Disabled Facilities Grants in Wales:
the legality of charging families for home adaptations to accommodate the needs of disabled young people

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Background

Local authorities have statutory obligations to pay grants to facilitate access to homes by disabled occupants as well as to make them safe for the disabled person and those they live with. The duties arise from several provisions, including the Social Services and Wellbeing (Wales) Act 2014 (SSWA), the Housing Grant, Construction and Regeneration Act 1996 (HGCRA) and the Regulatory Reform (Housing Assistance) (England and Wales) Order 2002 (RRO).

The interplay between these three provisions is at times complex.[2] Despite the 2014 Act making material changes to the law concerning the support of disabled young people the Welsh Government does not appear to have reviewed the guidance concerning 'disabled facilities grants' (DFGs). This paper highlights the recent statutory reforms in this field and identifies some of the questions that arise in consequence. It concludes by suggesting that in the absence of updated guidance there is the potential for confusion and for practice which may leave parents and carers of disabled children subject to irrational or unfair policy decisions by their local authority.

The legislative and policy context

Support for adaptations under the HGCRA 1996

The right to a DFG for housing adaptations derives from the HGCRA 1996 and the maximum mandatory grant at present in Wales amounts to £36,000.[3]

Data on DFG awards in Wales appears to be limited. A single 2018 spreadsheet issued by Stats Wales[4] reveals that in 2016-17 there were 4,597 DFG applications approved in Wales (from 953 in Cardiff to 59 in Merthyr). There does not seem to be any publicly accessible data concerning age profiles or award values.

Where a DFG is unavailable,[5] unsuitable[6] or the cost of the necessary adaptation exceeds the £36,000 mandatory amount, various statutory provisions exist which either authorise or require local authorities to pay for such works (or additional works). Most notable of these is

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[2] See for example *R (J & L) v. Hillingdon LBC* [2017] EWHC 3411 (Admin).
[3] The Disabled Facilities Grants (Maximum Amounts and Additional Purposes) (Wales) Order 200 SI 2370 Article 2 (£36,000).
[4] StatsWales *Disabled facilities grants by local authority area and type of grant* (2016-17).
[5] The 1996 Act imposes a number of conditions that have to be satisfied before a mandatory DFG award can be made – including for example that the intention is that the disabled person will live in the property for at least 5 years – which was the reason why such a grant was not available in *R (J & L) v. Hillingdon LBC* [2017] EWHC 3411 (Admin) (due to the house being scheduled for demolition).
[6] For example because the need is urgent and cannot wait for the DFG application process to be completed.

the social care duty in the SSWA 2014 (which was formerly found in the Chronically Sick and Disabled Persons Act 1970 section 2 and the Children Act 1989, section 17). In addition a discretionary housing authority power exists in the 2002 RRO.

Support for adaptations under the SSWA 2014

The 2014 Act creates a presumption that disabled children need care and support in addition to or instead of the care and support provided by their families (section 21(7)).

Section 34(2) of the Act provides an illustrative list of the care and support provision that can be provided under the Act and, significantly, this includes aids and adaptations. Section 34 provides continuity with the provisions under the previous legislation (the Chronically Sick and Disabled Persons Act 1970, section 2 and the Children Act 1989, section 17) and underlines the Assembly's view that home adaptations can be a core social care need.

In relation to the twin obligations (under the 1996 and 2014 Acts) the local government ombudsman has held that it is maladministration for a council to fail to appreciate that it has a duty under the social services legislation to provide adaptations, separate to that under the housing legislation.[7]

Support for adaptations under the RRO 2002

Article 3 of the RRO empowers housing authorities to provide assistance to individuals where (among other things) the need is 'to adapt or improve living accommodation (whether by alteration, conversion or enlargement, by the installation of anything or injection of any substance, or otherwise)' (Article 3(1)(b)). It will be noted that this power is not limited to disabled people.

Guidance

In terms of Government policy guidance, there appears to be nothing 'current' – ie contemporaneous with or postdating the SSWA 2014.

