

## Introduction

- 1.1 The pendulum swings – welfare policy changes: there are no straight lines in community care. It has swung ever since Henry VIII’s reformation set it in motion. For all their undoubted faults, the monasteries provided significant care for paupers<sup>1</sup> and their dissolution meant that the regal state had to intervene: that poor laws defining parish obligations had to be enacted.
- 1.2 Monastic support has been described as ‘indiscriminate and unorganised’<sup>2</sup> in the sense that it did not distinguish between categories of paupers – for example between the ‘impotent’ and the ‘able-bodied’ poor. The universal nature of the support monasteries provided created a political problem, since it undermined the failing feudal system. Ever since the Black Death and the shortage of labourers it created, workers (particularly those able to escape their bonded existence) had started to demand better pay. In an effort to restrict this, laws were enacted to control wages<sup>3</sup> and to criminalise begging and the free movement of workers.<sup>4</sup>
- 1.3 State concern about the free movement of workers and the availability of ‘universal’ benefits is a theme that reoccurs throughout the succeeding centuries. We see successive policies on ‘settlement’ (today we call it ‘ordinary residence’) and demands that support be less ‘indiscriminate’ (be more ‘targeted’ to use today’s language). We see this with the emergence of what the Victorian Poor Law system described as ‘deserving and undeserving’ poor and today we see it in a range of assessment mechanisms including social care ‘eligibility criteria’: a system for categorising those

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<sup>1</sup> While emphasising the variability of the support provided, Rushton concludes that it is ‘reasonable to assume that monastic charitable provision in the 1530s constituted a considerable social service of sheltered housing as well as poor relief in the form of distributions in money and in kind’: N S Rushton, ‘Monastic charitable provision in Tudor England’ in *Continuity and Change* 16 (1), 2001 pp9–144 at 34.

<sup>2</sup> N L Kunze, ‘The Origins of Modern Social Legislation: The Henrician Poor Law of 1536’ in *Albion* Vol 3, No 1 (Spring, 1971), pp9–20 at p9.

<sup>3</sup> See for example 23 Edward III The Statute of Labourers 1349.

<sup>4</sup> See for example 12 Richard II c3, 4, and 7.

- whom the state decides ought, and ought not, to be supported.
- I.4 Henry VIII's first Poor Law in 1531<sup>5</sup> was about social control. Able-bodied unemployed people were to be 'Tyed to the end of a Carte naked and be beten with Whppes'<sup>6</sup> and to this Edward VI added the sanction in the Poor Law of 1547<sup>7</sup> of branding and slavery.
  - I.5 Horrendous as the punishments were for defying the Poor Laws, they were unsuccessful. Social policy may tilt against economic change – the movement of labour in response to the collapse of feudalism, the rise of industrialism, the global free movement of capital under neoliberalism: it may create barbaric punishments; work houses and walls covering continents – but ultimately it is futile.
  - I.6 The Poor Law was eventually consolidated into the Poor Relief Act 1601. While there were many administrative changes to the system over the succeeding centuries, the basic 1601 scheme survived in a recognisable form until the cataclysmic Poor Law Reform Act 1834 – which Wikeley (citing Englander)<sup>8</sup> suggests must rank as 'the single most important piece of social legislation ever enacted'.
  - I.7 The 1601 'Old Poor Law' scheme was based on parish responsibility for the poor with whom it had established links (were 'settled') and who were, for one reason or another, unable to be maintained by their families. It was a remarkable system. By 1803 over 11 per cent of the population received poor relief (over one million people) and its cost had risen fivefold since 1760.<sup>9</sup> Slack<sup>10</sup> suggests that, although by

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<sup>5</sup> 1531 *Concerning Punishments of Beggars and Vagabonds* (22 Henry VIII c12).

<sup>6</sup> N L Kunze, 'The Origins of Modern Social Legislation: The Henrician Poor Law of 1536' in *Albion* Vol 3, No 1 (Spring, 1971), pp9–20 at p10.

<sup>7</sup> 1547 for the Punishment of Vagabonds and relief of the Poor and Impotent Persons (1 Edw. VI c3).

<sup>8</sup> J R Poynter, *Society and Pauperism: English Ideas on Poor Relief, 1795–1834*, Routledge and Kegan, 1969, p2, cited in N Wikeley *Child Support Law and Policy*, Hart Publishing, 2006, p39.

<sup>9</sup> N Wikeley, *ibid*, p49: it has been suggested that by 1750 poor rates amounted to 1% of national income; see P Slack *From Reformation to Improvement: Public Welfare in Early Modern England*, Clarendon Press, 1999, p163.

<sup>10</sup> P Slack, *ibid*, pp163–164.

