When implemented in 2016, the capital maximum will be set at £72,000. Instead of having a graduated maximum (varying for people of different ages) the figure will apply to all people whose care needs arise after the age of 18. The figure will be uprated for inflation each year and will only apply to social care costs. So a person in a care home costing £25,000 per annum will only be deemed to have spent £13,000 towards their social care costs: £12,000 being adjudged as the 'board and lodging' element. Ignoring the annual inflation uprating, it would take over 5½ years for a person with such costs to hit the maximum figure. Then and only then would they feel any benefit from the proposals. The changes will also see the upper capital limit rise from the current £23,250 to £118,000 (if a home is included in the calculation) £27,000 upper capital limit (if a home is not included in the calculation). The lower capital limit will remain 'low' - being pitched at £17,000. The assumption will continue that every £250 above the lower limit will yield notional income of £1 per week. This means that savings of £117,000 will be deemed to generate an income of £20,000 pa.

Even on the above analysis these reforms are of questionable value. It is thought they will cost a £1 billion and of course they will not add one penny to chronically underfunded social services budgets. It is however when one considers the administrative implications of these proposals that they become eye-wateringly painful.

What these proposals do, is to offer self funders a free insurance policy – one that would be of potential relevance to anyone with capital above (say) £100,000 (normally their house would be ignored unless the person is single or a widow/er). All such a person needs to do is to get social services to assess them and to agree that they have 'eligible needs'. Once this is done the local authority will either have to (1) meet these needs (with the self funder reimbursing the full cost); or (2) specify in a care plan what these eligible needs are – for example, 5 hours home care a week. At that moment, the self funder will have an account opened by the local authority and (in the current jargon) the 'Dilnot Taxi Meter' will start ticking. The self funder can then purchase their 5 hours home care and the local authority will have to put this down on their account. The local authority might state that home care should cost £9.00 an hour and on this basis that the meter should be increasing at the rate of £54 per week. It is a racing certainty that there will be many disputes / complaints / ombudsman interventions and claims for retrospective payments– with self funders arguing that their costs should be going up at a quicker rate (for example that care costs £12 per hour etc). Every time the person's needs change they will seek a reassessment and a recalibration of their Taxi Meter – with the aim of hitting the capital maximum as soon as possible. These accounts will have to be uprated for inflation each year and when the person moves to a new local authority their records will have to be transferred.

There is going to be a considerable need for guidance from the Department of Health to deal with the wicked detail: for example, whether or not adaptations are covered in this scheme. Significant disability related works could result in the maximum being hit immediately and of course this prospect could encourage people to have such work undertaken (and to dispute local authority arguments that it is unnecessary).

Social services may have to assess and care manage an additional 1.5 million services users (ie self funders) and the bureaucracy in maintaining and defending these records will be vast. Very few people will ever get to their

maxima – but since this is a free system, one can imagine that 'Which?', 'The Daily Mail', pension consultants etc will encourage everyone to get their foot in the door and to be assessed. It will be a monstrous, unnecessary and vastly expensive system that benefits a very few relatively well off people. To service this system, local authorities will presumably have to make further cuts to front line crisis services.

Reading the Dilnot provisions in the Bill, one is put in mind of the Deprivation of Liberty Safeguards in the MHA 2007. In 2007 it was obvious to anyone involved in this field that they were precious little 'safeguard' and would create vast and pointless bureaucracy (as they have done). However the legislation had a momentum which allowed no space for reasoned criticism. This is almost certainly the case now with the Dilnot provisions. The only chink of light is that they are not due to be implemented until 2016 – after the General Election.