A 2013 Inquiry into Home Adaptations by the Communities, Equality and Local Government Committee[8] referred to the frequent 'horror stories' that committee members heard from constituents about long waits in inappropriate accommodation. Importantly the Committee's 2013 Report reiterated the Welsh Government's core policy aim for children, of ensuring that they have access to a 'safe home and community which supports physical and emotional wellbeing'. The Committee concluded that there had been insufficient improvements in the system and that it needed 'to be kept under review'. The report made a number of references to the importance of having clear guidance concerning the process of awarding grants, in particular as to when other funding streams (such as under the RRO) were appropriate (para 133).

Despite the Committee's recommendation, it appears that all the relevant guidance predates the 2014 Act – for example the 'Quick Guide' to DFGs for Children, issued by the National Assembly for Wales in 2012[9] and the Housing Renewal Guidance issued in 2002.[10] As with the 2013 Committee Report, this guidance makes reference to legislation no longer relevant

[7] Complaint no 05/C/13157 against Leeds City Council, 20 November 2007.
[8] National Assembly for Wales *Inquiry into Home Adaptations* Communities, Equality and Local Government Committee July 2013
[9] National Assembly Wales *Housing For Disabled Children and Families – Quick Guide* (2012).
[10] National Assembly for Wales (2002) *Housing Renewal Guidance* NAFWC 20/02 annex D. The guidance is primarily concerned with the implementation of the RRO and only contains relatively brief advice concerning DFGs, which largely replicated previous advice in annex I of WOC 59/96.

in Wales such as the Chronically Sick and Disabled Persons Act 1970 and the Children Act 1989 (Part III).

Means testing

Means testing under the HGCRA 1996

Where a DFG is required for a disabled young person under 19 years of age the HGCRA 1996 exempts this from the means test (that applies to people over 19).

Means testing under the SSWA 2014

Regulations[11] to the SSWA 2014 (in marked contrast to the Children Act 1989[12] provisions that the 2014 Act repealed) - stipulate that local authorities may not impose a charge for care and support provided or arranged to meet the needs of a child and support of a child. This prohibition is given emphasis in the Code on Charging[13] which states (para 5.6):

> Local authorities must not therefore charge for care and support to a child, or for support to a child who is a carer, provided under Part 4 of the Act (Meeting Needs), nor must authorities seek payment of a contribution or a reimbursement towards such costs when direct payments are being made to secure such care and support.

It follows that the provision of (or the making of arrangements for) any aids or adaptations for a young person under the 2014 Act (section 34(2)(h)) must without charge to the young person or their parent.

Means testing under the under the RRO

The RRO Article 3(4) gives housing authorities a power to provide assistance unconditionally or subject to conditions including 'conditions as to the repayment of the assistance or of its value (in whole or in part), or the making of a contribution towards the assisted work' but it stipulates that 'before imposing any such condition, or taking steps to enforce it, a local housing authority shall have regard to the ability of the person concerned to make that repayment or contribution'. Article 3(7) provides that where the housing authority decides to place a charge on a home to secure repayment of its support, that it may 'at any time reduce the priority of the charge or secure its removal'.

It appears that many local authorities in Wales when providing support under the RRO impose a standard charge on the property, which means that if it is sold within 10 years of the grant, it must be repaid.[14]

Before a housing authority imposes any charge under the RRO it must have adopted a lawful, publicly available policy detailing how the charging scheme is to operate (Article 4). Given that the policy may well have an adverse impact on people with protected characteristics under the Equality Act 2010, it follows that such a policy must have been the subject of a full assessment as to this impact (referred to as a Public Sector Equality Duty (PSED) assessment).

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[11] Regulation 3(a) of The Care and Support (Charging) (Wales) 2015 SI 1843 (W. 271).
[12] Section 29.
[13] Welsh Government *Social Services and Well-being (Wales) Act 2014 Part 4 and 5 Code of Practice (Charging and Financial Assessment)*
[14] National Assembly for Wales *Inquiry into Home Adaptations* Communities, Equality and Local Government Committee July 2013 para 56.