1800 the Poor Law was considered to be either ‘too purposeless or too expensive’, it had nevertheless come to be regarded as a fundamental obligation of the state,<sup>11</sup> observing:

No other state could do that, though there were attempts in Scandinavian countries in the early eighteenth century to emulate it. Equally, no other society could so easily have taken on board the notion that the poor had an entitlement to subsistence, an assumption which rested as much on the Elizabethan statutes as on the writings of John Locke until both were challenged by Malthus and a later school of political economy.

- I.8 The Poor Law was exported to the UK’s colonies<sup>12</sup> and (prior to the eighteenth century) these laws also tended to be open-textured, and to a degree, ‘rights based’. In North America for example, the poor laws ‘did not define ... poverty ... as a critical social problem’<sup>13</sup> and there was no precise definition of which categories of poor person were eligible: ‘ministerial sermons on charity usually set down communal obligations to the poor without bothering to delineate exactly who fell into the category.’<sup>14</sup>
- I.9 In the UK, it would be another 150 years before the notion of an entitlement to subsistence returned, with the creation of the Beveridgean welfare state, and the enactment of the National Assistance Act 1948 – a statute whose endurance can be compared to that of the Poor Relief Act 1601. The 1948 Act, like its ancient predecessor, proved to be ‘adaptable,

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<sup>11</sup> Wikeley (footnote 8 above) cites Charlesworth who also considered that it was ‘meaningful to speak of a right relief under the poor law’ – L Charlesworth, ‘The Poor Law: a legal analysis’ in *Journal of Social Security Law* (1999) 6 79–92 – but then suggests that it would be more appropriate to express the duty as being on parishes to relieve the deserving poor (at 39).

<sup>12</sup> Although it is a mistake to consider that their local versions were ‘unthinking duplications of English laws’ – see David Rothman, *The Discovery of the Asylum*, (Little Brown 1971), p20.

<sup>13</sup> *ibid*, p4.

<sup>14</sup> *ibid*, p5.

permitting diversity of practice in time as well as place'.<sup>15</sup>

- I.10 There was, doubtless, an historical inevitability to the Poor Law Reform Act 1834 coming at did at such a turbulent period of British History: at the close of the Napoleonic wars, the rapidly increasing population, the impact of rural Enclosure, the full throttle of the Industrial Revolution and the brutal philosophies of Malthus and Ricardo eclipsing those of Locke and the Enlightenment.
- I.11 Social policy has had more than its fair share of highly fashionable but fundamentally mistaken fads – and the views of the reverend Thomas Malthus<sup>16</sup> must certainly fall into this category. Malthus took a pessimistic view of human nature; believed in 'moral decay' and propounded a theory of populations. The theory predicted that populations would grow exponentially and would only be checked by famine and disease. Despite noble dissenters,<sup>17</sup> the theory was widely accepted as a scientific truth in the early 1800s. Malthus was particularly antipathetic towards the old poor laws.
- I.12 Against this backdrop and the burgeoning cost of the Poor Law, a Royal Commission reported in 1834 recommending root and branch reform. This included the suppression of subsistence payments (to ensure they were lower than the lowest wages paid to labourers) and that able-bodied poor should no longer be eligible for Outdoor Relief (ie in their own homes) but only for Indoor Relief (ie in the workhouse, a place 'so severe and repulsive as to make them a terror to the poor'<sup>18</sup>). The Act encouraged parishes to combine to form unions to discharge their Poor Law responsibilities, to build a common workhouse and to create a Board of Guardians that would administer the scheme. The institution was therefore to be the default option unless the pauper could establish their deserving status: the antithesis of 'independ-

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<sup>15</sup> N Wikeley (fn 8 above) citing D Englander, *Poverty and Poor Law Reform in Britain: From Chadwick to Booth 1934–1914*, Addison Wesley Longman, 1998, p1.

<sup>16</sup> T Malthus, *Essay on the Principle of Population* (1798).

<sup>17</sup> See for example the writings of William Hazlitt (*A Reply to the Essay on Population* (1807)) and William Godwin (*Of Population: An Enquiry concerning the Power of Increase in the Numbers of Mankind* (1820)).

<sup>18</sup> E P Thompson, *The Making of the English Working Class*, Penguin, 1991, p295.

ent living'. In this we see echoes of Henry VIII's policies and of today's sanctions for the unemployed. To give a flavour of the Commission's brutalist/laissez-faire approach Mencher<sup>19</sup> quotes how it believed that the Old Poor Law conflicted with the 'ordinary laws of nature':

To enact that the children shall not suffer for the misconduct of their parents, the wife for that of the husband ... Can we wonder if the uneducated are seduced into approving a system which aims its allurements at all the weakest parts of our nature.

- I.13 These were the prevalent views of the powerful classes of the time: Benjamin Franklin, for example considered that the poor laws encouraged the poor to be 'idle and dissolute' and that the 'best way of doing good to the poor is not making them easy in poverty'<sup>20</sup> – and even J S Mill supported the Reform of the Poor Laws.<sup>21</sup> There is much in today's debate about social care that echoes the rhetoric of the 1830's: the emphasis on 'supporting hard-working families' (the Poor Law referred to 'aiding the industrious'); the attack on large families (Malthus); making work pay (the abolition of the 'Speenhamland System'); the workfare programme (teaching the poor how to work); the 'something-for-nothing culture' (the indolent and the workshy); the denial of poverty (poverty as a personal failing) and the 'entitlement culture' (of the poor – but not of bankers).
- I.14 The 1834 Act led to an increase in what were termed 'pauper lunatics' being placed in workhouses (rather than living in the community with outdoor relief) even though the Act (section 45) did not permit the detention in any workhouse of the 'dangerous lunatic, insane person, or idiot for any longer period than fourteen days'. Concern about this trend led to the Lunatic Asylums Act 1845 which resulted in the expan-

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<sup>19</sup> S Mencher, *Poor Law to Poverty Program*, University of Pittsburgh Press, 1967, p104.

<sup>20</sup> S Mencher, *ibid*, p97.

<sup>21</sup> Mill had a complex view on such things – partly influenced by his Malthusian views – although he was by no means antipathetical to the plight of the poor – see for example, O Kurer, 'John Stuart Mill and the Welfare State' in G W Smith (ed) *John Stuart Mill's Social and Political Thought*, Routledge, 1998, pp339–355.

sion of the formal asylums.

- I.15 The reforms could also be seen as firm evidence that the Government was now governing for the benefit of the emerging middle classes: a major force to be appeased and not merely by the wider enfranchisement.<sup>22</sup> Engels certainly saw it this way, describing the Act as ‘the most open declaration of war of the bourgeoisie upon the proletariat’<sup>23</sup> and for EP Thompson as the ‘most sustained attempt to impose ideological dogma, in defiance of the evidence of human need’.<sup>24</sup>
- I.16 In order to qualify for support under the reformed Poor Law, a person had to establish that they were ‘destitute’ which was conditional on a ‘subjective judgement’<sup>25</sup> of a poor law official. Like social care eligibility decisions today, it was a ‘gateway decision that has caused much confusion and an emphasis upon conditionality, negotiation and local custom’.<sup>26</sup> Proving destitution required evidence that there was no family member who could provide support (as required by the 1601 Act), no money or assets (such as furniture) and indeed no proper outer or undergarments.<sup>27</sup> It is argued that the creation by the Poor Law Reform Act 1834 of a new dimension of administrative arrangements was the first effective example of modern bureaucratic legislation and that its ‘successful innovations [have] influenced the subsequent

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<sup>22</sup> The Great Reform Act 1832.

<sup>23</sup> F Engels, *The condition of the working class in England*, Panther, 1969, cited by R Means and R Smith, *From Poor Law to Community Care*, Policy Press, 1998, p17.

<sup>24</sup> E P Thompson, *The Making of the English Working Class*, Penguin, 1991, p295.

<sup>25</sup> Lorie Charlesworth, ‘Welfare’s forgotten past: a socio-legal history of the poor law’ in *Amicus Curiae* Issue 81 Spring 2010 p19 and see also Mrs Sidney Webb, ‘The Abolition of the Poor Law’, Fabian Society, 1918, p3.

<sup>26</sup> L Charlesworth, *ibid.*

<sup>27</sup> ‘... the regulations of the Poor Law were such that a person had to be destitute, not only from the point of view of cash, but also from the point of view of clothing before he or she was permitted to receive assistance. I have been in a committee where the chairman ... persisted ... in seeing the underclothing of old people before the committee was prepared to give an order that new underclothing should be supplied. These things remain with us. We remember them.’ Betty Braddock MP, House of Commons Debate on the Second Reading of the National Assistance Bill, 24 November 1947 vol 444 cc1635.