The Public Sector Equality Duty (PSED)[15]

Section 149 of the Equality Act 2010 places a duty on councils to have due regard to (among other things) the need to eliminate discrimination and to advance equality of opportunity 'between persons who share a relevant protected characteristic[16] and persons who do not share it'.

When the PSED duty is engaged, public bodies must genuinely and conscientiously apply their minds to the promotion of equality: to the elimination discrimination, the advancement of equality of opportunity and the fostering of good relations. The courts[17] have held that this is a substantial duty and must (among other things) be considered in detail (and the consideration recorded in writing) before the policy is adopted and before any relevant decision is taken.

The obligation is to 'have regard' to the duty when formulating a policy or making a decision which means that it is a duty of 'substance' that must be exercised 'with rigour and with an open mind': it is 'not a question of "ticking boxes"'.[18] So where a decision may have an adverse impact on advancing equality, the public body must consider what it can feasibly do to mitigate this negative impact.[19]

DFG and disabled children research

2016 research in England found that over 70% of DFGs were paid to people aged over 60[20] and that overall the average grant was slightly more than £7,250.[21] It noted however that only 7% of grants were paid for persons under the age of 21 and that not infrequently in these cases the maximum mandatory grant ceiling was inadequate – as for children 'sometimes the only solution is to provide a purpose built extension which can cost anywhere up to £70,000' (para 5.20).

The research, when noting that many home adaptations required by young people were materially more expensive than for older people (and their cost not infrequently exceeding the maximum mandatory award), observed that this created a significant problem:

> Top-up funding from social care services has become increasingly hard to obtain and, although interest free loans are available in some cases, finding additional funding can often lead to long delays. Clarification is required about the responsibilities of the social care authority as this seems to be inconsistent across the country.
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> A DFG summit held by Foundations in 2015 called for the upper limit of the DFG to be raised as the long term cost savings to health and social care of keeping a family together and avoiding residential care are very high.[22] This has also been called for by disability organisations for people of all ages who need more extensive adaptations.[23]

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[15] For a more detailed review see Luke Clements *Community Care & the Law* Legal Action Group 6th edn (Legal Action Group 2017)para 2.59 - 2.63.

[16] By s149(7) the relevant protected characteristics are– age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; sexual orientation.

[17] *R (Brown) v Secretary of State for Work and Pensions* [2008] EWHC 3158 (Admin) at [84]–[96].

[18] Para 92; and see *R (Kaur and Shah) v Ealing LBC* [2008] EWHC 2062 (Admin) at paras 24–25; see also *R (Boyejo and others) v Barnet LBC and Portsmouth CC* [2009] EWHC 3261 (Admin), (2010) 13 CCLR 72.

[19] *R (Kaur and Shah) v Ealing LBC* [2008] EWHC 2026 (Admin) para 43.

[20] S Mackintosh & P Leather *The Disabled Facilities Grant* (Foundations 2016) para 5.42.

[21] S Mackintosh & P Leather *The Disabled Facilities Grant* (Foundations 2016) para 5.14.

[22] Foundations and the College of Occupational Therapists (2015) Report on the DFG Summit, Glossop: Foundations.
http://www.foundations.uk.com/media/4498/dfg-summit-report.pdf.

[23] Muscular Dystrophy UK (2015) Breaking point The crisis in accessible housing and adaptations, London: Muscular Dystrophy UK.
http://www.musculardystrophyuk.org/app/uploads/2015/09/POL5-C-Housing-briefing-final.pdf.

A small scale 2017 study[24] of the economic and well-being impact of adaptations to family homes to accommodate the needs of young disabled people suggested that the principal cost impacts were that the adaptations had avoided the need for the young people to be 'accommodated' ie to become 'Looked After Children'. The study suggested that investing in adaptations produced dramatic cost savings for local authorities even if one disregarded other cost impacts or well-being impacts for the young people and their families (a £5 saving for every £1 invested[25]).