- administrative direction of English public law'.<sup>28</sup>
- I.17 The plight of the poor ceased to be a political concern in the early 1800s – indeed it was not until Dickens and Disraeli<sup>29</sup> that poverty was ‘re-discovered’ mid-century – only for it to be forgotten and rediscovered at the turn of the century by Seebohm Rowntree,<sup>30</sup> and then to be neglected again/rediscovered again by Orwell<sup>31</sup> and then Peter Townsend.<sup>32</sup>
- I.18 Notwithstanding the brutalism underpinning the New Poor Law, it appears that its impact on poor people was often blunted by its humane local application<sup>33</sup> and that throughout the Victorian period outdoor relief still predominated.
- I.19 Opposition to the system was particularly strong in the industrialised north of England swelling support for Chartism and calls for radical change. In the UK, however, economic considerations predominated and so the reforms that came were largely driven by this consideration. The Public Health Act 1848, for example (enacted in the year that saw much of Europe in revolution<sup>34</sup>) was motivated in no small measure by concern that disease was hampering the ability of men to work and their early deaths was placing additional expense (of maintaining widows and orphans) on the Poor Law system.<sup>35</sup>
- I.20 Despite vehement opposition, the Poor Law system persisted (with minor change) until the end of the nineteenth century. A notable campaigner Beatrice Webb, and her husband Sydney, published a minority report to the Royal Commission on the Poor Laws and Relief of Distress in 1909 which called for the abolition of the Poor Laws and for a national scheme for promoting employment, health and education.

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<sup>28</sup> Lorie Charlesworth, *Welfare's forgotten past*, Routledge, 2010, p60.

<sup>29</sup> *Sybil, or The Two Nations*, 1845.

<sup>30</sup> *Poverty, A Study of Town Life*, 1901.

<sup>31</sup> *The Road to Wigan Pier*, 1937.

<sup>32</sup> *Poverty in the United Kingdom*, 1979.

<sup>33</sup> Of ‘subversive decision making’ that undermines the authority’s dominant agendas – see S Halliday, ‘The Influence of Judicial Review on Bureaucratic Decision-Making’ in (2000) *Public Law* 110–22, 118.

<sup>34</sup> Revolutions credited with the creation of the Bismarckian Welfare System.

<sup>35</sup> Edwin Chadwick Report to Her Majesty’s principal Secretary of State for the Home Department (Poor Law Commissioners 1842).

Although the report was largely ignored at the time, it was of enormous influence – not least on one of the report’s researchers (and close friend of the Webbs) William Beveridge.

- I.21 Nearly 40 years later Sir William, as he had then become, declared war on the five giant evils in society – Giant Want; Giant Disease; Giant Ignorance; Giant Squalor and Giant Idleness. At the end of the Second World War legislation was brought forward with the purpose of slaying some of these monsters: the Education Act 1944, the National Insurance Act 1946, the National Health Service Act 1946 and the National Assistance Act 1948. Giant Squalor was to be slain by a concerted programme of slum clearance and the building, within ten years, of three million new houses.<sup>36</sup>
- I.22 All this was done at a time when the UK’s public sector net debt was over 180 per cent of GDP (it rose to over 250 per cent in the early 1950s). In 2007, after the credit crisis, public sector net debt stood at 60 per cent of GDP<sup>37</sup> – but of course the public policy reaction was entirely different: the pendulum was moving in a different direction.
- I.23 The neglect of disabled, elderly and ill people living in the community was in many respects the forgotten sixth Giant. Part III of the 1948 Act did however contain the means by which Giant Neglect was to be slain, namely the provision of community care services for ill, elderly and disabled people and indeed accommodation for anyone else who was ‘in need of care and attention which is not otherwise available’.<sup>38</sup>
- I.24 Even today, reading section 1 of the 1948 Act sparks a sense of frisson, stating as it does ‘The existing poor law shall cease to have effect ... .’ The Act came into force on 5 July 1948 as did the NHS Act 1946 and the National Insurance Act 1946.<sup>39</sup> The pendulum had swung to the left and a new welfare state had been created: one where the ultimate

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<sup>36</sup> N Timmins, *The Five Giants*, Fontana, 1996.

<sup>37</sup> Office National Statistics, *Public Sector* 18 March 2010: public sector net debt is a key measure as – crucially – it compares the debt to the size of the economy.

<sup>38</sup> National Assistance Act 1948 s21.

<sup>39</sup> The Education Act 1944 came into force on 1 April 1945.



responsibility for the needs of elderly ill, disabled and poor people rested with the state and not with families or charities. It marked a turning point: a new settlement that abolished 400 years of poor laws and with it the hated 'destitution' test, the crippling 'liable family rule' and a great deal more. With the abolition, local resources (principally the workhouses) had to be redistributed. The best of these were absorbed into the fledgling NHS and the remainder were put to use in meeting the new obligations created by Part III of the 1948 Act.<sup>40</sup>

- I.25 Part II of the Act replaced outdoor relief with a national means tested benefits system known as 'national assistance' administered by the National Assistance Board, rather than by local councils. In due course Part II was repealed and national assistance replaced by supplementary benefit, which itself was replaced by income support, Employment and Support Allowance, Jobseeker's Allowance and now Universal Credit.
- I.26 Part III of the Act tackled the needs of disabled, elderly and ill people for residential accommodation and community or home-based (domiciliary) care services. However, in the context of the rationing and general shortages in the post war years, the provision of residential care together with other social welfare duties (the house building programme, the creation of the new NHS and the education reforms) represented a huge public spending commitment. Perhaps not surprisingly therefore, when it came to the provision of community or domiciliary care services, authorities were not obliged to provide these services, although they were given discretion to do so if they were able. This power was however limited to disabled people. This represented the concern in 1948 to ensure that those people who had sacrificed their health for peace should be given priority when it came to the provision of scarce resources.<sup>41</sup> In 1948 there was in relative terms a greater number of younger disabled people – in the form of wounded soldiers returning home and those injured in the bombing. This legislative prioritisation of the

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<sup>40</sup> For an excellent account of the evolution of 'community care' see R Means and R Smith, *Community Care*, Macmillan, 1994.

<sup>41</sup> H Bolderson, *Social Security, Disability and Rehabilitation*, Jessica Kingsley Publishers, 1991, p115.

- needs of disabled people (as opposed to those of the temporarily ill or elderly) remained anachronistically until the enactment of the Care Act 2014.<sup>42</sup>
- I.27 Although the post-war austerity years gave way to the increasingly prosperous 1950s and the relatively affluent 1960s, the provision of community care services remained a Cinderella area in social welfare terms. The mid and late 1960s were also characterised by a change in social philosophical attitudes – with, for instance, the enactment of the Family Law Reform Act 1969, the Children and Young Persons Act 1969 and the creation of social services departments in 1971 consequent upon the Seebohm report.<sup>43</sup>
- I.28 During this period the prevalent conceptualisation of disabled people as ‘handicapped’ by their medical condition became more openly contested. Disabled People’s organisations in the USA (radicalised in part by the Civil Rights Movement and the experiences of disabled Vietnam War veterans) and in Europe campaigned for the closure of the institutions in which large numbers of disabled people lived segregated lives: in asylums, in mental handicap hospitals, in residential care homes and hostels. The development of a ‘social model’ of disability (to distinguish it from the ‘medical’ or ‘individual’ or ‘tragedy’ models)<sup>44</sup> was a key component of this radicalism. The social model focuses on the physical, attitudinal, cultural and institutional barriers that handicap disabled people, rather than their individual impairments or illnesses. In social care terms this campaign called for laws providing for high quality community-based services rather than residential care.
- I.29 On 6 November 1969 it was announced that Alf Morris MP had won first place in the annual ballot for private members’ bills. He chose to promote his own bill (which he himself drafted), the Chronically Sick and Disabled Persons Bill. The

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<sup>42</sup> The Chronically Sick and Disabled Persons Act 1970 s2 converted the power into a duty, but only for disabled people. Section 2 was (in relation to adults) repealed by the Care Act 2014.

<sup>43</sup> Report of the Committee on Local Authority and Allied Personal Social Services [chair Frederic Seebohm] (HMSO, 1968).

<sup>44</sup> Anna Lawson and Mark Priestley, ‘The Social Model of Disability: Questions for law and legal scholarship’ in Peter Blanck, Eilionóir Flynn (eds) *Routledge Handbook of Disability Law and Human Rights* (Routledge 2016).

Act received Royal Assent on 29 May 1970, the day that parliament was dissolved for the 1970 general election.<sup>45</sup> The most important social care section of the Act proved to be section 2. It was drafted so as to make the provision of domiciliary services under the 1948 Act obligatory (rather than discretionary). The 1970 Act provided disabled people<sup>46</sup> with specifically enforceable legal rights to specific services. It also contained measures designed to improve the accessibility of new buildings and public space, education and parking.<sup>47</sup>

- I.30 The Act was never fully funded. In 1970 the pendulum had nearly completed its leftward swing. The ‘Golden Phase’ of the twentieth century<sup>48</sup> was drawing to the end. The turmoil precipitated by the oil crisis led to a general retreat from such specific and (in budgetary terms) open-ended welfare rights.
- I.31 In the 1970s, in the UK, the pendulum began its long rightward swing attracted by the policies of Friedrich von Hayek and Milton Friedman: small government, low taxes and deregulation. In social policy terms this has been described as workfare, prisonfare, and social insecurity.<sup>49</sup> Ironically, as the prisons expanded in the UK the closure of long-stay mental hospitals gathered pace, such that community care became linked in the public mind with the care of people with mental health difficulties in the community rather than by incarceration in isolated hospitals. The Mental Health Act 1983 s117 accordingly made particular provision for com-

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<sup>45</sup> For an account of the passing of the Act, see RADAR, *Be it enacted . . .*, 1995.

<sup>46</sup> The domiciliary care support rights under section 2 were limited to disabled people. The Health Services and Public Health Act 1968 s45 provided older people with this right (this section came into force at the same time as section 2 of the 1970 Act – 29 August 1970) and the same right was provided for people who were ‘ill’ (ie, those not ‘chronically sick’) in the NHS Act 1977 Sch 8.