Discussion

Choosing between the 1996 Act, the 2014 Act and the RRO

The question posed by this paper concerns the legality of local authorities charging families for home adaptations to accommodate the needs of disabled young people.

This paper has outlined three different mechanisms that enable authorities to fund necessary adaptations to the homes of disabled young people. Two of these mechanisms place duties on the authority and in both cases they have a prohibition on charging. One mechanism (via the RRO) is discretionary and it contains a discretion to charge (subject to significant procedural restrictions).

The choice can be posed in a fairly direct way. Why should not a public body always use the RRO mechanism (and so charge families) rather than consider requests for support under the 1996 or 2014 Acts? The answer would appear to be simple: these two Acts create duties and the RRO does not. If that is the case (and we submit it must be) then the RRO process can only act as a safety net – ie it is only to be considered when the duties under the 1996 or 2014 Acts are not triggered.

For the purposes of this paper, it is not necessary to consider in detail which of these two Acts has priority. The general view, however, is that in most cases the 1996 Act will be the first port of call[26] but that if for any reason a grant is not available (or would be too long delayed) then the 2014 Act would take precedence.

The extent of the obligation under the 2014

As the above statistics demonstrate, the cost of many adaptations required to the homes of disabled young people exceed the maximum mandatory grant available under the 1996 Act. In such cases the next duty to consider must be that under the 2014 Act.

Under the 2014 Act, as noted above, it is presumed that disabled young people are in need of care and support in addition to or instead of the care and support provided by their families (section 21(7)).

Since the processing of an application under the 1996 Act means that the young person (and their carers) will have come to the notice of the local authority, a duty to assess will have been triggered under the 2014 Act (section 21 for the young person and section 24 for the young person's carers). These assessments must comply with the requirements of the Act, must consider the relevant eligibility criteria and have regard to the principles enshrined in the Part 3 Code (Assessing Needs).

Although the process by which a council decides whether adaptations should be funded under the 2014 Act is different to that under the 1996 Act, it is difficult to see how in practice

[24] Luke Clements and Sorcha McCormack *Disabled Children and the Cost Effectiveness of Home Adaptations & Disabled Facilities Grants* (Cerebra 2017)
[25] Ibid paras 5.15 – 5.16).
[26] See for example *R (Fay) v. Essex County Council* [2004] EWHC 879 (Admin) at [28] where this pecking order was approved (albeit between the 1996 Act and the Chronically Sick and Disabled Persons Act 1970).

the outcome can differ. A decision by an Occupational Therapist that the works are 'necessary and appropriate' for the purposes of the 1996 Act[27] will almost certainly mean that the need for adaptations is eligible under the 2014 Act.

For the purposes of the 2014 Act, eligibility[28] is established if the young person's needs satisfy the following requirements:

- the need arises from (among other things) physical or mental ill-health or disability;
- the need is one that if unmet is likely to have an adverse effect on the young person's development;
- the need relates to 'ability to carry out self-care' – for example 'moving around the home';
- the need is one that neither the young person, their parents nor other persons in a parental role are able to meet; and
- the young person is unlikely to achieve one or more of their personal outcomes unless—the council provides or arranges he adaptations.

Where a local authority decides that the young person's needs do not satisfy the eligibility criteria under the 2014 Act it will have to provide evidence based, cogent and rational reasons for coming to this decision. One such reason cannot be that the necessary support could be provided under the RRO. This would be impermissible for many reasons – not least that it would allow a 'power' to trump a 'duty' and allow a local authority to avoid the statutory prohibition on charging for young people's support under the 2014 Act.

Even at this stage there is one more review that must be undertaken by local authority before it considers whether discretionary support should be provided under the RRO. This concerns the exercise of its power to provide support under the 2014 Act (section 38). The Act's prohibition on charging also applies where the local authority exercises this power.[29]

The restrictions on charging on the RRO

It is only after an authority has provided cogent reasons for deciding not to exercise its power under the 2014 Act that it could then move to consider whether discretionary support should be provided under the RRO. A reason for refusing to exercise its power under the 2014 Act cannot be that the necessary support could be provided under the RRO as this would allow the authority to avoid the statutory prohibition on charging for young people's support under the 2014 Act.