<sup>47</sup> See, for example sections 3 - 4 (public housing and new buildings to be suitable for the needs of disabled people), section 8 (education facilities to be accessible to disabled people) and section 21 (badges for disabled people to give dispensations in relation to parking restrictions).

<sup>48</sup> See E Hobsbawm, *Age of Extremes*, Michael Joseph, 1994.

<sup>49</sup> See for example, L Wacquant, ‘Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity’ in *Sociological Forum*, Vol 25, No 2, June 2010, pp197–220.

munity care services to be provided for certain patients on their discharge from hospital. Section 117 services are only available to a restricted number of people.<sup>50</sup> Most people with a mental health difficulty receive their care and support services under the Care Act 2014.

- I.32 The defining neoliberal social care Act came in 1990 – the National Health Service and Community Care Act. An Act predicated on a policy of privatisation, responsabilisation,<sup>51</sup> commodification, the reification of ‘independence’ (in the sense of personal self-sufficiency) and choice.<sup>52</sup> When the Act came into force in 1993 over 90 per cent of council funded community care was provided by council employed staff in the community or in council owned care homes or in council owned day centres. In 2014 less than five per cent of care homes were council run and less than eight per cent of domiciliary care was provided by council employed staff.<sup>53</sup>
- I.33 Ambiguity is the lubricant of public policy and social care is littered with soft beguiling labels masking harder intentions. ‘Community care’ is such a foil and has been much imitated in the intervening years: personalisation, supported living, extra care and many more sugar coated phrases.
- I.34 The major motivation for the 1990 Act was not the need to provide for more community based care, but the soaring social security expenditure on private residential care and nursing home accommodation: this had increased from about £10 million per annum in 1979 to £2.5 billion per annum in 1993. Hospitals were closing long-stay geriatric and

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<sup>50</sup> People who are discharged after detention under section 3 or one of the criminal provisions of the Mental Health Act 1983, see para 15.56 below.

<sup>51</sup> See for example I Ferguson, ‘Increasing User Choice or Privatizing Risk? The Antinomies of Personalization’ in *British Journal of Social Work* (2007) vol 37, pp387–403 and K Juhila et al (eds), *Responsibilisation at the Margins of Welfare Services*, Routledge, 2017.

<sup>52</sup> These are values, which in Martha Fineman’s opinion have attained sacred and ‘transcendent’ status: but which are a myth: for ‘all of us were dependent as children, and many of us will be dependent as we age, become ill or suffer disabilities’ – see M Fineman, ‘Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency’, in M Fineman and T Dougherty (eds) *Feminism Confronts Homo Economicus*, Cornell University Press, 2005, at p180.

<sup>53</sup> Health and Social Care Information Centre, *Community Care Statistics: Social Services Activity, England 2013–14, Final release* (2014) pp62 and 51 respectively.

psychiatric wards and discharging the patients into private nursing homes where the cost could be funded by the Department of Health and Social Security (DHSS), essentially, therefore, transferring the cost from one central government department's budget (the NHS) to another (social security). At the same time social services authorities were doing much the same, by closing their own residential care homes and transferring the residents to independent-sector homes, which again were capable of being funded via the DHSS, thus transferring the cost from local to central government.

- I.35 The 1990 Act sought to cap this expenditure by transferring most of the funding responsibility to social services authorities and restricting access to residential and nursing homes if the person was to be supported by public funds. Access to such care was to be conditional on the authority being satisfied that such a placement was appropriate. Social services authorities were provided with a 'Special Transitional Grant' to compensate them for their extra costs in implementing the community care reforms and in particular for assuming responsibility for funding such accommodation. In the first full year of the reforms (1994–95) the Grant amounted to £735.9 million of which 85 per cent was ring-fenced to the extent that it had to be spent on independent sector care services.<sup>54</sup>
- I.36 The 1990 Act was preceded by a white paper, 'Caring for People'<sup>55</sup> which owed much to a report prepared in 1988 by Sir Roy Griffiths for the Secretary of State for Social Services.<sup>56</sup> The white paper explained that local authorities would become 'enabling agencies' providing 'better value for taxpayers money' and although they would continue to provide services this would become 'a mixed economy of care' – with compulsory competitive tendering (CCT) for services open to the private and independent sectors. 'Mixed economy' is a phrase no longer used. As Hudson notes, the idea of providers competing on a 'level playing field', soon evapo-

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<sup>54</sup> For further details see B Meredith, *The Community Care Handbook*, Age Concern England, 1995, p165.

<sup>55</sup> Department of Health (1989) *Caring for People: Community Care in the Next Decade and Beyond*, Cm 849.

<sup>56</sup> R Griffiths, *Community Care: Agenda for Action*, HMSO, 1988.

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- I.37 The 1990 Act also endeavoured to bring together the disparate statutes which governed individual entitlement to community care services and, by various amendments, create a degree of coherence in this field of law. It did not, however, convert into law many of the themes which infused the white paper, the Griffiths report and many of the subsequent practice guides issued by the Department of Health. For example, despite its emphasis on individual choice (or 'preferences'), this concept appeared nowhere in any of the legislation, with the exception of a choice of accommodation – if it had been assessed as necessary (a right which continues today – see para 9.241 below).
- I.38 The Act was also silent on practical support for carers - indeed the evidence suggests that it:<sup>59</sup>  
fundamentally altered the 'balance' between formal and informal care, resulting in increasing care burdens for the family, friends and neighbours of older people requiring assistance to live independently in the community, and financial burdens for older people and their carers in terms of paying for care privately.
- I.39 Deinstitutionalisation had, by the mid-1990's, resulted in many more elderly, ill and disabled people being cared for in the community. There had, however, been no concomitant increase in local authority / NHS community based support. The effects of demographic change and of welfare residualism, had resulted in a substantial increase in unpaid caring,<sup>60</sup> which today is nearing the limits of what families can

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<sup>57</sup> Hudson B *The Failure of Privatised Adult Social Care in England: What is to be Done?* Centre for Health and the Public Interest (2016) p.5.

<sup>58</sup> See L.J.B. Hayes 'Work-time Technology and Unpaid Labour in Paid Care Work: A Socio-legal Analysis of Employment Contracts and Electronic Monitoring' (chapter 9) in Sian Beynon-Jones & Emily Grabham (eds) *Law and Time* (Routledge 2018) pp. 179-195.

<sup>59</sup> Institute of Public Care (2014), *The Stability of the Care market and Market Oversight in England*

<sup>60</sup> Carers UK *Policy Briefing*, 2014.

provide.<sup>61</sup> At the same time, there has been a significant increase in female employment rates<sup>62</sup> – in part to offset the decline in average household incomes that would have occurred had women not joined ‘the workforce alongside their husbands’.<sup>63</sup> Carers (and they are preponderantly working women) have proved to be ‘the elastic that has accommodated the contradictions in neoliberalism’ and by the 1990’s it was clear that they were ‘stretched to breaking point’.<sup>64</sup>

- I.40 The first formal legislative response to this problem had to wait until a private member’s bill – promoted by Malcolm Wicks MP – became law as the Carers (Recognition and Services) Act 1995. This was followed by two further such bills<sup>65</sup> culminating in the Care Act 2014 which – it has been argued – provides carers with the same legal rights to social care support as disabled people.
- I.41 Although neoliberal policies have had an overall negative impact on people who are disadvantaged, there are some aspects to the doctrine (sometimes referred to as ‘progressive neoliberalism’<sup>66</sup>) that have appeared to pull the other way. These, in general, are policies that provide for ‘process’ (rather than ‘substantive’) rights and ones that are focussed on individual rather than collective rights. Classically these concern aspects of equality law – for example the right of a disabled person to challenge discrimination he or she may experience.<sup>67</sup> The notion of progressive neoliberalism is one way of explaining why recent governments have been willing to endorse disability non-discrimination legislation, as

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<sup>61</sup> L Pickard, *Informal care for older people provided by their adult children: projections of supply and demand to 2041 in England*, Report to the Strategy Unit, Department of Health, 2008.

<sup>62</sup> M Gutiérrez-Domènech et al, *Female labour force participation in the United Kingdom: evolving characteristics or changing behaviour? Working Paper no 221*, Bank of England, 2004.

<sup>63</sup> J Stiglitz, *The Price of Inequality*, Allen Lane, 2012, p14.

<sup>64</sup> L Clements, ‘Does your carer take sugar’, *Washington and Lee Journal of Civil Rights and Social Justice* (2013) vol 19 pp397–434 at 432.

<sup>65</sup> Resulting in the Carers and Disabled Children Act 2000 and the Carers (Equal Opportunities) Act 2004.

<sup>66</sup> See for example Nancy Fraser ‘The End of Progressive Neoliberalism’ in Dissent January 2, 2017.

<sup>67</sup> It has been suggested that such rights do little to address the marginalisation of disabled people – see for example Samuel R. Bagenstos, S. A., (2004) *The future of disability law* Yale Law Journal 114.1 Oct 2004 pp 1 – 84.

well as policies promoting ‘independence’ (albeit that for governments and Disabled People’s organisations ‘independence’ means something different). This also explains the legalisation of direct payments. For many years Disabled People’s organisations’ had challenged the ‘service led’ nature of the community care regime, on the basis that it was paternalistic, disabling and disempowering. They argued that disabled people should be given cash payments to enable them to purchase their own care and support. Since commodification is also a key principle of neoliberalism (as is the transfer of risk from the state to the individual) this demand was accepted and addressed by the Community Care (Direct Payments) Act 1996.