As noted above, where an authority is considering the use of its power under the RRO it can only impose a charge if it has adopted a lawful policy detailing how the charging scheme is to operate and the policy has been the subject of a PSED impact assessment. Additionally the local authority will have to demonstrate that it has had regard 'to the ability of the person concerned to make that repayment or contribution'.

It appears that many local authorities in Wales when providing support under the RRO impose a standard charge on the property, which means that if it is sold within 10 years of the grant, it must be repaid.[30] In formulating a RRO policy a local authority must consider many important equality principles, including:

[27] Section 24 HGCRA 1996.
[28] The Care and Support (Eligibility) (Wales) Regulations 2015 SI 1578 (W. 187) regulation 4.
[29] Regulation 3(a) of The Care and Support (Charging) (Wales) 2015 SI 1843 (W. 271) applies to all care and support for a child provided under Part 4 of the Act.
[30] National Assembly for Wales *Inquiry into Home Adaptations* Communities, Equality and Local Government Committee July 2013 para 56.

- that the proportion of disabled children being brought up in lone-parent households is significantly greater than that for non-disabled children[31] and that the majority of lone parents are mothers;[32]
- that women with disabled children are less likely than other mothers to be in paid work;[33]
- that having a charge on a home is likely to have a chilling effect on the ability of a parent to move (for example, in order to take up work or a better job or undertake education or training);
- that having to sell a home to pay a charge will further impoverish such families
- that 4 in every 10 disabled children in this country live in poverty;[34]
- that the home adaptation needs of disabled children are generally more expensive than those of older people (and so there is a need to treat this difference differently);[35]
- that home adaptations can be vital to avoid the breakdown of families and to address the well-being, not only of the young person and his/her parents but also of the young person's siblings (engaging obligations under both the UN Convention on the Rights of People with Disabilities and the UN Convention on the Rights of the Child);
- that research suggests that home adaptations to accommodate the needs of young disabled people are likely to lead to significant cost savings to the local authority.

Conclusion

There is, as noted in this paper evidence that local authorities are defaulting to RRO powers (and charging) when the cost of a disabled young person's home adaptation exceeds £36,000. This paper argues that use of powers in the RRO should be the last step in such cases, not the first.

It is unclear why local authorities are using this incorrect process. There are no doubt many reasons for this misunderstanding. It may be, in part, that adaptations are seen as 'housing' budget responsibility – but as the above discussion makes clear – they are no less a social services responsibility.[36] Since all local authorities in Wales cover both housing and social services responsibilities this should not be a complicating (inter-authority) factor. It may be a response to the consequences of austerity economics that authorities are experiencing – in essence an attempt to defray some of the cost by charging families. It may however also be due to the absence of clear and unambiguous guidance in Wales. What this paper demonstrates is that Welsh Government guidance on this question is essential: guidance that ensures that parents of disabled children across Wales are confident that they will not be means tested and a charge placed on their home should they require additional funding for an adaptation to their property.

[31]Department for Work and Pensions, *Family Resources Survey*, 2012/2013.
[32] H Clarke and S McKay, *Exploring disability, family formation and break-up: reviewing the evidence,* Research Report No 514, Department for Work and Pensions, 2008; C Blackburn et al footnote 38 above.
[33]S McKay and A Atkinson, *Disability and caring among families with children,* Research Report No 460, Department for Work and Pensions, 2007.
[34] Children's Society *Disabled children living in poverty* (2011)
[35] *Thlimmenos v. Greece* Applic No. 34369/9731 6th April 2000; E.H.R.R. 411.
[36] As the Court noted in *R (J & L) v. Hillingdon LBC* [2017] EWHC 3411 (Admin) it is a social services function to 'properly identify the risk and the welfare needs of [disabled young people] to enable it to assess the appropriate way of addressing those needs and risks' (para 75).