- I.42 In the first decade of the current century, policy initiatives that have come to be called the ‘personalisation agenda’ sought to create the illusion of radical new thinking and reform. Although branded in terms of maximising personal choice and involvement, there is little to suggest that these have in practice transformed the lives of the majority of people in need of community care services.<sup>68</sup> Indeed it could be argued that it was a component of the responsibilisation agenda – making individuals take control and responsibility for their care needs – without providing the financial and advocacy support essential to enable this to become a reality.
- I.43 In 2008 the Law Commission produced a scoping paper<sup>69</sup> proposing the codification of adult social care law: the hotchpotch of conflicting statutes, enacted over a period of 60 years. In due course this process produced the Care Act 2014. The Act repealed almost all of the previous adult social care statutes and those that applied to carers. The 2014 Act largely ‘rolled over’ the duties owed to disabled, elderly and ill people (now referred to as ‘adults in need’). The duty under the 2014 Act to assess, care plan, provide care and so on is little different to that under the previous legislation. The Act did however make commodification of care compulsory (with personal budgets) and opened the way for the almost complete privatisation of adult social care, by enabling the delegation of assessments and care planning to the in-

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<sup>68</sup> See L Clements, ‘Individual budgets and irrational exuberance’ (2008) 11 CCLR 413–430.

<sup>69</sup> Law Commission, *Adult Social Care Scoping Report*, 2008.



- dependent sector.
- I.44 The Act's treatment of carers was however radically different in that eligible carers became entitled to support (even if the person for whom they care was not eligible for support) and carers were no longer required to provide 'substantial and regular' care to qualify.
- I.45 Law reform does not in itself improve anything. For this to happen the law needs to be obeyed (in spirit and in word) and in the current context extra resources need to be provided.<sup>70</sup> Since adult social care accounts for less than two per cent of central government expenditure (for older people it is less than 0.7 per cent)<sup>71</sup> this is not asking for a great deal.
- I.46 Funding remains the outstanding problem – and as the King's Fund notes, 'England remains one of the few major advanced countries that has not reformed the way it funds long-term care in response to the needs of an ageing population'.<sup>72</sup> A succession of Commissions have suggested mechanisms for placing the funding of social care on a sustainable footing – most recently the Dilnot Commission<sup>73</sup> – but politically, there appears to be little enthusiasm to take action. The 2014 Act ss15–16 contains a mechanism for a 'cap on costs' but it appears that it will not now be brought into force.<sup>74</sup>
- I.47 In March 2017 the Conservative Government undertook to publish a Green Paper (in the summer of that year) making proposals for the reform of social care funding. At the time

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<sup>70</sup> Central government funding to local government reduced by 37 per cent in real terms between 2010/11 and 2015/16 National Audit Office, *Financial sustainability of local authorities 2014*, HC 783, The Stationery Office, 2014.

<sup>71</sup> R Humphries et al, *Social care for older people: home truths*, Kings Fund, 2016, p12.

<sup>72</sup> R Humphries, *ibid*, p74–75.

<sup>73</sup> Commission on Funding of Care and Support (2011) *Fairer Care Funding: The Report of the Commission on Funding of Care and Support* (the 'Dilnot Report').

<sup>74</sup> This is to be welcomed, as the tracking and recording of independent personal budgets (section 28) and the resultant disputes would require a large and disproportionately costly bureaucracy – see L Clements *Administering the cap* March 2018 at [www.lukeclements.co.uk/administering-a-cap-on-costs/](http://www.lukeclements.co.uk/administering-a-cap-on-costs/)

of writing this edition (April 2019) this has yet to appear.<sup>75</sup>

- I.48 The only workable solution that has so far emerged for the funding challenge, is that proposed by the Sutherland Commission<sup>76</sup> in 1999: that social care be free at the point of need. It is a proposal that has been largely adopted in Scotland and a report that deserves a reconsideration. Its adoption in England would of course come at a cost (as it has in Scotland) but since 50 per cent of older people (as 'self-funders') personally pay for all their care, it is a cost that is already being born – but unequally. For this to happen of course, the pendulum would have to swing to the left – but change is inevitable: there are no straight lines in community care.

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<sup>75</sup> Tim Jarrett *Social care: forthcoming Green Paper (England)* Briefing Paper 8002 (House of Commons Library April 2019)

<sup>76</sup> The Sutherland Report, *With Respect to Old Age: A Report by the Royal Commission on Long Term Care*, HMSO, 1999.